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Notion of "Large Risks" – Legal Considerations in the Context of Polish and European Law

The notion of large risks historically appeared for the first time in the context of the regulatory issues concerning insurance and reinsurance activity in the European Union when it was introduced by the second non-life insurance Directive, enabling to take the first steps in the direction of the EU internal financial market. Nowadays, the role of the "large risks" notion has fairly exceeded this primary goal and is gaining more and more dimensions in the contemporary regulation of the insurance market. One of the most important changes seemingly consists in drawing the line between the professional insurance and those cases where the protective instruments must be applied to the policyholder and the insured. Through the implementation of the Solvency II Directive and the direct application of the Rome I and Brussels I bis Regulations, it has penetrated the systems of all the EU Member States. The evolution which the notion of large risks has undergone during the last 40 years shows its increasing importance in defining the limits of freedom to shape the insurance contract. The change confirmed in the Insurance Distribution Directive seems irreversible in its tendency and further steps in this direction can be expected.

Keywords: large risks, consumer, distribution, insurance.

1. Introduction

The notion of large risks historically appeared for the first time in the context of the regulatory issues concerning insurance and reinsurance activity in the European Union. Introduced by the non-life insurance Directive of the second generation, it enabled to take the first steps in the direction of the EU internal financial market and applying its core principle of single licence. Nowadays, the role of the "large risks" notion has fairly exceeded this primary goal and is gaining more and more dimensions in the contemporary regulation of the insurance market. One of the most important approaches seemingly consists in drawing the line between the professional insurance and those instances where the protective instruments must be applied to the policyholder and the insured. The aim of this article is to analyse the notion of the "large risks", the legal context in which it appears in the insurance law and practice, as well as to propose some *de lege ferenda* solutions.

2. Notion of large risks – from financial approach to legal definition

As mentioned at the beginning, the notion of large risks, appeared for the first time in the second non-life Directive. However, before it found its place in the Directive, there had been various attempts to define "large risks", mostly from the point of view of insurance finances and risk measurement. The pro-

posed context of analysing the "large risks" for the purposes of the insurability focused on analysing the size of the risk from the linguistic, legal, economic, statistical and risk management points of view[1]. However, the concept was far from being clear and unequivocal in its meaning.

For example, B. Berliner stated that "*common terms indicating the size of risks such as, for example, "large risk", "small risk", "bagatelle risk" are, of course, clearly connected with the abstract general concept "size of a risk" and, therefore, also share its fate as a conceptual Tower of Babel. They contribute to the familiar state of talking at cross purposes. Only rarely will two discussion partners understand exactly the same thing by the term "large risk". It is, however, the case that terms like "large risk" or "small risk" are usually connected with absolute and not relative figures, i.e. they are expressed in money units and not in percentages*"[2]. Basing on the approach of the risk size, it was proposed to take into account these factors as a measure for a maximum size of a loss event, where the risk is regarded in probability terms, i.e. *"the risk increases as the probability of occurrence of a loss event becomes greater and the loss amount to be expected in the event of loss becomes higher*"[3].

As a result of the above analysis, a close connection between the insurance (and risk transfer) notion and size of the risk has been determined. Therefore, the size of the risk is crucial for many aspects of insurance activity in its general understanding. "*The size of a risk with all its objective and subjective, deterministic and stochastic aspects is an important cause of insurance. Insurance can partly be explained and defined on the basis of the concept "size of a risk". Spread and breakdown of risk are methods of insurance aimed at reducing the size of risk to ensure that a realization of a large risk can be borne without serious consequences*"[4].

It has also been admitted that *"the concept "size of a risk" cannot be fully covered by one definition. It can be analysed in its objective and subjective aspects and can be ordered in such a way that large risks are larger than medium size, small or bagatelle risks for nearly all risk carriers and applicants for cover. Taking this ranking as a starting point, we shall from now on only consider the partial set of risks with large size which we call "large risks" with respect to a certain professional risk carrier or an applicant for cover respectively*"[5].

Do we continue analysing the large risks from the same perspective? Apparently not, at least when we ask the lawyers. The concept of large risks has taken on a completely formal meaning and has detached from its primarily functional approach.While the above and many other analyses conducted for the pur-

[1] B. Berliner, "Large Risks and Limits of Insurability', The Geneva Papers on Risk and Insurance, 10 (No 37, October 1985), p. 318.
[2] *Ibidem*, pp. 313–329.
[3] *Ibidem*, p. 314.
[4] *Ibidem*, p. 321.
[5] *Ibidem*, p. 321.

poses of insuring large risks from the economic and financial perspectives are of crucial value for the insurers as the risks carriers[6], they do not refer to the legal meaning of the "large risks" notion and legal consequences of applying thereof. Moreover, the notion of 'large risks' as a legal concept had not existed before being proposed by the European Union in the second non-life insurance Directive[7].

The legal approach accompanied the first attempts to create an internal financial market, including insurance. The idea standing behind this concept, as expressed in the recitals to the Directive, was as follows: "*whereas it is desirable to prevent the uncoordinated application of this Directive and of Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance (6) from leading to the existence of three different systems in every Member State; whereas, therefore, the criteria defining "large risks" in this Directive should also define risks likely to be covered under Community co-insurance arrangements*"[8].

As a result, the second non-life insurance Directive, which introduced certain changes to the first non-life insurance Directive, supplemented *inter alia* also Article 5 of the first non-life insurance Directive[9]. Article 5 got the new enlarged wording, according to which the large risks have been defined as (i) risks classified under classes 4, 5, 6, 7, 11 and 12 of point A of the Annex; (ii) risks classified under classes 14 and 15 of point A of the Annex, where the policy-holder is engaged professionally in an industrial or commercial activity or in one of the liberal professions, and the risks relate to such activity; and finally as (iii) risks classified under classes 8, 9, 13 and 16 of point A of the Annex in so far as the policy-holder exceeds the limits of at least two of the following three criteria: (until the end of the first stage ending 31 December 1992) – balance-sheet total: 12,4 million ECU, – net turnover: 24 million ECU, average number of employees during the financial year: 500; (and at the second stage: from 1 January 1993): balance-sheet total: 6.2 million ECU, net turnover: 12.8 million ECU, average number of employees during the financial year: 250. If the policy-holder belongs to a group of undertakings for which consolidated accounts within the meaning of Directive 83/349/EEC (7) are drawn up, the criteria mentioned above shall be applied

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[6] See also B. Biais, T. Mariotti, J.C. Rochet & S.Villeneuve, (2010), "Large risks, limited liability, and dynamic moral hazard". Econometrica, 78(1), pp. 73–118, doi: 10.3982/ECTA7261.

[7] D. Weber-Rey, "Harmonisation of European Insurance Contract Law, in:The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice" – ed by Stefan Vogenauer and Stephen Weatherill,Studies of the Oxford Institute of European and Comparative Law, Hart Law Publishing 2006.

[8] Recitals to the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC; OJ L 172, 04/07/1988, p. 0001–0014.

[9] First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ L 228, 16.8.1973, pp. 3–19.

on the basis of the consolidated accounts. These relate to transport risks in terms of casco and liability, i.e. risks in rail, sea and air transport, as well as some financial risks. Apart from that, each Member State could add to the category mentioned under (iii), risks insured by professional associations, joint ventures or temporary groupings[10]. The uniform interpretation of the large risk criterion, based on the first and second non-life insurance Directives has been weakened by the possibility granted to Member States to extend the definition of large risks (Article 5 letter D, third sentence of Directive 73/239), although its reinforcement in turn guaranteed reference to risks recognized as large directly in the Directive and not based on the above-mentioned competence standard[11].

The notion of large risks appeared then as well in the Motor Directive, which provided for the application of that concept in the compulsory motor insurance. According to its recitals,(subject to the provisions of the said Directive concerning compulsory insurance), "*it is appropriate to provide for the possibility of large risk treatment, within the meaning of Article 5 of the said Directive, for the said insurance class of motor vehicle liability, as well as large risk treatment should also be envisaged for insurance covering damage to or loss of land motor vehicles and land vehicles other than motor vehicles and finally provided an express approval for including those classes in the list of classes which may be covered by way of Community co-insurance*". Nevertheless, Member States were granted a possibility of transitional arrangements for the gradual application of the specific provisions of this Directive relating to large risk treatment for certain insurance classes, including risks covered by co-insurance[12].

The definition included in the first non-life insurance Directive has been consequently repeated in Article 13 point 27 Solvency II Directive[13]**.** The reference of the "large risks" criterion to the insurance classes set out in the Solvency II Annex is of importance to the integration of the extent of this concept and its legal consequences, in particular where the notion of "large risks" in economic sciences has been used in an inconsistent

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[10] On the legal classification of the non-life insurance risks see as well K. Malinowska, "Zarządzanie ryzykiem w ubezpieczeniach mienia", in: "Ryzyko ubezpieczeniowe. Wybrane zagadnienia teorii i praktyki", ed S. Serwach, Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2013, p. 125 *et subsq*.

[11] *Each Member State may add to the category mentioned under (iii) risks insured by professional associations, joint ventures or temporary groupings. Article 6 For the purposes of applying the first subparagraph of Article 15 (2) and Article 24 of the first Directive, the Member States shall comply with Annex 1 to this Directive as regards the matching rules.* See also M. Kropka, "Kolizyjnoprawna regulacja umowy ubezpieczenia w Rozporządzeniu Rzym I", Wydawnictwo Uniwersytetu Śląskiego, Katowice 2010, p. 138.

[12] Council Directive 90/618/EEC of 8 November 1990 amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance; OJ L 330, 29.11.1990, pp. 44–49.

[13] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (Text with EEA relevance), OJ L 335, 17.12.2009, pp. 1–155.

manner[14]. As can be seen from the above, since its beginning the concept of large risks has been relevant only to the non-life insurance as included in Section II of the Annex to the Act. Thus, it does not cover life insurance regardless of the criteria of the policyholder[15].

The concept of large risks in the regulations governing insurance intermediation has appeared for the first time in the Insurance Distribution Directive (IDD). In the Insurance Mediation Directive[16], the predecessor of the insurance distribution directive, the large risk criterion did not occur, so the obligations of intermediaries towards each type of customer were the same. The current change can be partly attributed to the regulation of all distributors, not only intermediaries, but also insurers who have already managed to get used to the facilitations related to the application of the large risk criterion. Mostly, it seems to result from the fact that the criterion of large risks proved to be efficient in various fields of the integration of insurance law in the European Union. The definition used in the IDD is made by reference to the Solvency II Directive. In Article 2, Definitions, point (16) "large risks" mean large risks as defined in Article 13 point 27 of Directive 2009/138/EC.

In the Polish law, the definition of large risks was included in the Act on insurance and reinsurance activity enacted on 11 September 2015, in Article 3 sec. 1 point 6) (referred hereinafter as "Insurance Activity Act"). As it was mentioned above, it is not an invention of the Polish legislator. However, it is worth emphasizing that the Act on insurance distribution of 15 December 2017 did not refer to any directives but to the definition included in the Polish Insurance Activity Act, defining large risks in a descriptive manner. The comparison between the definitions of Insurance Activity Act and the Solvency II Directive shows that Poland did not use the competence to extend the definition of large risks to professional organizations, neither did it include the financial criteria of the policyholder belonging to the capital group[17].

Having all the above in mind, the following conclusions can be drawn. Firstly, the legal notion of the large risks has been applied in a consistent manner in all the legal acts adopted by the European Union, and secondly, those acts not only concern directly the freedom of providing insurance services and

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[14] See for example T. Aven, "Risk assessment and risk management: Review of recent advances on their foundations (where the issues of the risk quantification have been analysed)", European Journal of Operational Research 253 (2016), pp. 1–13; O. Amundrud, T. Aven, "On how to understand and acknowledge risk", Reliability Engineering and System Safety 142 (2015), 42–47; B. Berliner, "Large risks and limits of insurability", The Geneva Papers on Risk and Insurance, 10 (no 37, October 1985), pp. 313– 329.

[15] See as well M. Kropka, *Kolizyjnoprawna regulacja umowy ubezpieczenia w Rozporządzeniu Rzym I*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2010, p. 129.

[16] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation OJ L 9, 15.1.2003, pp. 3–10.

[17] It provides that: "if the policyholder belongs to a group of undertakings for which consolidated accounts within the meaning of Directive 83/349 / EEC are drawn up, the criteria referred to in the first subparagraph shall be c) are applied on the basis of the consolidated financial statements".

freedom of establishment[18] in the European Union, but also serve numerous other functions, which will be shortly analysed below.

3. Large risks as an indicator of freedom of insurance services

The criterion of large risks has been primarily proposed as a first step towards the integration of the financial markets within the European Union. This was supposed to be its main function. It followed the first measures implemented in the area of the co-insurance offered by the insurers in the EU by the Co-insurance Directive[19]. As stressed in the recitals "*this Directive thus constitutes a first step towards the coordination of all operations which may be carried out by virtue of the freedom to provide services; whereas this coordination, in fact, is the object of the proposal for a second Council Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services, which the Commission forwarded to the Council on 30 December 1975 (3)*". The first reference to the size of the risk has been though made therein, by stating that such coordination **covers only those co-insurance operations which are economically the most important, i.e. those which by reason of their nature or their size are liable to be covered by international co-insurance.**

This approach was confirmed by the second non-life insurance Directive, adopted in 1988, where the freedom of providing insurance services within the scope of co-insurance of the large risks was expressly provided (Article 26 of the Directive). It was also used in the judgements of the European Court of Justice, such as in case C-205/84[20]. The subsequent, third generation of the insurance directives further enlarged the area of the freedom to provide insurance services to include the remaining mass risks (and then it related to both life and non-life insurance).

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[18] There is no doubt that the notion of large risks is important both for freedom of services and freedom of establishment since introducing the criterion; see for example: https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=LEGISSUM:l24028a#KEYTERMS, access 15.11.2018.

[19] Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance, OJ L 151, 07/06/1978, p. 0025–0027.

[20] In this judgement, it was stated that "*in the case of the insurance to which directive 78/473 on co-insurance applies, not only the requirement that the leading insurer be established but also the requirement that he be authorized, which are laid down in the insurance supervision law, are contrary to articles 59 and 60 of the treaty and therefore also to the directive . The case was brought in relation to the application for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the EEC treaty, and in particular under articles 59 and 60 thereof, in relation to the freedom to provide services in the field of insurance, including co-insurance, and under council directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to community co-insurance*". (OJ L 151, p. 25), Commission of the European Communities v Federal Republic of Germany, Freedom to provide services – Insurance, Case 205/84, European Court Reports 1986 – 03755, ECLI identifier: CLI:EU:C:1986:463.

As regards the Solvency II Directive, Article 190 provides for special rules of co-insurance within the field of large risks, including special principles of assessing claims, fixing the amount of technical provisions, special cooperation between the supervisory authorities of the Member States and between those authorities and the Commission, keeping statistical data showing the extent of the UE co-insurance operations in which they participate and the Member States concerned, as well as treatment of co-insurance contracts in winding-up proceedings (Articles 190–196).

4. Large risks as a factor of insurance finances

As was indicated in the second point of the article, the size of the risk is an important criterion in the finances of the insurers with respect to the insurability of the risks. However, the notion of the "large risks" as adopted in the Directives does not seem to stress particularly that purpose. The exception in this respect is the Motor Directive, which **applied the criterion of large risks to the rules of setting the technical reserves. Article 11 provided that** "*…in the case of a large risk within the meaning of Article 5 (d) of Directive 73/239/EEC, classified under class 10, other than carrier's liability, the Member State of provision of services may provide that (1) the amount of the technical reserves relating to the contract concerned shall be determined, under the supervision of the authorities of that Member State, in accordance with its rules or, failing such rules, in accordance with established practice in that Member State, until the date by which the Member States must comply with a Directive coordinating the annual accounts of insurance undertakings, (2) the covering of these reserves by equivalent and matching assets shall be under the supervision of the authorities of that Member State in accordance with its rules or practice, until the notification of a Third Directive on non-life insurance, (3) the localization of the assets referred to in the second indent shall be under the supervision of the authorities of that Member State in accordance with its rules or practice until the date by which the Member States must comply with a Third Directive on non-life insurance*".

As a result, we can state that the legal notion of "large risks"as defined in the Directives, has not had any major impact on the finances of the insurers. Notwithstanding the above, the importance of the criterion of large risks in the development of the internal financial market cannot be overestimated also for other reasons.

5. Large risks and harmonization of the insurance contract law in the EU

After the introduction of full freedom of insurance services by the third generation insurance directives, one may ask whether we still need the notion of large risks. In this respect, we should refer to the period when the works on harmonizing the law of the insurance contract failed. It was decided then to apply a half-measure in the form of introducing the freedom to provide services in the area of large risks as well as to enlarge the scope of freedom by introdu-

cing the free choice of law in the area of large risks insurance contracts, while within the mass risks (remaining ones), freedom was excluded for a long time and still remains quite restricted (see point 6 below). As a result, the cross-border provision of insurance services within the field of large risks has already become a common occurrence. It rarely encounters obstacles arising from differences in European insurance contract law since the parties are free to choose the applicable legislation[21]. Naturally, the notion appears more often in the context of "freedom of services" than in the "freedom of establishment". It is related to the differences in the manner of supervising the cross-border activities, where the lack of host country supervision has been justified by the "large risks". The establishment of a business unit in another EU country entails more host country supervision so the protection of local policyholders is less vulnerable than in case of freedom of services.

While discussing the harmonization of insurance contracts the role of the **Restatement of insurance contract** should be emphasized. This document was prepared by the Working Group of Principles of European Insurance Contract Law first under the leadership of the late Professor Reichert-Facilides and subsequently of Professor Helmut Heiss. The concept adopted by the group of eminent Professors extended the one used so far by the EU law, as a criterion of freedom of insurance services or even as a criterion of free choice of the law. The standard applied by the Restatement working group indicated the new border line in protecting the rights of the policyholder and the insured under the insurance contract. In essence, this approach is similar to that taken by the Insurance Distribution Directive.

The Principles of European Insurance Contract Law cover all types of insurance with the exception of reinsurance. Therefore, they also concern insurance of specific risks (e.g. air and sea risks), as well as large risks. The notion of large risks, though defined in a descriptive manner, has been fully based on the Solvency II Directive. The main function thereof is again to draw the border between the insurance contracts where no protective measures are required (and therefore granting almost unlimited freedom of contracting is possible) and those where such measures are ensured by obligatory binding provisions of law[22]. Article 1:103 directly regulates the possibility of departing from the semi-imperative nature of PEICL. The justification set up by the Working

[21] Final Report of the Commission Expert Group on European Insurance Contract Law, p. 6. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/insurance-contracts/expert-group-european-insurance-contract-law_en, access 15.11.2018.

[22] Project Group Restatement of European Insurance Contract Law, *Principles of European Insurance Contract Law,* red. Basedow, Brids, Clark, Cousy, Heiss, Loacker, Otto Schmitt, Cologne 2016, p. 7.
Art. 1:103 provides that (1) Articles 1:102 second sentence, 2:104, 2:304, 13:101, 17:101 and 17:503 are mandatory. Other Articles are mandatory in so far as sanctions for fraudulent behaviour are concerned. (2) The contract may derogate from all other provisions as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary. (3) Derogation in the sense of para. 2 shall be allowed to the benefit of any party in contracts covering large risks within the meaning of Article 13 para. 27 Directive 2009/138/EC. In group insuran-

Group indicates that there is no need to protect the policyholder as weaker party to the insurance contract, where the large risk is involved. Consequently, it should be recognized that the traditional subdivision into consumer and other insurance has been replaced in PEICL by the division into insurance of large risks and mass risks (although only the definition of the former is expressed in the *acquis communautaire*)[23].

The importance of large risks concept in the PEICL concerns both the rights and obligations of the parties, as well as the possibility of regulating the period of limitation of claims under the insurance contract. On the other hand, limiting the freedom of contracting in order to meet the large risk criterion is provided in group insurance in such a way that not the status of the policyholder (organizer of the group) is decisive, but the attributes of the insured, due to the need of protecting entities covered by insurance, regardless of which entity is actually financing the insurance premium[24].

6. Large risks in the conflict of laws Regulation

As mentioned above, the definition of large risks at the moment boils down to replacing the harmonization of the substantive law on the insurance contract. This stands behind including the notion of large risks into the rules of private international law of the European Union. In this respect, particular attention is due to the Rome I Regulation[25] and Brussels I bis Regulation[26].

The criterion of large risks allows for the application of the basic principle expressed in the Rome I Regulation, namely the freedom of choice of the law applicable to insurance contract as opposed to other, mass risks, in relation to which Article 7 introduces far-reaching restrictions. As results from its wording, "*an insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (16) shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation*".

However, it should also be emphasized that the concept of large risks in the system of private international law has not been introduced coherently. The Rome I Regulation does not include a self-standing definition of large risks, and only in Article 7 there is a reference to the definition included in the Article 5 of the first non-life insurance Directive. Then, in the Brussels I bis Regulation (Regulation No. 1215/2012) we are dealing with a reference

ce a derogation shall only be held against an individual insured who fulfills the personal characteristics mentioned in Article 13 para. 27(b) or (c) Directive 2009/138/EC, where applicable.

[23] *Principles of European Insurance Contract Law*, p. 10.

[24] *Principles of European Insurance Contract Law*, p. 357.

[25] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),OJ L 177, 4.7.2008, pp. 6–16.

[26] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

to large risks and mass risks[27]. In addition, it should be recognized that the definition of large risks is not concise since it may also include motor TPL insurance, which is irrespective of the policyholder's criteria. The latter is always a consumer insurance due to the protection granted to the aggrieved party (equated with consumer in the level of protection) . For this reason, the regulation of Article 7 of Rome I could not be limited to the division into large risks and mass risks, and it was necessary to add paragraph 4 on compulsory insurance[28].

The Brussels I bis Regulation governs jurisdiction in insurance matters regulated in favour of the policyholder, the insured or the entitled person, and the possibility of derogating in this respect has been provided only for the risks defined directly in the Regulation. They include: "*1) all damage a) in sea-going ships, devices placed in coastal waters or in the open sea or in aircraft, resulting from risks related to their use for commercial purposes; (b) in transported goods other than baggage, if the goods are carried exclusively or partially by those ships or aircraft; 2) liability of any kind, except for liability for damage to passengers or damage to their baggage: a) arising from the use or operation of sea-going vessels, equipment or aircraft referred to in point 1 lit. (a) unless, as regards the latter, the legal provisions of the Member State in which the aircraft is entered in the Register prohibit the conclusion of agreements concerning jurisdiction over matters relating to insurance against such risks; b) for damage caused by transported goods during transport within the meaning of point 1 lit. b); 3) financial losses related to the use or operation of sea-going vessels, equipment or aircraft referred to in point 1 lit. a), in particular loss of freight or charter payment; 4) any additional risk related to one of the risks listed in items 1–3; 5) without prejudice to points 1–4, all "large risks" within the meaning of the Solvency II Directive*".

The criterion of large risks does not affect the scope of compulsory insurance regulations. The provisions in this respect have priority over the freedom granted to the large risks insurance contracts. However, this is not a general rule, but applies to compulsory insurance regulations in which the criterion of large risks arises. The regulations on compulsory insurance in these cases have the meaning of *lex specialis*. This applies in particular to the Rome I Regulation and the Brussels I bis Regulation.

7. Large risks in the insurance distribution law

The first regulatory signs (apart from the Restatement working group) of introducing direct correlation between the size of the risk and policyholder protection in the substantive insurance law, appeared in Solvency II Directive. Pursuant to Article 184 the obligations imposed on the insurers with respect to the additional information provided before entering into any commitment by

[27] H. Heiss, "Insurance contracts in Rome I: Another recent failure of the European Legislature", Yearbook of Private International Law, Vol. 10 (2008), p. 267.
[28] See as well M. Kropka, *op.cit*., p. 129 *et subsq*.

the policyholder shall not apply to large risks. It is an exclusion of the basic rule, according to which, additional information in the case of non-life insurance offered under the right of establishment or the freedom to provide services, should be provided to the policyholder, before he/ she enters into any commitment. This information concerns the Member State in which the head office or, where appropriate, the branch with which the contract is to be concluded is situated (the information should be included in any documents conveyed to the policyholder).

However, the real turn in this respect can be observed in the Insurance Distribution Directive that makes reference to the notion of large risks as a criterion of providing the increased protection of the policyholder. The Directive follows the general tendency of ensuring higher level of protection in insurance contracts, taking the view that consumer criterion is not sufficient in the complicated nature of insurance services.

There are certainly issues that raise doubts on that ground, which relate to the insurance contracts providing protection of several risks, including some that may be classified as large ones. According to the doctrine in the event of overlapping insurance of large risks and mass risks, the contract should be perceived separately in relation to each risk and the provisions should apply accordingly. While in theory it seems possible, in practice, it will be necessary to apply the protective standards provided for mass risks insurance to the whole agrement that covers both large and mass risks. This pertains in particular to information obligations imposed on insurance distributors. Various risks under one insurance contracts may be treated differently only in the context of the insurance product governance.

The Directive and the Polish Insurance Distribution Act, by introducing the large risk criterion, gave up the special, separate protection for customers who meet the criteria of the consumer. This does not mean that notion of the consumer has been excluded as a principal idea underlying the increased protection. It is still the main criterion included in the Consumer Rights Act, the provisions of the Civil Code and other regulations. There is no doubt, however, that introducing the large risks notion as decisive for protective measures in the insurance distribution provisions is important for the future trend in protecting the rights of the policyholder and the insured. The criterion of large risks in insurance distribution is essential for a variety of aspects. It applies to product governance, advising (so-called broker's recommendation in Poland), information obligations, regulation of remuneration, needs and demands analysis, as well as preparation of IBIP. These issues have been regulated in Article 9 par. 8 and Article 11 para. 8 of the Polish Insurance Distribution Act.

It is too early to consider the real impact of the large risk criterion on the intermediaries' daily work, but primarily brokers seem to have a greater chance of enjoying the large risks exemption. As a professional group they focus on enterprise and professional risks more often than the agents. Consequently, they may be released from obligations under the delegated acts with respect to the

product governance[29]. On the other hand, the release from the obligation to render advice to the large risk client may be problematic. This is due to the general principle of ensuring that the insurance contract meets the needs and demands of the client, regardless of the size of the risk. As regards the Polish Insurance Distribution Act, an additional emphasis should be placed on the provisions of Article 9 sec. 8 (by reference to sec. 2) and Article 32 sec. 2 point 4. These regulations concern advice provided by a broker, traditionally known as a broker's recommendation. In the case of insurance contracts or agreements covering large risks, the broker is not obliged to provide the client with any advice. In general, according to Article 32 sec. 1 point 4), prior to the conclusion of the insurance contract, the insurance broker gives advice (...), unless the client submits a written statement of resignation from the advice. The exemption made in Article 9, however, directly refers to the form of advice and not advice itself[30]. Similar doubts arise with regard to the extent of the exemption concerning the delivery of the IBIP, regulated together with the obligation to perform the needs and demands analysis. It is not clear what the real scope of the exemption is, taking into account the absolute obligation to ensure that the insurance contract meets such needs and demands[31]. In other words, can we conclude that Article 9 of the Polish law essentially regulating only the form of fulfilling information obligations, exempts from the obligation to proceed with the needs and demands analysis, or to provide advice to the client by the broker, or that the exemption concerns only the form, as its literal wording suggests?

8. Summary

The evolution of the "large risks" notion proves that it has taken on a formal meaning, having detached from its functional approach. Moreover, there are more and more voices from the market, indicating the lack of adequacy of "large risks" definition to the current state of market development. Notwithstanding the above reservations, an indisputably crucial role of the criterion of large risks in establishing an internal financial market must be emphasized. Following the first regulations in this respect, the criterion of large risks has gained importance in defining the limits of freedom of shaping the contract content in insurance, freedom of choice of law and freedom of choice of jurisdiction. In this way, a coherent freedom of contracting in insurance was created. Through the implementation of the Solvency II Directive and the direct application of the Rome I and Brussels I bis Regulations, it has pene-

[29] Commission Delegated Regulation (EU) 2017/2358 of 21 September 2017 supplementing Directive of the European Parliament and of the Council (EU) 2016/97 with regard to the requirements for the supervision and governance of the insurance product.

[30] "2. The information referred to in Article 32 (1) (4) shall be provided by the insurance broker in writing, free of charge and in a language, referred to in Article 7 (3). This information is clear, reliable and not misleading".

[31] According to Article 9 par. 8, in the case of an insurance contract covering large risks, the insurance distributor is not obliged to provide the client with the information referred to in para. 1 and 2, i.e., among others, "information about the insurance product referred to in Article 8 sec. 1 and 4".

trated the systems of all EU Member States. Its function has certainly undergone a substantial evolution from a regulatory context (release from licensing regime) to replacing the traditional concept of consumer and non-consumer insurance. The change confirmed in the Insurance Distribution Directive seems to follow this tendency and will lead to further steps in this direction.

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Pojęcie „dużych ryzyk" – prawne rozważania w kontekście prawa polskiego i europejskiego

Pojęcie dużych ryzyk historycznie pojawiło się po raz pierwszy w kontekście kwestii regulacyjnych dotyczących działalności ubezpieczeniowej i reasekuracyjnej w Unii Europejskiej, kiedy to zostało wprowadzone przez drugą dyrektywę dotyczącą ubezpieczeń innych niż ubezpieczenia na życie, umożliwiając postawienie pierwszych kroków w kierunku rynku wewnętrznego UE w ubezpieczeniach. W dzisiejszych czasach rola pojęcia „dużych ryzyk" wykroczyła poza ten pierwotny cel i pojawia się w innych płaszczyznach współczesnych regulacji rynku ubezpieczeniowego. Jedna z najważniejszych wydaje się polegać na wyznaczeniu granicy dla wprowadzenia wzmożonej ochrony ubezpieczającego i ubezpieczonego. Dzięki wdrożeniu dyrektywy Solvency II oraz bezpośredniemu stosowaniu rozporządzeń Rzym I i Bruksela I bis, pojęcie dużych ryzyk występuje w systemach wszystkich państw członkowskich UE. Ewolucja, którą przeszło to pojęcie w ciągu ostatnich 40 lat pokazuje jego rosnące znaczenie w określaniu granic swobody kształtowania umowy ubezpieczenia. Wydaje się, że zmiana potwierdzona w dyrektywie o dystrybucji ubezpieczeń jest nieodwracalna w swojej tendencji i możemy oczekiwać dalszych kroków w tym kierunku.

Słowa kluczowe: duże ryzyka, konsument, dystrybucja, ubezpieczenia.