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## The Polish Financial Supervision Authority's power to order the sale of shares in a domestic insurance company within a prescribed period – a few remarks and practical insights

*This paper presents an analysis of one of the most severe ex-post supervisory measures, namely the decision in which the Polish Financial Supervision Authority (PFSA) orders the sale of shares in a domestic insurance company within a prescribed period. However, this measure has never been applied in the insurance market, either under the Act of 11 September 2015 on insurance and reinsurance activities or under the previously applicable regulatory enactments for the insurance market. Since a similar supervisory measure has recently been applied in the banking market and posed numerous practical problems, it seems reasonable to describe this measure in more detail and refer to the problems that may arise as a result of its practical application. In particular, this analysis will touch upon the relationship between the discussed measure and a supervisory measure that must precede its use, namely, the prohibition on the exercise voting rights on shares in a domestic insurance company.*

**Keywords:** Polish Financial Supervision Authority (PFSA), insurance market supervision, order of sale of shares in a domestic insurance company, prohibition on the exercise voting rights on shares in a domestic insurance company.

### Introduction

Under the provisions of Article 2 of the Act on Financial Market Supervision of 21 July 2006<sup>1</sup>, the purpose, and consequently, the aim of the insurance market supervision (Article 1, paragraph 2, point 3 of the Act on Financial Market Supervision) is to ensure the proper functioning, stability, security and transparency of that market and confidence in the financial market and to ensure protection

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1. Consolidated text: Journal of Laws of 2016, item 174, as amended.

of interests of market participants also through the provision of reliable information on the functioning of the market, the accomplishment of the objectives set out, in particular, in the Act of 29 August 1997 – the Banking Law<sup>2</sup>, the Act on Insurance and Pension Supervision of 22 May 2003<sup>3</sup>, the Act on the Supplementary Supervision of Credit Institutions, Insurance Companies, Reinsurance Companies and Investment Firms Being Members of Financial Conglomerate of 15 April 2005<sup>4</sup>, the Act on Capital Market Supervision of 29 July 2005<sup>5</sup>, the Act on Cooperative Savings and Credit Funds of 5 November 2009<sup>6</sup> and the Act on Payment Services of 19 August 2011<sup>7</sup>.

In order to achieve these objectives<sup>8</sup>, it was necessary to vest appropriate powers (measures of supervision) in the PFSA. This is because the PFSA, like all other public authorities, is bound by the related constitutional and legal principle of law and order. Under the said principle the Authority is entitled to perform only such regulatory acts for which there is a direct and explicit legal basis arising from the provisions of the applicable law (the principle expressed in Article 7 of the Polish Constitution). At this point, it should be stated that the measures of supervision are, by their nature, characterized by diverse force, which is to allow the supervision authority to use them in a way adapted, as much as possible, to the circumstances of a given case, thus making them the regulatory as if they were tailor-made. It seems to be obvious that diverse oppression of such measures is also connected with varying force of supervision. Even a preliminary analysis of the catalogue of measures of supervision which are vested in the PFSA leads to the conclusion that some of them are particularly onerous.

One of the most interesting powers of the Polish Financial Supervision Authority, which may be applied as part of the supervision of the insurance market, and at the same time a supervisory measure which is extremely onerous, is the power of the PFSA set out in Article 94 paragraph 6 of the Insurance and Reinsurance Activities Act of 11 September 2015<sup>9</sup>, to issue an administrative decision demanding that a given shareholder of an insurance company sell shares of such a company within the time limit set out in the decision.

At this point, it should be clearly stated that although this power has never been used so far by the Polish Financial Supervision Authority and although the authors of this article hope that the PFSA will never be forced to use this power in the insurance market, the instrument of supervision which is a decision demanding the sale of shares to a financial institution within a prescribed time limit, is an instrument of trading causing serious concerns in practice. Several months ago, the Financial Supervision Authority issued a decision with respect to a shareholder of one of the banks, referred to in Article 25n paragraph 4 of the Banking Law. There were a number of doubts and concerns about that decision in practice. In the latter context, please note that it is known to the public that one

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2. Consolidated text: Journal of Laws of 2015, item 128, as amended; the “Banking Law”

3. Consolidated text: Journal of Laws of 2016, item 477.

4. Consolidated text: Journal of Laws of 2016, item 1406, as amended.

5. Consolidated text: Journal of Laws of 2014, item 1537, as amended.

6. Consolidated text: Journal of Laws of 2013, item 1350, as amended.

7. Consolidated text: Journal of Laws of 2014, item 873, as amended.

8. Cf. B. Wojno, M. Wędrychowski, *Ustawa o nadzorze nad rynkiem finansowym. Komentarz* [in:] *Prawo rynku kapitałowego. Komentarz*, eds. M. Wierzbowski, L. Sobolewski, P. Wajda, Warszawa 2014.

9. Consolidated text: Journal of Laws of 2015, item 1844, as amended.

of the most significant effects of this decision is a currently pending arbitration proceeding before the International Court of Arbitration against the Republic of Poland for a breach of the investment protection agreement concluded between the Republic of Poland and Luxembourg (the country of the registered office of the said shareholder). This makes us take a closer look at the power of the Financial Supervision Authority, as referred to in Article 94 paragraph 6 of the Insurance and Reinsurance Activity Act, and refer to the problems that may arise when the supervision authority hypothetically uses that power.

## 1. Mandatory sale of shares in a domestic insurance company within a prescribed time limit – general comments

A justification for the solution adopted in the provision of Article 94 paragraph 6 of the Insurance and Reinsurance Activity Act (IRAA) is to ensure the stable and prudent management of a domestic insurance company by excluding the possibility of exerting influence on the functioning of the company either by the majority shareholder in a domestic insurance or reinsurance company or by the parent entity of such a company, which could adversely affect the proper functioning of the company<sup>10</sup>. The supervision authority is provided with the instrument and when using such an instrument the supervision authority will be able to somehow remove shareholders of a given domestic insurance company, which - in the opinion of this authority - have a negative impact on the proper functioning of the company. Such a character of the measure under review allows for its inclusion in the category of measures of post-check supervision, and thus the measures aiming by their nature at eliminating the confirmed violations of law, and taking measures and establishing penalties against the entities guilty of a breach found.

The recipient of a decision ordering the sale of shares in a domestic insurance company within a prescribed period, and thus a party to administrative proceedings concerning the application of the supervisory measure under Article 94 paragraph 6 IRAA, may only be a shareholder of the company and accordingly the parent entity of the company. The recipient of this decision may not, however, be any other entity. If this decision is hypothetically referred to a shareholder of the domestic insurance company or the parent entity of the company, and such entity is not listed in Article 82 et seq. IRAA, this will cause the need to apply the extraordinary legal remedy under Article 156 § 1(4) of the Code of Administrative Procedure of 14 June 1960<sup>11</sup> with respect to such a decision, due to the fact that an administrative decision is referred to an entity which is not a party to the case.

At this point it should be emphasized that the obligation of the Polish Financial Supervision Authority, which is the obligation that has to be performed at the stage of the initiation of the proceedings and consistently throughout their course, is to verify whether the recipient of the decision referred to in Article 94 paragraph 6 IRAA is a shareholder of a given domestic insurance company or the parent entity of the company. Should it turn out at the stage of the initiation of the said

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10. Cf. *Ustawa o działalności ubezpieczeniowej i reasekuracyjnej. Komentarz*, eds. P. Wajda, M. Szczepańska, Warszawa 2016; M. Torończak, *Decyzja z art. 25n ust. 1 ustawy – Prawo bankowe*, Monitor Prawa Bankowego 4/2015, pp. 62–75.

11. Consolidated text: Journal of Laws of 2016, item 23, as amended.

proceedings by the Polish Financial Supervision Authority that the entity which, in the opinion of the PFSA, should be a party to such proceedings, is not actually a shareholder of a domestic insurance company or the parent entity of the company, the obligation of the Polish Financial Supervision Authority will be to withdraw from the initiation of the proceedings due to the fact that this entity does not have the attributes of a party (Article 28 of the Code of Administrative Procedure read in connection with Article 61 et seq. CAP). In the situation where a party to the proceedings (namely the entity with respect to which the PFSA intends to take a supervisory measure which is referred to in Article 94 paragraph 6 IRAA) lost the status of a domestic shareholder of the domestic insurance company or the parent entity of the company (e.g. as a result of the sale of shares), the PFSA will be obliged to discontinue the proceedings relating to the application of the supervisory measure under Article 94 paragraph 6 IRAA due to the futility of the proceedings (Article 105 § 1 of the Code of Administrative Procedure). It should be stressed once again that the PFSA is under the obligation to verify whether a given entity is a shareholder of a domestic insurance company or its parent entity throughout the stage of pending proceedings. This applies to the proceedings of first instance and the proceedings relating to the ordinary legal remedy in the form of a request for reconsideration of the case by the same authority (namely, the legal remedy under Article 127 § 3 of the Code of Administrative Procedure).

The expression “*the supervision authority may*” used by the legislator in Article 94 paragraph 6 IRAA suggests that the relevant proceedings may only be initiated *ex officio* (Article 61 of the Code of Administrative Procedure). This choice of words also indicates that the discussed supervisory measure is based on an administrative decision. The use of a decision-based procedure allows for the precise adjustment of severity of the regulatory instruments used by the Authority to the specific circumstances of a case, which leads to achieving a general regulatory result desired by the legislator. Therefore it must be observed that the structure of the norm expressed in Article 94 IRAA begs the assumption that the supervisory measure under Article 94 paragraph 6 IRAA is, by its nature, exceptional and may be applied only in situations in which the supervisory measure under Article 94 paragraphs 1–3 IRAA proves to be insufficient. This will be discussed in detail later in this paper.

For the Polish Financial Supervision Authority, the purpose of the administrative proceedings is to verify whether the use of the supervisory measure under Article 94 paragraphs 1–3 IRAA was a measure that led to the development of the desired regulatory result, which is to achieve the objectives referred to in Article 2 IRAA. Such objectives include ensuring that a domestic insurance company is managed in a prudent and sustainable manner.

The burden of proof in this matter rests entirely with the PFSA (Article 7 of the Code of Administrative Procedure read in connection with Article 77 CAP<sup>12</sup>). Consequently, it is the Polish Financial Supervision Authority that is required to demonstrate that a shareholder or the parent entity of a national insurance company fails to ensure that the national insurance company is managed in a prudent and sustainable manner despite the application of the supervisory measure under Article 94 paragraphs 1–3 of the Insurance and Reinsurance Activity Act. The supervision authority is obliged to carefully consider all the facts related to a specific administrative case in order to obtain an accurate picture of the matter at hand, which will serve as a basis for the accurate application of substantive law. In accordance with the principle of the objective truth, an authority that

12. Cf. P. Wajda, M. Śliwa, *Zasada prawdy obiektywnej (art. 7 k.p.a.) i ciężar dowodu w postępowaniach administracyjnych prowadzonych przez KNF*, „Monitor Prawa Bankowego”, 5/2014, pp. 54–72.

conducts administrative proceedings is obliged to explain all the facts fully and comprehensively. Therefore, the authority is required to take all the steps necessary to properly establish the factual basis for a ruling<sup>13</sup>. The determination of the facts of a case that are consistent with the objective and verifiable reality, is also a necessary condition for the proper resolution of the case. In fact, the authority's obligation to establish the facts (and the associated burden of proof) stems not only from the wording of Article 7 of the Code of Administrative Procedure but also from the obligation to respect the general principles of the rule of law and public order (Articles 6 and 7 CAP read in conjunction with Article 7 of the Constitution of the Republic of Poland). The correct determination of the facts is essential for the correct application of norms of substantive law<sup>14</sup>. The performance of this obligation is fundamentally important for satisfying the requirements stemming from the principles of the rule of law and public order (Articles 6 and 7 of the Code of Administrative Procedure read in conjunction with Article 7 of the Constitution of the Republic of Poland). This is because a correct determination of the facts of a case is a necessary starting point for the correct application of norms of substantive law<sup>15</sup>. It is possible to properly apply relevant norms of the substantive law to the facts proven to the Polish Financial Supervision Authority (and then to determine legal consequences of such facts) only if the facts conform to the objectively verifiable reality<sup>16</sup>. The correct determination of the facts of a case is therefore a necessary condition (although not a sufficient condition) for a correct resolution of the case. This is because the absence of or insufficient explanation of the facts always leads to the issuance of a faulty decision<sup>17</sup>. In the hypothetical situation where an authority applies a norm of substantive law to the facts which were not specified in the wording of the descriptive part of the norm, such an application will constitute a violation of the legal order resulting in the obligation to revoke the relevant administrative decision. In accordance with Article 7 of the Code of Administrative Procedure, while conducting a preliminary investigation in an administrative case, the Polish Financial Supervision Authority must take all the necessary steps to properly establish the factual basis for a decision. As it has been indicated, this is a *sine qua non* condition for a correct decision in an administrative case, "correct" being understood here as consistent with the facts and applicable law. In accordance with Article 77 § 1 CAP, in the course of a preliminary investigation, the PFSA is required to collect all evidence in a given case. Subsequently, having examined the evidence, the PFSA will resolve the case by way of an administrative decision. Only the complete evidence collected and evaluated in the manner specified in Articles 7, 77 and 80 CAP can be a factual basis for the issuance

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13. Cf. the judgment of the Supreme Administrative Court of 8 May 2009; case no. I OSK 849/08; Legalis.

14. Cf. judgment of the Provincial Administrative Court in Warsaw of 4 November 2008; case no. III SA/Wa 1694/08; Legalis.

15. Cf. judgment of the Provincial Administrative Court in Warsaw of 4 November 2008; case no. III SA/Wa 1694/08; Legalis.

16. Cf., for example, judgment of the Provincial Administrative Court in Warsaw of 7 August 2007; case no. VII SA/Wa 878/07; Legalis; judgment of the Provincial Administrative Court in Warsaw of 19 September 2006; case no. VII SA/Wa 452/06; Legalis.

17. Cf. judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 22 July 2009; case no. II SA/Go 330/09; Legalis; An authority violates the law not only in the event of an incorrect legal assessment of the facts or an incorrect application of law but also when the authority properly applies the law to incorrectly established facts; cf. judgment of the Provincial Administrative Court in Warsaw of 27 November 2006; case no. VII SA/Wa 1532/06; Legalis.

of an administrative decision. Collecting of “all” evidence means collecting of the evidence relating to all acts relevant to a case under the law. Evidence is assessed by a public administrative authority based on the rule of substantive law that forms the legal basis for the issuance of the decision in a case. The examination of evidence involves the making of such an assessment of each piece of evidence collected in a case, as well as the examination of the interrelations between individual pieces of evidence. The purpose of the assessment is to obtain a clear picture of the facts and the law. The assessment of evidence should be made in accordance with the principle of the free evaluation of evidence expressed in Article 80 of the Code of Administrative Procedure. The Polish Financial Supervision Authority is subject to no restrictions as to the weight of evidence, because every piece of evidence in proceedings can be rebutted by another piece of evidence.

## **2. Mandatory sale of shares in a domestic insurance company within a prescribed time limit and the prohibition on the exercise of voting rights on shares in a domestic insurance company.**

Pursuant to Article 94 paragraph 6 of the Insurance and Reinsurance Activity Act, a necessary condition for the issuance of the Polish Financial Supervision Authority’s administrative decision ordering the sale of shares within a prescribed time limit is the ineffectiveness of the measures applied in accordance with Article 94 paragraphs 1–3 IRAA. In other words, the mandatory sale of shares may be ordered in the situation where such measures proved to be insufficient to ensure that a shareholder or a parent entity of a domestic insurance company manages the company in a prudent and sustainable way. The above means that the PFSA may not issue a decision ordering the sale of shares as a stand-alone measure, which is not related to the prior application of the supervisory measures under Article 94 paragraphs 1-3 IRAA.

Similarly, the PFSA may not simultaneously issue the decision under Article 94 paragraphs 1–3 IRAA *and* the decision under Article 94 paragraph 6 IRAA. This is a consequence of the literal interpretation of Article 94 paragraph 6 IRAA, in which the legislator uses the expression “*in the cases referred to in paragraphs 1, 2 or 3*”, explicitly stating that a prior issuance of the decision under Article 94 paragraphs 1–3 IRAA is a necessary condition for the issuance of the decision under Article 94 paragraph 6 IRAA. The proper procedural order of the both procedures is as follows: first, the supervision authority issues the decision under Article 94 paragraphs 1–3 IRAA, and later initiates administrative proceedings for the issuance of the decision under Article 94 paragraph 6 IRAA. The above conclusion is based on the dually specific nature of administrative cases, and also on the rule that only one administrative decision (Article 1 of the Code of Administrative Procedure) may be issued in a given administrative case. Since both types of measures are made in the form of an administrative decision, it is impossible for the PFSA to concurrently issue such decisions in a single administrative case. If this was the case, we would deal with a situation in which the supervisory authority issues two administrative decisions in one administrative case.

Similarly, it is impossible for the Polish Financial Supervision Authority to issue a single decision to simultaneously resolve the matters referred to in Article 94 paragraph 6 *and* paragraphs 1–3 IRAA. If the PFSA did so, we would deal with a resolution of two administrative cases by way of a single administrative decision.

Considering the above, a necessary condition for the issuance of the PFSA administrative under paragraph 6 is the existence of an administrative decision issued under paragraphs 1–3 as of the date when the latter decision is issued. This means that the PFSA is obliged, upon the initiation of the proceedings for the issuance of the “Paragraph 6 Decision”, to ascertain that the “Paragraph 1–3 Decision” has been validly issued. Similarly, the PFSA is obliged to ascertain that the latter decision remains in force throughout the duration of the administrative proceedings for the issuance of the former decision.

Hypothetically, if the Polish Financial Supervision Authority issues a “Paragraph 6 Decision” and the required “Paragraph 1–3 Decision” does not validly exist on the date when the former decision is issued, the “Paragraph 6 Decision” will be revoked as having been issued in a way that grossly violates the law (Article 156 § 1(2) of the Code of Administrative Procedure).

In the case of the both types of decisions we deal with a classic sequence of administrative decisions, where the existence of a previous decision<sup>18</sup> (here, the decision under Article 94 paragraphs 1–3 IRAA) is a necessary condition for the issuance of another decision (here, the decision under Article 94 paragraph 6 IRAA).

Another ambiguity should be noted at this point, namely the impact of a revocation of the decision issued under Article 94 paragraphs 1–3 IRAA on the existence of the decision issued under Article paragraph 6 IRAA. An analysis of the relevant provisions of the Code of Administrative Procedure leads to the conclusion that the effective challenge of a “Paragraph 1–3 Decision” will enable the resumption of the proceedings for the issuance of a “Paragraph 6 Decision” (Article 145 § 1(8) of the Code of Administrative Procedure).

There is no automatism within the relationship between administrative decisions issued under Article 94 paragraphs 1–3 IRAA and those based on Article 94 paragraph 6 IRAA. Although a necessary condition for the issuance of a “Paragraph 6 Decision” is the existence of a “Paragraph 1–3 Decision”, this does not mean that the Polish Financial Supervision Authority must issue the former in the wake of issuing the latter. Conversely, while the decision under Article 94 paragraph 6 IRAA is not valid in the absence of the decision issued under Article 94 paragraphs 1–3 IRAA, the latter decision may exist independently of the former. Furthermore, a “Paragraph 1–3 Decision” may exist somewhat parallelly to a “Paragraph 6 Decision”. Given the above, one cannot discern any inseparable link between the two decisions. Consequently, there are no legal grounds for the argument that the issuance of the decision under Article 94 paragraphs 1–3 IRAA obliges the PFSA to issue a decision under Article 94 paragraph 6 IRAA.

The decision under Article 94 paragraph 6 IRAA may be issued only in exceptional circumstances, namely whenever the supervision authority decides that the supervisory measures applied under Article 94 paragraphs 1–3 IRAA are insufficient to bring about a desired regulatory effect in relation to a shareholder or the parent entity of a domestic insurance company.<sup>19</sup> While assessing if such an effect have or have not been exerted, the PFSA applies the legal criteria for a prudent assessment of an investor who purchases shares in a domestic insurance company. The decision referred to in Article 94 paragraph 6 IRAA is therefore secondary to the decision referred to in Article 94 paragraphs 1–3 IRAA. Accordingly, if it is evident that the supervisory measure applied by virtue of an effectively introduced decision under Article 94 paragraphs 1–3 IRAA

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18. Cf. the judgment of the Supreme Administrative Court of 10 October 2006; case no. II GSK 156/06; Legalis.

19. Cf. Article 2 IRAA.

has failed to ensure a prudent and sustainable management of a domestic insurance company, the PFSA will be entitled to issue a “Paragraph 6 Decision”.

The contention of the subsidiary nature of the decision issued under Article 94 paragraph 6 IRAA is supported, in particular, by the requirements arising from the constitutional principle of proportionality (Article 31 paragraph 3 of the Polish Constitution). The primary function of this principle is to limit the extent of the powers exercisable by public authorities that interfere with constitutionally protected freedoms and substantive rights<sup>20</sup> whenever the exercise of such powers in a given case is not justified by the need to protect the interest of the public. Thus the Polish Financial Supervision Authority is certainly *not* entitled to apply excessively onerous measures of supervision, namely such measures that may bring about the desired regulatory effect, which is to ensure a prudent and sustainable management of a domestic insurance company in a way that places an excessive burden on the regulated entity. If the PFSA applied an excessively onerous supervisory measure, such a measure would need to be declared unlawful and revoked. This can be done, for example, by way of ascertaining the invalidity of the administrative decision which served as the basis for the application of this measure under the procedure established in Article 156 § 1(2) of the Code of Administrative Procedure.

The principle of proportionality determines a special type of purposive rationality, which protects all subjects of law against excessive and unjustified interference by the legislator or public administration authorities. Such protection is granted by way of the precise determination of the criteria applicable in the selection of appropriate measures and instruments designed to attain specific goals and perform specific tasks. According to the principle of proportionality, the Polish Financial Supervision Authority is obliged to use measures of supervision that are best suited to address the circumstances of a case. These measures must strictly comply with the requirements arising from the individualized nature of a given set of facts; hence, the extent of the placed burden must be proportional to the value of the interests protected.

Consequently, the PFSA may use the more onerous measure under Article 94 paragraph 6 IRAA only if a less onerous measure under Article 94 paragraphs 1–3 IRAA proves to be insufficient for the achievement of a desired regulatory effect. As a result, the supervisory measure under paragraph 6 is reserved exclusively for the situations in which the measure depriving a shareholder of the voting rights on their shares in a domestic insurance company (or depriving a parent entity of its right to exercise control over a subsidiary) will fail to ensure the proper functioning of a domestic insurance company.

The decision referred to in Article 94 paragraph 6 IRAA may be issued only in exceptional cases, namely in such situations where, in the opinion of the supervisory authority, the measures of supervision under Article 94 paragraphs 1–3 IRAA fail to bring about a desired regulatory effect in respect of a majority shareholder of a domestic insurance company or the parent entity of such a company; here the desired effect is the effective supervision of the capital flows occurring within the domestic insurance company. In the assessment whether or not the desired effect have been attained, the PFSA applies the legal criteria of the prudent assessment of an investor who purchases shares, pursuant to Article 82 et seq. IRAA. As a result, the supervisory measure under paragraph 6

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20. Cf. K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warsaw 2007, pp. 56–59; and also P. Pietrasz, *Zasada proporcjonalności a postępowanie administracyjne* [in:] ed. J. Niczyporuk, *Kodyfikacja Postępowania Administracyjnego Na 50-lecie K.P.A.*, Lublin 2010, p. 637.

is reserved exclusively for the situations in which the measure depriving a shareholder of the voting rights on their shares in a domestic insurance company (or depriving a parent entity of its rights) will fail to ensure the prudent and sustainable management of a domestic insurance company.

At this point, it should be once again strongly emphasized that the supervisory measure under Article 94 paragraph 6 IRAA is an exception. This conclusion determines the approach to the interpretation of the provision in question, which must follow the general rule governing the interpretation of exceptions and be strict. Given the above, if there are any doubts whether this measure should be applied, the Polish Financial Supervision Authority must refrain from applying the measure.

### **3. The administrative decision ordering the sale of shares in a domestic insurance company within a prescribed period**

As mentioned above, the case in question will be resolved by way of the issuance of an administrative decision. This decision may be challenged through an ordinary appellate remedy, namely the application for the reconsideration of a case (*argumentum* under Article 127 § 3 of the Code of Administrative Procedure); the final decision in the case may be appealed against through a complaint filed with an administrative court (*argumentum* under Articles 50 et seq. of the Administrative Courts Procedure Act of 30 August 2002<sup>21</sup>).

Analyzing the legal nature of such a resolution, one should note an important issue, namely the timeframe of a shareholder's disposal of the shares. The expression "*within a prescribed period*", used by the legislator in Article 94 paragraph 6 IRAA, should be interpreted as enabling the supervisory authority to freely determine the length of that period. This means that the length of this time limit is to be set in the administrative decision issued in a given case. In practice, in determining this time limit, the PFSA will take into consideration, on one hand, the fact that such a period should be short enough so that a shareholder's inability to exercise its voting rights on its shares do not adversely affect the prudent and sustainable management of a given domestic insurance company. Inability to exercise voting rights may not lead to a situation where the proper functioning of the company is put at risk. On the other hand, the PFSA should take into account the need to protect the rights and interests of a party to administrative proceedings, which means that the time limit should be long enough to enable the sale of shares within the timeframe of such proceedings. The time limit should therefore be determined in line with the economic interests of the shareholder obliged to sell shares in a national insurance company. In this context, it should be emphasized that in setting the time limit for the sale of shares, the PFSA must bear in mind that trading in significant blocks of shares in a national insurance company is a regulated activity. The PFSA has been vested with the power to exercise control over capital flows occurring in companies. In consequence, the time limit under Article 94 paragraph 6 IRAA is the result of the balancing of the above-mentioned values. This time limit is a time limit of substantive law and as such may not be extended or shortened. Similarly, it is impossible to suspend the running of this period.

If the shares are not sold within the prescribed time limit, the Polish Financial Supervision Authority is entitled to impose a fine of PLN 10,000,000 on the responsible shareholder of a domestic insurance company. In such a case, the PFSA may also establish a receivership or withdraw

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21. Consolidated text: Journal of Laws of 2012, item 270, as amended.

the permission for carrying out insurance activity. It should be mentioned, as a side note, that the latter measure is considered controversial. If this penalty is applied, we will deal with a situation in which an infringement committed by a shareholder of a domestic insurance company (or its parent entity) indirectly affects the company's other shareholders (including minority shareholders who do not have any serious impact on the operations or strategy of the company), as well as the customers of the company. Consequently, one should expect that the PFSA exercise extreme caution and prudence while resorting to the said measure.

The only factual basis for the issuance of measures referred to in Article 94 paragraph 7 IRAA is a shareholder's failure to timely comply with the decision issued under Article 94 paragraph 6 IRAA. The verb "may" used by the legislator in paragraph 7 indicates that the PFSA's powers to impose the measures laid down in this provision is discretionary. In practice, the PFSA will be guided in this respect primarily by the requirements stemming from the constitutional principle of proportionality (Article 31 paragraph 3 of the Polish Constitution), which means that the PFSA's selection of the applied measure must adhere to the facts of a case at hand. Given the above, in most cases, the PFSA is likely to impose only a financial penalty, whereas the supervisory measures involving the establishment of a receivership or withdrawal of a permission to carry out insurance or reinsurance activity will be applied only in exceptional cases and, therefore, in situations where less onerous measures prove to be insufficient.

The above measures will be imposed in the form of an administrative decision. This decision may be challenged through an ordinary appellate remedy, namely the application for the reconsideration of a case (*argumentum* under Article 127 § 3 of the Administrative Procedure Code); a party will also be entitled to file a complaint with an administrative court against the final decision (*argumentum* under Articles 50 et seq. of the Administrative Courts Procedure Act).

## Summary

The decision ordering the sale of shares in a domestic insurance company within a prescribed time limit is one of the most severe measures of supervision, which should be used only in exceptional situations. The above conclusion results specifically from the constitutional principle of proportionality. Given the above, the decision should be applied only if the prohibition on the exercise of voting rights on shares (or the rights of a parent entity) proves insufficient to achieve the desired regulatory effect. The discussed measure cannot be applied automatically and exist parallelly to the measure under Article 94 paragraphs 1–3 of the Insurance and Reinsurance Activity Act. Any such automatism would violate the constitutional principle of proportionality and provisions of the Code of Administrative Procedure.

Considering the applicable law on the issue, one may reasonably argue that the supervisory authority should show restraint in the use of this measure and apply it to address only the most serious threats to the prudent and sustainable management of domestic insurance companies. One should also hope that this measure will never be applied.

The decision under Article 94 paragraph 6 IRAA must be issued in the administrative proceedings that are separate from the proceedings for the issuance of the decision under Article 94 paragraphs 1–3 IRAA, which must precede the former decision. It is thus impossible to issue both decisions to resolve a single administrative case or in one administrative proceedings. A prior

issuance of the administrative decision referred to in Article 94 paragraphs 1–3 IRAA and its validity is therefore a condition for the issuance of the “Paragraph 6 Decision”.

Finally, one should emphasize that the strict adherence to the above requirement related to the above relationship between the two decisions and to the constitutional legal principle of proportionality and regulations of the Code of Administrative Procedure, is a necessary condition for the validity of the administrative decision under Article 94 paragraph 6 IRAA.

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- Verdict of the Provincial Administrative Court in Poznań of 9 August 2007; file ref. no.: III SA/PO 601/07; Legalis

Verdict of the Provincial Administrative Court in Warsaw of 4 November 2008; file ref. no.: III SA/Wa 1694/08; Legalis

Verdict of the Provincial Administrative Court in Gorzów Wielkopolski of 22 July 2009.; file ref. no.: II SA/Go 330/09; Legalis

## **Kompetencje Komisji Nadzoru Finansowego do nakazu zbycia akcji krajowego zakładu ubezpieczeń w wyznaczonym terminie – kilka wątpliwości i uwag praktycznych**

*W artykule przedstawiono analizę jednego z najbardziej – w naszej ocenie – dolegliwych środków nadzoru następczego, jakim jest decyzja Komisji Nadzoru Finansowego o nakazie zbycia akcji krajowego zakładu ubezpieczeń w wyznaczonym terminie. Jakkolwiek środek ten nie znalazł do tej pory kiedykolwiek zastosowania w obrębie rynku ubezpieczeń – czy to pod rządami ustawy z dnia 11 września 2015 r., czy też pod rządami wcześniej obowiązujących ustaw normujących prowadzenie działalności ubezpieczeniowej – to okoliczność, iż analogiczny środek nadzoru znalazł niedawno zastosowanie w obrębie rynku bankowego i wywołał przy tym liczne problemy praktyczne skłania do przybliżenia tego środka i odniesienia się do problemów, które mogą zaistnieć na kanwie jego praktycznego wykorzystania. W szczególności przedmiotem analizy będzie relacja pomiędzy tym środkiem nadzoru, a poprzedzającym jego zastosowanie środkiem nadzoru jakim jest zakaz wykonywania prawa głosu z akcji krajowego zakładu ubezpieczeń.*

**Słowa kluczowe:** Komisja Nadzoru Finansowego, nadzór nad rynkiem ubezpieczeń, nakaz zbycia akcji krajowego zakładu ubezpieczeń, zakaz wykonywania prawa głosu z akcji krajowego zakładu ubezpieczeń.

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