THE ROLE OF RECOMMENDATIONS AND GUIDELINES OF THE FINANCIAL SUPERVISION COMMISION (KNF) IN COMBATING THE IRREGULARITIES ON THE BANKING AND INSURANCE MARKET IN POLAND

ÚLOHA ODPORÚČANIA A USMERNENIA KOMISIE PRE FINANČNÝ DOHĽAD (KNF) V OBLASTI BOJA PROTI NEZROVNALOSTIAM NA TRHU V OBLASTI BANKOVNÍCTVA A POISŤOVNÍCTVA V POĽSKU.

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ABSTRACT
This article applies to the essence of recommendations and their role in influencing banking and insurance. The legal nature of the recommendations, as well as the difference between recommendations issued by the Financial Supervision Authority and those issued by local self-government are presented here. The article also indicates the differences of legal regulations of the recommendations issued by the Financial Supervision Authority recommendations in relation to banks and insurance companies. The author postulates unification of these regulations for the safety of trading in financial services, financial market of the consumer protection.

ABSTRAKT
Tento článok sa týka podstaty odporúčaní a ich úlohe v ovplyvňovaní bankovníctva a poisťovníctva. Právna povaha odporúčaní, rovnako ako rozdiely medzi odporúčaniami vydanými Úradom finančného dozoru a tými, ktoré vydáva miestna samospráva sú v tejto práci prezentované. Táto práca tiež poukazuje na rozdiely medzi právnymi predpismi - odporúčaniami vydanými Úradom finančného dozoru a odporúčaniami vzťahujúcimi sa na banky a poisťovne. Autorka predpokladá unifikáciu/zjednotenie týchto právnych predpisov pre bezpečnosť obchodu v oblasti finančných služieb, finančného trhu na ochranu spotrebiteľa.

INTRODUCTION

The aim of this paper is an attempt to analyse and evaluate the legal nature of issuing recommendations of good practices (i.e. the guidelines) by the Financial Supervision Authority for the banking sector and economic insurance. The discussed supervisory instruments are of a growing importance in the financial market and the in real terms they affect the practice of banking and insurance activities. The occurrence of an increasing number of Acts of a soft law character, created by the Financial Supervision Authority, is beginning to rise. Polish Financial Supervision Authority issued 19 recommendations aimed

at banks[1], and 5, which were addressed to insurance companies.[2] The indicated recommendations allow a quick response (communication) for Polish Financial Supervision Authority when it identifies the risk of the unlawful behaviour of banks or insurance companies without the necessity to institute individual cases. On the other hand, this also provides for the supervised entities (banks, insurance companies), access to knowledge concerning the approach of the supervisory authority. The study highlighted the differences between the recommendations and the guidelines issued by the FSA with the recommendations developed by the economic self-governments.

I. THE LEGAL NATURE OF ISSUING RECOMMENDATIONS BY THE FINANCIAL SUPERVISION AUTHORITY

The problem of the legal nature of the recommendations issued by the FSA has already been the subject of studies in the doctrine.[3]

The recommendations are the standards of the recommended by the FSA proceedings the compliance of which cannot be ordered through the use of state coercion.[4] These are the standards of general and abstract nature, being a reaction to the perceived threats to the functioning of banks by supervisory authority. They should be considered as guidelines (rules) of recommended procedure. It should be agreed with the view that recalling these principles is not creating law, but the fulfilling the market supervisor, which must strive for the supervised entities to act in accordance with the applicable law.[5]

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1 Recommendation A concerning managing the risk accompanying transactions on the derivatives market concluded by banks, which is attached hereto, 2010; Recommendation B on the control of banks' capital investment risk, 2002; Recommendation C on the management of large exposure risk, 2002; Recommendation D on the management of IT and telecommunications risk at banks, 2013; Recommendation F on the basic criteria applied by the Commission for Banking Supervision in approving rules issued by mortgage banks for the determination of the mortgage lending value of property, 2014; Recommendation G on the management of interest rate risk at banks, 2002; Recommendation H on bank internal controls and audit, 2011; Recommendation I on the management of foreign exchange risk at banks and principles for the performance by banks of transactions involving exposure to foreign exchange risk, 2010; Recommendation J on the creation by banks of data bases concerning the property market, 2012; Recommendation K on the principles for the maintenance by mortgage banks of collateral accounts for mortgage bonds and projections of those accounts, 2014; Recommendation L on the role of external auditors in contributing to the process of bank supervision, 2001; Recommendation M on the management of operational risk at banks, 2013; Recommendation P on bank liquidity monitoring systems, 2015; Recommendation R concerning the rules for identification of impaired balance-sheet credit exposures, calculation of impairment losses on balance-sheet credit exposures and provisions for off-balance-sheet credit exposures, 2011; Recommendation S concerning good practices related to mortgage-secured credit exposures, 2013; Recommendation T on best practices in managing credit risk related to exposures to households, 2013; Recommendation U - on bancassurance, 2014; Recommendation W on internal models at banks, 2015. See more: https://www.knf.gov.pl/regulacje/praktyka/rekomendacje/rekomendacje.html

2 Guidelines on the Management of Information Technology and ICT Environment Security for General Pension Companies 2014), Guidelines on Motor Vehicle Insurance Claims Settlement (2014), Guidelines on flood risk management in the insurance sector (2014), Guidelines on the Management of Information Technology and ICT Environment Security for Insurance and Reinsurance Undertakings (2014). See more: http://www.knf.gov.pl/en/aktualnosci/PFSA_Guidelines_16122014.html

3 T. CZECH, The Legal Nature of FSA Recommendations, Przegląd Prawa Publicznego 2009, no 11, p. 63-80; M.Olszak, Recommendations banking supervisory authority - the genesis, subject to regulations, the legal nature, Przegląd Ustawodawstwa Gospodarczego 2010, no 11, p. 2-11; J.A. Krzyżewski, Supervisory Recommendations - the legal nature and the scope of the binding force, Prawo bankowe 2000, no 7-8, p. 110-121; D. Lewandowski, The regulatory function of banking supervision. Prudential supervisory Recommendations A,B,C of 3 March 1997, Prawo bankowe 1997, no 3, p. 55-68.

4 R. TUPIN, Supervisory Acts of the Financial Supervision Authority (w:) The principles of social and economic system in the process of applying to the Constitution (red.) C. Kosikowski, Warszawa 2005, s. 205.

5 M. ORLICKI, Recommendation U, Distribution Guidelines, Draft Insurance and Reinsurance Activity Act, - a Chance to Change the Practice of Concluding and Implementing Group Insurance, Prawo Asekuracyjne 2015, no 1, p. 26.

For those reasons, as opposed to other acts that have arisen from the statutory authorization, Polish Financial Supervision Authority recommendations may not impose on their recipients any obligations and only recommend taking certain actions.[6]

In addition, it should be emphasized that the recommendations of Polish Financial Supervision Authority do not fall within the category of acts of generally applicable law, since they are not included in Art. 87 of the Constitution of the Republic of Poland[7]. For those reasons Polish Financial Supervision Authority recommendations cannot become a legal basis for an administrative decision due to their not-governing character (sanctions supervision by the Polish Financial Supervision Authority), and cannot be a subject of the control supervised by administrative courts.[8] Such a sanction imposed by Polish Financial Supervision Authority must have a legal basis within the legal regulations in force. In the event of issuing by the FSA an administrative decision based on the recommendation the possibility of an annulment is postulated due to lack of legal grounds for its release pursuant to art. 156 par. 1 point 2 of the Code of Administrative Procedure.[9] However, the provisions of generally applicable law interpreted in a manner consistent with the recommendations may be the basis for any decisions and judgments.[10]

Recommendations cannot therefore be considered as the source of universally binding standards. The literature indicates that they cannot be considered as a source of national law (acts of internal management), as pursuant to art. 93 of the Constitution of the Republic of Poland, there is no organizational subordination of insurance companies (including banks) towards Polish Financial Supervision Authority.[11]

No less compelling is the Constitutional Court's judgment of 28 June 2000 (Ref. No. K 25/99, OTK ZU 2000, No. 5, pos. 141), that formulated the requirements, the fulfilment of which gives the possibility of issuing internal legislation in view of entities functionally subordinated to state. Constitutional Tribunal explained that the body entitled to do so can only be the constitutional body, the acts themselves may concern only the constitutionally defined public duties. These considerations make it clear that Polish Financial Supervision Authority is not entitled to issue internal legislation addressed to insurance companies (banks) because it is not a constitutional body and does not completely to fulfil constitutional public duties.[12]

II. THE FINANCIAL SUPERVISION AUTHORITY SUPERVISIORY RECOMMENDATIONS AND GOOD PRACTICE RECOMMENDATIONS DEVELOPED BY LOCAL GOVERNMENTS ADDRESSED TO BANKS AND INSURANCE COMPANIES

Self-regulation of the market in the form of recommendations of best practices represent a kind of filling the loophole (inconsistencies of a legal provision). The legal nature of the recommendations should be identified as so-called self-governance namely a regulation introduced voluntarily by entities operating within the market. And there appears to be a

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6 R. KASZUBSKI, The functioning of the sources public banking law, Zakamycze 2006, p. 78.

7 The system of sources of law in a given State is closed within the subjective and objective terms. S.WRONKOWSKA, Basic concepts of law and jurisprudence, Poznań 2005, p. 26.

8 A.SKOCZYLAS, Bank protection measures to the proceedings before the Commission for Banking Supervision (selected), Prawo Bankowe 2002, no 2, p. 58.

9 T. NIEBORAK (w:) Act on Capital Market Supervision. Comment, red. T. Nieborak, T. Sójka, Warszawa 2011, p. 78, See also T. Czech, The Nature...., s. 78.

10 M. ORLICKI, Recommecdation U..., s.26.

11 In the literature, however, they are different opinions on this subject. See, e.g. T. Czech The legal nature ...., pp. 70-71 - the author discusses the views of doctrine in this regard.

12 See more: R. TUPIN, Commentary to the judgement of TK of 28 June 2000 (ref. Act K 5/99), Przegląd Sądowy 2001, z. 1, p. 87.

significant difference between Recommendations and Guidelines issued by the PFSA and recommendations of best practices developed by the economic self-government (i.e. by the Polish Bank Association and Polish Chamber of Insurance). In the former case we have the effect of independent activities acting as the supervisory authority.[13] However, for the latter we have the effect of self-regulation, which is the result of an effort and a compromise of entities undergoing such regulations. They may be considered as restrictions voluntarily imposed on each other by financial market participants.[14]

The adopted market practices should be regarded as an established custom in the financial market and, therefore, have legal effects of an act concluded by a market participant.[15] While voluntarily accepted by banks or insurance companies, they constitute the Code of Good Practices within the meaning of Art. 2 point 5 of the Act on Unfair Commercial Practices.[16] Whether in this case banks or insurance companies apply the practice different from the declared as compliant with the content of recommendations, such activities may be regarded as contrary to the law and cause certain actions government bodies responsible for protecting the interests of consumers.[17]

In the case where the bank's actions are contrary to the regulations of recommendations, the Office of Competition and Consumer Protection (UOKiK) may initiate administrative proceeding on the application of unfair market practices. On the other hand, when it is determined that the use of unfair market practice harms the collective interests of consumers, the OCCP President may, on the basis of the provisions of the Act of 16 February 2007 on competition and consumer protection[18] take action to eliminate this practice from the market. Appropriate action may be taken by the other organizations responsible for protecting the interests of persons insured: the Insurance Ombudsman, the Ombudsman and the county or municipal Consumer Ombudsmen.[19]

The activities may also be taken by consumers themselves, exercising the powers granted in Art 12 paragraph 1 of the Act on Unfair Commercial Practices, according to which the consumer can individually apply to the court with the following civil law claims:

1) such a practice be discontinued;
2) the effects of such a practice be removed;
3) a single or multiple statement of appropriate content and appropriate form be made;
4) the damage as per general terms and conditions be redressed and, in particular, to request that the contract be cancelled and the benefits mutually returned and the costs associated with the purchase of the product be reimbursed by the trader;
5) an adequate amount of money be adjudicated for a specific social cause related to supporting the Polish culture, national heritage or consumer protection.[20]

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[13] Such a state of law applies in the banking law, and the insurance market legislator in the Act of 11 September 2015 on the insurance and reinsurance activities, in Art. 365 paragraph. 2 requires the supervisory authority to consult the draft of recommendations with stakeholders and institutions.

[14] M. KOPYŚCIAŃSKI, Border of legal interference in functioning of alternative systems of the turnover with financial instruments (MTF), Wrocław 2013, p. 210.

[15] P. WAJDA, Accepted market practices - the legal status, Monitor Prawa Bankowego 2014, no 7-8, p. 138.

[16] The Act of 23 August 2007 on combating unfair commercial practices (Journal of Laws no 171, item 1206)

[17] In accordance with Art. 5 paragraph. 2 Section 4 of the Act of 23 August 2007 on combating unfair commercial practices. An unfair commercial practice shall be regarded inter alia as *„commercial practice misleading that involves the failure to comply with a code of good practice to which a trader voluntarily joined, if the entrepreneur informs within the framework of market practice that he/she is bound by the code of good practice"*.

[18] OJ. no 50, item 331.

[19] B. MROZOWSKA, *Bancassurance* – regulation and self-regulation of the market, Prawo Asekuracyjne no 3/2012, p. 38.

[20] See also, p. 39.

So far, the Polish Banks Association (ZBP) adopted three recommendations of good practices in the area of *bancassurance*[21]:

- The First Recommendation of the Polish Chamber of Insurance and PBA on protective insurance linked to banking products[22],
- The second recommendation of good practice on the Polish *bancassurance* market in the Scope of Financial Insurance Combined with Bank Products Secured by Mortgage[23],
- The third recommendation of good practice on the Polish *bancassurance* market in respect of insurance with an investment or savings component. [24]

These recommendations have taken the consultations with the Polish Chamber of Insurance (PIU), the Insurance Ombudsman, the Financial Supervision Authority, the Office of Competition and Consumer Protection, the Government Plenipotentiary for Equal Treatment, as well as banks and insurance companies into account.

The indicated recommendations apply to the irregularities observed in the phenomenon of *bancassurance*. In practice, banks act as the policyholder (party to a contract of insurance on someone else's behalf) by purchasing an insurance on behalf of their clients. Additionally, banks charge a payment from the insurance companies related to the agreements of group insurance. Therefore, they are also interested in obtaining the greatest group of clients using insurance coverage. It comes in this situation rights violations of bank customers via: their hampered access to the content of the insurance contract, restrictions on freedom of having the choice of an insurer of the bank's customer, the lack of possibility to direct claims by the insured or their heirs, as well as the problem of recourse claims directed to the borrowers by insurers after paying the insurance to the bank.

In 2012 the Financial Supervision Authority tried to establish, by directing a supervisory survey for banks, whether they adhere to high standards in the distribution of insurance and whether, and to what extent, they have adjusted to the previously discussed recommendations prepared by Polish Chamber of Insurance and adopted by the Polish Bank Association.[25]

It proved that within the phenomenon of *bancassurance* still a significant breaches and violations of the rights of bank customers appear, i.e._ Banks merge the function of the policyholder and the broker charging the insurance company with a remuneration characteristic for a broker, banks continue to transmit their customers with the minimum information in connection with the accession to the insurance contract to a third party. On the other hand, up 76.3% of the surveyed banks declared that the insured client has the possibility

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[21] See: www.zbp.pl *Bancassurance* is providing insurance by banks (intermediation in the conclusion of insurance contracts or offering accession to the insurance contract, i.e. the agreement on behalf of customers) on the basis of agreements concluded between the bank and the insurance company directly linked to the service, banking and insurance services of investment or savings (bank customer under a separate agreement agrees to cover the costs of bank insurance protection against different types of risk covered by the insurance contract).

[22] The first edition of the Recommendation was adopted by the Committee on. Consumer Credit at the PBA on 25 February 2009 and by the Board of the Polish Bank Association on 3 April 2009, the second edition of the Recommendation was adopted by the Committee for. Consumer Credit at the PBA on 25 June 2012 and approved by the Board of the Polish Bank Association on 10 July 2012.; http://www.piu.org.pl/public/upload/ibrowser/Rekomendacje/I%20Rekomendacja%20Bancassurance.pdf

This recommendation was developed in cooperation with the Polish Chamber of Insurance and adopted by the Management Board of the Polish Bank Association on 22 December 2010 and entered into force on 1 July 2011. http://piu.org.pl/public/upload/ibrowser/II_rekomendacja_ba.pdf

[24] This recommendation was developed in cooperation with the Polish Chamber of Insurance and approved by the Board of the Polish Bank Association on 10 July 2012. http://piu.org.pl/public/upload/ibrowser/Bancassurance/Rekomendacje/III%20Rekomendacja%20Bancassurance%20-final.pdf

[25] http://piu.org.pl/public/upload/ibrowser/W.Kwaśniak_V_Kongres_bancassurance_zalozenia_rekomendacja.pdf The survey results presented by Mr Wojciech Kwaśniak, Deputy Chairman of the Financial Supervision Commission at the Fifth Congress of *Bancassurance*, which took place on 24-25 October 2013 In Jozefów near Warszawa. The Congress was organized by the Polish Chamber of Insurance in cooperation with the Association of Polish Banks.

of direct claims and 53% of the banks accept principle of freedom of choice of insurer without restrictions. The results of supervisory surveys directed to banks within the context of the actions taken so far by the Polish Bank Association and Polish Chamber of Insurance, indicate that self-regulation of the sector through recommending the PBA and PCI - despite the fact that they are necessary indeed and they fill the legal gap - is insufficient.[26]

III. THE LEGAL BASIS OF ISSUING RECOMMENDATIONS IN THE BANKING LAW

The provision of Art 137 paragraph 5 of the Banking Act[27] indicates that the PFSA may make recommendations concerning good practices cautious and stable management of banks They are a source of banking prudential norms that are not the legal standards. Furthermore Art. 102 section 2 of the Act on payment services[28] states that the PFSA may make recommendations concerning good practices prudent and stable management of the national payment institutions, having regard to protection of the interests of users or holders of electronic money. Moreover, art. 62 paragraph. 2 of the Act on Cooperative Savings and Credit Association[29] stipulates that the PFSA may issue , after consulting the National Association, recommendations on best practices of prudent and stable management of the savings banks. Follows from the foregoing that Polish Financial Supervision Authority has a legal basis to issue a recommendation on the banking market supervision, as required under the applicable standards for the legal basis for issuing recommendations.

In the banking law recommendations are only acts on good practices of cautious and stable banks management. Legislature does not *expressis verbis* indicate in their case that they are binding for banks. [30] They should be considered as guidelines proceedings an instrument to educate its recipients, and by this preventive effect on banking practices. Thus, the proceedings in a manner inconsistent with the pattern of behaviour, which was presented in the recommendation cannot be identified as a requirement to impose supervisory sanction by the PFSA. In contrast, orders and expectations formulated by the PFSA to establish the validity and authority of this recommendation should be interpreted as meaning that within the prescribed time and scope they remain, in the opinion of Polish Financial Supervision Authority, valid.[31]

De lege ferenda it seems that it is necessary to introduce to the Banking Act a provision which clearly would have resulted in possibility failure of the bank to comply with the content of recommendations. Indeed compliance with the recommendations should be fully based on the rule of *comply or explain* where banks could not apply to the Polish Financial Supervision Authority recommendation, but in a such a case at the request of Polish FSA a bank would be obliged to make a proper explanation. The explanation should indicate the circumstances and the reason of being not obliged, as well as the way in which the bank intends to remove the consequences of not applying to the recommendations. Therefore, banks should be given the option enshrined in law, to demonstrate in the process of supervisory review and evaluation that despite the failure specified in the recommendation solutions objective indicated in it was realized by adopting another alternative solution that is not in contravention of action recommended by Polish Financial Supervision Authority. It should be de *lege ferenda*

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[26] *M. SZARANIEC*, Self-regulation of bancassurance services market as a result of irregularities in their functioning (in :) "New types of services in business", ed. A. Walaszek-Pyzioł, T.Długosz, Difin, Warszawa 2014, pp. 178-194.

[27] The Act of 29 August 1997 Banking Law (Dz. U. 2015-, i.e., Pos. 128 as amended.)_

[28] The Act of 9 August 2011 on payment services (OJ 2011 No 199, item. 1175, as amended.).

[29] Act of 5 November 2009 on Credit Unions (OJ 2012-, i.e, pos. 855 as amended.).

[30] Otherwise the matter in art. 137 item 3 of the Banking Act, a provision which is directly binding for banks about the liquidity standards and other standards of acceptable risk in the banks' operations.

[31] M. OLSZAK, Banking prudential standards, Białystok 2011, p. 185.

introduced to the Banking Act a statutory duty to consult the draft recommendations with banks and institutions of self-government.

These proposals remain highly valid in terms of new developments in this regard in the insurance economy market.

IV. THE LEGAL BASIS OF ISSUING RECOMMENDATIONS IN THE LAW BUSINESS INSURANCE

Prior to January 1, 2016, PFSA did not have a clear legal basis to issue recommendations in relation to insurance companies. The literature indicates that recommendations of 2014 issued by the supervisory authority, and addressed to insurance companies, had no legal grounds.[32]

In Art. 365 of the Act on Insurance and Reinsurance[33], which will come into force on 1 January 2016, the Financial Supervision Authority will be granted with the right to issue recommendations addressed to the insurance and reinsurance undertakings only to the extent necessary for the implementation of guidelines and recommendations of EIOPA (European Insurance and Occupational Pensions Authority) issued pursuant to Art. 16 of Regulation of the European Parliament and the EU Council No. 1094/2010 of days 24 November 2010 on a European Supervisory Authority, amending Decision No 716/2009/EC and repealing Commission Decision 2009/79 / EC. EIOPA may issue guidelines and recommendations addressed to competent supervisory authorities of the insurance market, which operate in the Member States.

The competent national authorities and national financial institutions are required to make every effort to comply with the guidelines (Art. 6, paragraph. 3 of the aforementioned regulation). Within two months after issuing the guideline the competent national authority shall confirm whether it complies or intends to comply with that guideline. If it does not comply, and does not intend to comply, EIOPA shall be informed, with clear reasons stated. It should be noted that the provisions of EU regulation - in accordance with Art. 288 of the TFEU - are directly applicable and require no implementation into national law.[34] The existence of EIOPA guidelines does not results in the necessity to equip the national supervisory authorities with the power to issue guidelines. Nevertheless EIOPA shall be informed guidelines have been indicated as a justification for strengthening the remit of the Financial Supervision Authority in relation insurance undertakings and justify for the explicit legitimacy to act in this way on the market - following the example to regulations of art. 137 Section 5 of the Banking Act.

Thus, for the Financial Supervision Authority to have, based on the law, possibility to place guidelines and recommendations the EIOPA to the Polish insurance market for the national insurance and reinsurance undertakings, it became necessary to grant the Financial Supervision Authority such an instrument of influence. It should be emphasized that the new law proposes to give PFSA the right to issue guidelines the extent necessary for the implementation of guidelines and recommendations of the EIPOA issued pursuant to Art. 16 of Regulation 1094/2010 to:

- ensure compliance of the insurance and reinsurance undertakings with the law,

[32] See more: E. KOWALEWSKI, M. ZIEMIAK, On the legality of the guidelines of the Financial Supervision Commission, Wiadomości Ubezpieczeniowe 2014, no 3, p. 15-30.

[33] The Act of 11 September 2015 on the insurance and reinsurance activities, hereinafter referred to as Act on Insurance.

[34] D. MAŚNIAK, Supervisory Recommendations and Guidelines of the Financial Supervision Authority - dialogue supervised, or "soft law" with a hard result, Prawo Asekuracyjne no 2/ 2015, p.6.

- prevent the violation of the interests of policyholders, insured, beneficiaries or those entitled to insurance contracts,
- limit the risk inherent in the operations of the insurance or reinsurance undertaking,
- ensure the continuing ability of the insurance undertaking to perform its obligations.[35]

Thus, the draft envisages granting the Financial Supervision Authority the right to issue guidelines within a wide range wherever the supervisory authority determines violations of the law or the interests of policyholders, insured, beneficiaries and any threats of fulfilling the obligations. In the explanatory memorandum of the bill was raised that the introduction of such guidelines would allow a quicker response (communication) of the supervisory authority when it identifies a risk of unlawful conduct of insurance or reinsurance without the necessity to bring individual cases. It also means that the supervised entities will be insured with simultaneous access to knowledge about the position of the supervisory authority in the proper functioning of the insurance market.[36]

An important innovation in the field the discussed art. 365 is the possibility of the insurance or reinsurance undertakings to declare that they do not intend to comply with the recommendations. [37] This applies to a situation in which the undertakings do not apply to the recommendations of the supervisory authority issued within the implementation of the guidelines and recommendations of the EIPOA.

In this case, the insurance company is obligated to inform the FSA of this fact, and the FSA has an obligation to publicize (disclose) the information received.[38]

Such a legal solution confirms the previous opinions in the doctrine that the recommendations are the standards prescribed, recommended by the PFSA proceedings, compliance with which may not be ordered by the imposition of sanctions by the supervisory authority. These recommendations should be considered as guidelines for the proceedings which are an instrument for preventative effect on the insurance practice. No less in the adopted regulation can be discerned introducing penalties for non-complying with the insurance companies addressed to them by the PFSA recommendations. The penalty is a result, however, from the Act and it imposes on the Financial Supervision Authority the obligation to present the information on insurance companies, which had decided that they would not comply with the published recommendation of the supervisory authority.

Such a publicized information may represent a barrier for acquiring new customers by insurance companies, and for existing customers an inspiration to change the insurer in the future. In the case of issuing recommendations by the Financial Supervision Authority for the purposes referred to in Art. 363 paragraph. 1 point 2 Act on Insurance Activity the legislator also envisages the possibility to withdraw the possibility to comply with the issued guidelines. In this case, however, the legislature imposes on insurance an obligation to achieve the objectives of the procedure specified in content of the guidelines in other ways. Information, to the extent of not complying with the content of the recommendations and information on the ways to achieve the objectives set out in the recommendation, the insurance company is obliged to submit to the supervisory authority, which shall be both made public. It should be emphasized that the provision of this information is the responsibility of insurance companies.[39] Under these assumptions the recommendations issued by the Financial Supervision Authority and addressed to insurance companies in connection with the

[35] Art. 363 paragraph. 1 point 1 and 2 the Act on Insurance Activity.
[36] See the substantiation of the project: https://legislacja.rcl.gov.pl/docs//2/12269454/12276884/12276885/dokument150673.pdf
[37] See: Art. 363 paragraph. 4 of the draft Act on Insurance and Reinsurance.
[38] Art. 365 paragraph. 4 of the Act on Insurance Activity.
[39] Art. 365 paragraph. 5 the Act on Insurance Activity.

objectives specified in the proposed Art. 365 paragraph. 1 point 2 the insurance company does not have an actual possibility to withdraw from the content of that recommendation. Indeed, the analysis of the content of the discussed provision that it must realize that content by other possible methods than those that indicated by the Financial Supervision Authority.

To sum up, it should be noted that a division in the proposed provision of the recommendations in Art. 365 Act on Insurance Activity the Financial Supervision Authority on those whose contents insurance is not necessarily to be realized[40] from those whose contents must be pursued is unclear, i.e. achieving these objectives, the implementation of which the supervisory authority has issued recommendations for (even if it means the means that had been indicated). [41]

The question then is what happens in a situation where the insurance undertaking does not comply with the content of the recommendations issued by the Financial Supervision Commission under Art. 365 paragraph. 1 point 2 of the Act on Insurance Activity that will be detected in the framework of the subsequent supervision. From the gist of the recommendations it is indicated that they do not belong to the group of acts legally binding and cannot the Financial Supervision Authority, by means of supervisory measures, require obliging to its content. Therefore it would be appropriate for the legislature to introduce a provision in a situation of not providing any information about the intention to not comply with the recommendation, authorizing the supervisory authority to publish such information on its own initiative, as a result of the inspection.

In fact a situation where the insurance company does not implement the obligation to provide information for the Financial Supervision Authority of not applying to the recommendations can be imagined.

In the Act a statutory obligation to consult the draft of recommendations with stakeholders and institutions, and evaluating the anticipated effects (costs and benefits) of social and economic development of the regulations prior to making the draft guidelines has been introduced.[42]

SUMMARY

The codes of good practice developed by local governments are certainly good practice and as such should be created. They are the result of effort and compromise of entities undergoing such regulation. In some cases, however, a number of irregularities that appear in the financial market, e.g. In the case of *bancassurance* they are not sufficient.

Therefore, recommendations of the Supervisory Authority (the Financial Supervision Authority) seem to be a necessary legal instrument of a non-governing nature addressed to banks and insurance companies. Their general and abstract nature of the supervisory authority is the answer to the perceived threat to the functioning of banks or insurance companies in the dimension beyond a single entity, as well as to protecting financial services of the customer. It is important, however, that the control of the issuing of recommendations by the PFSA to be uniform for banks and insurance companies. Currently, insurance law provides a possibility to withdraw of an insurance undertaking from the implementing the content of recommendations, sanctions as public disclosure of information about the insurance company, which has declared that it does not comply with the issued recommendation a statutory obligation to achieve the objectives of the procedure specified in content of the guidelines by

[40] The recommendations based on Art. 365 paragraph. 1 point 1of the Act on Insurance Activity.
[41] The recommendations based on Art. 365 paragraph. 1 point 2 of the Act on Insurance Activity.
[42] Art. 365 paragraph. 1 and 2 of the Act on Insurance Activity.

other means and a statutory obligation to consult the draft of recommendations with stakeholders and institutions.

Given the above, one would postulate the possibility to propose a statutory guarantee of the principle of comply or explain in relation to the recommendations issued by the Financial Supervision Authority for the banks.

Surely this will contribute to the harmonization and consistency between the solutions in this regard on the financial market, improve its security and protect the financial services of the customer.

KĽÚČOVÉ SLOVÁ
Bankové poistenie, odporúčania, finančný dohľad, trh v oblasti poisťovníctva, trh v oblasti bankovníctva.

KEY WORDS
Bancassurance, recommendations, financial supervision, insurance market, banking market

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