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## SUPERVISORY ARBITRAGE ON THE EU INSURANCE MARKET

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**Summary:** Supervisory arbitrage occurs when entities search for gaps in regulations and allocate their activities in a different country due to the “less restrictive” regulations in terms of supervising their activities. On the EU insurance market there is a risk of supervisory arbitrage as the result of differences between countries, both in the methods of insurance supervision organization, the exercised supervision practices and the methods for supervisory tasks’ implementation. In consequence, supervision institutions may compete in supervisory “indulgence”, thus pushing out a “better” supervisory environment in favour of a worse one and adverse selection related to the possibility of allocating activities outside the EU, which increases the systemic risk and can disrupt the functioning of the entire internal market.

**Keywords:** supervision, arbitrage, insurance market.

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### 1. Introduction

Searching for the market which offers the least restrictive conditions for running a business represents the natural behaviour of every entity. If a given entity is subject to regulations and supervision by the state administration authorities, it will search for an environment perceived as friendly in terms of the legal regulations in force and for the mode of supervisory process implementation, which is supposed to be beneficial and favourable. On the EU insurance market, all insurance institutions are subject to common regulations and supervision, however, there are differences between particular countries, both in the Community regulations and in the positions presented by the supervisory authorities, which can result in the occurrence of supervisory arbitrage.

The objective of the study is to characterize the phenomenon of supervisory arbitrage, to provide examples confirming its occurrence on the EU insurance market<sup>1</sup> and to discuss the threats to the insurance market resulting from such an occurrence.

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<sup>1</sup> The problem of regulatory and supervisory arbitrage on the EU financial market was the subject of the author’s interest in other studies.

## 2. The essence of supervisory arbitrage

The concept of supervisory arbitrage is commonly known and applied. Such arbitrage takes place when discrepancies in legal regulations and differences in the levels of regulatory restrictiveness in various markets are present. Regulatory arbitrage can be analyzed on a supranational scale (differences between countries) and on a domestic scale when differences appear in an area common for the functioning of similar sectors.

The differences in regulations which have an impact on the possibility of regulatory arbitrage presence may refer to diverse areas of functioning, for example non-uniform requirements referring to market entry [Rao, Yue, Ingram 2011, p. 366], a different tax burden [Ross 1976, pp. 341-360] or the non-harmonized procedures of administration supervision authorities. The appearance of arbitrageurs, i.e. entities interested in taking advantage of the differences between markets, is determined by the appropriate scale of operations [Tarczyński, Mojsiewicz 2001, p. 242] and the freedom of functioning between the markets (the absence of barriers and limitation in the allocation of conducted activities).

Supervisory arbitrage is not a commonly used term nor a precisely defined one. It is frequently used interchangeably with the term regulatory arbitrage. Supervisory arbitrage is, however, a narrower concept and can be referred to when entities subject to regulations are also supervised by the state administration authorities. There exist strict relations and dependencies between the phenomena of supervisory and regulatory arbitrage, which are presented in Table 1.

**Table 1.** Differences and common characteristics of regulatory and supervisory arbitrage

Type of arbitrage	Regulatory arbitrage	Supervisory arbitrage
Regulations in the sphere of control and disciplinary mechanisms in regulatory compliance	Prudential regulations (legal environment)	Prudential supervision (supervisory process) – regulatory criteria – free interpretation
Arbitration moment	<i>a priori</i> (prior)	<i>a posteriori</i> (posterior)
Behaviour of the supervised entity	Negative selection	Moral hazard
The selection criterion for the allocation of activities	Legal environment, powers granted to the supervisory authority	Practical usage of powers granted to the supervisory authority
The selection determinant for the allocation of activities	Regulatory restrictiveness (legal regime)	“Restrictive” or “soft” supervision (approach of the supervisory authority)
Assessment methods adopted by the supervisory authority	Restrictive approach (depending on regulations)	Soft approach (depending on the supervisory authority’s approach)
Consequences for the market	Regulatory competition	Supervisory competition

Source: [Kurek 2013].

Regulatory and supervisory arbitrage are of equal standing in the part which covers regulations specifying tasks to be performed by the supervision authorities and their organization, however from the perspective of procedures adopted by the supervision authorities, the tools used, as well as the supervisory activities and practices which follow, it is advisable to apply a completely different term – supervisory arbitrage.

### 3. The characteristics of supervisory arbitrage on the EU insurance market

Theoretically meeting one of the criteria underlying good supervision, i.e. ensuring “equal conditions of supervision” [*Europäische Integration...* 2006, pp. 4-7], the possibility of supervisory arbitrage occurrence on the European Union forum is excluded. However, owing to the existing freedom in the allocation of resources and an appropriate scale of performance, the supranational insurance institutions may act as arbitrageurs seeking attractive environment in terms of running a business and taking advantage of the differences in the level of supervisory procedures restrictiveness, since such variations do occur. The differences in supervisory authorities’ organization and conducted activities which determine the interest of an arbitrageur (“encouragement” for supervisory arbitrage) can be characterized based on three factors:

- detailed regulations covering the organization of supervision,
- the applied practices and adopted supervisory procedures,
- the approach presented by supervisory authorities (intensity and “restrictiveness of supervisory tasks implementation).

The possibility of taking advantage of the differences in supervisory restrictiveness, in terms of the detailed regulations referring to the **supervision organization**, was already present in the background of the EU functioning. Along with the directives of the third generation (the establishment of the Single Insurance Market in 1994) [Sterzyński 2004, pp. 71-72], supervision over the functioning of foreign insurance institutions was taken away from the host country and moved to the home country, which resulted in the fact that in the area of every EU Member State the supervisions exercised in the home and in the hosting country coexisted next to each other [Monkiewicz 2004, p. 9], whereas the appropriate supervision authority is the one coming from the country of the financial institution’s origin. Due to the fact that the EU countries did not establish one common supervisory authority, the issues related to supervision performance were supplemented by the principle of supervision rules harmonization, as well as the bilateral and multilateral cooperation of supervisions [*Banki...* 2001, p. 32]. Such a situation resulted in the possibility of insurance institutions taking advantage of the differences in supervisory restrictiveness and the appearance of the supervisory arbitrage phenomenon at supranational level.

The organizational diversification of methods for exercising supervision in the area of the European Union (integrated supervision, sector specific supervision), allowing for the appearance of supervisory arbitrage, is also present in the case of supranational financial groups with the participation of insurance entities. In one country such a group is covered by the supervision of an integrated institution, whereas in another (in the case of a sector-oriented supervision organization) it is subject to both insurance supervision and financial supervision (but can also be covered by another supervision authority, e.g. retirement supervision), since various supervision institutions have powers of supervising particular subsectors of the financial sector (non-integrated financial supervision is present, among others, in the Czech Republic, Greece, Ireland and Holland). This method of supervision organization can become the determinant for the choice of insurance activities allocation and result in the occurrence of supervisory arbitrage.

**The applied practices and adopted supervisory procedures** are related to powers granted to the supervision authorities which can be diversified depending on the local jurisdiction. In accordance with established EU rules, the domestic supervision authorities are expected to act “in line with the specified practice applied in the home country based on regulations provided at Community level” [Directive 92/49/EEC..., Art. 9]. An example of the differences allowing for the occurrence of supervisory arbitrage is the solution aimed at the elimination of the pro-cyclicality phenomenon (the so-called anti-cyclicality buffer), which remains at the discretion of domestic supervisory authorities. The bodies are entitled to impose an additional capital charge for insurance institutions, depending on the development of the circumstances in the local market. This can result in a situation when insurance companies will move their activities to a country in which the supervisory authorities do not function too conservatively and do not impose capital charges at all or set them at an acceptable level (from the perspective of the supervised entity).

Supervisory arbitrage can also occur in the objective approach to the operations performed by insurance institutions, where launching an insurance product on the market can require approval or administrative permission, which is not required by foreign insurance institutions since they are only obliged to meet the requirement of their activities' notification. Another example of supervisory practices diversification originates from the collective investment fund market in which the registration of a capital fund in Luxemburg (the largest European fund market) takes 2-3 weeks, while in other countries it can take up to several months in Poland 4-5 months) and is connected with arduous administrative procedures (approval for the establishment of each fund, consent for making any statutory amendment, etc.). The inequality of the competitive conditions results in the fact that insurance institutions running insurance capital funds can transfer their operations to countries offering more “indulgent” requirements and less burdensome procedures associated with their activities.



**The approach of supervision authorities** (the intensity and “restrictiveness” of the method of implementing supervisory tasks) results from the customs and traditions of the supervisory authorities functioning in particular countries within the framework of the powers granted by the legislator. The special case of supervisory arbitrage occurrence in the insurance market is represented by the approach to the assessment and control methods of insurance institutions’ performance provided for in the Solvency II Directive [Directive 2009/138/EC...]. Solvency I was based on the top-down set parameters following the top-down regulated sanction mechanism which, by definition, did not allow for assessment individualization and did not provide for derogations from the imposed procedures. The soft approach offered by Solvency II and resulting in the supervision authority assessment and performance dependent on an individual risk profile adequate for the supervised entity, provides for the right to “depart” from certain standards or assumptions and even “encourages” supervisory arbitrage to occur. An individual approach in the assessment of activities performed in some areas of supervised processes can serve as the example: the rule of prudent investor for capital investments [Directive 2009/138/EC..., Art. 132], the validation of internal models [Directive 2009/138/EC..., Art. 112-126], the acceptance of the eligible own funds position Directive 2009/138/EC..., Art. 100-101]. The assessment of investments made, the final form of an internal model (the possibility of calculating capital requirements on its basis, implementation) and also the verification of own funds position, constituting the coverage of capital requirements, depends on the supervisory authority’s control and approval. The staff of supervisory authority analyze relations between the financial situation and the most important types of risk and the total risk incurred by an insurance institution. This particular area may become the reason for differences in terms of assessment between the supervision authorities in various countries. Some supervision authorities tend to present a “strict” approach to the assessed areas, while others a “softer” one, which may open space for arbitration. Possible differences in supervisory tasks implementation methods also appear in relation to an expert interpretation of the supervised supervisory processes, since the “professional opinion of individuals presenting adequate knowledge and experience in terms of risk types related to insurance activities” [Final Report... 2013] can be non-uniform, while the performed quality assessment may also be different depending on the supervisory authority. From the perspective of the level of restrictiveness of the supervisory activities initiating the supervisory arbitrage, an opportunity for choosing a soft approach to the mechanism of possible supervisory sanctions, which are not centrally controlled, also represents a distinctive example. A uniform system of penalties does not exist on the EU forum. A sort of “charges schedule” is also absent, whereas the extensive discretion of the supervising authorities in this matter means that some of them may impose “harsher” penalties, whilst others choose “softer” ones.

In order to facilitate both initiating and running insurance activities, it is necessary to “eliminate the most significant differences in legislation of particular Member

States” [Directive 2009/138/EC..., Preamble], however, the differences in the methods of exercising supervision cannot be eliminated solely by the underlying regulations. It is, among others, for this particular reason that EIOPA [Regulation (EU) No 1094/2010...] was appointed, which is mainly responsible for coordination and advisory tasks. Its supervisory competencies are strictly limited and present a subsidiary nature against the activities performed by the domestic supervisory authorities. This means, however, that the supervision of the insurance market is still of a national dimension and thus opens space for supervisory arbitrage by offering the possibility of freedom in the supervision authorities’ operations and the right to take action on their own. Establishing guidelines for the domestic supervision authorities [Regulation (EU) No 1094/2010..., Art. 16] covering procedures in the course of preparing the application of Solvency II Directives provisions is a vital component of the supervisory activities harmonization on the EU forum, however, within the framework of its tasks EIOPA does not exercise any direct supervision over insurance institutions<sup>2</sup>. Even though it does have the possibility of issuing binding decisions for domestic supervision authorities in particular situations, these possibilities are so limited that there is still space for such supervisory “lawlessness” which provides for the supervisory arbitrage occurrence.

#### **4. Supervisory arbitrage in the EU market – potential threats**

Entities subject to supervision choose the environment which is most favourable (comfortable) for their allocated activities and the powers granted to the supervisory authorities, in the course of establishing the EU regulations, influence such approaches of the supervisory authorities which facilitate supervisory arbitrage to occur. The absence of uniform procedures in supervisory activities and the possibility for avoiding limitations introduced in one country and performing transactions in another one, results in higher costs for observing the regulations in force by insurance institutions, especially those operating on several markets, since they have to offer diverse activity profiles in order to meet the various requirements imposed by the supervisory authorities functioning in different EU countries.

On the EU scale, supervisory arbitrage can result in a situation based on supervisory competition – similar to an undesirable phenomenon of regulatory competition [Carbo-Valverde, Kane, Rodriguez-Fernandez 2009, pp. 11-13]. Supervision authorities, by succumbing to market pressure, take part in the so-called supervisory “race” and compete against each other in terms of how liberal their applied supervisory practices are (supervisory “indulgence”). Supervisory

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<sup>2</sup> There are, however, exceptions to the rule and in exceptional cases EIOPA has the right to prohibit an insurance institution from offering some products or performing financial operations (leaving out an appropriate supervision authority) if they are recognized as detrimental to the functioning of the market.

competition is by all means possible at the level of the entire European Union where legal regulations supply supervisory authorities with soft competencies. In the entire EU, the situation of displacing better “supervisory environment” for the sake of a worse one [Nguyen, Molinari 2009, p. 50] can also occur, which is disadvantageous from the perspective of the remaining market participants (clients, contractors). When supervised entities operate in conditions of supervisory competition, the proper functioning of the insurance market can be shaken up, as well as disturbing the maintenance of the established supervisory tasks. This may result in a growing number of incorrectly assessed insurance institutions because adequate protective mechanisms will be missing in their risk profile, which increases the systemic risk and can disturb the effective functioning of the financial market.

Adverse selection represents the consequence of supervisory arbitrage in the global market which offers opportunities for choosing the place of activities allocation. Insurance institutions which function in the EU in conditions of even slight dysfunctions in terms of institutional and legal system, lose “systemic” distance to competitors outside the EU and thus can allocate their activities outside the EU, in more “attractive” countries in terms of supervision, which can result in losses for the EU insurance market.

## 5. Final remarks

From the perspective of supervised insurance institutions, meeting every supervisory requirement is a cost for them and for this reason they react to “strict” supervision by searching for methods to minimize costs and investigate possibilities for the reduction of arduous procedures connected with supervisory activities.

The absence of a coherent and convergent system for exercising supervision at EU level may result in (and in fact does result in) the emergence of diverse domestic solutions, detrimental for the correct functioning of the EU market as a whole. As long as the supervising authorities have to function in an environment of various legal systems, diversely applied tools, internal restrictions and different, even though more and more harmonized, methods (Solvency II implementation), the differences in regulations and methods for exercising supervision will pose a threat to supervisory arbitrage.

Supporting coherence in supervision appears to be one of the biggest challenges faced by the insurance market regulators and supervisors. Even if the common regulatory framework constitutes the correct basis, equal competition conditions can be obtained by more coherent and uniform decisions in terms of the current application and enforcement of EU legislation towards the supervised entities, as well as the practices and approaches of supervision authorities within which a significant role – in the case of differences between the supervision authorities – is played by mutual verifications and mediatory mechanisms.

Although there are only few who question the role played by the supervisory environment on an insurance market, the excessive regulating of supervisory authorities, as well as granting powers to them, does not fit the changing world of European Union finance. The establishment of over-restrictive regulations and supervisory procedures gives way to supervisory arbitrage and the misuse of regulations by domestic “interpretations”, which can distort them and still the “financial innovations can be ahead of the skills presented by both regulators and supervision authorities in performing their roles” [Lascelles 2006, p. 92].

Instead of the restrictive insurance supervision formula, the implementation of such regulatory solutions can be postulated which, most of all, require transparency from the insurance sector (through information obligations) and offer incentives for the insurance institutions environment to effectively exercise market supervision and corporate governance. It can be envisaged that the self-regulating market component will influence, to a greater extent, the basic relations between the insurance market parties where there will be no space for supervisory arbitrage.

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## ARBITRAŻ NADZORCZY NA RYNKU UBEZPIECZENIOWYM UE

**Streszczenie:** Arbitraż nadzorczy ma miejsce wówczas, gdy podmioty poszukują luk w regulacjach i dokonują wyboru miejsca prowadzonej działalności w innym państwie z powodu łagodniejszych sposobów nadzorowania ich działalności. Na rynku ubezpieczeniowym UE występuje ryzyko zaistnienia arbitrażu nadzorczego ze względu na różnice między krajami zarówno w sposobach organizacji nadzoru ubezpieczeniowego, w praktykach nadzorczych, jak i w sposobach realizacji zadań nadzorczych. W następstwie może dochodzić do konkurencji między organami nadzoru w pobliżności nadzorczej, wypierania lepszego otoczenia nadzorczego na rzecz gorszego oraz negatywnej selekcji związanej z możliwością wyboru miejsca działalności poza UE, co zwiększa ryzyko systemowe i może zakłócić funkcjonowanie rynku wewnętrznego jako całości.

**Słowa kluczowe:** nadzór, arbitraż, rynek ubezpieczeniowy.