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The ECJ rules on whether and under which conditions a Member State may prohibit an insurance undertaking operating in its territory under the freedom of services from concluding insurance contracts in the territory of that Member State.

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On April 27th, 2017 the ECJ issued its judgment with number C-559/15 concerning the interpretation of article 40 para. 6 of the Third Non-Life Insurance Directive (92/49/EEC). The significance of this ruling becomes evident since the relevant provisions of article 40 para. 6 were retained when this Directive was abolished and replaced by the Solvency II Directive (2009/138/EC), which is currently in force.

The facts of the case

Onix Asigurari SA ("Onix"), an insurance company with its head office in Bucharest, Romania, had been carrying on business in Italy under the freedom to provide services, in particular for contracting authorities, providing surety for private undertakings selected in connection with tendering procedures, in order to guarantee their participation in public contracts and the execution of such contracts.

In response to a request for information from the Italian supervisory authority ("IVASS"), the Romanian supervisory authority ("ASF") reported that Onix's principal shareholder was an Italian citizen who held 0.01% of Onix's capital as a personal shareholder and the remaining 99.99% of that capital as sole shareholder of a Romanian company and that that specific person also was the chairman and managing director of Onix. The IVASS discovered, however, that several convictions tarnished the reputation of this shareholder for crimes such as attempted aggravated fraud against the Italian State. Furthermore, that shareholder was, as the IVASS stated, the sole director of G.C.C. Garanzie Crediti e Cauzioni spA, an Italian company which, among others, had been removed from the list of financial intermediaries in 2008 pursuant to a decision of the Bank of Italy on account of serious management irregularities and non-compliance with minimum equity requirements.

By letter of 4 October 2013, the IVASS provided ASF with the information and documents in its possession, asked it to take all appropriate measures to protect the insured persons and advised it that, if the ASF failed to take action, it would itself take all expedient and necessary measures to protect the interests of Italian insured persons. Following correspondence between the two supervisory authorities thereafter, the IVASS again pointed out the urgency of

the matter stating that, if the ASF had not revoked Onix's authorisation within 30 days, it would be obliged to prohibit the company from concluding insurance contracts in Italy. In December 2013, the two supervisory authorities held a meeting during which, it is claimed, the ASF refused to revoke Onix's authorisation due, in particular, to the fact that the criteria laid down in the guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector, required by the applicable at the time Directive 2007/44/EC, had not been transposed into Romanian law. In view of the above, by decision of 20 December 2013, adopted on the basis of Article 40 para. 6 of Directive 92/49 (the "Third Non-Life Insurance Directive" or simply "Directive") and Article 193(4) of the Italian Private Insurance Code, the IVASS prohibited Onix from concluding insurance contracts in Italian territory.

Following the above, Onix brought a complaint, on 5 February 2014, before the European Insurance and Occupational Pensions Authority (EIOPA). The complaint was rejected, on the grounds that the power of the competent authorities of the Member State of the provision of services to take appropriate measures in an emergency, as referred to in Article 40 para. 6 of the Third Non-Life Insurance Directive, may be exercised where the concerns of those authorities cannot be addressed through co-operation between supervisory authorities or any other way. In the same decision it was also held that it is for the Member State of the provision of services to define the scope and limits of that power, that compliance with the national rules is subject to judicial review by the Italian courts and hence no infringement of the Directive by the IVASS was found.

In response to a letter from Onix of 8 October 2014, EIOPA confirmed that position by letter of 24 November 2014. Onix brought an appeal against that letter before the Board of Appeal, but, by decision of 3 August 2015, the Board of Appeal dismissed the appeal on the ground of inadmissibility[1].

Secondly, Onix brought an action against the IVASS decision before the Regional Administrative Court, Lazio, Italy, which dismissed that action, ruling that the finding that the reference shareholder of the company exercising the freedom to provide services did not satisfy the reputation requirements in order to be able to carry on the business of insurance in Italian territory constitutes an emergency which justified the intervention of the IVASS, by way of derogation from the principle of supervision by the home Member State.

Subsequently, Onix lodged an appeal against that judgment, claiming that the supervisory authority of the Member State of the provision of services cannot, by way of derogation from the principle of supervision by the home Member

[1] That decision was the subject of an action before the General Court of the European Union (Case T590/15) which also rejected Onix's motions. The relevant judgement of the General Court may be found here.

State, prohibit an insurance operator authorised in the home Member State from concluding new contracts in its territory on the ground that the reputation condition is not met. The Consiglio di Stato, before which the appeal was pending, decided to stay the proceedings and refer to the ECJ for a preliminary ruling.

The question referred for a preliminary ruling

The question set before the ECJ concerned whether article 40 para. 6 of the Third Non-Life Insurance Directive, Commission Interpretative Communication 2000/C 43/03 on freedom to provide services and the general good in the insurance sector (OJ 2000 C 43, p. 5) and the EU principle of home country supervision preclude an interpretation in accordance with which the supervisory authority of the State of the provision of services may, in cases of urgency and for the protection of the interests of insured persons and beneficiaries, specifically prohibit the conclusion of new contracts within the territory of the host State, on the grounds of the alleged failure to satisfy a subjective precondition laid down for the purpose of the issue of authorisation to engage in insurance business, in particular the requirement of good repute.

The ruling of the ECJ

The ECJ highlighted that it is clear, that the Third Non-Life Insurance Directive, which aims to complete the internal market in the sector of non-life direct insurance, is based on two principles: a) the creation of a single authorisation which, once granted, allows insurance undertakings to carry on business throughout the European Union and b) the principle of supervision of insurance undertakings by the home Member State. In pursuit of that objective, a single authorisation may be sought only from the authorities of the home Member State, under the conditions of EU law, including that of the good repute of the directors of the undertaking concerned. Moreover, it is clear from Article 14 of the Directive that it is also for the home Member State to withdraw the authorisation granted to an insurance undertaking which no longer fulfils the conditions for admission or fails seriously in its obligations under the regulations to which it is subject. Thus, pursuant to the Court's judgment, only the competent authorities of the home Member State, excluding those of other Member States, can ascertain whether an insurance undertaking satisfies the requirement that its directors are of good repute. As a result, in this case, the IVASS had no authority to review whether Onix's shareholder satisfied such requirement.

Notwithstanding the above, article 40 para. 6 of the Directive, which only applies to cases of emergency, may necessitate the immediate adoption of measures in case of imminent irregularities on the part of the insurance undertaking. In such a case, it is not required that that Member State, faced with an emergency, informs the home Member State beforehand, resulting in delay in adopting such measures, to the detriment of the interests of insured persons and beneficiaries.

In this context, the ECJ further accepted that it is for the Member State of the provision of services, exercising the prerogatives it has in emergency situations, to establish whether certain inadequacies or uncertainties relating to the good repute of the directors of the insurance undertaking concerned present a **real** and **imminent danger** that irregularities will occur to the detriment of the interests of the insured persons or other persons who may benefit from the insurance cover taken out; in such a case, the Member State where the services are provided may take appropriate measures immediately, including, if appropriate, prohibiting the conclusion of new contracts in its territory.

The Court held in this regard that the protection of policy-holders, which is the main objective of the Third Non-Life Insurance Directive (and EU law on insurance supervision in general) could be jeopardised if article 40 para. 6 of the Directive were to be interpreted as precluding, in the event of an emergency, the Member State of provision of the services concerned from assessing whether there was an imminent danger to the interests of policy-holders and immediately taking measures to remedy that situation, without being obliged to refer to the authorities of the home Member State the task of taking appropriate action for that purpose.

However, given that the principle of supervision of insurance undertakings by the home Member State applies in all cases, the Member State of the provision of services may take, in an emergency, only **protective measures**. Those measures apply, therefore, only pending a decision by the competent authorities of the home Member State, drawing the conclusions, in the light of the conditions for granting the authorisation, in particular relating to good repute, from the evidence identified by the Member State of the provision of services.

The Court concluded that article 40 para. 6 of the Directive precludes the supervisory authorities of a Member State from taking emergency measures, as against an undertaking providing direct insurance operating in its territory under the freedom to provide services, in order to protect the interests of the insured persons, such as prohibiting it from concluding new insurance contracts in that territory, on the grounds of the failure to satisfy a subjective precondition laid down for the purpose of issuing authorisation to engage in insurance business, such as the requirement of good repute. However, the Directive does not preclude that Member State, in exercising the prerogatives it has in emergency situations, from establishing whether certain inadequacies or uncertainties relating to the good repute of the directors of the insurance undertaking concerned present a real and imminent danger that irregularities will occur to the detriment of the interests of the insured persons and, if so, from taking appropriate measures immediately, including, if appropriate, prohibiting the conclusion of new contracts in its territory.

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By this judgment, the ECJ once again reaffirmed its established view that the principle of supervision by the home Member State running through the totality of EU harmonised law should be respected and applied at all times in order to guarantee the proper functioning of the internal market. However, the supervisory authorities of Member States of the provision of services shall also take into consideration that protection of the policy-holders is the principal goal of the EU legislation on insurance supervision and thus take all necessary measures to prevent any *real* and *imminent* danger that may harm the interests of policy-holders, even if this would mean that they will prohibit an insurance undertaking from concluding insurance contracts in the territory of said Member States.

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