

| *Monika Szaraniec*

# Administrative Decisions Addressed to Insurance Intermediaries Issued by the EIOPA – A Macro-prudential Supervision Instrument for Consumer Protection

## Abstract

This article identifies new supervisory competences of the EIOPA in relation to insurance intermediaries and insurance companies on the domestic insurance market of the European Union, which constitute public-law protection of the customer (consumer) of insurance services. These competencies protect the client (including the consumer) of insurance services. In the present legislation the client enjoys twofold micro-prudential supervision protection – at the national and the EU level. Decisions issued by the EIOPA may be addressed both to national supervisory authorities and to the supervised entities themselves. Decisions addressed to the supervised entities shall prevail over any previous decisions adopted by the competent national authorities in the same case.

**Keywords:** micro-prudential supervision, the consumer, the customer as the weaker party in an insurance relation, the EIOPA, the Financial Supervision Authority, insurance company, insurance intermediary.

## 1. Introduction

The new structure of the EU's financial market supervision has required national and supranational financial supervisors to cooperate. The study analyses the provisions of the EU regulation concerning cases of direct intervention of the EIOPA in relation to independent insurance intermediaries (brokers) and insurance companies using the services of insurance agents<sup>1</sup> under the Regulation of the European Parliament and of the Council (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority – (EIOPA)), amending decision No 716/2009/EC and repealing Commission decision 2009/79/EC<sup>2</sup>. The EIOPA's new competences include the ability to take binding decisions on the EU insurance market addressed directly to financial institutions<sup>3</sup>, bypassing the national insurance supervision authorities.

The new regulations are aimed at enhancing the protection of customers of insurance services, including consumers. They pursue a new approach to protecting the rights and interests of consumers of insurance services, where there is a clear increase in the activity of the state in the form of regulation, supervision and direct intervention. All new legal solutions are the result of the reaction of the European legislator to phenomena that adversely affect the legal situation of the client (including the consumer) in the insurance services market. This concerns, in particular, the lack of transparency of advertising, marketing and promotional materials, which are often confusing; the lack of reliable information on costs and fees (in relation to certain insurance services of an investment character with respect to their return on investment); the inconsistency of disclosures causing difficulties in comparing services; the continuing upward trend in terms of unjustified refusal to pay benefits; and disputes over compensation and delays in payment (Łańcucki 2015, p. 3–5). All of these factors compelled the European legislator

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<sup>1</sup> On the basis of the Act of 22 May 2003 on insurance intermediation (consolidated text: Journal of Laws of 2014, item 1450, as amended), insurance brokers (independent intermediary) are supervised by the Financial Supervision Authority (art. 21), while insurance agent is supervised by the insurance company for which the latter operates (art. 18). The Financial Supervision Authority can only inspect the operations of the insurance company in respect of the use of the services of an insurance agent (art. 19 paragraph 1). Hence, the administrative decisions addressed by the Financial Supervision Authority or the EIOPA to the financial institutions will relate directly or indirectly to insurance companies using the services of an insurance agent or directly to insurance brokers.

<sup>2</sup> Official Journal of the European Union, series L 331 of 15 December 2010, p. 48 as amended, hereinafter referred to as the EIOPA Regulation.

<sup>3</sup> Art. 4 section 1 of the EIOPA Regulation contains the definition of the concept of financial institutions – they stand both for insurance companies and insurance intermediaries.

to restructure financial market supervision, which will be more effective in protecting clients of financial services, including consumers. Due to its restricted scope, this article discusses only the authoritative powers to influence insurance intermediaries under the EIOPA Regulation.

## 2. The New Structure of Financial Market Supervision

The financial crisis the world has been battling back from since it hit in July 2007 has proved to be the most serious financial crisis since the Crash of 1929, and spread to all financial sectors and countries. The crisis had a negative impact on the world's economies in part because financial markets are based on customers' trust. This has led to a fundamental change in the existing legislation of the EU financial market and the creation of new law governing the EU's financial market.

The existing legal instruments within the current supervision related only to the micro scale and did not take into account the impact on the EU's entire financial system. Accordingly, macro-prudential instruments were seen as necessary (Hertig, Lee, McCahery 2010, p. 191). In November 2008, the European Commission built a high-level group, chaired by Jacques de Larosière (former Director General of the International Monetary Fund), to develop recommendations on how to strengthen European supervisory arrangements to better protect the Union's citizens and rebuild trust in the financial system. Its final report was presented on 25 February 2009 ([https://ec.europa.eu/internal\\_market/finnces/docs/de\\_larosier\\_report\\_en.pdf](https://ec.europa.eu/internal_market/finnces/docs/de_larosier_report_en.pdf), accessed: 12.02.2014), it presented its final report, a balanced and pragmatic vision for a new European system of financial supervision. At its heart, there were proposals to strengthen the cooperation and coordination between national supervisors, including through the creation of new European supervisory authorities and, for the first time, a player on the European level vested to supervise the financial system as a whole, and the myriad risk to which it is exposed (Michór 2011a, p. 306–307). From that point on, prudential supervision would be present in two areas which have an effect on another – macro-prudential supervision and micro-prudential supervision.

Macro-prudential supervision was entrusted to the new European entity, the European Systemic Risk Board (ESRB), pursuant to the Regulation of the European Parliament and of Council No 1092/2010<sup>4</sup>, which is to monitor and assess risks to the stability of the financial system as a whole. ESRB tracks systemic

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<sup>4</sup> Regulation of the European Parliament and of the Council (EU) No 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, Official Journal of the European Union, series L 331 of 15 December 2010.

risk in the EU, both within individual sectors of the market and the financial market of the EU as a whole. It also combines its macro-prudential supervision with micro-prudential supervision (Stanisławiszyn 2011, p. 138), thus affecting the policy makers and other supervisory authorities not through binding legal instruments, but by means of authority (Nieborak 2010, p. 51). ESRB consists of, among others, the President of the European Central Bank (being the chairman of ESRB) and Vice-President of the ECB, as well as representatives of national supervisory authorities of the financial market and, depending on the supervision model in force in the individual Member States, of representatives of the banking authority.

The ESRB assesses and monitors the market, and in the event of an emergency contacts the Council, which then assesses the need to adopt a decision addressed to national supervisory authorities (Piotrowska 2013, p. 341).

It should be emphasised that the impact of national supervisors on the decisions taken within the ESRB is negligible, since the representatives of national supervisors do not have the right to vote in the ESRB (Fedorowicz 2013, p. 133).

The opposite situation can be observed in relation to the representatives of the national central banks of the Member States of the EU and the European Central Bank which participate in the work of the ESRB and its internal bodies. They have a significant influence on the decisions taken within the framework of the ESRB. That framework is related to the scope of the tasks assigned to representatives of national central banks by the ESRB and their natural actions taken on the financial market within the European System of Central Banks (the ESCB)<sup>5</sup>.

Possessing expertise and being responsible for financial stability, the European Central Bank and the central banks are of essential importance for the macro-prudential pillar. The Polish Act of 5 August 2015 on macro-prudential oversight of the financial system and crisis management in the financial system<sup>6</sup> assigned macro-prudential powers to the Financial Stability Committee (hereinafter referred to as FSC), and macro-prudential supervision – in connection with art. 458 of the Regulation (EU) No 575/2013 (CRR) – to the Minister of Finance (Fedorowicz 2016, p. 116–117). The Polish legislator indicates that the aim of the macro-prudential supervision is to identify, assess and monitor systemic risk arising in the financial system or in its environment and contributing to its elimination or reduction with the use of macro-prudential instruments, in particular strengthening the resilience of the financial system should systemic risk occur,

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<sup>5</sup> Council Regulation No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, Official Journal of the European Union, series L 2010.331.162.

<sup>6</sup> Journal of Laws of 2015, item 1513.

in order to support of the country's long-term and sustainable economic growth<sup>7</sup>. Thus, the FSC became the body to address crisis management in the event of imminent danger and when macro-prudential tasks were called for (Fedorowicz 2016, p. 117).

In turn, the micro-prudential supervision pillar is provided by the European System of Financial Supervision (ESFS). This consists of a network of national financial supervisors cooperating with new European supervisory authorities, including the European Banking Authority (EBA) established by Regulation (EU) No 1093/2010 of 24 November 2010<sup>8</sup>, the European Insurance and Occupational Pensions Authority (EIOPA) established by Regulation (EU) No 1094/2010 dated 24 November 2010<sup>9</sup> and the European Securities and Markets Authority (ESMA) established by Regulation (EU) No 1095/2010 of 24 November 2010<sup>10</sup>. The ESA is made up of, among others, the heads of the national financial market supervision authorities and representatives of the national central banks of the EU Member States, as well as representatives of the European Central Bank and the European Systemic Risk Board (ESRB).

These authorities oversee the different segments of a unified internal EU financial market. In addition, micro-prudential supervision includes supervision over the systemically most important banks by the European Central Bank, within the SSM<sup>11</sup> and micro-prudential supervision exercised by the national authorities of financial market supervision<sup>12</sup>.

In Poland, micro-prudential supervision is exercised by the Financial Supervision Authority.

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<sup>7</sup> Art. 1 of the Act on macro-prudential oversight of the financial system and crisis management in the financial system.

<sup>8</sup> Official Journal of the European Union, series L 331 of 15 December 2010, p. 12.

<sup>9</sup> Official Journal of the European Union, series L 331 of 15 December 2010, p. 48.

<sup>10</sup> Official Journal of the European Union, series L 331 of 15 December 2010, p. 84.

<sup>11</sup> This is the single supervisory mechanism (SSM), namely an integrated banking supervision resulting in the transfer of supervision of credit institutions on the EU level; micro-prudential supervision as part of SSM was entrusted to the European Central Bank under Regulation 1024/2013.

<sup>12</sup> Moreover, micro-prudential supervision includes the Joint Committee of the European Supervisory Authorities (Joint Committee) provided for in art. 54 of the Regulation (EU) No 1093/2010, art. 54 of the Regulation (EU) No 1094/2010, and in art. 54 of the Regulation (EU) No 1095/2010 as well as the competent authorities and supervisory authorities of Member States set forth in legally binding EU legal acts referred to in art. 1 paragraph 2 of the Regulation (EU) No 1093/2010, art. 1 paragraph 2 of the Regulation (EU) No 1094/2010 and in art. 1 paragraph 2 of the Regulation (EU) No 1095/2010.

### 3. Comments on the Consumer in Commercial Insurance

The term “consumer” has been defined in the general part of the Civil Code, which means that the term applies to consumer regulations, unless special provisions differently define it (Gnela 2013, p. 133). A consumer is any natural person undertaking legal operations with a trader with the aim not directly related to the consumer’s business or professional activities<sup>13</sup>. The last amendment to the definition of the consumer consisted in clarifying art. 22 (1) of the Civil Code by adding in the appropriate place the words “with the trader”. The concept of the consumer is therefore limited to natural persons, conditioned by the fact of the consumer entering into relations with the trader and extending to all legal acts (undertaken by him) not directly related to the business or professional activity pursued by him.

It is therefore assumed that in an insurance-based relationship, with the current definition of the consumer, its status is only granted to the insuring party who enters into a contract of insurance. The insured, the beneficiary and the victim<sup>14</sup> who are natural persons cannot be regarded as consumers within the meaning of art. 221 of the Civil Code because they do not undertake legal acts within the meaning of that provision (Gnela 2013, p. 350).

In the definition of a consumer contained in the code, the concept of a legal action can be replaced with the term “operation”. The use of it in the definition of the consumer could broaden its scope so as to cover individuals “operating” at the pre-contractual stage or exposed to torts of professionals. Reference to the trader’s operations, instead of to the circumstances of undertaking a legal action, should therefore be made in the definition of the consumer (Gnela 2013, p. 136).

Irrespective of the current definition of the consumer, it should be noted that in commercial insurance law it is justified to protect the weaker party in an insurance contract, while such protection should be implemented by the appropriate authority, which is not the consumer protection authority (Szaraniec 2015, p. 119). What follows from the regulation of the insurance contract is a clear trend to

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<sup>13</sup> Art. 22 (1) of the Civil Code was introduced by the Act of 14 February 2003 amending the Act – the Civil Code and some other acts (Journal of Laws No 49, item 408). On 25 December 2014 there came into force an amendment to the Civil Code made by the Act of 30 May 2014 on the consumer rights (Journal of Laws of 2014, item 827, as amended).

<sup>14</sup> An insured person who is not the insuring party, does not undertake a legal action with the trader, but is the subject of the relation of insurance. In turn, the beneficiary is not a party to the contract and does not have the status of the entity in a tripartite legal relation. It is a third party in relation to the insurance contract, which draws future financial benefit in the form of the right to receive the agreed sum insured in case of death of the insured (art. 831 par. 1 of the Civil Code). See also a judgment of the Supreme Court dated 15 March 2000, OSN 2000, No 9, item 169, according to which a consumer is a person who is party to an agreement concluded with a professional contractor engaged in business activities (trader), whose objective is to meet its own needs.

protect the rights of each counterparty of the insurer, regardless of their legal status. If the insurer's contractors also include consumers, their status should not affect the application of any special additional protective regimes in respect of them, as provided for in the regulation of the insurance contract.

For these reasons, the regulation of the insurance contract itself should not implement the idea of the consumer protection, but rather the idea of the weaker party in an insurance relation, which also includes consumers. Nevertheless, there arises the question of whether the insurance protection of the weaker party of the insurance contract should cover every insuring party, regardless of its legal status and whether, in this group of subjects there are also those that will not be subject to this special protection. There is no easy answer to this question – there will always be doubts as to why this and not another entity has been granted additional protection. The Directive of the European Parliament and of the Council (EU) 2016/97 of 20 January 2016 on insurance distribution<sup>15</sup> allows Member States to introduce a definition of a professional client, who does not have to be provided with certain information intended to protect him against ill-conceived decision of signing the insurance contract<sup>16</sup>. An unprofessional (retail) customer (Szaraniec 2017, p. 133) in an insurance contract deserves greater protection in respect of the obligation to provide information, not because he is a consumer, but because he is the insured party. An unprofessional (retail) customer should be covered by a separate information regime, different from the consumer protection regime, and tailored for commercial insurance law. Consumers, on the other hand, will be able to benefit from the specific consumer provisions relating to consumer protection.

#### **4. The Tasks and Powers of the European Insurance and Occupational Pensions Authority (EIOPA)**

The EIOPA is part of the European System of Financial Supervision (ESFS), micro-prudential supervision, and answers to the European Parliament and the Council. The EIOPA is the EU body with a legal character. It is represented by the Chairman, and consists of: the Board of Supervisors, the Management Board, the Chairman, the Chief Executive Officer and the Board of Appeal. The EIOPA's objectives have been included in art. 1 paragraph 6 of Regulation 1094/2010. Its most fundamental task is to protect the public interest by helping ensure the

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<sup>15</sup> Official Journal of the European Union, series L 26 of 2 February 2016, p. 19, hereinafter referred to as IDD.

<sup>16</sup> See: art. 22 paragraph 1 of IDD, <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=4C1441608619830EB1E23D2B6F53D141.node1?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0155%200%20DOC%20XML%20V0/en#BKMD-28>, accessed: 31.01.2017.



stability and efficiency of the financial system for the benefit of the EU economy, its citizens and businesses. The EIOPA is further charged with improving the functioning of the internal market, i.e. to ensure the effective and consistent level of regulation and supervision, to ensure the integrity, transparency, efficiency and orderly functioning of financial markets, to strengthen international coordination in financial supervision, to prevent regulatory arbitrage and to promote equal conditions of competition, to ensure proper regulation and supervision of the risks taken with regard to insurance, reinsurance and to enhancing customer protection. The EIOPA's remit covers the activities carried out by insurance companies, reinsurance undertakings, institutions for occupational retirement provision schemes and insurance intermediaries, to the extent to which these entities are subject to the provisions of Regulation 1094/2010. The subjective scope of the supervision is also implemented in relation to the national supervisory authorities in the field of market insurance and occupational retirement provision schemes, both of the integrated national supervisors and national specialised (sectoral) supervisors.

## **5. The Legal Nature of the Instruments Used by the EIOPA in the Framework of Micro-prudential Supervision**

The new competences assigned to the EIOPA include the authority to develop draft regulatory and implementing technical standards (hereinafter referred to as BTS). The authorities provide the European Commission with the draft regulatory and implementing technical standards for approval in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts (art. 290 and 291 of TFEU)<sup>17</sup>.

Binding technical standards (BTS) are purely technical. They cannot settle the strategic decisions or policy choices and their content shall be to determine the conditions of the application of those acts. Technical standards, which are in fact delegated acts, are legal instruments of the European Commission, on the basis of which it is authorised to issue universally binding norms of a technical nature.

One instrument the EIOPA has in its arsenal for interfering in the insurance market is guidelines and recommendations it can issue to address the competent authorities or entities of the financial market. While not of a binding nature, the European legislator forces recipients to observe these guidelines and recommendations (Szaraniec 2016, p. 24).

The EIOPA can also issue administrative decisions, which can be directed either to the national supervisory authorities or to financial institutions.

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<sup>17</sup> The Treaty on the Functioning of the European Union, Journal of Laws of 2004, No 90, item 864/2, as amended, hereinafter referred to as TFEU.



The EIOPA has the autonomy to issue binding decisions on national supervisors and financial institutions, so the resulting EU surveillance system has the ability to directly discipline EU financial market participants, acting in this respect as the representation at the EU level of the activity of national supervisors (Fedorowicz 2013, p. 177). These decisions can be divided into four groups (Fedorowicz 2013, p. 179):

- 1) decisions issued when the competent authority or entity has failed to apply the EU acts (art. 17 of the EIOPA Regulation),
- 2) decisions in emergency situations (art. 18 of the EIOPA Regulation),
- 3) decisions made in resolving disputes between competent authorities in cross-border situations (art. 19 of the EIOPA Regulation),
- 4) special supervisory decisions, referred to as intervention decisions (art. 9 paragraph 5 of the EIOPA Regulation).

Both individually and in a binding manner, the EIOPA's decisions prejudice the situation of the legal entities of the financial market (in terms of their commitment to specific action or omission) on the basis of the applicable EU regulations and directives, by means of which the EU law is applied. They are therefore supervisory decisions in the strict sense (Fedorowicz 2013, p. 177–178), and can as such be directly addressed to financial institutions in the market, as well as to the national authorities which engage in financial market supervision. The decisions addressed to individuals shall prevail over any previous decision adopted by the competent national authorities in the same case.

## **6. EIOPA Decisions Addressed to Insurance Intermediaries and Insurance Companies in the Case of Subsidiaries**

Art. 17 of the EIOPA Regulation provides the EIOPA the authority to take an individual decision addressed to a financial institution. Such decisions require the institution to undertake the measures EIOPA prescribes for it to comply with its obligations under the EU law, including the cessation of practices. This power is of utmost importance because it enables the EIOPA to intervene in the market, independently of the activities of national supervisory authorities (Michór 2011b, p. 80). This relates particularly to the EIOPA determining the premises for the infringement of EU law or its improper application, which may constitute a violation of EU law by the national supervisory authority. In such a case, an investigation in relation to the national financial supervisor is initiated. As part of proceedings, the national supervisors are required to provide the EIOPA with all information it considers necessary for the investigation, during which the EIOPA may also address the national supervisors with recommendations setting out the action necessary to ensure compliance with EU law. In such case, the national supervisor is obliged,

within 10 days, to inform the EIOPA about the actual or potential measures taken to ensure compliance with EU law<sup>18</sup>.

If the national supervisor does not cooperate in this regard with the EIOPA and does not comply with the recommendation within one month, the Commission may issue a formal opinion, which in fact takes into account the recommendations of the EIOPA and on the basis of which there may be imposed upon the national supervisory authority the obligation to take specific action<sup>19</sup>. The fact that the national supervisory authority received a formal opinion materialises the obligation of the national supervisor to respond to the formal opinion of the Commission. In response, the national supervisors inform of the actions they intend to take or have taken to comply with the formal opinion. In the event of a failure to comply with the formal opinion and to meet other conditions of the provisions of the EIOPA Regulation, the specific sanction to the national supervisory authorities is the omission of their individual decisions addressed to the respective financial institutions operating in the market, since in such a situation EIOPA decisions enjoy the priority of application (Fedorowicz 2011, p. 42).

The EIOPA also has an express role to play in emergency situations. First, the EIOPA actively facilitates and, where deemed necessary, coordinates any actions undertaken by the relevant national competent supervisory authorities in the case of adverse developments which may seriously jeopardise the orderly functioning of financial markets and their integrity or stability of the EU's entire financial system or a part thereof. Next, if the European Commission adopts the decision addressed to the EIOPA, determining the existence of an emergency situation for the purposes of Regulation 1094/2010 and there arise exceptional circumstances prompting the need for coordinated action by the national authorities in relation to adverse developments which may seriously jeopardise the orderly functioning of financial markets and their integrity or the stability of the entirety or a part of the EU's financial system, the EIOPA may adopt individual decisions requiring the competent national authorities to take the necessary action in accordance with the legislation referred to in art. 1 paragraph 2 of the EIOPA Regulation, in order to address any such developments by ensuring compliance by the financial institutions and the competent authorities of the requirements laid down in that legislation<sup>20</sup>. Also in this case, if the national supervisor is not acting or is acting improperly, the EIOPA may adopt an individual decision requiring the financial institutions take specific action<sup>21</sup>.

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<sup>18</sup> Art. 17 paragraph 3 of the EIOPA Regulation.

<sup>19</sup> Art. 17 paragraph 4 of the EIOPA Regulation.

<sup>20</sup> Art. 18 paragraph 1 and 2 of the EIOPA Regulation.

<sup>21</sup> Art. 18 paragraph 4 of the EIOPA Regulation.

It should also be noted that regulations concerning the settlement of disputes between competent authorities in cross-border situations have also been set forth<sup>22</sup>. The EIOPA also supervises dispute conciliation between the national supervisors. When conciliation fails, the EIOPA may take a decision requiring the national supervisory authorities to take specific action or to refrain from action, with binding effects for the competent authorities to ensure compliance with EU law. A specific sanction national supervisors have available to them is that the EIOPA can issue decisions addressed directly to financial institutions operating in the market, which have precedence over the decisions of national financial supervisors<sup>23</sup>.

The EIOPA monitors the market of insurance investment products which are marketed, distributed or sold in the European Union. The EIOPA may, if certain conditions are met, temporarily introduce in the EU prohibitions or restrictions on marketing, distribution or sale of certain insurance products and certain insurance investment products with specific characteristics<sup>24</sup>. A prohibition or restriction may be imposed the following conditions are met<sup>25</sup>:

- 1) the proposed operation concerns a significant problem in the field of investor protection, or threats to the orderly functioning and integrity of financial markets or the stability of the whole or a part of the EU system,
- 2) the regulatory requirements under EU law that are applicable to the specific insurance investment product do not prevent this threat,
- 3) the competent authority or competent authorities have not taken action to address the threat or the measures taken do not sufficiently address the threat.

The EIOPA must ensure that the measures it takes do not have an adverse effect on the efficiency of financial markets or on investors, if such an impact is disproportionate to the their benefits and that they do not pose the risk of regulatory arbitrage<sup>26</sup>. The measures taken by the EIOPA take precedence over any previous measures taken by the competent authority.

Based on art. 17 of PRIIP, the national supervisor of a Member State can also introduce prohibitions or restrictions in its State or on its territory in terms similar to the EIOPA for the EU. The competent national authority may take the said measure, if on reasonable grounds it ensures that: 1) the given insur-

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<sup>22</sup> Art. 19 of the EIOPA Regulation.

<sup>23</sup> Art. 19 paragraph 4 of the EIOPA Regulation.

<sup>24</sup> Under art. 9 paragraph 5 of the EIOPA Regulation.

<sup>25</sup> Art. 17 of the Regulation of the European Parliament and of the Council (EU) No 1286/2014 of 26 November 2014 on the document containing key information relating to retail products for collective investment and insurance investment products (PRIIP), Official Journal of the European Union, series L 352 of 9 December 2014.

<sup>26</sup> Art. 16 paragraph 3 of PRIIP.

ance investment product raises serious concerns regarding investor protection or poses a threat to the orderly functioning and integrity of financial markets in at least one Member State; 2) existing regulatory requirements under the EU law which apply to the insurance investment product, do not sufficiently address the risks referred to above, and the issue was not better addressed through improved supervision or enforcement of existing requirements; 3) the action is proportionate taking into account the nature of the identified risks, the level of knowledge of interested investors or market participants and the likely effect of the action on investors and market participants who may possess or use the respective insurance investment product or a given activity or practice, or to derive benefits therefrom; 4) the competent authority has carried out proper consultations with the competent authorities in other Member States, for which a given action may have a significant impact; and 5) the action does not have a discriminatory effect with respect to the services or activities conducted from another Member State<sup>27</sup>. The competent national authority may impose prohibitions or restrictions, provided that at least one month before the moment of entry of the product into force it shall communicate in writing or in another agreed manner to all relevant involved competent authorities and to the EIOPA detailed information on: 1) the insurance investment product or activity or practice to which the planned action refers; 2) the exact nature of the proposed prohibition or restriction and the planned moment of its entry into force; and 3) the evidence on which it based its decision and on the basis of which it made sure that each of the five conditions described above is satisfied.

It is noted in the literature that the issuance of individual decisions to insurance intermediaries by the EIOPA can cause problems associated with replacing them with the decisions of national supervisors<sup>28</sup>. One should agree with the view that in such a case the decisions of national supervisors will not be challenged, because the decisions of the EIOPA will not be essentially identical in substantive terms with all the decisions of the national supervisory authority related to the violation of the law by an insurance intermediary (Michór 2011b, p. 81–82).

## 7. Proceedings before the EIOPA

Proceedings before the EIOPA are related to the provision of certain procedural standards, which result from the Regulation 1094/2010. It should be emphasised that before taking the decision, the Authority shall inform any named addressee of

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<sup>27</sup> Art. 17 paragraph 2 of PRIIP.

<sup>28</sup> The decisions of the EIOPA shall take precedence over any decisions taken previously by the national supervisory authorities and they require insurance intermediaries to take the necessary measures to fulfill their obligations under European law, including the cessation of any practice.

its intention to take the decision, setting the time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the decision. This procedure is also applicable in relation to the recommendations. The decisions of the EIOPA shall provide the justification, and the addressees of the decisions are informed of the legal remedies available to them under the Regulation. It should be emphasised that the EIOPA is committed to making the undertaken decisions public, pursuant to art. 17, 18, 19 of the Regulation 1094/2010.

Regulation 1094/2010 established the appeal procedure against decisions of the EIOPA. This means that the supervised entities and national supervisory authorities may appeal against EIOPA decisions referred to in art. 17, 18, 19 of Regulation 1094/2010, as well as against any other decision taken by the EIOPA which is addressed to that person, or against a decision which concerns them directly and individually, even though it was addressed to another entity. The appeal, together with the reasons, shall be submitted to the EIOPA in writing within two months of the date the entity was notified of the decision or – in the absence of such notification – from the date the EIOPA published the decision. The appeal shall not suspend the execution of the decision; however, the Board of Appeal may suspend it should it determine that circumstances so require. The Board of Appeal shall examine the matter and as a result of examination of the case it can maintain the decision or remit the case to the competent body of the Authority. The decision of the Board of Appeals is binding on this entity and the latter is obliged to comply with the decision.

The decision taken by the Board of Appeal ends the course of instances and provides the possibility to challenge the decision taken by the Commission at the CJEU, pursuant to art. 263 of TFEU. In addition, if the EIOPA was required to act and failed to issue a decision, there may be initiated proceedings for a failure to act in accordance with art. 265 of TFEU before the CJEU.

## **8. Conclusions**

The authoritative powers of the EIOPA in the insurance market discussed in this article indicate the increasing role of regulation and supervision in the field of customer protection (including consumer protection) in the insurance services market. An integrated financial market requires cross-border supervision of financial institutions. However, the transfer of certain supervisory powers to the European level should be accompanied with the transfer of the burden of responsibility for the actions undertaken by the EIOPA, in particular in terms of transferring the burden of responsibility from the national to the EU level, since the coercive

powers of the EIOPA in the form of administrative decisions result in changing the legal situation of the addressee of the decision and impose certain behaviour on the latter. Accordingly, it is important to clarify this responsibility at the level of the European bodies for the administrative decisions taken and addressed to insurance intermediaries or insurance companies.

It is also worth noting that the client (including the consumer) of the insurance services is currently protected not only at the level of national supervision, but also at the European level, under the powers of the EIOPA. If a certain service is improper from the perspective of the protection of the client (including the consumer), then the EIOPA (in addition to the Financial Supervision Authority) may prohibit or restrict the sale of insurance investment services. Such supervisory competence – one which stands for the new approach in the financial market to the issues of the protection of the rights and interests of consumers of insurance services – had not existed until the EIOPA was established. At the same time, there exists a tendency in public law to interfere in private law, where the administrative instruments aimed at client protection influence the shape of the insurance contract. The tendency of the regulatory method's pervasion into civil law relationships can be traced in the provisions of Regulation 1094/2010, which is proof for the process of publicisation of the legislation on insurance services distribution. Intrusion of regulatory methods in civil law relationships is not intended to eliminate the private law model as such and replace it by public law regulation. The regulatory method is only complementary to the latter.

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## **Decyzje administracyjne skierowane do pośredników ubezpieczeniowych wydane przez EIOPA jako instrument ochrony konsumenta (klienta) w ramach nadzoru makroostrożnościowego**

(Streszczenie)

Artykuł ma na celu omówienie nowych, władczych kompetencji nadzorczych EIOPA w odniesieniu do pośredników ubezpieczeniowych i zakładów ubezpieczeń na wewnętrznym rynku ubezpieczeniowym Unii Europejskiej, które stanowią ochronę klientów (konsumentów) usług ubezpieczeniowych. Kompetencje te chronią klienta, w tym konsumenta, usług ubezpieczeniowych w obecnie obowiązującym prawie, a ochrona ta ma charakter dwuszczeblowy na poziomie nadzoru mikroostrożnościowego, tj. na poziomie krajowym i na poziomie UE. Decyzje wydane przez EIOPA mogą być kierowane zarówno do krajowych organów nadzoru, jak i do samych podmiotów nadzorowanych. Decyzje skierowane do nadzorowanych podmiotów mają pierwszeństwo przed wszystkimi wcześniejszymi decyzjami przyjętymi przez właściwe organy krajowe w tym samym zakresie.

**Słowa kluczowe:** nadzór mikroostrożnościowy, konsument, klient jako słabsza strona usługi ubezpieczeniowej, EIOPA, Komisja Nadzoru Finansowego, zakład ubezpieczeniowy, pośrednik ubezpieczeniowy.