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## BANCASSURANCE ON THE EU MARKET – SPECIFICITIES OF THE POLISH LAW

### Abstract

The increase of interest in bancassurance as a form of distribution of insurance products in Poland provides many challenges for the market. The EU Directive on insurance mediation, local Polish regulations and the self-regulations of the Polish market players became an interesting topic for legal discussion on how bancassurance should be structured in Poland, and whether it requires any additional regulations. This article discusses the specific regulations of the Polish market in connection with the EU regulations.

*Key words:* bancassurance, intermediaries, group insurance contract, soft law.

### 1. BANCASSURANCE – POLISH DEFINITION?

Polish law does not provide a definition for bancassurance business. The practical or market definition can be stated as the various types of cooperation between banks and insurers. The forms of such cooperation have developed over many years as beneficial forms of meeting clients' needs, as distribution channels of insurance products, and as a common tool for the exchange of information and cross selling. In Poland and elsewhere, bancassurance, for both insurers and banks, is treated as an excellent opportunity to use a bank's branch networks and maintain "face to face" contact with clients as a means of selling insurance products, and a way of developing product ranges and increasing client satisfaction.

From a legal point of view, although bancassurance can have a variety of definitions and structu-

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res, the two most common can be defined as "intermediation structure" and "group insurance structure".

The first is structured on the basis of cooperation between an insurer, and a bank that acts as an intermediary, distribution channel of insurance products. In relation to such a structure, the provisions of the Directive 2002/92/EC on insurance mediation<sup>1</sup> (hereinafter: the IMD) apply to both the insurer and the agent. The provisions of the IMD have been implemented into Polish law through the Act on Insurance Intermediation dated 22 May 2003<sup>2</sup> (hereinafter: the IMA) which now covers all aspects of insurance mediation in Poland. There is no doubt that the intention of the legislators drafting the provisions of the IMA in 2003 was not only the transposition of the national legal regulations aimed at harmonizing them with EU legal requirements, but also the far-reaching protection of consumers. The consumers' position on the Polish and European insurance market has been strengthened due to the implementation of the IMD<sup>3</sup>.

A "group insurance contract" is based on the concept of group insurance, structured on the basis of insurance for the benefit of a third party (on account of a third party). The main feature of this concept is that the bank, although remaining a type of distribution channel for insurance products (insurance cover), does not become an intermediary, but is merely a policyholder that allows the insured (usually its clients) to be granted with insurance cover by the insurer. Although the preamble of the IMD in recital (9) indicates that various types of persons or institutions, including "bancassurance operators" can distribute insurance products, the acts to be performed by the bank are aimed at being the sole activity of the policyholder, not the intermediary. As a re-

<sup>1</sup> Directive 2002/92/EC of the European Parliament and of the Council on insurance mediation (IMD), adopted on 9 December 2002, published on 15 March 2003 (Official Journal L 009, 15/01/2003 P. 0003 - 0010).

<sup>2</sup> The Act on Insurance Intermediation dated 22 May 2003 (Journal of Laws No 124, item 1154, as amended).

<sup>3</sup> Przybytnowski, W. Jarosław, "Analiza porównawcza funkcjonowania pośrednictwa ubezpieczeniowego w Polsce i w Niemczech po implementacji insurance mediation directive z 2002 roku" (Legal and economic aspects of the functioning of the insurance market in Poland and Germany after implementing the Insurance Mediation Directive of 2002), *Wiadomości Ubezpieczeniowe*, 3/2009.

sult, the bank should not be qualified as a “bancassurance operator”. Hence, the provisions of the IMD or IMA do not apply to the group insurance structure.

It should be noted that the IMD<sup>4</sup> also indicates that it should apply to persons whose activity consists in providing insurance mediation services to third parties for remuneration, which may be pecuniary or take some other form of agreed economic benefit tied to performance, providing, at the same time, for certain exceptions<sup>5</sup>. Such exceptions have also been provided for in Polish law<sup>6</sup> and, in general they repeat the wording of the IMD. As the said exceptions, according to the IMD and IMA, are to be applied jointly they usually do not apply to banks and do not play an important role on the bancassurance market in Poland.

Hence, in terms of bancassurance, the bank usually acts as an insurance intermediary or an entity that does not fall within the scope of the IMD and the IMA, i.e. a policyholder in a group insurance structure.

## 2. A BANK AS AN INTERMEDIARY IN BANCASSURANCE

In the discussed concept, an insurance contract between an insurer and a client is concluded through an intermediary, that being a bank. Polish law provides for a diversification of insurance intermediaries, allowing for two general forms of insurance intermediation: agency and brokerage activity<sup>7</sup>. The former (agency activity) can be executed in two operational forms: an agent (performing agency acts on behalf of one insurance company), and a multi-agent (performing agency acts for more than one insurance company in the field of the same branch of insurance), and both can exclusively perform agency activity. The main difference between

an agent and a broker is that an insurance agent acts in the name and on behalf of an insurance company, whereas an insurance broker acts in the name and on behalf of an entity seeking insurance coverage. In other words, insurance agents and multi-agents represent insurers in their contacts with their potential customers. Insurance brokers are independent intermediators - advisers, representing the interests of policyholders against insurers<sup>8</sup>. Needless to say, it is the banks that tend to act as insurance agents, not brokers, and the latter form is actually not recognized on the market.

The IMA, following the regulations of the IMD, provides that insurance mediation consists in the performance, for remuneration, of factual or legal acts involved in the conclusion and performance of insurance contracts. “Agency activity” consists of soliciting clients, carrying out work in preparation to the conclusion of insurance contracts, the conclusion of insurance contracts, and assisting in the administration and performance of insurance contracts in the event of a claim, as well as in the organisation of and supervision over agency acts<sup>9</sup>.

The banks, in order to act under the “intermediary structure”, need to be registered by the relevant insurance company before they commence agency activity. As an agent the bank needs to fulfil certain conditions, including training, which, according to the IMD remains one of the most important features of this profession. The general rules regarding the qualifications of the persons intermediating in selling insurance contracts are regulated in the IMD as an obligation to possess the appropriate knowledge and ability, as determined by the home Member State. This regulation is very general and its aim was to indicate the direction of the solutions to be adopted by the Member States<sup>10</sup>. Polish law provides for very detailed regulations regarding obtaining the relevant qualifications and meeting certain criteria, as well as undergoing training. The latter, once completed (taking an exam is also required) need to be repeated periodically.

<sup>4</sup> Recital (11) of the preamble of the IMD.

<sup>5</sup> Recital (13) of the preamble of the IMD and Article 1 point 2 of the IMD.

<sup>6</sup> Article 3 point 2 of the IMA.

<sup>7</sup> Article 2 point 2 of the IMA. For the diversification of insurance intermediation within the IMD please see “Tied Insurance Intermediaries”, Chrissanthi, Christos in: Insurance Intermediaries. Distribution of Insurance Products, AIDA Working Party MAY 2007 – 2010. A comparative Study edited by Prof. Dr. Ioannis Rokas.

<sup>8</sup> Biernat, Tomasz, “Pośrednik ubezpieczeniowy w świetle prawa europejskiego”, *Prawo Unii Europejskiej*, Nr. 1/2004.

<sup>9</sup> Article 2 point 1 and Article 4 sub-point 1) of the IMA, that repeats the general definition “insurance mediation” indicated in Article 2 point 3 of the IMD.

<sup>10</sup> Biernat, T. *Ibid.*

Although the rights and obligations of the bank – insurance agent – do not greatly differ from other intermediaries, the banks enjoy a number of benefits, the most important of which is limited training obligations; which is the main obstacle connected with registering an entrepreneur as an agent. Although the general rule indicates that an agent's training should last for at least 152 hours, a person employed as an insurance agent on the basis of an employment contract, who will perform agency acts only in the scope of insurance contracts concluded by a bank or savings or credit cooperative in the scope of the banking acts performed by those entities, or in the case where the bank or savings or credit cooperative serves as an intermediary in conducting those agreements, has to complete a course of training in a limited scope that should last at least 36 hours. This difference, being in accordance with the IMD regulations, is usually explained as justified since the banks are already subject to the rules of their own business that require certain qualifications and financial knowledge<sup>11</sup>.

The agents have many obligations towards their clients (the insured), banks inclusive. Both, the IMD and IMA provide detailed information on the data and documents that should be provided by an agent to the client. The information obligations towards the clients are intended to be full and comprehensive<sup>12</sup>.

Among the many obligations of insurance agents, training is one of the most important, both from the point of view of timing and the costs for insurers. It plays a great role in making the decision as to whether to choose the concept of the "intermediation structure" of cooperation, or "group insurance".

### 3. GROUP INSURANCE CONTRACT CONCEPT

As with other European countries, the Polish market, over many years of practice, has developed a

<sup>11</sup> Marano, Pierpaolo, "The EU regulatory framework on bancassurance: What in progress on what?", *Revija za pravo osiguranja (Insurance Law Review)*, Belgrade, 2/2011, p. 14.

<sup>12</sup> There are currently preparatory works on a number of amendments to the IMD, including the manner of providing information to the client that may have a significant impact on the legal environment on bancassurance cooperation in Poland. For details please, see Marano, Pierpaolo. *Ibid.*

number of alternative distribution channels<sup>13</sup>. One of them is a group insurance contract that is based on the concept of a contract for the benefit of a third party (on account of a third party) and is very often used as the form of providing insurance cover in Poland.

The concept of an insurance contract for the benefit of a third party can apply to both individual insurance or to group insurance; however its structure, in terms of bancassurance, is much more closely related to a group insurance contract, as such a contract is usually concluded by a bank for the benefit of its clients. On the basis of a group insurance contract, the insurer enters into a group insurance contract with a bank being a policyholder. Usually, most of the rights and obligations arising from the insurance contract are regulated between the parties, those being the insurer and the bank (policyholder). It is the bank that agrees to pay the premium (according to Polish law, it is the only entity the premium can be claimed from) and also agrees to offer the possibility of joining the insurance cover to its clients. The insurance cover is usually related to the products offered by the banks, such as payment protection insurance (PPI).

Although the bank can always act as a policyholder (regardless of whether the insurance contract has been concluded for the benefit of their employees or clients) the banks should carefully design their obligations within the group insurance contract as well as the grounds on which the insurance contract has been concluded. The group insurance concept, although absolutely allowed under Polish law, depending on the scope of the actions entrusted to the bank and the basis on which the bank enters into the insurance contract, may be connected with the risk of treating the bank as an insurance intermediary.

One of the factors that may trigger a bank to act as an intermediary, or a policyholder, in a group insurance contract is the degree of flexibility in offe-

<sup>13</sup> For details regarding alternative distribution channels for insurance products please see: Demirakou, Maria. "A comparative review on insurance mediation based exclusively on the answers received by AIDA National Chapters and on reports and speeches of the participants during the sessions of the Working Party", *Insurance Intermediaries. Distribution of Insurance Products, AIDA Working Party May 2007 – May 2010*, edited by Prof. Dr. Ioannis Rokas, *Insurance Law Review*, Belgrade, No. 2/2010, pp. 30-40.

ring insurance products. According to Polish legal doctrine, a bank, in order to act as a policyholder within a group insurance contract, should be able to demonstrate the possessing of, so-called, "insurable interest", i.e. a legal (not economic) interest in organising insurance cover for its clients. A lack of "insurable interest" may be connected with recognizing that a bank acted, de facto, as an insurance intermediary, whereas the group insurance contract was concluded only in order to avoid applying the provisions of the IMA. Market practice shows that most group insurance contracts are usually concluded as a form of loan/credit protection products, therefore, connected with the activity of a bank. However, market competition and the development of new insurance products show that there is a strong tendency to also include stand-alone insurance products, unrelated to the activity of a bank, to the group insurance contracts.

In the process of granting insurance cover, a bank's clients are informed of the option to join the insurance cover. This usually occurs in the process of taking out loans, bank loans or any other banking activity. Although such practice has been discussed on the Polish market, it has not faced a situation similar to the British market, where the UK Competition Commission prepared a report regarding suggested changes in the sale of insurance products constituting the security of consumer loans and bank loans<sup>14</sup>, and two years later issued a final order in this respect<sup>15</sup>. In Poland, if a bank's client wishes to apply for the insurance cover at the moment of taking out a loan or any other bank's product, he/she can do it at the credit / loan point of sale, at the bank. He/she can do that by way of consenting to certain conditions of the cover and signing the relevant documents, such as an application to be covered by insurance.

<sup>14</sup> The UK Competition Commission prepared a report on the issue of suggested changes in the sale of PPI products at the request of the Office of Fair Trading – Market Investigation into payment protection insurance, dated 29 January 2009. The remedies indicated in the report were to be adopted in 2010 and related, inter alia, to a prohibition on selling PPI products at the credit point of sale.

<sup>15</sup> News Release 13/11, Competition Commission, 24 March 2011 – PPI – CC Publishes Final Order. According to the final order, a point of sale prohibition will come into force on April 6 2012.

A feature of a group insurance contract is that there is no direct contractual insurance relationship between an insurer and a bank's clients. The bank acts as a policyholder, while its clients remain the insured<sup>16</sup>. As previously indicated, the bank, acting as the policyholder, is solely obliged to pay the insurance premium to the insurer. In practice, the financial burden of the premium can be transmitted onto the client (the client pays the relevant fees). However, it is still the bank that remains the only entity obliged to pay the insurance premium. To make this structure even more complicated, a group insurance contract can also be concluded through an intermediary that plays the role of introducing the insurer and the bank to each other, offering the insurance product (group insurance product) to the bank.

There is no doubt that contracts for the benefit of third parties, either individual or group, including bancassurance, are permissible under Polish law. However, in a regular insurance contract, the insurer and the policyholder have very clear obligations; providing the insurance cover / payment of the insurance benefit and the payment of the insurance premium, accordingly. Although in a group insurance contract the above structure remains the same, and the insured is not a party to the insurance contract, his / her rights and obligations also need to be taken into account. It must also be remembered that since the insured is usually a consumer, the application of additional consumer protection laws, which are not discussed in this article, will have to apply.

Although the insured does not have an obligation to pay the premium to the insurer (no contractual obligation), the bank (policyholder) usually requests that the client (insured) pays the insurance fee (the fee for the insurance cover) either in full or in part. Polish law does not provide for an obligation to provide the insurance premium from the financial resources of the policyholder and the practice accepts such a structure. The payment of the premium and granting insurance, however, is only part of the usual contractual relations between the insurer and the bank.

<sup>16</sup> According to Polish law, the potential insured has to give its consent for being covered in life insurance, while in non-life insurance there is no such obligation. The above results from article 829 § 2 of the Polish Civil Code dated 23 April 1964, (*Journal of Laws*, No. 16, item 93, as amended).

The banks, not being insurance intermediaries, usually perform certain operational or administrative acts for the insurers, either due to some organisational or technical requirements (the number of the insured, contact details, etc.) or because of financial arrangements (the amount of premium that can depend on supporting the insurer with certain actions). The performance of such acts is usually remunerated, and the manner of calculation and payment of remuneration depends on the agreement between the parties. In order not to fall within the activity of intermediation, the banks tend to carefully limit the number of activities that they perform within a group insurance contract and structure the remuneration conditions. Regardless of obtaining remuneration, because of the limited number of actions that the banks perform, the administration or operational activity of the banks – policyholders – should not, and is not treated as agency activity. What is more, this has never been officially questioned in practice by the supervisory authority, and the features of group insurance contracts have been established as market practice for many years.

As banks are not qualified as insurance agents, neither the IMD nor the IMA apply in relation to group insurance contracts. This non-applicability relates to both of the most important matters, those being training and the obligation to provide information. The only basis for the obligation to provide the insured with the relevant information is because of other legal provisions. In the case of bancassurance it is the Polish Insurance Activity Act<sup>17</sup> and the Polish Civil Code<sup>18</sup>. On their basis the insured can request the policyholder to provide information related to the rights and obligations of the insured under the insurance contract<sup>19</sup>.

<sup>17</sup> Act on Insurance Activity dated 22 May 2003 (uniform text in: *Journal of Laws 2010*, No. 11, item 66, as amended).

<sup>18</sup> Act on the Civil Code dated 23 April 1964 (*Journal of Laws*, No. 16, item 93, as amended).

<sup>19</sup> According to art. 808 § 4 of the Civil Code, the insured may demand from the insurer that the insurer provide information on the provisions of the concluded contract and the general terms and conditions of the insurance within the scope applicable to the insured's rights and duties. Additionally, according to art. 13 sec. 3c of the Insurance Activity Act, in the event of life group insurance contracts, the insurance company shall be obliged to submit, at the insured's request, the information mentioned in this Act, e.g. before the parties express their consent to change the terms and conditions of the

Due to the limited regulations regarding the provision of the above information to the insured, the banks and insurers faced a number of questions from the regulators; the Polish Insurance Ombudsman (hereinafter: the "Insurance Ombudsman") and the financial supervisory authority. Because of the number of consumer claims (the insured) and the concerns of the Insurance Ombudsman regarding the potential mis-selling of insurance products or granting covers on the Polish market, the specific working structures of group insurance contracts have been questioned.

#### 4. THE CONCERNS OF THE INSURANCE OMBUDSMAN AND THE RESPONSE OF THE POLISH INSURANCE MARKET – DOES IT SUFFICE?

In 2007, the Insurance Ombudsman published a report on issues regarding bancassurance<sup>20</sup> as a result of an analysis of market practices applied by banks in cooperation with insurers, and an analysis of the issues related to the potential breaches of consumer interests. Among the other issues the report mentioned, the Insurance Ombudsman was concerned about the issue of the structure of insurance contracts, position of the insured and the information obligations towards the insured.

As a result of questions raised by the Insurance Ombudsman in relation to the banks' clients being the insured and the market analysis conducted, the

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contract, or change the governing law for the concluded insurance contract, the insurance company shall be obliged to submit, in writing, to the insured, information in this respect, including the determination of the influence of such changes on the value of the benefits to which he/she is entitled by virtue of the concluded contract, the insurer should be obliged to inform, at least once a year, about the amount of benefits to which the person is entitled by virtue of the concluded insurance contract, and in particular, on the surrender, if the amount of benefit has changed during the insurance contract. In the event the person, by virtue of the insurance contract, is entitled to the benefits determined on the basis of the sum insured expressed in a fixed amount, the insurance company shall inform about each change of the sum insured, the insurance company shall be obliged to inform, in writing, at least once a year, about the amount of bonus, if the insurance contract provides for profit sharing from the investment of technical provisions.

<sup>20</sup> "Basic Problems of bancassurance in Poland – Insurance Ombudsman's Report" dated 13 December 2007.

market issued a number of "soft laws" aimed at transparency of the rights and obligations of the insured and improving client protection. These "soft laws" took the form of the "Bancassurance Recommendation"<sup>21</sup> which applies to those banks that are policyholders in group insurance contracts. The Recommendation was prepared by the Committee for Consumer Loans working within the Polish Bank Association with the participation of representatives of banks and insurers, as well as the Polish Chamber of Insurance, and the Banking Arbitrator. The purpose of adopting the Recommendation was to establish the principles of offering insurance connected with bank products in respect of those matters which are not regulated by the generally applicable provisions of law.

The Recommendation contains a list of good practices on the bancassurance market compiled in connection with the objections to certain bank activities, and introduced the standards of practices in the relations between banks and their clients aimed at protecting the interests of the insured provided with insurance cover by means of insurance products directly linked to bank products. The Recommendation contains detailed guidelines on the information which should be present in the documents made available to clients in connection with the provision of insurance cover, not only with respect to the content, but also the form of the information provided to consumers. It provides that the documentation should be made in a format which enables the client to become acquainted with its content, and should be written in an easy-to-understand way as well as contain certain information, including client's statement on his/her joining the insurance cover, or on the receipt of information that he/she has been covered by such insurance cover (in the case where the insurance involves any fees for the client, it is necessary to apply a document containing the client's will statement that he/she has been covered by insurance cover). The documentation should also contain the name of the insurer, as well as the name of the insurance terms and conditions constituting the basis for the client's cover and its extent, information on the sum insured, the costs of the cover incurred by the client (the in-

formation whether these costs are to be incurred on a one-off basis or periodically, and the deadline for making the payments), together with information concerning the manner of covering these costs by the client, and others.

According to the Recommendation, banks should exercise the utmost care so that the terms and conditions of the cover specified in the insurance contract are advantageous for clients, and the insurance cover takes into account the nature and key features of the bank product and the client's needs arising from their potential obligations towards the bank. They are also obliged to ensure the client's access to the insurance documentation within the time limit allowing the client to become acquainted with the information obtained. The documentation should be available in a manner enabling the client to become acquainted with the terms and conditions of the insurance cover before he/she decides and makes a statement of intent on being covered by the insurance cover and include information on whether the insurance cover is required by the bank, as well as its costs to be incurred by the client. This tendency aims at providing similar transparency conditions and information obligations as if the bank was an agent. It does not, however, change the legal position of the bank, that remains being the policyholder.

The banks have also been obliged to do their utmost to verify, before providing the insurance cover, whether the client meets the conditions for being provided with the cover (especially with regard to their age), as specified in the insurance terms and conditions. This verification of the information is made on the basis of the bank documentation in possession. Those clients who do not meet the conditions necessary for being provided with cover should be informed about it. According to the Recommendation, in such a case, the bank should, as far as possible, offer another bank product to the client, with a different extent of cover, or with no insurance cover.

From the point of view of the training that is inevitable in the insurance intermediation sector, but does not apply to bancassurance, the banks have also been obliged to ensure that their employees, i.e. those persons engaged in the sale and post-sale servicing of bank products and performing activities aimed at the provision of information in respect of the insurance cover provided, have the competencies necessary for the performance of the obligations

<sup>21</sup> "Recommendation in respect of good practices on the Polish bancassurance market relating to insurance linked to bank products" adopted on 3 April 2009, by the Management Board of the Polish Bank Association.

specified in the Recommendation, including the necessary training concerning insurance terms and conditions. In other words, the banks' clients, being the insured, should be provided with a similar level of information and care as if the bank was an agent.

There are no doubts that the Recommendation, being the "soft law" regulation, is not a source of generally binding law, but merely a regulation that has been voluntarily introduced by the representatives of the bancassurance market. One of the objectives of preparing this kind of regulation was the assumption that if a set of principles of best practices were to be established and adopted independently by the representatives of the market, the chances of observing these principles would be higher than in the case of legal provisions imposed from outside. If these "soft laws", established by the concerned entrepreneurs themselves in the form of the Recommendation, do not affect an improvement in the situation on the bancassurance market, the possibility will be considered of introducing relevant, generally binding provisions of law.

The specific regulations and market practice regarding group insurance in relation to the bancassurance sector, despite the lack of direct and detailed legal regulations, seem to accept the solutions proposed by the "soft laws" instruments and, according to most of the market players, does not need any further, especially legal, regulations. The regulations introduced on the Polish market prove to support the concept of the group insurance contract in bancassurance and, currently, should be treated as sufficient from the point of view of both, the market players and the insured.

## 5. SUMMARY

The form of offering insurance products in Poland on a bancassurance market proves to be satisfactory to all the players on the market: the insurers, the banks and the potential insured (the banks' clients) that especially in group insurance contracts can enjoy the benefits of the group, those being the beneficial price, easy accessibility, and wide diversity of the products.

Despite the existence of a group insurance concept that allows banks to act as policyholders, the Polish regulations implemented the provisions of the

IMD and do not significantly diverge from the regulations functioning in other member states of the EU.

The concept of a group insurance contract, to which the IMD does not apply, has been developed over many years of practice and allows for a distribution of insurance cover to a bank's clients. Designing a contractual relationship and the mutual obligations of the parties to an insurance contract in this particular form of activity requires the parties to place special attention to the customers' requirements, especially in relation to the data and documents that need to be provided to the insured. The lack of EU regulations and the very limited number of legal provisions in this respect in Poland have made it necessary for the insurance and banking market to provide "soft law" regulations that aim at meeting the clients' needs and for the bank to provide as much information as is reasonably required. Although not formally binding, the Recommendation tends to be obeyed on the Polish market and seems to have started a trend that will continue. After the Recommendation was adopted, a Second Recommendation<sup>22</sup> was proposed, relating to financial insurances and was accepted by market representatives. Currently, preparatory works are pending on a Third Recommendation in the Bancassurance sector regarding unit-linked products. It appears that market participants in Poland are ready to prepare and obey their own sector regulations, rather than request binding regulations from either the local regulator, or the EU.

<sup>22</sup> The Recommendation on good practices regarding financial insurance connected with bank products secured by a mortgage.