Articles

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TWO ISSUES CONCERNING INSURANCE-BASED INVESTMENT PRODUCTS, IN RETROSPECT

PROFESSIONAL PAPER

Abstract

This article deals with insurance-based investment products, more precisely, with two key (legal) issues that may be raised in connection with this type of insurance. The first issue concerns the legal nature of the insurance lines that has been addressed in the practice of the European Court of Justice, whereas the second issue concerns regulatory requirements for the distribution of such products, depending on their legal form and qualification. The second issue is all the more important because the difference in regulatory requirements was the impetus and one of the main reasons for a comprehensive reform of the rules of market conduct in the field of insurance and the adoption of Directive 2016/97 (EU) on insurance distribution.

Key words: *insurance-based investment products, Directive on insurance distribution, life assurance*

I. Introduction: Definition of Insurance-Based Investment Products

Insurance-based investment product is a new name for old insurance services. These include life assurance lines classified as class III since 1979 and the adoption of Directive 79/267 / EEC[2] (so-called First Life Insurance Directive). According to the Insurance Law (*Official Gazette of RS* no. 139/2014), it is about life assurance policies

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[2] First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance OJ L 63.

stipulated in Article 8 paragraph 5 (life insurance on survival to a stipulated age, life insurance on death, life insurance on survival to a stipulated age or on death) when these policies are linked to the investment fund units.[3] These are, therefore, hybrid financial services, which, by their nature partly include traditional insurance and partly involve investment products. However, this link between insurance and investment products can vary in its intensity. A Study commissioned by DG Internal Market and Services of the European Union[4] has identified four types of hybrid services that partly stem from insurance and partly from investment products:

- life assurance where the policyholder „purchases"[5] units in an investment fund. The sum insured and the value of the policy at maturity is dependent on the growth of the fund, and there is generally no guarantee to the value of the sum insured.[6] Basically, investment risk in such product is borne by the policyholder. Capital market directly impacts the value of the sum insured (unit-linked life assurance);
- life assurance where the policy's cash value is tied to the performance of a financial index, (index-linked life assurance);
- insurance products where benefits are partly guaranteed and partly dependent on the evolution of assets in which the premium is invested, and which are chosen by the policyholder. In this case, the insurance firm partially invests the premiums in guaranteed assets and partly in assets on the account and risk of policyholder. This mostly concerns undertakings for collective investments in transferable securities;[7]

A „new" name introduced by the Regulation EU no. 1286/2014,[8] and the Directive on Insurance Distribution,[9] is „insurance-based investment products" and thus, for easier reference, this term should be used in future for all four types of

[3] S. Olević, Perspectives of Life Insurance Development in Serbia, *Insurance Trends* 4 – 2016, pp. 67–68.

[4] Europe Economics, The Study on the Costs and Benefits of Potential Changes to Distribution Rules for Insurance Investment Products and other Non-MIFID Packaged Retail Investment Products (Final Report), September 2010, pp.1-2.

[5] The owner of the assets i.e. of the investment fund unit in which the premium is invested is not the policyholder but the insurance company. See: Rokas, 'Distribution by Banks & Other Distributors of Investment Policies a Focus on the Distributed Product', *European Insurance Law Review* 1 – 2011, pp. 30.

[6] Europe Economics, The Study on the Costs and Benefits of Potential Changes to Distribution Rules for Insurance Investment Products and other Non-MIFID Packaged Retail Investment Products (Final Report), September 2010, pp.1-2.

[7] Defined in Article 1 paragraph 2 of Directive 2009/65/EC as undertakings with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50 (1) of capital raised from the public and which operate on the principle of risk-spreading.

[8] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ 2014, No L 352.

[9] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26 (Insurance Distribution Directive).

services. Insurance-based investment product is defined as an insurance product where maturity or surrender value is "wholly or partially exposed, directly or indirectly, to market fluctuations".[10]

II. Differences between Classic Insurance and Insurance-Based Investment Product

What are the key differences between classic life assurance and insurance-based investment products? In life assurance, the insurer's obligation consists of the payment of the agreed sum insured in the event of death or survivorship. The insurance contract therefore by its economic nature (even when there is no link to the investment fund units) combines the elements of savings and the elements of hedging.[11]

In traditional life assurance, the premiums paid under a concluded contract are invested at the own risk of the insurance company i.e. the company bears the investment risk. From the perspective of policyholders, ROE in life assurance is relatively small. Investment strategy is adopted at the level of the insurance company, and is subject to strict regulation and supervision, taking into account strict rules on risk exposure and solvency. Most traditional insurance lines have a guaranteed sum insured, with some exceptions that entitle the policyholder to a share in the insurance company's profits.

Life assurance had successfully operated on these principles until the 1980s when business model was changed owing to the combination of economic circumstances and amendments to legal framework.[12] When it comes to economy, insurance companies, faced with the growth and momentum of stock markets and falling interest rates, found it difficult to use their prudent investment strategies to pay out life benefits. In such circumstances, clients were attracted by other financial services and investments that were able to generate higher ROE.

In response to this new situation, insurance companies have massively started to offer hybrid insurance services i.e. policies linked to certain financial instruments on the capital market. Such services provided for the option that the policyholder may choose how his premiums would be invested. However, that right

[10] Article 2 paragraph 17 of Insurance Distribution Directive.

[11] According to some authors, particularly those coming from English-speaking countries, life assurance is more similar to insurance-based investment product than to property insurance because the main property insurance principles, such as indemnity principle, among others, are not applied in life assurance. In other words, according to that belief, almost all life assurance lines are inherently investment-related, regardless of how the value of the sum insured is determined. See: R. Merkin, *Insurance Law – an Introduction,* Routledge, 2007, pp. 5–6.

[12] Undoubtedly, such insurances existed before, but only with the change of the legal framework and the economic situation in the eighties and the nineties did they see the expansion in the markets of Western Europe.

came with the transfer of the investment risk onto the policyholder. The customers found that such products were attractive because in their search for higher ROE they were able to participate in the capital markets and have higher returns than those offered through the purchase of traditional life policies.[13] For insurance companies, the advantage of switching to business models based on such types of insurance was, among other things, that insurance-based investment products were less burdensome for insurance companies in terms of (then) solvency requirements.[14] Apparently, the strategy of switching to insurance-based investment products was successful. In the period between 1995 and 2000, the premiums collected through the sale of investment-based insurance policies went up by 24%, whereas in the same period, traditional life business recorded the growth of only 5%.[15]

Hard sale of such insurance services marked the beginning of a fundamental transformation in the insurance industry. Some authors consider that this helped the revival of life assurance,[16] while the others tend to see the neglect of the main protective function of insurance as one of the first causes of the crisis and indications of the collapse that occurred in 2008.[17] Whichever way that transformation was perceived, the Rubicon was crossed and that was quite logical, if not expected. Insurance companies are the largest institutional investors, and there was no point to prevent the largest institutional investors from providing investment products directly or indirectly by prohibiting them to sell insurance combined with investment products. However, it was the hybrid nature of these services that made them particularly problematic from a legal point of view and particularly risky for policyholders. The policy value was directly linked to the value of the investment fund unit, with the possibility to increase over time, but also decrease due to changes in the market.

[13] Economic circumstances and growth of capital market are the main preconditions for attracting clients to such services; See: S. Olević, Perspectives of Life Insurance Development in Serbia, *Insurance Trends 4 – 2016,* pp. 79–80.

[14] Some authors believe that the transition to Solvency II regime is largely caused by hard selling of unit-linked insurance in the European markets and the risks associated with unit-linked insurance services. N. Moloney, *How to Protect Investors Lessons from the EC and the UK*, 2010, Cambridge University Press, pp.195.; Unit-linked policies were beneficial for insurance companies in terms of capital requirements. The solvency requirements laid down for traditional life business require life insurers to hold 4% of mathematical reserves plus 0.3% of the sum at risk, while for unit-linked policies the requirements were 1% of the fund value plus 0.3% of the sum at risk; Swiss Re, Unit-linked life insurance in western Europe: regaining momentum?, Sigma Study No. 3/2003, pp. 7. available at: *http://www.asefi.it/portale/approfondimenti/vita/1119.pdf*

[15] Swiss Re, Unit-linked life insurance in western Europe: regaining momentum?, Sigma Study No. 3/2003, pp. 11.

[16] H. Cousy, *Insurance Regulation in the European Union Solvency II and Beyond*, Springer, 2017, pp.41.

[17] W. Rohrbach, 'Externe und interne ursachen der Lebensversicherung Krise sowie Lösungsansätze zu Ihrer Bewältigung', Reforms and New Challenges in Insurance Law, Association for Insurance Law of Serbia (AIDA Serbia), Deutsche Stiftung fur international rechtliche Zusammenarbeit e. V. (IRZ) and Gesamtverband der Deutschen Versicherungswirtschaft e. V. (GDV), AIDA Serbia, IRZ Bonn, GDV Berlin, 2016, pp. 199–201.

Therefore, three key differences between traditional life assurance and insurance-based investment products can be summarized as differences in terms of:

- premium investments (investment strategy): in traditional insurance, the investment strategy is adopted by insurance company, while in the case of insurance-based investment products, it is the policyholder who decides where and how his premium will be invested;
- investment risk: in traditional life assurance, the investment risk is borne by the insurance company, while in insurance-based investment products, the policyholder assumes the investment risk;
- Amounts of the sum insured: in traditional life assurance, the sum insured / redemption value is determined in advance by the insurance contract, while in insurance-based investment products, the value of the sum insured / policy redemption value depends on the unit value of the investment fund or other financial instrument in which the policyholder chooses to invest his premium.

III. Can Insurance-Based Investment Products Qualify as Insurance by Their Legal Nature?

With the increased share of insurance-based investments in the life market, it was only a matter of time before this issue will be presented to the national and European courts. It is the aforementioned features i.e. the primary issue of policyholders assuming the investment risk that will be controversial in the legal qualification of these insurance lines. Risk transfer is traditionally one of the basic insurance features.[18] The insurance company assumes a certain risk to which the insured is exposed, while the insured in turn pays the insurance premium. In the case of traditional insurance, the insurance company bears both actuarial and investment risk. In the case of investment-based insurance policies, the investment risk is borne by the policyholder, while the insurance company bears only the actuarial risks.[19] The obligation of the insurance company under such insurance contracts is "only" the payment of the value contained in the unit of the investment fund for which the policyholder opted at the conclusion of the contract, and in which the premiums under the contract are invested.[20] Therefore, the question can justifiably be raised as to whether a contract in which there is no transfer of financial risk can still be considered an insurance contract.

[18] R. Merkin, *Colinvaux's Law of Insurance, 11th Edition*, Sweet & Maxwell, 2016, para 1-030; John Lowry & Philip Rawlings, *Insurance Law Cases And Materials*, 2004, Hart Publishing, 2004, pp. 45.

[19] Case C-166/11. Ángel Lorenzo González Alonso, para 20.

[20] To be achieved by insurance company with the change of its own investment strategies.

In order to answer this question, it is necessary to consider mutual obligations of the contracting parties. Under an insurance contract a policyholder shall assume the obligation to pay a specific amount to an insurer, while the insurer shall assume the obligation, should an insured event take place, which represents the case covered by insurance, to pay to the insured person, or to a third party, compensation, the stipulated amount, or to do something else.[21]

From the above, it can be concluded that for the policyholder, the main obligation under the insurance contract is the payment of the premium, and for the insurance company the payment of indemnity or the agreed sum in case of risk occurrence.[22] The key difference between investment-based and standard life assurance is not a *different obligation* of the insurance company (in terms of payment of a certain amount), but the manner of determining the *extent of obligation* (*sum*) under the contract. The investment-based insurance policy still covers the biometric risk (death), the right to receive the payment of the insured amount still exists upon the risk occurrence i.e. the survival to a particular age, and the only difference is *how* the sum insured is calculated. In traditional insurance, the amount is predetermined and more or less fixed at the time of contract conclusion. In insurance-based investment products, the sum is exposed to market fluctuations i.e. it is not expressed through the absolute amount of money but through the value of the investment fund unit.[23] The fact that the investment risk is borne by the policyholder does not change the nature of the legal transaction between the policyholder and the insurance company because (as the French Court of Cassation noted) the fact that the insurance company still bears the actuarial risk, namely faces the uncertainty regarding maturity of the obligation, still makes it sufficiently aleatory in its legal nature to be able to qualify as an insurance contract.[24]

If there were any doubts as to the aforementioned (at least from the aspect of the European law), they were resolved by the European Court of Justice with its

[21] Article 897 of the Law of Contracts and Torts. While it is very difficult to define insurance as an economic activity, most European laws contain a similar definition of insurance contracts, e.g. Article 1288 of the Austrian Civil Code, Article 1 of the German Insurance Contract Act, and even administrative systems in which there is no legal (doctrinal) definition of insurance contract (such as countries of *common law* tradition) case law has established the basic elements and insurance principles that are inherently very similar to the presented definitions. See: K. Noussia, *Definition: different common law and civil law approaches the definition of insurance*, Edward Elgar, 2011, pp. 38.

[22] For more details about the obligations under insurance contract see: P. Šulejić, *Pravo osiguranja,* Beograd, 2006, pp. 213–244.

[23] A policyholder is not the owner of the unit of the investment fund in which he has invested the premium. The owner of the investment unit is the insurance company. A functional approach to the issue of insurance-based investment products would be to consider that such products are insurance by their nature because they are offered by insurance companies; Rokas, 'Distribution by Banks & Other Distributors of Investment Policies a Focus on the Distributed Product', *European Insurance Law Review* 1 – 2011, pp. 29–30.

[24] H. Cousy, *Insurance Regulation in the European Union Solvency II and Beyond*, Springer, 2017, pp. 41–43.

ruling in the case of C-*166/11, Ángel Lorenzo González Alonso*. The Court concluded that insurance contracts are also considered the contracts in which the risk of premium investment is borne in whole or in part by the policyholder.

This case was connected with the right of the insured to waive the contract under Council Directive 85/577/EEC to protect the consumer in respect of contract negotiated away from business premises,[25] i.e. in line with the application of these rules. Namely, Article 3 paragraph 2 of this Directive excluded insurance contract from its application. An employee of insurance company, Nationale Nederlanden, visited Mr González Alonso at his place of work to offer him a financial product. The specific nature of such insurance was that the beneficiaries were entitled to benefits which, in their nature were not the standard sum insured but had the characteristics of benefits that follow investment services which, according to the Spanish court, converted this contract into a mixed contract and not an insurance contract.[26] The question of the Spanish court to the European Court was therefore whether the exception to the application of the rules of Directive also applied to such "mixed" contracts, which the court considered insurance contracts only in part? The European Court of Justice has essentially qualified the question as a question of whether "mixed" contracts or life assurance contracts where the sum insured depends on the value of the investment fund are considered insurance contracts in terms of EU regulations, and answered this question unequivocally. Namely, according to this court, such contracts are permitted by point III of Annex I to the Third Life Insurance Directive.[27]

IV. Differences in the Treatment of Selling the Investment Products and Investment-Based Insurance Policies

The position of the European Court of Justice has created an unusual situation. If, by their legal nature, Class III services are insurance services and not investment services, then it is only logical that they are covered by the legal treatment of selling provided for by the insurance directives and not by the investment services directives.[28] In other words, this mixed service has created a situation in which essentially the same services are sold under different conditions depending on the legal form in which they are offered and depending on who offers them on the market (insurance company or investment firms). The three key elements - rules of market conduct, information, advice and professional competences –*qualitatively* differ in these two

[25] These rights can be found today in Directive 2011/83/EU on consumer rights.

[26] Case C-166/11. Ángel Lorenzo González Alonso, para 18.

[27] Case C-166/11. Ángel Lorenzo González Alonso, para 28-29.

[28] N. Filipović, Decision of the European Court of Justice of 31- 5- 2018 in Case C-542/16 länsförsäkringar Sak Försäkringsaktiebolag V Dödsboet Efter Ingvar Mattsson, *Insurance Trends 3/2019*, pp. 108–115.

areas. Namely, the EU law regulated these obligations in different financial areas with different intensity.

1. Information

The third generation life assurance Directive[29] regulated the obligation of insurance companies to inform and thus, the said directive stipulated the obligation of the insurer to communicate the information to the policyholder in writing, in a clear and accurate manner, and in an official language of the Member State.[30]

Directive on insurance mediation[31] stipulated the obligation to communicate information on paper or on any other durable medium, in a clear and accurate manner, *comprehensible to the customer* (supplement to direct selling – author's comment), in an official language of the Member State of the commitment or in any other language agreed by the parties.[32]

Contrary to the obligation to communicate information when selling an investment product as insurance, let us now take a look at the prescribed obligation to inform, that would apply if the same product was sold as an investment product. In such case, the treatment of market conduct established in Directive on markets in financial instruments would be applied.[33]

The requirement for investment firms and portfolio managers is that they must provide information to customers in a comprehensible form so that the customer is reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered. The information must be communicated so that the client is able to make an informed investment decision.[34] Communicated information must be accurate and in particular must not emphasise any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks. The information must be presented in a way that is likely to be understood by the average member of the group to whom it is directed, or by whom it is likely to be received. [35] Eventually, the information must not disguise, diminish or obscure important items, statements or

[29] Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance; (Consolidated Life Insurance Directive).

[30] Article 36 and Annex III to Directive 2002/83/EC.

[31] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation OJ L 009.

[32] Article 13 paragraph 1 Directive 2002/92/EC.

[33] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ L 145.

[34] Article 19 paragraph 3 Directive 2004/39/EC.

[35] Article 27 Directive 2006/73 EC (Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ 2006, No L 241).

warnings. Any comparisons (services) must be meaningful, shown in a clear and comprehensible manner, and provided in a durable medium or by means of a website, [36] in the language in which the client communicates with the investment firm.[37]

2. Advice

In terms of advice, the rules of market conduct laid down for insurance companies did not require advice or an assessment of the needs and wishes of the insureds. In other words, as insurance companies *were not required* to survey the needs and demands of clients or to advise the clients regarding any insurance product, there was no such obligation for insurance-based investment products.[38]

Insurance Mediation Directive had one general provision regarding advice – the insurance intermediaries shall: „at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product; these details shall be modulated according to the complexity of the insurance contract being proposed." [39]

The requirement of Directive on markets in financial instruments was that when providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation, and his investment objectives.[40] Namely, the firm shall ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the envisaged investment service or product is appropriate for the client,[41] and if the client or potential client elects not to provide this information, or if he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client that such a decision will not allow the firm to determine whether the envisaged service or product is appropriate for him.

3. Professional Qualifications of Employees

Finally, it is important to consider the issue of professional qualifications of persons who essentially fulfil the obligations to communicate information and provide

[36] Article 29 paragraph 4 Directive 2006/73/EC.
[37] Article 30 Directive 2006/73/EC.
[38] Case E-11/12, Koch, Hummel and Müller para 69.
[39] Article 12 paragraph 3 of Directive 2002/92/EC.
[40] Article 19 paragraph 4 of Directive 2004/39/EC.
[41] Article 19 paragraph 5 of Directive 2004/39/EC.

advice - employees in insurance and brokerage companies. Professional qualifications and competencies are an important prerequisite for effective protection of users of all financial services. With regard to professional requirements, EU insurance law did not impose strict training requirements, and in particular there was a striking absence at EU level of any *additional* training and competence requirements for those involved in the distribution and selling of insurance-based investment products.[42] This means that even when specific obligations to communicate information and provide advice are imposed at the national level, the quality of information (necessary for an informed decision) and advice (i.e. adequacy recommendations) largely depended on the level of knowledge that the individual seller had about financial instruments related to the offered insurance product.

Under the regime provided for in the life insurance directives, employees in insurance companies were not obliged to undergo continuous professional development or training in terms of insurance-based investment products and financial instruments to which the policies were linked. There was a general legal obligation for *members of the management* of an insurance company, but in general, the training of employees in direct contact with clients was delegated to the insurance companies themselves. A 2009 CEIOPS survey[43] indicates that only three Member States had specific requirements directed to employees of insurance companies that offered insurance-based investment products.[44]

Under Insurance Mediation Directive, insurance intermediaries had certain obligations to undergo continuous training, but such obligations were rarely focused on the issues of the product to which the policies were linked. The training of insurance intermediaries was primarily focused on the topics in the field of insurance, and not on the topics related to market risks, market fluctuations, and possible impacts on the insured persons. The study shows that with regard to insurance intermediaries, only three Member States had special requirements in terms of knowledge and skills, and only four Member States had special requirements with regard to the education and professional experience of intermediaries before they start selling insurance-based investment products.[45]

[42] CEIOPS, *Report on National Measures regarding Disclosure Requirements and Professional Requirements for Unit-Linked Life Insurance Products,* which are additional to the Minimum Requirements of the CLD and IMD, CEIOPS-DOC-20/09, July 2009, 4-8.

[43] CEIOPS, Committee of Insurance and Occupational Pensions Regulators, legal predecessors of EIOPA – European Insurance and Occupational Pension Supervisory Authority.

[44] CEIOPS, *Report on National Measures regarding Disclosure Requirements and Professional Requirements for Unit-Linked Life Insurance Products,* which are additional to the Minimum Requirements of the CLD and IMD, CEIOPS-DOC-20/09, July 2009, pp. 39.

[45] CEIOPS, *Report on National Measures regarding Disclosure Requirements and Professional Requirements for Unit-Linked Life Insurance Products,* which are additional to the Minimum Requirements of the CLD and IMD, CEIOPS-DOC-20/09, July 2009, pp. 40.

Consequently, insurance-based investment products were offered by employees of insurance companies, agents and intermediaries who were not subject to any explicit legal obligation to acquire knowledge in the field of financial instruments that related to the insurance product they offered.

V. Final Considerations

With regard to the first question as to whether insurance-based investment products constitute insurance by their legal nature, the European Court of Justice has given an affirmative answer.

As a consequence of the court's position in cases C-166/11 - *González Alonso*, and C-542/16 - *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, it is clear that such services are subject to the treatment of distribution provided for in the insurance directives. This raised two new issues:

1. When viewed from the market conduct rules and protection of policyholders, the regulatory treatment in the field of insurance envisaged by the directives was not adjusted or designed to protect policyholders and the insureds from financial risks and market changes to which policyholders were exposed by purchasing such products. The obligations to communicate information (and to advise) in the field of insurance were focused on the nature *of the insurance contract and the status of the provider of insurance services* i.e. i*nsurance intermediation*, and not on the risks associated with the nature of the financial instrument to which the insurance is linked. First and foremost, the insurance regulations did not require that the policyholder is informed of the hybrid nature of products and the risks he assumes. The only obligation of an insurance company was to inform the insured of the *nature* of the underlying assets in which the premium was invested.[46] „Insurance-based investment products were not a *safe* investment"[47] as the policyholders intuitively assumed having in mind the way in which traditional insurance operates.

2. From the aspect of vertical harmonization of regulations, investment-based insurance products were sold under regulatory requirements that were different from those envisaged, regardless of the fact that they essentially represented the same but differently packaged product i.e. legal form. While the protection of small investors was elaborated in detail at the EU level, similar (detailed) rules did not exist in the field of protection of insured persons.[48] This created an opportunity for evasion of regulations in the field of protection of small investors by offering investment

[46] Annex III 12a, Directive 2002/83/EC.

[47] Opinion of AG, Campos Sánchez-Bordona of 21 November 2017 in Case C-542/16, *Länsförsäkringar Sak Försäkringsaktiebolag and Others,* para.79.

[48] Moloney, *How to Protect Investors Lessons from the EC and the UK*, Cambridge University Press, 2010, pp. 253.

products legally shaped as insurance. This prompted the EU to take a legal treatment of the protection of small investors as the reference point for the new rules.

Therefore, one of the main objectives of the new EU regulatory framework is to raise the level of protection of service users and create a level playing field in respect of small investors, notably through the adoption of Insurance Distribution Directive.[49] Consequently, the new treatment of the rules of market conduct poses completely new and complex legal challenges to insurance companies, which from the aspect of insurance law may seem unorthodox, partly because the new rules do not originate from insurance law but from the capital market. Due to the aforementioned, it seems that it is quite justified to raise a question whether all policyholders need the same level of protection as small investors, or whether the change of the complete regulatory framework is an appropriate response to the risks identified in one market segment.

Literature

- Case C-166/11. Ángel Lorenzo González Alonso.
- Case E-11/12, Koch, Hummel and Müller.
- CEIOPS, *Report on National Measures regarding Disclosure Requirements and Professional Requirements for Unit-Linked Life Insurance Products, which are additional to the Minimum Requirements of the CLD and IMD,* CEIOPS-DOC-20/09, July 2009.
- Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26 (Directive on Insurance Distribution).
- Directive 2002/83/EC of The European Parliament and of The Council of 5 November 2002 concerning life assurance (Consolidated Life Insurance Directive).
- Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation OJ L 009.
- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ L 145.
- Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ 2006, No L 241.
- Europe Economics, The Study on the Costs and Benefits of Potential Changes to Distribution Rules for Insurance Investment Products and other Non-MIFID Packaged Retail Investment Products (Final Report), September 2010.

[49] Preamble No. 10 to the Insurance Distribution Directive.

- First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance OJ L 63.
- H. Cousy, *Insurance Regulation in the European Union Solvency II and Beyond*, Springer, 2017.
- John Lowry & Philip Rawlings, *Insurance Law Cases And Materials*, 2004, Hart Publishing, 2004.
- N. Filipović, Decision of the European Court of Justice of 31. 5. 2018. In Case C-542/16 länsförsäkringar Sak Försäkringsaktiebolag V Dödsboet Efter Ingvar Mattsson, *Insurance Trends 3/2019*.
- N. Moloney, *How to Protect Investors Lessons from the EC and the UK*, 2010, Cambridge University Press.
- Opinion of AG,Campos Sánchez-Bordona of 21 November 2017 in Case C-542/16, Länsförsäkringar Sak Försäkringsaktiebolag and Others.
- R. Merkin, *Colinvaux's Law of Insurance, 11th Edition*, Sweet & Maxwell, 2016;
- R. Merkin, *Insurance Law – an Introduction,* Routledge, 2007.
- Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ 2014, No L 352.
- Rokas, 'Distribution by Banks & Other Distributors of Investment Policies a Focus on the Distributed Product', *European Insurance Law Review* 1-2011.
- S. Olević, Perspectives of Life Insurance Development in Serbia, *Insurance Trends 4-2016.*
- Swiss Re, Unit-linked life insurance in western Europe: regaining momentum?, Sigma Study No. 3/2003, available at: *http://www.asefi.it/portale/approfondimenti/vita/1119.pdf.*
- W. Rohrbach, 'Externe und interne ursachen der Lebensversicherung Krise sowie Lösungsansätze zu Ihrer Bewältigung', Reforms and New Challenges in Insurance Law, Association for Insurance Law of Serbia (AIDA Serbia), Deutsche Stiftung fur international rechtliche Zusammenarbeit e. V. (IRZ) and Gesamtverband der Deutschen Versicherungswirtschaft e. V. (GDV), AIDA Serbia, IRZ Bonn, GDV Berlin, 2016.

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