



**markt h.2(2010) 840921
October 2010**

Life Assurance

Cross-border activities entirely or mainly carried out outside the home Member State

Executive Summary

Some life assurance undertakings operate entirely or mainly outside their home Member State. The services of the European Commission have received a number of complaints from different Member States alleging that this practice would probably represent a breach of EU law.

The Commission's internal investigation did not reveal any concrete evidence of a violation of EU law. However, this matter is important. Therefore, the services of the European Commission want to raise it at the EIOPC meeting on 26 November 2010 so as to offer all Member States the possibility to present their views upon the legal arguments presented in this note.

1. EU WIDE AUTHORISATION

The Consolidated Life Assurance Directive 2002/83/EC¹ ('the Life Assurance Directive') aims at completing the internal market in direct life assurance, by making it easier for assurance undertakings with head offices in the European Union to cover commitments situated within the European Union, and by making it possible for policyholders to have recourse not only to life assurance undertakings established in their own Member State, but also to life assurance undertakings from other Member States.

Article 5(1) of the Life Assurance Directive establishes that the authorisation of a life assurance undertaking by its home Member State is valid for the entire European Union. An authorisation permits an undertaking to carry out business in other Member States - without any further authorisation - under either the right of establishment or the freedom to provide services.

In accordance with Article 4 of the Life Assurance Directive, such authorisation shall be sought from the authorities of the home Member State. The home Member State is defined in Point (e) of Article 1 of the Life Assurance Directive as the Member State in which the head office of a life assurance undertaking covering the commitment is situated. Article 6(3) of the Life Assurance Directive complements these provisions by establishing that the head office and the registered office of a life assurance undertaking must be in the same Member State.

2. HOME MEMBER STATE SUPERVISION

The Life Assurance Directive builds upon the principles of mutual recognition and home Member State supervision. This approach is based on a minimum harmonisation of national laws to an extent considered necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems.

According to the Life Assurance Directive, in particular Articles 10 and 13(3), the competent authorities of home Member States are responsible for monitoring the financial health and soundness of life assurance undertakings in their entirety. All assets and liabilities must be taken into consideration without distinguishing between insurance activities carried out in the home or host Member State. The lack of a distinction being drawn between insurance activities carried out in the home or host Member State is further confirmed by Article 39 of the Life Assurance Directive, which does not refer to a withdrawal of authorisation of a life assurance undertaking if the undertaking does not carry on business in its home Member State.

The scope of supervision by the competent authority includes life assurance undertakings' state of solvency, the establishment of adequate technical provisions and the covering of those provisions by matching assets. Life assurance undertakings are required to possess a supplementary reserve over and above technical provisions, including mathematical provisions, of sufficient amount to meet their underwriting liabilities. This solvency margin, represented by free assets and, with the agreement of the competent authority, by other implicit assets, acts as a buffer against adverse business fluctuations. The then Community legislator pointed out in Recital 39 of the Life Assurance Directive that this margin must

¹ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

relate to all the commitments of the undertaking and to the nature and gravity of the risks presented by the various activities falling within the scope of the Life Assurance Directive.

Article 13(1) of the Life Assurance Directive further obliges each Member State to require every life assurance undertaking whose head office is situated in its territory to produce an annual account of its financial situation and solvency covering all types of operation.

Furthermore, Article 49 of the Life Assurance Directive in conjunction with Article 13(2) foresees an obligation of the life assurance undertaking to inform the authority of its home Member State separately in respect of transactions carried out under the right of establishment and the freedom to provide services and of the amount of premiums without deduction of reinsurance broken-down by Member State and assurance class. The competent authority of the home Member State must, within a reasonable time and on an aggregate basis, forward this information to the competent authorities of each of the Member States concerned which so requests. In accordance with Article 13(2) of the Life Assurance Directive the competent authorities must provide each other with any documents and information that are useful for the purposes of supervision.

As a result, the services of the European Commission conclude from the above provisions that a home Member State has a legal obligation to effectively exercise financial supervision over the entire insurance activities of an EU life assurance undertaking which has received its authorisation from a competent authority of that Member State, i.e. regardless of whether the insurance activities are carried out in the home or host Member State.

3. CROSS-BORDER ACTIVITIES ENTIRELY OR MAINLY CARRIED OUT OUTSIDE THE HOME MEMBER STATE

Recital 12 of the Life Assurance Directive states that competent authorities should not grant or should withdraw authorisation where factors such as the content of programmes of operations or the geographical distribution of the activities actually carried on indicate clearly that an assurance undertaking has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within whose territory it carries or intends to carry on the greater part of its activities. An assurance undertaking must be authorised in the Member State in which it has its registered office. In addition, Member States must require that an assurance undertaking's head office always be situated in its home Member State and that it actually carries on its business there.

However, it should be noted that a preamble to a European Union legislative act has no binding legal force and cannot be relied on either as a ground for derogating from the actual operative provisions of the act in question or for interpreting those provisions in a manner which is clearly contrary to the wording of such operative provisions.²

The conditions for granting and withdrawing authorisations are set out in Articles 4 – 6 and 39 of the Life Assurance Directive.

According to Point (a) of Article 4 of the Life Assurance Directive, an authorisation for taking up activities covered by the Directive shall be sought from the authorities of the home Member State by any undertaking which establishes its head office in the territory of that State. Article 6(3) of the Life Assurance Directive requires that the head office and the

² Case C-134/08, *Hauptzollamt Bremen v J. E. Tyson Parketthandel GmbH hanse j.*, Paragraph 16.

registered office of a life assurance undertaking must be in the same Member State. It can be concluded from these provisions that the concepts of home Member State as well as the concept of the establishment of the head office of a life assurance undertaking are based on formal criteria which do not take into consideration whether business is carried out in the home or host Member State. This is also true with respect to the last sentence of Recital 12. It states that an assurance undertaking actually carries on its business where it is situated. Here, again, there is no distinction between the home and host Member State.

Additionally, Article 39(1)(a) of the Life Assurance Directive on withdrawal of authorisation does not distinguish between business carried out in the home and host Member State. The Article does not refer to a withdrawal of authorisation of a life assurance undertaking if it does not carry on business in its home Member State.

In conclusion, the mere fact that a life assurance undertaking carries out its business entirely or mainly outside its home Member State does not in itself constitute a case which prohibits the granting of authorisation or which triggers the withdrawal of such an authorisation.

4. CROSS-BORDER PROVISIONING AND GENERAL GOOD RULES

The fact that an assurance undertaking may carry out cross-border activities solely in a Member State which is different from the home Member State does not leave the authorities of the host Member States concerned without remedy.

With regard to the life assurance sector,³ i.e. an area which is subject to minimum harmonization, the Court of Justice of the European Union ('the Court of Justice') clarified that a Member State cannot be denied the right to take measures to prevent a life assurance undertaking providing services entirely or mainly directed towards its territory. However, the Court went on to say that the freedom to provide services may be restricted only by provisions which are justified by the general good and which are applied to all life assurance undertakings operating within the territory of the Member State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in its home Member State.⁴

According to Article 33 of the Life Assurance Directive, the Member State of the commitment shall not prevent a policyholder from concluding a contract with a life assurance undertaking from another Member State as long as that does not conflict with legal provisions protecting the general good in the Member State of the commitment. Article 33 of the Life Assurance Directive is an expression of the TFEU provisions on the freedom to provide services and the right of establishment. This provision has to be seen in the light of established case-law of the Court of Justice that exceptions to the fundamental principles of the TFEU with regard to the freedom of establishment and the free movement of services must be interpreted in a restrictive fashion. The TFEU precludes the application of any national legislation which, without objective justification, impedes the provider of services from actually exercising the freedom to provide them.⁵ In the event of a dispute, the Member

³ Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (Third Life Assurance Directive).

⁴ Case 205/84, *Commission of the European Communities v Federal Republic of Germany*.

⁵ Case C-381/93, *Commission v France*, Paragraph 16; Case C-118/96, *Safir*, Paragraph 22.

State imposing the restriction has to show that the measure meets the aforementioned conditions.⁶

Neither the Life Assurance Directive nor the Court of Justice's case-law contain an exhaustive definition of the general good. The Court requires that a national provision must satisfy the following requirements if it wants to obstruct or limit the exercise of the right of establishment or the freedom to provide services:

- it must come within a field which has not been harmonised;
- it must pursue an objective of the general good;
- it must be non-discriminatory;
- it must be objectively necessary;
- it must be proportionate to the objective pursued; and
- it is also necessary for the general good objective not to be safeguarded by rules to which the provider of services is already subject in the Member State where it is established.⁷

These conditions are cumulative. A national measure which is claimed to be compatible with the principle of freedom to provide services or the right of establishment must satisfy all the conditions.

Moreover, the Life Assurance Directive aims at protecting consumers through being able to make choices based on information. If consumers are to profit fully from a wider and more varied choice of contracts, they must be provided with whatever information is necessary to enable them to choose the contract best suited to their needs. It has to be borne in mind, however, that, according to Article 36 of the Life Assurance Directive, the Member State of the commitment may require life assurance undertakings to furnish information, if it is necessary for a proper understanding by the policyholder, of the essential elements of the commitment. Such requirement must, however, meet the general good test.

It should also be pointed out that the Member States of the commitment may not exclude from their markets certain life assurance contracts offered by life assurance undertakings which are established and supervised in another Member State, and thereby limit the possibility of consumers to choose the contract best suited to their needs. This, evidently, would not apply to activities which would not be authorised by the home Member State or which would not be in conformity with the principle of general good.

5. IFRS

According to Article 4 of Regulation (EC) No 1606/2002 on the application of international accounting standards⁸ only listed companies must prepare their consolidated accounts in conformity with international accounting standards adopted by the EU.

⁶ See for example Case C-319/06, *Commission v Grand Duchy of Luxembourg*, Paragraph 51.

⁷ See for example Case C-244/04, *Commission v Germany*, Paragraph 31.

Article 5 of the Regulation offers Member States the possibility to extend the scope of the Regulation's application to, *inter alia*, non-listed companies and for instance all life assurance undertakings. A Member State's decision to make use of such option does not constitute a violation of EU law.

6. TAX EVASION AND TAX AVOIDANCE

It is established case-law that EU law does not restrict the freedom of each Member State to define its tax system. National tax systems are compatible with EU law if they pursue objectives which are themselves compatible with the requirements of the TFEU and its secondary legislation.

In order to combat tax evasion and tax avoidance, a Member State may rely on the Mutual Assistance Directive 77/799/EEC⁹ in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of taxes *inter alia* on income, capital and insurance premiums,¹⁰ or all the information it considers necessary to ascertain the correct amount of tax payable by a taxpayer according to the applicable legislation.¹¹ It should be borne in mind that the Court of Justice found that the difficulties connected with the exchange of information under Directive 77/799/EEC did not justify the obstacles imposed by a Member State.¹² In addition, the Mutual Assistance for the Recovery of Claims Directive 2008/55/EC¹³ ensures the recovery in each Member State of the claims relating to *inter alia* value added taxes and taxes on income, capital and on insurance premiums.

The Life Assurance Directive can also be useful in this respect. As mentioned above, its Article 49 foresees an obligation of a life assurance undertaking to inform the competent supervisory authority of its home Member State separately in respect of transactions carried out under the right of establishment and the freedom to provide services and of the amount of premiums without deduction of reinsurance broken-down by Member State and assurance class. The home Member State's competent authority must forward this information in an aggregated form to the competent authorities of each of the Member States concerned which request this information. In addition, in accordance with Article 13(2) of the Life Assurance Directive the competent authorities must provide each other with any documents and information that are useful for the purposes of supervision.

⁸ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards.

⁹ Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

¹⁰ See Case C-55/98, *Vestergaard*, Paragraph 26 relating to income tax.

¹¹ See Case C-80/94, *Wielockx*, Paragraph 26; Case C-136/00, *Danner*, Paragraph 49 relating to income tax.

¹² See Case C-150/04, *Commission v Denmark*, Paragraph 55, relating to taxation of pensions.

¹³ Council Directive 2008/55/EC of 16 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures..

7. CONCLUSION

The legal assessment above only represents an opinion of the competent services of the European Commission and does not prejudice the position of the Commission itself. Furthermore, the Commission's interpretations do not prejudice the interpretation that the Court of Justice, which is ultimately responsible for interpreting the Treaties and secondary legislation, might make on the matters at stake.

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