ASSOCIATION OF INSURANCE LAW OF SERBIA

14TH ANNUAL CONFERENCE

APRIL 2013

CROSS BORDER INSURANCE SERVICES WITHIN THE EEA: IS AN ESTABLISHMENT NECESSARY?

Insurance Regulatory and Corporate Formations

Alkistis Christofilou
Partner
Rokas & Partners Athens

Diagram

PART I - The concept of passporting insurance services in the EU

1.1 Freedom of Services vs Freedom of Establishment

1.2 Grey area and relevant tests

1.3 The general good restrictions

1.4 Possible violations and the regulator's tools

PART II – The principal place of business

2.1 The central administration (head office)

2.2 Registered office and head office of insurance undertakings: Do they have to coincide?

PART III – Cross border transfers of businesses

3.1 Insurance policies portfolio transfers

3.2 Cross border merger

CONCLUSION

This paper focuses on the cross border activity of insurance undertakings in the Common Market. Under the single license principle, EEA authorised insurers may passport their services to all EEA countries by way of establishment or under the freedom of services. The delimitation between the two is discussed. Insurers may work from several locations; however EU legislation requires that the central administration shall be where the registered seat is. Furthermore, insurance policy portfolios ensuing from national and cross border activity, and/or the related business organisations may be transferred; the paper further discusses the interplay between such transfers and corporate formations

and transformations provided under EU law, recently explored by undertakings, on the example of cross border merger.

PART I – The concept of passporting insurance services in the EU

1.1 Freedom of Services and Freedom of Establishment

The freedom of establishment, set out in Article 49 (ex Article 43 TEC) of the Treaty and the freedom to provide cross border services, set out in Article 56 (ex Article 49 TEC), are two of the "fundamental freedoms" which are central to the effective functioning of the EU internal market.

The taking-up and pursuit of direct insurance is subject to prior authorisation. Authorisation is sought from the authorities of the home Member State; it is valid for the entire European Union (EU) - literally for the entire European Economic Area (EEA)[1], and allows the insurance company to carry on business throughout this area, under either the right of establishment or the freedom to provide services.

More specifically, the Third Council Directives 92/49/EEC [2] and 92/96/EEC [3] completed the establishment of the single market in the insurance sector. They introduced a single system for the authorisation and financial supervision of insurance undertakings by the Member State in which they have their head office (the home Member State). Such authorisation issued by the home Member State enables an insurance undertaking to carry on its insurance business anywhere in the European Union (more specifically, in the whole European Economic Area), either on the basis of the rules on establishment ("FoE"), i.e. by opening agencies or branches in any other Member State, or under the rules on the freedom to provide services ("FoS"). In the latter case, the insurance undertaking may work through the internet, or via a small non permanent office, or by authorizing specific persons in the host Member State as will be discussed below.

Financial supervision is the responsibility of the home Member State's supervisory authority, which must monitor the insurance company's business within the home Member State and across its borders within the EEA territory, and, most importantly, its state of solvency. It must also ensure the existence of technical provisions, sound administrative and accounting procedures and adequate internal control mechanisms.

Where it carries on business in another Member State, the insurance undertaking must comply with the conditions by which, for reasons of the general good, such business must be conducted in the host Member State[4].

---

[1] The European Economic Area comprises the countries of the European Union (EU), plus Iceland, Liechtenstein and Norway.

[2] Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ L 228, 11.8.1992, p. 1–23

[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), OJ L 360, 9.12.1992, p. 1–27.

[4] See European Commission's Interpretative Communication on Freedom to Provide Services and the General Good in the Insurance Sector (2000/C 43/03).

Any licensed insurance company that wishes to establish a branch within the territory of another Member State or which intends to carry out its business in one or more Member States under the freedom to provide services must notify the competent authority in its home Member State and provide it with the necessary information as required by law. Subsequently, the authority of the home Member State notifies accordingly and cooperates with the authority of the host Member State.

Although the regulatory supervision belongs to the home Member State authorities, a branch will be subject to the tax rules of the host Member State. On the contrary, in the context of FoS, the tax rules of the host Member State are only confined to indirect taxes and relevant charges, while income tax is payable in the home Member State; provided, the activity of the undertaking does not increase and expand in such a way, which will trigger the application of tax rules pertaining to established undertakings.

Policies issued under both FoS and FoE are subject to the private international law rules of the insurance directives and of the Rome I Regulation (art. 7). Therefore in the context of life insurance, policies are, as a rule, subject to the law of the Member State of the commitment, while non-life covers are subject to the law of the Member State of the risk. However, certain provisions offer the freedom to opt for a different law of the contract under specific conditions.

1.2 The borderline between FoS and FoE and relevant tests

The demarcation between the right of establishment and the freedom to provide services is not clear-cut. It has provoked the attention of the European Court, the Commission and the local supervisory authorities.

Recognising the need for guidance in the market, the Commission, following a public consultation, issued in 2000 the Interpretative Communication on Freedom to Provide Services and the General Good in the Insurance Sector (2000/C 43/03), in which it seeks to combine the European Court jurisprudence and its own insight on the insurance market. The Interpretative Communication introduces a number of tests to draw a borderline between the two forms of cross border activity in the field of insurance.

Pursuant to the Court of Justice, a fundamental test is time and duration: Where business is carried on under the freedom to provide services **with the provider present on the territory of the Member State of provision, the concept of the provision of services is basically distinguished from that of establishment by its temporary character, while the right of establishment presupposes a lasting presence in the host country.** In this context, the Communication again refers to the relevant jurisdiction of the Court of Justice, according to which "…the temporary nature of the provision of services is to be assessed in the light of its **duration, regularity, periodicity and continuity**".

This position recognizes and takes into account the realistic needs which accompany the cross border activity, i.e. that it is often impracticable or even impossible to pursue an FoS business without having a basic presence in the host Member State.

However, taking into account the evolution of jurisprudence and the actual business circumstances, the Communication dilutes this test, by recognizing that the freedom to provide services applies also to activities which consist "in providing services on a **lasting basis and [which] do not involve movement by the service provider to the host Member State".**

Establishing an office is a particular situation. At earlier cases the European Court of Justice treated the existence of an office managed by an independent person authorised to act on a permanent basis for the host undertaking, as an establishment, even if that presence would not take the form of a branch or agency. More recently it has acknowledged that the temporary character of the provision of services does not mean that the provider may not equip himself with some form of infrastructure (chambers, office, etc.) in the host Member State in so far as is necessary for the purposes of performing the services in question, without coming under the right of establishment.

In such cases the temporary character of the services provided should be assessed in the light of the above tests of duration, regularity/frequency, periodicity and continuity: in other words, the mere existence of infrastructure in a Member State does not automatically prove that the situation falls within the scope of the rules on the right of establishment.

In elaborating this concept further, the Commission took the view that there is an establishment if the independent person meets the following three cumulative criteria:

(i) it is subject to the direction and control of the insurance undertaking it represents;

(ii) it is able to commit the insurance undertaking, and

(iii) it has received a permanent brief.

The fact that an independent person fulfills the above criteria, does not mean that such person itself constitutes a branch of the insurer, because "*a branch is place of business which forms a legally dependent part of an insurance undertaking*"[5].

The above are also the prevailing criteria which, from a tax law point of view, acknowledge that the insurer's activity qualifies for the status of establishment.

On the contrary, activities that are not considered to amount to a branch involve the use by the insurance undertaking of independent intermediaries and other persons in the host Member State, such as: the appointment of a local intermediary to present the covers and their terms, the appointment of a risk assessor, or of a local expert to assess the damage, or local legal, actuarial or medical services, a permanent structure for collecting the premiums and paying the applicable indirect taxes, a permanent structure for receiving notices of claims or for the management of claims files and the payment of indemnities; whereby, it remains clear that **the underwriting decision which is the core activity of the insurance undertaking, must remain with the home office.**

[5] Interpretative Communication 2000/C 43/11.

This corresponds to one of the prevailing market approaches: when the underwriting decision is made at the host state, then the policy is written under FoE, whereas when the underwriting decision is made at the home state, then it is FoS.

Another test comes in to distinguish the two forms: the performance of activities on a **FoS basis is not allowed to entail circumvention of national law**. The logic behind this criterion concentrates primarily on the **rules of professional conduct**. In other words, the Commission considers it unacceptable that the insurer pretends to passport via FoS although it should proceed to establish, in order to avoid submitting itself to the business conduct rules of the host Member State which would apply to it, if it were established there. However, in practice the need to succumb to the local business conduct rules is covered by the provisions on general good applicable in each host Member State (please see section 1.3 below), the national laws on insurance contract and the strict law national rules of such host Member State even when the performance of activities is conducted on a FoS basis.

The matter of circumvention of the law goes further from the business conduct rules, to touch upon **consumer protection, e-commerce and employment**, and last but not least, **tax law rules.** To determine whether there is an attempt of circumvention of national law within the above meaning, the **frequency criterion** is useful.

At the same time, "**the situation where an insurance undertaking is approached within its territory by consumers residing in other Member States may not be regarded as circumvention, unless a circumvention intention by the service provider is clearly demonstrated".** In other words, if an insurance undertaking is frequently being approached within its own territory, **for example, via electronic means of communication,** by consumers residing in other Member States, this should not be regarded as circumvention, unless it were demonstrated that the insurer had the intention to circumvent the national rules of those Member States where the (prospective) clients originate.

Already since 1974, the Court of Justice has held in its Judgment on the case 33/74 *Van Binsbergen V Bedrijfsvereniging Metaalnijverheid* that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed[6] towards its territory of the freedom guaranteed by Article 59 (now 56 TFEU) for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. The case law on this matter is abundant[7]. However, the ECJ has not acknowledged explicit criteria that may set evidence from which it may be concluded that there is an attempt of circumvention of national law within this context. Circumvention of a law or an abuse of law is regularly characterized by an intention to circumvent or abuse, which is undoubtedly a subjective factor. The interpretation of the Van Binsbergen case-law put forward by the Commission to the effect that there is an objective and a subjective test suggests itself. However, according to the Opinion of Mr Advocate General Lenz on the case C-23/93 *TV10 SA v Commissariaat voor de Media*, "the avoidance of legal provisions by a legal person (and not a natural person)

[6] For the criteria of the Concept of activity 'directed to' the Member State of the consumer's domicile see the ECJ Judgment on the joint cases Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09).

[7] See ECJ judgements on cases C-204/85 C-23/93, C 196/04, C- 212/97, C- 403/08.

should be able to be determined using objective criteria". Avoidance of national legislation should be capable of determination on the basis of objective characteristics, such as, for instance, the time of the commencement, the substance and orientation of the company's business operations. In any event, the Member State is empowered to frustrate an attempt by an undertaking to evade the jurisdiction of that State by treating the company in that respect as if it were subject to its jurisdiction[8].

1.3 The general good restrictions

The insurance supervisory authority of each Member State may declare the general good provisions under which the passporting undertakings may provide insurance services in its territory.

The Insurance Directives do not provide a definition of the notion of general good. The concept has been developed by the case law of the Court of Justice, and constitutes the only acceptable restriction to the fundamental Treaty freedoms, the freedom to provide services and the right of establishment. They must relate to a field that has not been harmonized, which narrows down considerably the admissible general good restrictions as the insurance sector has been extensively harmonized, as has also been the consumer protection law, anti-money laundering, and other areas of law related to insurance. General good restrictions must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable to secure the objective they pursue; and they must be proportionate, i.e. must not go beyond what is necessary to attain such objective[9]. In addition, general good restrictions should not relate to rules to which the exporter of services is already subject under its national law.

For example, if a Member State decides to provide an interest grouping in its territory with increased protection compared to the protection provided by union law, such protection should pass the proportionality test in order to be binding upon passporting undertakings.

The Court's case law gives a number of examples which justify general good restrictions; however, owing partly to the fact that new union legislation has been introduced, not all examples are relevant. A number of admitted general good restrictions aim at the protection of consumers, the prevention of fraud, the protection of intellectual property, protection of workers including social security rights, the preservation of the national historical and artistic heritage, the cohesion of the tax system, the preservation of the good reputation of the national financial sector, the protection of creditors, road safety.

Arrangements introduced by the host Member State for the collection and payment of indirect taxes, such as the obligation to appoint a tax representative, are acceptable to the extent they are proportionate and necessary. On the contrary, mandatory systems applying uniform no-claims bonus systems with the effect of uniformity in tariffs and

[8] See Opinion of Mr Advocate General Lenz on the case C-23/93 TV10 SA v Commissariaat voor de Media, par. 58-68.

[9] Interpretative Communication 2000/C 43/17 with specific reference to the Gebhard case, [I-1995] ECR I 4165, and to the later cases C-415/93 Bosman [1995] I-4921 and C-250/95 Futura [1997] I-2471.

to the extent they are not applying coefficients for the increase or reduction of premiums and insurers are not free to determine the premium levels, are not admissible.

There are Member States that have included in the general good reservation, whole areas of their national legislation. This should be seen as misuse of the concept of the general good with the effect that it should not be binding.

With the passing of the time, general good restrictions decrease, as more areas of the law are harmonized, and unclear issues are clarified, particularly in terms of consumer protection and financial issues addressed under Solvency II.

1.4 Possible violations and the regulator's tools

We have looked at the delimitations between freedom of establishment and freedom to provide services. It becomes obvious from the above short analysis, that in real life terms it is quite difficult to distinguish between FoS and FoE; which in turn makes it difficult for the insurance undertaking to decide clearly on which terms it should establish, and for the regulator to spot irregularities.

The passporting of insurance services within the common market is of considerable dimension. However, next to the obvious benefits, which not only entail benefits to commerce, but also to consumers, as the latter may avail of better services and prices, there are also several areas of concern, such as:

- are all passporting undertakings compliant with the host country general good and business conduct rules?
- Does the host regulator appropriately monitor passporting services, to ascertain that competition is not distorted?
- Are consumers appropriately informed, in order to allocate services and providers which may have lapsed efficient supervision while they are not compliant with applicable law, or business conduct rules, or consumer protection law?
- Do the supervisors in the common market cooperate sufficiently so as to spot and combat distortions?
- Are any of the undertakings passporting under FoS, rather eligible to work under establishment?
- Are the regulatory tools sufficient to monitor that?
- Would a possible cooperation between insurance supervisors and tax authorities help eliminate illicit competition which may result from insufficient compliance or from tax-avoidance by passporting undertakings?
- Is the passporting undertaking in a better position than the local one, and in which respect?

- And, finally, what is the priority interest in the concept of passporting? Is it the growth of the common market, is it the elimination of its segmentation by national frontiers, or is it the appropriate functioning of the insurance market within the EU and in the national markets? Does any of the above priorities have to succumb to the others?

The tools which are specifically confined to address insurance undertakings not complying with the legal provisions on cross border services under the Third Generation Directives are specifically provided under Article 46 of the Recast Life Directive 2002/83/EEC, and Article 40 of the Third Insurance Non-Life Directive 92/49/EEC and provide the following:

(a) Passporting undertakings may be required to submit certain documentation regarding their activity in the host member state; such documentation may be required, provided they also have to submit such documentation to their home supervisor.

(b) The host supervisor may require the passporting insurer to remedy the irregularity.

(c) If it fails to comply, the host supervisor informs the home supervisor asking it to take measures.

(d) If the violation persists, the host supervisor informs the home supervisor and then takes measures and applies sanctions; it may prevent the conclusion of new insurances, enforce against property, etc., always on the basis of a reasoned decision.

(e) Emergency measures can be taken in any event.

EIOPA as a central authority may play a decisive role as a monitor and liaison between supervisors. Within its framework and activities, supervisors tend to cooperate closer in monitoring passporting irregularities. However it remains a question at the time, how far a supervisor can "protrude" in the regulatory field of the home supervisor, when the latter does not sufficiently mend the irregularity.

PART II – The principal place of business

2.1 The central administration (head office)

We have looked at the ways which allow a passporting insurer to build a business, i.e. an insurance policies portfolio, in another Member State. We shall now look at the situation, where the decision making processes and the actual management of the undertaking moves to another Member State, or is established in a country other than that where the registered seat of the insurance company is located. This could happen, for example, in situations where the offspring outgrows the root, i.e. when the cross border business grows to become very important in comparison to the home office; or when the directors of the company are placed in a different Member State; or for any other reason.

This matter relates to the problematic of the so-called "regulator shopping": an insurer may elect to register its seat in a Member State, where it believes it will better comply with regulation or with the requirements of the regulatory authority, while its principal place of business, i.e. of the main management and central administration, is located in another Member State.

Would this be an eligible option under EU insurance law?

2.2 Registered office and head office: Do they have to coincide?

This principle that the location of head office and registered office has to coincide, is endorsed throughout the financial sector: According to recital (7) of the preamble of Directive 95/26 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/29/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investments firms and Directive 86/611/EEC in the field of undertakings for collective investment in transferable securities (UCITS), with a view to reinforcing prudential supervision:

> "*(7) Whereas the principles of mutual recognition and of home Member State supervision require that Member States' competent authorities should not grant or should withdraw authorization where factors such as the content of programmes of operations, the geographical distribution of the activities actually carried on indicate clearly that a financial 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 on or intends to carry on the greater part of its activities; whereas a financial undertaking which is a legal person must be authorized in the Member State in which it has its registered office; whereas a financial undertaking which is not a legal person must have its head office in the Member State in which it has been authorized; whereas, in addition, Member States must require that a financial undertaking's head office always be situated in its home Member State and that it actually operates there;*".

Further, Article 3 par. 1 of the same Directive 95/26/EC provides as follows:

> "*1. The following paragraph shall be inserted in Article 8 of Directive 73/239/EEC and in Article 8 of Directive 79/267/EEC: «1a. Member States shall require that the head offices of insurance undertakings be situated in the same Member State as their registered offices*»".

Article 6 par. 3 of Directive 2002/83/EC concerning life insurance ("Consolidated Life Insurance Directive") which [10] has repealed, among others, Directive 79/267/EEC, has preserved the content of said provision, by providing as follows:

[10] Pursuant to its Article 72 par. 1 in conjunction with Annex V Part A

"*3. Member States shall require that the head offices of insurance undertaking be situated in the same Member States as their registered offices*".

Pursuant to Article 20 of Directive 2009/138 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II):

"*Member States shall require that the head offices of insurance and reinsurance undertakings be situated in the same Member State as their registered offices*".

The abovementioned provisions reflect a general EU law principle, according to which the administrative seat of an insurance undertaking should be situated in the same Member State in which such insurance undertaking has its registered seat for supervision reasons[11].

PART III – Cross border transfers of businesses

3.1 Insurance policies portfolio transfers

Insurance portfolios are compiled by insurance policies and include the ensuing rights and obligations. In executing the contract the policyholder has aimed at a specific insurer, which in turn has undertaken certain obligations against the policyholder. In order to change, or to be transferred to a third party, pursuant to contract law this contract requires the consent of the policyholder. However taking into account the circumstances and operation of the insurance market, the EU legislator has chosen to make such transfers feasible without the explicit consent of the policyholder, provided specific requirements are met, which ensure (a) that the policyholder, the insured (if not coinciding with the policyholder) and/or creditors who have claims arising out of insurance contracts are collectively informed and given the opportunity to oppose, and (b) that the successor, after the transfer, will be solvent in terms of insurance prudential regulation requirements. The procedure for the transfer of portfolios varies between jurisdictions: some require the court to sanction the transfer, while in others the decision of the insurance supervisory authority suffices. The provisions of EC Directives 92/96/EEC[12], 92/49/EEC [13]and of the harmonized national laws apply.

Where the transfer affects portfolios formed under FoE or FoS, the home regulator seeks the opinion of the host regulator. The latter must respond within three months; failure to respond is deemed to be a favourable opinion, by contrast to the administrative law position shared by many jurisdictions, that the silence of the public administration equals a negation.

Certain jurisdictions, such as Greece, will not allow the portfolio transfer unless the transferring or the successor entity undertake the obligation to replenish any funds

[11] See also *I. Rokas*, Private Insurance – the Greek law relating to insurance contracts & insurance undertakings, 11 eds. 2006, nr. 1096, note 1 and nr. 1103, note 4.
[12] Article 49 – now article 14 of the recast life 2002/83/EC.
[13] Article 12 and 28a Directive 92/49/EEC

that may be missing for capital adequacy and asset-backing of insurance reserve/ provisions requirements taking into account the transferred portfolio.

Upon the completion of the procedure, no further objections can be made with regard to the portfolio transfer (provided, the procedure has been completed pursuant to the requirements of the law). Policyholders and other interested parties that may have any objections, will have to relate these to their individual contracts; only their own relation with the insurer will be affected, without affecting the transfer of the portfolio as a whole.

In the context of the discussion of Part I above, it would be interesting to examine the following example:

3.2 Cross border merger

With the aim to prepare for Solvency II, to rationalise their finances, organisation and operations, and to better monitor their risk, Europe-wide insurers have over the recent years been focusing on re-organising their group structure across Europe.

EU company law provides a number of interesting tools to accommodate such reorganizations, one of which is the merger between companies based in different Member States.

At EU level the cross-border mergers of limited liability companies are regulated by Directive 2005/56/EC[14]. The European Court has accepted that the cross-border merger operations "*…constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC*"[15] (49 TFEU).

Under the basic definition of the Directive[16], "*"merger" means an operation whereby:*

(a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or

(b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or

[14] As amended by Directive 2009/109/EC.
[15] Judgment of the Court of 13 December 2005, Case C-411/2003, *SEVIC Systems AG*, ECR 2005 I-10805, nr. 19.
[16] Article 2 paragraph 2 of Directive 2009/109/EC.

(c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital".

Relevant is any merger of one or more domestic limited liability companies with one or more limited liability companies which have been established in accordance with the legislation of another Member-State and have their registered seat, their central administration or their central establishment within the Community.

In terms of procedure, the rules applicable in the member states concerned are followed. The companies compile draft merger terms which are advertised in summary so that interested parties are informed, and are given a period of time to oppose if they have a valid legal interest justifying such opposition. Following the successful completion of this pre-merger phase, the general assemblies of the company shareholders shall approve of the merger, and the merger deed will be signed and formally registered.

In the context of insurance undertakings, where the transferred assets may include the portfolio of insurance policies, with all ensuing rights and obligations, it will be not only the company supervisory authorities that will scrutinize the legality of the merger and authorize it; it will also be the insurance supervisory authorities, which will have to secure that the portfolio transfer requirements are performed and that the outcome of the merger will be compliant with insurance law provisions. For time and efficiency, the two procedures will ideally take place in parallel. Eventual competition law clearance may also be required.

The cross border merger has been long awaited from the industry in the European Union, to enable cross-border mergers of limited-liability companies, which previously had been impossible or very difficult and expensive, as national law would not recognize the transfer of the corporate seat, even by way of a merger. It was design to accommodate particularly small and medium sized companies wishing to operate in more than one Member State, but not throughout Europe, which would not qualify for incorporation under the European Company Statute.

A very essential advantage of this tool is that in order to promote it, the Commission designed it to be tax free. Therefore the ensuing asset transfers are not subject to national taxation.

The following example illustrates the dynamics and particularity of the cross border merger tool. An insurance undertaking wishes to expand its business in another Member State and identifies an interesting local insurance undertaking it wishes to acquire. However at the same time, it is engaging in a reorganization process, under which it will consolidate all EEA national activities to form branches of a central, single, insurance societe anonyme seated in an EU Member State. Having a local subsidiary will distort this reorganization scheme. Therefore it decides to integrate the local insurer by application of the combined tools of the cross border merger and the portfolio transfer as follows: (a) it purchases the shares of the target company; (b) it declares to its home insurance regulator that it intends to passport insurance services via a branch in the target's jurisdiction; the home regulator in turn undertakes the formalities with the regulator of the target's jurisdiction (c) it absorbs via cross border

merger the newly acquired target, which by application of the local rules on mergers becomes its branch in the target's Member State. The transaction is tax neutral.

CONCLUSIONS

The cross border provision of insurance services within the EEA is flourishing, based on the provisions of Third Generation Insurance Directives. Insurers are based on their license issued by their home Member State insurance regulatory authority, and passport services to other Member States. Such activity is based on fundamental common market freedoms, the freedom of establishment and the freedom to provide services, as endorsed in Articles 49 and 56 of the Treaty. The delimitation between establishment and provision of services is not always clear; with the result that guidance has been necessary and has been sought from the European Commission and the Court of Justice.

Member States are entitled to subject the passporting of insurance services into their jurisdiction to mandatory restrictions safeguarding the general good. In order to conform to the fundamental freedoms of establishment and provision of services, such restrictions must be justified by imperative requirements in the general interest; they must be suitable to secure the objective they pursue, proportionate and non-discriminatory. They must relate to a non-harmonised field and should not relate to rules to which the exporter of services is already subject under its national law.

When an insurance undertaking commits the services of an independent person in the host Member State, its activity will fall within the rules on establishment rather than those on the freedom to provide services when it has conferred the independent person the powers to act as a genuine extension of the insurance undertaking, i.e. when (i) it is subject to the direction and control of the insurance undertaking it represents; (ii) it is able to commit the insurance undertaking, and (iii) it has received a permanent brief; finally, when it can take the underwriting decision. The issue whether the activity of the insurance undertaking in the host Member State connotes establishment will further be assessed on the criteria of duration, regularity, periodicity and continuity. Furthermore, the performance of activities on a FoS basis is not allowed to entail circumvention of the national law. Host regulators have a number of tools to address breaching conduct by passporting insurers; however these are not always effectively applied.

In providing services within the common market, an insurance undertaking must have its central administration (head office) where its registered office is. Subject to this rule, the insurance undertaking may transfer its insurance policies portfolio or acquire those of other insurers, by abiding to the special procedures laid down in the Insurance Directives and the ensuing national laws. These rules secure that all interested parties may file their justified objections prior to the completion of the portfolio transfer, and that the acquiring undertaking will, taking into account the acquisition, comply with the financial prudential supervision requirements provided by insurance law. In that case, and by deviation from contract law principles, the individual consent of policyholders or insured persons is not required; neither may they challenge the portfolio transfer after its completion.

EU company law provides a number of tools which facilitate the transfer of businesses and the reorganization of insurance undertakings and groups. An interesting and tax neutral tool is the cross border merger, which combines union and national rules and procedures and requires both corporate and insurance regulatory approval.

Summary

Under the Third Generation Insurance Directives, Insurance undertakings are entitled to passport insurance services to other EEA Member States taking avail of their license to operate, which is valid throughout the EEA, and subject to home office supervision. Certain formalities must be fulfilled prior to engaging in providing the services. The insurance undertaking falls within the rules on establishment rather than those on the freedom to provide services when the independent person it commits in the host Member State has the powers to act as a genuine extension of the insurance undertaking. The delimitation between establishment and freedom of services is not always clear and guidance is provided by the European Commission and the Court of Justice. Member States are entitled to subject the passporting of insurance services into their jurisdiction to mandatory restrictions safeguarding the general good.

The head office of an EEA insurance undertaking must be where its registered office is.

Insurance policies portfolios may be transferred pursuant to the special procedures laid down in the Insurance Directives and harmonized in national laws. They may also be transferred through a number of business and corporate transformations, reorganizations and amalgamations, of which an innovative and tax neutral one is the cross border merger. Merger may take place by absorption or by formation of a new entity.

KEY WORDS

- Freedom of establishment
- Freedom to provide services
- Crossborder services
- Single license
- Merger
- Cross border merger
- Insurance undertaking
- Head office
- Principal place of business
- Registered office
- Portfolio of insurance policies