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**Prof. dr Dr Nataša S. Petrović Tomić<sup>1</sup>**

# DOPUNSKO ZDRAVSTVENO OSIGURANJE U FUNKCIJI DOPRINOSA RAZVOJU ODRŽIVOG SISTEMA ZDRAVSTVENE ZAŠTITE U REPUBLICI SRBIJI

ORIGINALNI NAUČNI RAD

## Apstrakt

Zakon o zdravstvenom osiguranju uređuje tri vrste dobrovoljnog zdravstvenog osiguranja: paralelno, dopunsko i privatno zdravstveno osiguranje. U pitanju su vrlo perspektivne usluge osiguranja, od kojih je autorka izdvojila dopunsko zdravstveno osiguranje. Kakav je potencijal tog tipa pokrića? Koji su uslovi za njegov razvoj? Da li su u našem zakonodavstvu ispunjene institucionalne prepostavke za stvaranje održivog sistema zdravstvene zaštite? Nakon analize odnosa dopunskog i dobrovoljnog zdravstvenog osiguranja, autorka izdvaja zdravstveno opismenjavanje građana, potencijalnih korisnika osiguranja kao faktor koji nadmašuje sve ostale u važećem regulatornom okviru. Promovisanjem dopunskog zdravstvenog osiguranja kao usluge koja se direktno nadovezuje na obavezno zdravstveno osiguranje i dopunjuje ga u delu troškova participacije šalje se poruka građanima da zdravstveni troškovni rizik u jednom delu usluga obavezne zdravstvene zaštite može da se prevali na osiguravače dobrovoljnog zdravstvenog osiguranja. Autorka u zaključku dokazuje da se time podstiče uključivanje privatnih osiguravača u finansiranje troškova obavezne zdravstvene zaštite, čime se ostvaruje saradnja privatnog i državnog sektora radi održivog razvoja sistema zdravstvene zaštite.

**Ključne reči:** Dobrovoljno zdravstveno osiguranje. – Dopunsko zdravstveno osiguranje. – Regulatorni okvir. – Perspektivne usluge osiguranja.

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## I. Uvodna razmatranja

Dobrovoljno zdravstveno osiguranje shvaćeno u širem smislu pruža finansijsku zaštitu od rizika bolesti i s njim povezanih posledica.<sup>2</sup> To osiguranje – koje se kreira prema željama i potrebama osiguranika – može da se koristi na različite načine: kao redovno osiguranje (koje u potpunosti zamjenjuje obavezno zdravstveno osiguranje) ili kao dopuna postojećem sistemu zdravstvene zaštite.<sup>3</sup> Imamo li u vidu ambijent XXI veka koji karakterišu starenje stanovništva, finansijski pritisak na javne fondove zdravstvenog osiguranja i neslućene mogućnosti lečenja odnosno prevencije, jasno je da je jedan od primarnih zadataka svake države da *upotpuni paket zdravstvene zaštite*. Poslednjih decenija velika pažnja se posvećuje upravo dobrovoljnom zdravstvenom osiguranju iz tih razloga. Uočeno je da postojeći sistemi mogu opstati samo ako se osmisli kombinacija obavezognog i dobrovoljnog osiguranja, što će obezbediti i kombinovano korišćenje kapaciteta državnih i privatnih zdravstvenih ustanova. Preduslov za to je *zdravstveno opismenjavanje* najšireg kruga građana, uz istovremeno ukazivanje na potencijal dobrovoljnog zdravstvenog osiguranja u koje se pravovremeno investira. Građani, odnosno potencijalni pacijenti treba da budu sposobljeni da se postaraju za svoje zdravlje i da donose odluke kojima će ostvariti *upravljanje zdravstvenim rizikom* kao jednim od bazičnih i egzistencijalnih rizika.<sup>4</sup>

Dokle se u Srbiji stiglo sa zdravstvenim opismenjavanjem građana? I da li postoji *adekvatna zdravstvena strategija* koja uključuje i dobrovoljno zdravstveno

<sup>2</sup> H. Müller, „Private Krankenversicherung“, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *Versicherungsrechts-Handbuch*, Verlag C. H. Beck München 2009, str. 2697; J. Bigot, „Les assurances de personnes non-vie, Notions générales“, u: Jean Bigot, Philippe Baillot, Jérôme Kullmann, Luc Mayaux (ed.), *Les assurances de personnes*, Tome 4, L.G.D.J, Paris, 2007, str. 503.

<sup>3</sup> „Dobrovoljno (privatno) zdravstveno osiguranje pokriva finansijske posledice ugovorom nabrojanih bolesti, ubičajeno je da pokriva farmaceutske troškove, troškove lečenja i hospitalizacije, a može da pokrije i posledice privremene nesposobnosti (invalidnosti) ili rizik od smrti nastao kao posledica bolesti.“ – N. Petrović Tomić, *Pravo osiguranja, Sistem*, Knjiga prva, Službeni glasnik, Beograd, 2019, str. 708. U.: I. Spasić, „Mesto dopunskog i privatnog zdravstvenog osiguranja u uporednom pravu i predlozi za reformu sistema zdravstvenog osiguranja u Srbiji“, *Revija za pravo osiguranja*, br. 1/2, 2004, str. 1–13; J. Slavnić, „Ugovor o dobrovoljnom zdravstvenom osiguranju kao predmet zakonskog regulisanja – prilog raspravi o regulisanju ugovora o osiguranju u novom Građanskom zakoniku Srbije“, *Evropske (EU) reforme u pravu osiguranja Srbije*, Palić 2010, str. 2.

<sup>4</sup> Upravljanje zdravstvenim rizikom podrazumeva niz mera, od kojih naročito izdvajamo zdravstvenu prevenciju. Preventivni sistematski pregledi su dragoceni u postupku ranog otkrivanja bolesti i stanja koja zahtevaju dugotrajno i skupo lečenje. Systematski pregledi zaposlenih preventivnog karaktera su zakonita prestacija zdravstvenih ustanova. To proizlazi iz regulatornog okvira Republike Srbije, koji čini niz zakona, od kojih izdvajamo Zakon o zdravstvenoj zaštiti (*Službeni glasnik RS*, br. 25/2019 – dalje: ZZZ). Prema tom zakonu, zdravstvena zaštita obuhvata sprovođenje mera i aktivnosti za očuvanje i unapređenje zdravlja državljana Republike Srbije, sprečavanje, suzbijanje i rano otkrivanje bolesti, povreda i drugih poremećaja zdravlja i blagovremeno, delotvorno i efikasno lečenje, zdravstvenu negu i rehabilitaciju (čl. 2 st. 1). Po slovu tog zakona, zdravstvene ustanove u javnoj i privatnoj svojini, kao i privatna praksa, pružaoci su zdravstvene zaštite.

osiguranja? Kao što ћemo u daljem izlaganju pokazati, u Srbiji trenutno postoji niz problemskih situacija počev od terminoloških nedoumica do protekcionizma državnog fonda koji prete da uspore i/ili uruše napore za uspostavljanje javno-pri-vatnog partnerstva države i osiguravača, kao jedinog održivog modela sprovođenja zdravstvene zaštite građana.

## **II. Regulatorni okvir dobrovoljnog zdravstvenog osiguranja u Srbiji**

### **1. Iсторијски осврт – од Уредбе до Закона**

Regulatorni okvir za obavljanje privatnog zdravstvenog osiguranja u Srbiji već decenijama je izrazito podnormiran.<sup>5</sup> Naime, u ovom trenutku može se govoriti samo o statusnom delu regulatornog okvira, koji čine Zakon o osiguranju (dalje: ZO)<sup>6</sup> i Zakon o zdravstvenom osiguranju (dalje: ZZO).<sup>7</sup> Zakon o obligacionim odnosima (dalje: ZOO)<sup>8</sup> ne sadrži posebne odredbe o dobrovoljnem zdravstvenom osiguranju.<sup>9</sup> I pored usvajanja *lex specialis* propisa, ugovorni deo regulatornog okvira privatnog zdravstvenog osiguranja je neizgrađen, što već godinama ocenujemo kao veliki nedostatak našeg zakonodavstva.<sup>10</sup> Za većinu materijalnopravnih pitanja vezanih za dobrovoljno zdravstveno osiguranje odgovor se mora tražiti u odeljku ZOO koji sadrži opšta pravila za osiguranje, dok je ZZO samo delimično i ovlaš dotakao ugovornu materiju. To će u mnogim situacijama dovesti do pravnih praznina, koje se moraju popunjavati shodnom primenom opštih ili posebnih pravila iz odeljka posvećenog osiguranju lica. Dakle, *nedostaje materijalnopravni deo regulatornog okvira* ugovora o privatnom zdravstvenom osiguranju. Problem može biti rešen samo donošenjem posebnog Zakona o ugovoru o osiguranju, koji bi sadržao odeljak posvećen dobrovoljnem zdravstvenom osiguranju.

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<sup>5</sup> Termin privatni ovde koristimo u širem smislu kao opozit obaveznom zdravstvenom osiguranju, koje je javno i pod pokroviteljstvom države (nap. aut.).

<sup>6</sup> Službeni glasnik RS, br. 139/2014 i 144/2021.

<sup>7</sup> Službeni glasnik RS, br. 25/2019. Do usvajanja ZZO, materija dobrovoljnog zdravstvenog osiguranja bila je uređena podzakonskim aktom – Uredbom o dobrovoljnem zdravstvenom osiguranju (dalje: Uredba), Službeni glasnik RS, br. 108/2008, 49/09.

<sup>8</sup> Službeni list SFRJ, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Službeni list SRJ, br. 31/93 i Službeni list SCG, br. 1/2003 – Ustavna povelja.

<sup>9</sup> Za ovo postoji jednostavno objašnjenje. Iсторијски posmatrano, ovaj zakon je donet u vreme dominacije državnog sistema obavezne zdravstvene zaštite, te je logičan izostanak i samog pominjanja dobrovoljnog zdravstvenog sistema. Ni uporednopravno posmatrano, situacija nije bila drugačija.

<sup>10</sup> Poređenja radi, u uporednom pravu je uobičajeno da se donose zakoni koji regulišu samo dobrovoljno zdravstveno osiguranje, a ne i obavezno, kako je slučaj kod nas. Mi smo, zapravo, ushićeni što je konačno materija dobrovoljnog zdravstvenog osiguranja dobila zakonodavni rang, iako je to daleko od prakse referentnih evropskih i svetskih pravnih kultura.

Naglašavamo: pošto ZOO uopšte ne pominje dobrovoljno zdravstveno osiguranje, smatramo da se njegove opšte odredbe o osiguranju, kao i odeljak koji sadrži posebna pravila za osiguranje lica, moraju *mutatis mutandis* koristiti za odgovor na sva pitanja iz domena ugovornog prava, koja su ostala izvan ZZO. To svakako nije lak posao, budući da je i dobrovoljno zdravstveno osiguranje – kao i osiguranje od posledica nezgode – hibridna usluga i da prestacije osiguravača nije moguće posmatrati samo iz ugla osiguranja lica.<sup>11</sup> *In ultima linea*, takav zakonodavni okvir stvara plodno tlo za pojačani značaj uslova osiguranja. Osiguravači nastoje da zakonski vakuum popune detaljnim uređenjem svih pitanja uslovima osiguranja. Poželjno bi bilo usvojiti (bar) zajednička načela ugovora o dobrovoljnem zdravstvenom osiguranju. Uslovi naših osiguravači razlikuju se i po dopunskim i posebnim uslovima koje prilagođavaju konkretnim paketima zdravstvene zaštite. Ako znamo da je u pitanju prilično nova usluga osiguranja za naše prilike, to moramo računati sa još većom neukošću potrošača usluga osiguranja nego što je to slučaj kada se radi o ostalim ugovorima o osiguranju. Tipična potrošačka pozicija iz tih razloga natprosečno je tangirana odsustvom zakonskog minimuma uređenja osetljivih pitanja ugovornog odnosa dobrovoljnog zdravstvenog osiguranja. Stoga je jedan od razloga što godinama apelujemo na usvajanje ugovornog zakona o osiguranju upravo zakonsko normiranje podele na odštetna i svotna osiguranja, koja predstavlja *conditio sine qua non* pravilne kvalifikacije prestacija kod dobrovoljnog zdravstvenog osiguranja.<sup>12</sup>

Da napravimo kratak istorijski osvrt na naše zakonodavstvo. Kako ZOO ne sadrži odredbe posvećene dobrovoljnem zdravstvenom osiguranju, materijalnopravna regulativa ove vrste osiguranja donedavno se nalazila u podzakonskoj regulativi. Zapravo, kod nas takva zakonodavna zbrka postoji od 2008. godine. Usvajanjem Uredbe o dobrovoljnem zdravstvenom osiguranju napravljen je presedan u našem pravu, koji treba istaći kao negativnu paradigmu. Naime, njome su uređena brojna pitanja ugovornog prava osiguranja koja čine *domain réservé* zakonodavne materije: postupak zaključenja ugovora o dobrovoljnem zdravstvenom osiguranju, ograničenje slobode ugovaranja osiguravača – iako nije u pitanju obavezno osiguranje (sic!), uređenje obaveza osiguravača u pogledu kolektivnih ugovora itd. Kao takva, Uredba

<sup>11</sup> O tome smo već pisali: N. Petrović Tomić, „Hibridni proizvodi osiguranja – stanje i perspektive razvoja“, u: Z. Petrović, V. Čolović, D. Obradović (ured.), *Prouzrokovanje štete, naknada štete i osiguranje*, XXIV međunarodni naučni skup, Beograd – Mionica 2021, str. 325–341.

<sup>12</sup> Po ugledu na uporedno pravo, u odeljak o dobrovoljnem zdravstvenom osiguranju trebalo bi uključiti minimum zaštite ne samo osiguranika, već i same ustanove osiguranja. Pod tim podrazumevamo ograničavanje slobode osiguravača da utvrđuju osnove tarifiranja premija osiguranja. Premija ne sme da bude obračunata samo na osnovu pristupne starosti i zdravstvenog stanja osiguranika, jer takav način obračuna favorizuje mlađe osiguranike, a može značiti odbijanje starijih osiguranika. Osiguravačima se ne sme ostaviti potpuna sloboda u pogledu uređenja karence; treba urediti bonus i malus na način kojim se osiguranik podstiče da smanji verovatnoću nastupanja rizika; franšize su uobičajene itd.

je bila protivna Ustavu Republike Srbije i ZOO.<sup>13</sup> Uredba, uz to, određuje i sadržaj polise dobrovoljnog zdravstvenog osiguranja (iako je to zakonska materija ZOO), nabraja pravila koje se odnose na dobrovoljno zdravstveno osiguranje (uključujući i opšte i posebne uslove) itd.

Polazeći od Ustava Srbije (čl. 68 st. 3), materija zdravstvenog osiguranja treba da bude uređena zakonom. Stoga pozdravljamo usvajanje posebnog zakona o zdravstvenom osiguranju, koji ima odeljak posvećen dobrovoljnem zdravstvenom osiguranju. Ali to bi moralo biti samo **prelazno rešenje**. Naime, u referentnim zakonodavstvima materija dobrovoljnog zdravstvenog osiguranja uveliko se uređuje *lex specialis* propisom, koji ne reguliše u istom paketu i obavezno zdravstveno osiguranje. Iznećemo nekoliko razloga zašto smatramo da je od esencijalnog značaja zakonsko uređenje ove vrste osiguranja, odnosno razdvajanje uređenja obaveznog i dobrovoljnog zdravstvenog osiguranja. Prvo, zbog *korisnosti* pomenute vrste osiguranja. Rizik od bolesti je jedan od onih rizika s kojim se svako lice suočava, koji je uz to potenciran u dvadeset i prvom veku koji karakteriše izraženo starenje stanovništva. U pitanju je *rizik egzistencijalnog karaktera*, čije pokriće nije moguće samo na osnovu obaveznog zdravstvenog osiguranja.<sup>14</sup> Na odluku jednog lica da investira u taj oblik pokrića odlučujuće utiče saznanje da je usled novih otkrića medicina toliko napredovala da mnoge bolesti više nisu neizlečive, kao i da lica i posle ozbiljnih nezgoda i povreda mogu računati na oporavak i nastavak života ako su u mogućnosti da sebi priuště savremene metode lečenja. Dakle, takvo korisno osiguranje treba da bude uređeno zakonskim izvorom, budući da se njime pokriva rizik koji nije u potpunoj dispoziciji lica na koje se odnosi, već pogađa javni interes. Država ima jasan interes da se stara o zdravlju stanovništva, što taj rizik izmešta iz polja slobodne dispozicije korisnika usluga. Drugo, iako u različitim državama postoje različiti modeli, generalno se može reći da dominira princip koegzistencije privatnog i javnog sektora u oblasti zdravstvene zaštite. Tako dobrovoljno osiguranje postoji **paralelno** sa obaveznim zdravstvenim osiguranjem i služi kao **dopuna** sistema obavezne zdravstvene zaštite. Zbog istovremenog smanjenja broja zaposlenih i izraženog starenja stanovništva u većini zemalja, sistem obaveznog zdravstvenog osiguranja se suočava s velikim ograničenjima. Ključno je da se lica koja su korisnici obavezne zdravstvene zaštite podstaknu da od najranijih dana izdvajaju sredstva na ime osiguranja, koje će svojim postojanjem smanjiti pritisak na fondove obavezne zdravstvene zaštite. Samo dobro osmišljeni paket dobrovoljnog zdravstvenog osiguranja može da nadomesti ograničene kapacitete obaveznog zdravstvenog osiguranja.

Treće, potreba zaštite osiguranika kao slabije strane ugovora o osiguranju još je više izražena kada je reč o novim vrstama osiguranja, s kojima su oni još manje

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<sup>13</sup> Za detaljniju kritiku Uredbe: J. Slavnić, „Pogled na regulisanje ugovora o dobrovoljnem zdravstvenom osiguranju“, *Pravni život*, br. 12/2009, str. 807–823.

<sup>14</sup> M. Wandt, *Versicherungsrecht*, 5. neu bearbeitete Auflage, Carl Heymanns Verlag, Köln 2010, str. 462.

familijarni nego sa ugovorima koje godinama unazad kupuju. Oni će biti bolje zaštićeni ako se zakonskim imperativnim ili poluimperativnim normama uredi najveći broj pitanja od značaja za ugovor o osiguranju. Time se sužava manevarski prostor za osiguravače. Zaštitna funkcija zakonskih normi utoliko je izraženija ukoliko se zna da u ovoj vrsti osiguranja postoji rizik od antiselekcije rizika. Zbog toga se osiguravač zakonom obavezuje da zaključi ugovor o osiguranju sa svakim licem koje uputi ponudu za zaključenje ugovora, a same okolnosti na osnovu kojih će biti ocenjen rizik i određena premija unapred se zakonom definišu.<sup>15</sup>

Četvrtu, već smo ukazali na specifičnost ove vrste osiguranja i na različite prestacije koje osiguravač može preuzeti ugovorom.<sup>16</sup> Kod takvih usluga osiguranja u interesu je i osiguravača da se zakonom izvrše određena preciziranja. Peto, sudske prakse će biti neuporedivo lakše da rešava sporove iz te vrste osiguranja ako postoji jasan i moderan regulatorni okvir. Šesto, dobrovoljno zdravstveno osiguranje odlično se prodaje na razvijenim tržištima ne samo kao osnovni već i kao dopunski ugovor uz životno osiguranje ili osiguranje od posledica nezgode. Kada se pokriva rizik od smrti, budući da se može ostvariti i kao posledica nesrećnog slučaja ili bolesti, osiguravači nude povoljne pakete koji kombinuju životno i dobrovoljno zdravstveno osiguranje. Favorabilna regulativa tog osiguranja može, dakle, delovati podsticajno na razvoj drugih usluga osiguranja, sa kojima je po riziku srođno.

Sedmo, osiguranje lica (a najviše osiguranje od posledica nezgode i zdravstveno osiguranje) ima značajnu ulogu u poboljšanju sistema *socijalne zaštite*. Bilo koja nezgoda ili ozbiljnija bolest lakše se prebrode ako je lice unapred investiralo u odgovarajući paket pokrića. Stoga se na razvijenim tržištima poslodavci takmiče u pogledu privlačenja kvalifikovane (ili deficitarne) radne snage dobrim paketima kombinovanog osiguranja od posledica nezgode i zdravstvenog osiguranja.<sup>17</sup> Imajući u vidu višestruke koristi od osiguranja lica, zakonodavci razvijenih država – koji planiraju da podstaknu ekspanziju proizvoda osiguranja – uvode poreske olakšice za osiguranja lica, pogotovo za osiguranje života. Porez na premije životnih osiguranja u mnogim državama ne postoji ili je takav da ne predstavlja dodatno fanansijsko opterećenje potrošača usluga osiguranja.

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<sup>15</sup> U pitanju je ograničenje slobode uobičajeno u obaveznim vrstama osiguranja. Ali imajući u vidu socijalnu funkciju dobrovoljnog zdravstvenog osiguranja, zakonodavac nije mogao da prepusti osiguravačima da prilikom preuzimanja rizika primenjuju čisto tržišni pristup. Iz istih razloga, ugovorna sadržina je u velikoj meri uredena samim zakonom. Detaljnije o ograničenju principa slobode ugovaranja u pravu osiguranja: N. Petrović Tomić, „O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja: fenomen ‘pokoravanja’ ugovora o osiguranju“, u M. Karanikić Mirić, M. Đurđević (ured.), *Zbornik radova sa Drugo regionalne konferencije iz obligacionog prava održane 14. i 15. novembra 2019. godine na Pravnom fakultetu Univerziteta u Beogradu*, Beograd 2020, str. 318–343.

<sup>16</sup> N. Petrović Tomić, „O pravnoj prirodi dobrovoljnog zdravstvenog osiguranja – Povodom predloga Zakona o zdravstvenom osiguranju“, u: M. Orlić (ur.), *Aktuelna pitanja savremenog zakonodavstva*, Budva, 2019, str. 487–506.

<sup>17</sup> J. M. Binon, *Droit des assurances de personnes, Aspects civils, technique et sociaux*, Larcier, Bruxelles, 2007, str. 20.

## **2. Pogled na ZZO**

U ZZO su sadržane identične odredbe onima koje sadrži Uredba. Po našem mišljenju, čl. 6 i 7 ZZO ne donose potreban napredak ovoj delatnosti. Naime, u čl. 7 stoji da se obavezno zdravstveno osiguranja organizuje i sprovodi u Republičkom zavodu, dok dobrovoljno zdravstveno osiguranje mogu da organizuju i sprovode i pravna lica koja obavljaju delatnost osiguranja (tj. društva za osiguranje), pored Republičkog zavoda, u skladu sa ZZO i zakonom kojim se uređuje osiguranje.<sup>18</sup> To potvrđuje čl. 10 st. 1 tač. 15. Po ZZO, društvo za osiguranje može da pruža sve vrste usluga dobrovoljnog zdravstvenog osiguranja, dok Republički zavod ne može da se bavi poslovima privatnog zdravstvenog osiguranja. ZZO izričito kaže da se na organizaciju i sprovođenje dobrovoljnog zdravstvenog osiguranja primenjuju odredbe zakona kojim se uređuje osiguranje. To otvara pitanje da li se odredbe ZO podjednako odnose i na Republički zavod kada se nađe u ulozi osiguravača dobrovoljnog zdravstvenog osiguranja. Pitanje nema samo teorijski značaj.

Na to se može odgovoriti sistematskim tumačenjem ZZO. Iako bi se samo na osnovu uvodnih odredaba moglo pomisliti kako svaki osiguravač dobrovoljnog zdravstvenog osiguranja – uključujući i Republički zavod – treba da ispunjava uslove iz ZO, takav zaključak ne proizlazi iz onoga što piše u trećem delu posvećenom dobrovoljnom zdravstvenom osiguranju. U čl. 177, koji nosi naslov Uslovi za organizovanje i sprovođenje dobrovoljnog zdravstvenog osiguranja, izričito se pravi razlika između uslova koje treba da ispuni osiguravač i onih koje treba da ispuni Republički zavod. Dok Republički zavod donosi odluku o organizovanju i sprovođenju dobrovoljnog zdravstvenog osiguranja (podvukla N. P. T.); za privatne osiguravače važi sistem dvostrukе dozvole. Oni, naime, pored mišljenja ministarstva za poslove zdravlja o ispunjenosti uslova za organizovanje i sprovođenje dobrovoljnog zdravstvenog osiguranja, treba da pribave i dozvolu NBS. Dok se mišljenje resornog ministarstva daje na osnovu ZZO, dozvola NBS dobija se na osnovu ZO.

Ono po čemu će se razlikovati poslovanje društava koja se osnivaju za poslove dobrovoljnog zdravstvenog osiguranja jeste kumuliranje dozvola. Naime, resorno ministarstvo izdaje mišljenje o ispunjenosti uslova za organizovanje i sprovođenje dobrovoljnog zdravstvenog osiguranja. Ali uz zahtev za izdavanje tog mišljenja u slučaju privatnih osiguravača dostavlja se i kopija dozvole za rad NBS o obavljanju poslova osiguranja u skladu sa zakonom o osiguranju. Budući da je dobrovoljno zdravstveno osiguranje podvrsta neživotnog osiguranja, tim poslovima bave se kompozitna društva za osiguranje, kao i ona što imaju dozvolu za obavljanje poslova neživotnog osiguranja. Izuzetno, poslovima dobrovoljnog zdravstvenog osiguranja mogu se baviti i društva koja obavljaju poslove životnog osiguranja u delu koji pokriva troškove lečenja, pod uslovom da se to osiguranje odnosi na lice s kojim je

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<sup>18</sup> Obavezno zdravstveno osiguranje rezervisano je za Republički zavod, koji osigurava osnovni paket pokrića.

zaključen neki od ugovora o životnom osiguranju.<sup>19</sup> Dopunska klauzula zahteva da se o tim ugovorima vodi posebna evidencija.

Ispada da je specijalnim zakonom samo prepisana Uredba! To je slaba tačka statusnopravnog dela regulatornog okvira dobrovoljnog zdravstvenog osiguranja. Osim toga, pomenuto rešenje Uredbe protivno je odredbama važećeg ZO (i naravno direktivama EU o neživotnom osiguranju). Time je napravljen dvostruki izuzetak u domenu dobrovoljnog zdravstvenog osiguranja. Prvo, Republičkom zavodu, koji je *ex lege* ekskluzivni osiguravač u domenu obaveznog zdravstvenog osiguranja, priznato je pravo da se bavi i nekim poslovima dobrovoljnog zdravstvenog osiguranja. I to bez prethodnog odobrenja nadzornog tela za poslove osiguranja. Time je napravljen presedan ne samo iz ugla našeg prava, već i generalno. U sektoru osiguranja sistem dozvola može se nazvati tekovinom. Drugo, time što Republički zavod ne primenjuje ZO čini se još opasnije odstupanje od pravnog režima koji – po dobroj evropskoj praksi – treba da važi za sve pružaoce usluga osiguranja. To doslovno omogućava Republičkom zavodu da ne formira potrebne rezerve, a NBS onemogućava da vrši nadzor nad delom poslovanja koji se odnosi na dobrovoljno zdravstveno osiguranje. Jedino što je u ZZO rečeno jeste to da i Republički fond vodi sredstva dobrovoljnog zdravstvenog osiguranja odvojeno od sredstava i računa obaveznog zdravstvenog osiguranja, i to po vrstama dobrovoljnog zdravstvenog osiguranja koje sprovodi na posebnim računima (čl. 193 st. 2). Osim što nije u interesu potrošača usluga osiguranja, situacija koju ponavlja ZZO, a koja već postoji na osnovu Uredbe, krajnje je nepodsticajna po privatne osiguravače, koji su u nepovoljnijem položaju od Republičkog zavoda.<sup>20</sup>

Sigurno je da je regulatorni okvir pružanja zdravstvenog osiguranja u Srbiji vrlo limitiran, te da se osiguravači koji pokušavaju da razviju ovu vrstu osiguranja suočavaju s brojnim ograničenjima. Nije obezbeđena jednakost dobrovoljnih (premijskih) osiguravača i fondova obaveznog zdravstvenog osiguranja, niti sigurnost poslovanja. Po onome što piše u ZZO, to neće biti slučaj ni ubuduće. Favorizovanje Republičkog zavoda za zdravstveno osiguranje u odnosu na privatne osiguravače utoliko je problematičnije ukoliko znamo da on nema razvijenu prodajnu mrežu, što je, po nama, jedan od dugogodišnjih uzroka što dobrovoljno zdravstveno osiguranje nije uhvatilo korena. Sve i da naprasno izgradi prodajnu mrežu, pitanje je da li će nju činiti samo lica koja imaju licencu za prodaju usluga osiguranja? Ili je RFZO i u tom pogledu iznad i izvan ZO? Osim toga, zakon stvara sukob interesa, budući da se o pravima koja proizlaze iz obaveznog osiguranja i pravima koja proizlaze iz dobrovoljnog osiguranja (koje se plaća!) odlučuje na istom mestu!!

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<sup>19</sup> ZO, čl. 22 st. 1.

<sup>20</sup> N. Botica Jukić, „Usklađenost Zakona o dobrovoljnem zdravstvenom osiguranju s pravnom stečevinom Evropske unije“, *Osiguranje*, br. 1/2015, str. 30–33.

Uzor kako treba regulisati privatno zdravstveno osiguranje je nemačko pravo.<sup>21</sup> U zakonu o nadzoru osiguranja stoji da se zdravstvenim osiguranjem ne može baviti osiguravač koji se bavi poslovima osiguranja imovine ili životnog osiguranja.<sup>22</sup> Zakon o ugovoru o osiguranju sadrži materijalnopravne odredbe. Taj zakon dopušta da se dobrovoljno zdravstveno osiguranje ugovori kao imovinsko ili kao osiguranje lica, u zavisnosti od toga o kojoj vrsti zdravstvenog osiguranja je reč. Primena zakona o ugovoru o osiguranju u svakom slučaju je ograničena (primera radi, ne primenjuju se norme o povećanju rizika, ali se primenjuje subrogacija osiguravača i kod zdravstvenog osiguranja koje je zaključeno kao osiguranje lica). Osim toga, u nemačkom pravu postoje i model-uslovi za pojedine vrste zdravstvenog osiguranja koje je donelo udruženje osiguravača i koje pojedinačni osiguravači prihvataju i na osnovu njih pružaju ovu vrstu usluga osiguranja.

### **III. Vrste dobrovoljnog zdravstvenog osiguranja u Srbiji – da li je zakonodavac pobrkao lončice?**

ZZO sadrži poseban odeljak koji uređuje dobrovoljno zdravstveno osiguranje. Zapravo, predmet tog zakona su dve vrste zdravstvenog osiguranja: obavezno i dobrovoljno osiguranje. Sama činjenica da je materija dobrovoljnog zdravstvenog osiguranja prvi put kod nas dobila zakonodavni rang zaslužuje da se istakne kao korak napred u razvoju ovog tipa osiguranja, koji u razvijenim državama uveliko doživljava ekspanziju. Ali da li zbog nedovoljne familijarnosti ili iz namere da izbegne zamke zakonskih definicija, zakonopisac koristi *generični pojam dobrovoljno zdravstveno osiguranje* kako bi njime uredio tri vrste pokrića. Stoga je zadatak teorije da najpre razgraniči srodne modalitete pokrića obuhvaćene istim zakonskim pojmom.

ZZO pominje sledeće vrste dobrovoljnog zdravstvenog osiguranja: 1) **dopunsko** zdravstveno osiguranje – osiguranje kojim se pokrivaju troškovi zdravstvene zaštite koji nastaju kada osigurano lice dopunjuje prava iz obaveznog zdravstvenog osiguranja u pogledu sadržaja, obima i standarda; 2) **dodatačno** zdravstveno osiguranje – osiguranje kojim se pokriva učešće u troškovima zdravstvene zaštite, to jest troškove zdravstvenih usluga, lekova, medicinskih sredstava, odnosno novčanih naknada koji nisu obuhvaćeni pravima iz obaveznog zdravstvenog osiguranja; 3) **privatno** zdravstveno osiguranje – osiguranje lica koja nisu obuhvaćena obaveznim zdravstvenim osiguranjem, za pokrivanje troškova za vrstu, sadržaj, obim i standard prava koja se ugоварaju sa osiguravačem.<sup>23</sup>

<sup>21</sup> R. Müller-Stein, „Krankenversicherung“, u: H. W. Van Bühren, *Handbuch Versicherungsrecht*, 4. Auflage, Deutscher AnwaltVerlag, Bonn, 2009, str. 2119–2182.

<sup>22</sup> Time je obezbeđen najveći mogući stepen finansijske zaštite osiguranika zdravstvenog osiguranja.

<sup>23</sup> ZZO, čl. 6 st. 2 tač. 1 do 3 u vezi sa čl. 174.

Generalno posmatrano, dobrovoljno zdravstveno osiguranje omogućava viši nivo zdravstvenih usluga korisnicima, kao i obezbeđenje onih usluga koje sistem obaveznog zdravstvenog osiguranja nema u ponudi.<sup>24</sup> Uobičajeno je da se prvi modalitet privatnog (dobrovoljnog) zdravstvenog osiguranja označava kao paralelno (engl.: *complementary voluntary health insurance*),<sup>25</sup> a drugi kao dopunsko zdravstveno osiguranje (engl.: *supplementary voluntary health insurance*),<sup>26</sup> dok je za treću vrstu rezervisan naziv privatno zdravstveno osiguranje (engl.: *private voluntary health insurance*).<sup>27</sup> To je slučaj u uporednom pravu, dok se kod nas termini dopunsko, odnosno dodatno zdravstveno osiguranje koriste u pogrešnom kontekstu. Stvar je u tome da je zakonopisac pobrkao lončice i upotrebio pogrešne nazine za vrste dobrovoljnog zdravstvenog osiguranja koje reguliše, pri čemu i u uporednim pravu ima primera preklapanja pokrića dodatnog, odnosno dopunskog zdravstvenog osiguranja.<sup>28</sup> Imajući u vidu stepen neupoznatosti potrošača s tim uslugama osiguranja kao faktor koji utiče na njihovo interesovanje, smatramo da je propust zakonopisca utoliko veći. U sklopu *zdravstvenog opismenjavanja stanovništva*, element o kome treba voditi računa jeste i dobrovoljno zdravstveno osiguranje.<sup>29</sup> Korisnicima zdravstvene zaštite treba približiti potencijal dobrovoljnog zdravstvenog osiguranja, što se čini kao nemoguća misija ako je greška napravljena već u nazivu usluge.

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<sup>24</sup> Pružanjem mogućnosti izbora korisnicima, dobrovoljno zdravstveno osiguranje utiče na smanjenje prekomernog korišćenja usluga obavezne zdravstvene zaštite, smanjenje korupcije, investiranje u zdravstvo, itd. V.: T. Rakonjac Antić, *Penzijsko i zdravstveno osiguranje*, Ekonomski fakultet u Beogradu, Beograd, 2018.

<sup>25</sup> Primera radi, u hrvatskom Zakonu o dobrovoljnem zdravstvenom osiguranju stoji da se dodatnim zdravstvenim osiguranjem osigurava viši standard zdravstvene zaštite u odnosu na standard zdravstvene zaštite iz obveznoga zdravstvenog osiguranja, te veći opseg prava u odnosu na prava iz obavezog zdravstvenog osiguranja (čl. 6).

<sup>26</sup> Dopunsko zdravstveno osiguranje jest osiguranje kojim se osigurava pokriće troškova zdravstvene zaštite iz obveznoga zdravstvenog osiguranja iz članka 16 stavka 3 i 4 i članka 17 stavka 5 Zakona o obveznom zdravstvenom osiguranju (Hrvatski Zakon o dobrovoljnem zdravstvenom osiguranju, čl. 5).

<sup>27</sup> Za pravo EU: E. Mossialos, S. Thomson, *Voluntary Health Insurance in the European Union*, European Observatory on Health Systems and Policies, Brussels, 2004, str. 51–67.

<sup>28</sup> Neki autori preferiraju termin *voluntary additional health insurance* kojim obuhvataju sva dobrovoljna zdravstvena osiguranja, osim privatnog, koje ima potpuno drugačiju funkciju. V.: P. Calcoen, W. P. M. M. van de Ven, „Voluntary Additional Health Insurance in the European Union: Free Market or Regulation“, *European Journal of Health Law*, Vol. 24 /2017, str. 2.

<sup>29</sup> Zdravstvena pismenost stanovništva je od kručilnog značaja za održivost zdravstvenog osiguranja. *Svetska zdravstvena organizacija definiše zdravstvenu pismenost kao znanje pojedinca i sposobnost da razume i primeni informacije o zdravlju kako bi mogao da donosi odluke vezane za zdravlje i time uticati na održavanje i/ili poboljšanje zdravlja tokom života.* V.: H. D. C. Roscam Abbing, „Health, human rights and health law: The move towards internationalizam, with special emphasis on Europe“, *International Digest of Health Legislation*, Vol. 49, No. 1, 1998, str. 101–112.

#### **IV. Dopunsko versus dodatno zdravstveno osiguranje: dva stuba privatne zdravstvene zaštite**

Prema uporednom pravu i praksi, prva asocijacija na dobrovoljno zdravstveno osiguranje je dodatno, to jest *paralelno zdravstveno osiguranje*. To je osiguranje kojim se pokrivaju troškovi zdravstvene zaštite što nastaju kada osigurano lice unapređuje paket zdravstvene zaštite u pogledu sadržaja, obima i standarda. Već na prvi pogled, jasno je da je to prilično nejasno osiguranje, oko čijeg se opsega mogu javiti nedoumice. U pitanju je osiguranje koje stupa na scenu kada osiguranik ostvaruje zdravstvenu zaštitu koja je obuhvaćena obaveznim zdravstvenim osiguranjem na način i po postupku koji su drugačiji od načina i postupka ostvarivanja prava iz obaveznog zdravstvenog osiguranja propisanog zakonom kojim se uređuje zdravstveno osiguranje i propisima donetim za sprovođenje tog zakona. Paralelno zdravstveno osiguranje, kao što naziv sugerije, zamišljeno je kao dopuna postojećem sistemu obaveznog zdravstvenog osiguranja. Ono bespogovorno po vokaciji zakona pruža širi obim prava od obaveznog zdravstvenog osiguranja, iako može biti razlike između zakonodavstava u pogledu onoga šta se pod tim tačno podrazumeva.<sup>30</sup> Odgovor na to pitanje može se dobiti samo na osnovu uvida u uslove osiguranja.

Da bismo razgraničili polje primene paralelnog dobrovoljnog zdravstvenog osiguranja, upoređićemo ga s dopunskim zdravstvenim osiguranjem. Iako ZZO za tu vrstu osiguravajuće zaštite koristi pogrešan naziv, definisana je na način koji se inače sreće u uporednom zakonodavstvu. Dopunsko zdravstveno osiguranje pokriva troškove zdravstvene zaštite, odnosno zdravstvenih usluga, lekova, medicinskih sredstava,<sup>31</sup> rehabilitacije i novčanih naknada, koje nije obuhvaćeno obaveznim zdravstvenim osiguranjem. *Dopunsko zdravstveno osiguranje*, zapravo, dopunjuje paket obaveznog zdravstvenog osiguranja u delu zdravstvenih usluga poznatih pod nazivom troškovi participacije.<sup>32</sup> A contrario, ako neko želi širi obim dodatnog pokrića, a ne samo da pokrije troškove participacije, opredeliće se za dodatno, a ne za dopunsko zdravstveno osiguranje.

Suštinski posmatrano, dve vrste sličnog pokrića mogu se pribaviti dobrovoljnim zdravstvenim osiguranjem. Sličnost se ogleda u tome što se u većoj ili manjoj meri oslanjaju na obavezno zdravstveno osiguranje, takoreći bez njega nije moguće odrediti njihov opseg pokrića, dok je treći modalitet (privatno zdravstveno osiguranje) potpuno samostalno.<sup>33</sup> Uostalom, osiguranik je fizičko lice koje je zaključilo ugovor

<sup>30</sup> E. Mossialos, S. Thomson, str. 66–67.

<sup>31</sup> U Uredbi je stajalo medicinsko-tehničkih pomagala i implantata, što je sada izostavljeno. Verujemo da će to ograničiti širinu pokrića, odnosno umanjiti stepen zdravstvene zaštite stanovništva.

<sup>32</sup> E. Mossialos, S. Thomson, str. 67.

<sup>33</sup> B. Nikolić, „Slovenian Complementary Health Insurance as a Service of General Economic Interest“, *International Public Administration Review*, Vol. 13 (1), 2015, str. 49–67.

o dobrovoljnom zdravstvenom osiguranju ili za koga je ugovor zaključen, i koji koristi prava predviđena ugovorom, kao i član njegove porodice. ZZO je postavljeno ograničenje u pogledu svojstva osiguranika paralelnog i dodatnog zdravstvenog osiguranja. U paralelnom i dodatnom osiguranju osiguranik može biti samo lice koje ima svojstvo osiguranika obaveznog zdravstvenog osiguranja. Dakle, lice koje nije obuhvaćeno obaveznim zdravstvenim osiguranjem ne može u Srbiji kupiti ni paralelno ni dodatno dobrovoljno zdravstveno osiguranje. Takođe, ZZO propisuje da lice koje izgubi položaj osiguranika u obaveznom osiguranju gubi isti položaj i u paralelnom i u dodatnom zdravstvenom osiguranju. Time je jasno ukazano na vezu između pomenutih vrsta dobrovoljnog zdravstvenog osiguranja i obaveznog zdravstvenog osiguranja.<sup>34</sup>

Da najpre krenemo od pokrića koje se odnosi na onaj deo troškova zdravstvene zaštite koji po pravilima obaveznog zdravstvenog osiguranja snosi sam osiguranik (tzv. troškovi participacije).<sup>35</sup> Iako ga zakon pominje kao drugi tip dobrovoljnog zdravstvenog osiguranja, njegova sadržina se lakše može odrediti. Dok u pogledu troškova participacije i nema problema,<sup>36</sup> drugi oblik pokrića – koje donosi „veći sadržaj, obim i standard prava“ u odnosu na prava iz obaveznog zdravstvenog osiguranja – prilično je neodređen. Zakon nije definisao šta se smatra pod navedenim višim standardom zaštite i većim obimom prava. Za njegovo određenje bitno je poznavanje propisa koji uređuju obavezno zdravstveno osiguranje. Generalno posmatrano, veći standard zdravstvene zaštite obično se odnosi na lekarske pregledе i dijagnostičke postupke bez listā čekanja, viši standard bolničkog smeštaja, mogućnost izbora specijaliste ili hirurga, proširenu listu lekova čiju kupovinu finansira osiguravač.<sup>37</sup> Takođe, iz uslova osiguranja proizlazi da dodatno zdravstveno osiguranje može da obuhvata i: troškove godišnjeg sistematskog pregleda, troškove različitih specijalističkih pregleda, troškove dodatnih laboratorijskih analiza itd.<sup>38</sup> Ono što je izvesno, bar stručno posmatrano,

<sup>34</sup> Osim toga, u opštim uslovima osiguranja postoji klauzula supsidijariteta dobrovoljnog zdravstvenog osiguranja. Prema toj klauzuli, osiguranik ima pravo na pokriće troškova lečenja na osnovu dobrovoljnog zdravstvenog osiguranja samo ako nema pravo na naknadu tih troškova po osnovu obaveznog zdravstvenog osiguranja. Samo privatno zdravstveno osiguranje uživa autonomiju u odnosu na obavezno zdravstveno osiguranje. Paralelno i dodatno zdravstveno osiguranje posmatraju se u sadejstvu sa obaveznim zdravstvenim osiguranjem. To je jako korisno pri tumačenju nejasnih pitanja, poput domaća paralelnog osiguranja i njegovog razgraničenja od dodatnog zdravstvenog osiguranja.

<sup>35</sup> Detaljnije o tome na šta se odnose troškovi participacije: L. Belanić, „Ugovor o dobrovoljnem zdravstvenom osiguranju u hrvatskom pravu s osvrtom na njemačko pravo“, Palić 2017, str. 117.

<sup>36</sup> Uvođenje troškova participacije nastalo je kao posledica smanjenja troškova u sistemu obaveznog zdravstvenog osiguranja. Prebacivanjem dela troškova zdravstvenih usluga na teret građana nastoji se obezbediti racionalizacija troškova.

<sup>37</sup> V. Bradić, „Privatno zdravstveno osiguranje“, *Osiguranje*, br. 3/2002, str. 51–52.

<sup>38</sup> Ali troškovi stomatoloških tretmana, presađivanja organa, estetskih zahvata, dijalize, promene pola, veštačke oplopljenje, prekida trudnoće koji nije medicinski indikovan itd. isključeni su iz pokrića. U: L. Belanić, str. 124.

jeste to da se oba tipa pokrića mogu nazvati dopunskim ili dodatnim u širem smislu, budući da se njima kompletira zdravstvena zaštita koja proizlazi iz državnog sistema zdravstvene zaštite. Ali jezička distinkcija nije nebitna, tako da je u praksi uobičajeno da se za pokriće koje obuhvata troškove participacije koristi termin dopunsko zdravstveno osiguranje.

Zvući neozbiljno to što je naš zakonopisac našao za shodno da koristi drugačiju terminologiju od one koja je široko odomaćena u uporednom pravu i praksi. Pitanje je kolike će probleme izazvati takav pristup, budući da terminološka odrednica predstavlja ličnu kartu svake usluge osiguranja. Ako se već prilikom prevoda jave nedoumice (u ovom slučaju potpuno opravdane), može se očekivati da strani poslovni partneri (ulagači u delatnost osiguranja) pokažu određenu dozu nepoverenja. Poslednje što treba da uradi ozbiljan zakonodavac jeste da prilikom uređenja nedovoljno poznatih vrsta osiguranja pribegava nekakvoj originalnosti, koja ga može skupo koštati. Terminološki aparat je azbuka regulative svakog instituta, a ovo utoliko više važi u uslovima globalizacije i širenja stranih investicija.

*Privatno zdravstveno osiguranje* zamišljeno je kao rešenje za ona lica koja nisu obuhvaćena obaveznim zdravstvenim osiguranjem ili se nisu uključila u obavezno zdravstveno osiguranje.<sup>39</sup> Na osnovu privatnog zdravstvenog osiguranja, ona mogu pribaviti uži ili širi paket pokrića, već prema visini premije osiguranja. Tako se privatnim osiguranjem mogu obuhvatiti samo lekarski troškovi ili i troškovi boravka u bolnici, različite vrste naknada itd. Pritom se ugovorom određuje s kojim zdravstvenim ustanovama osiguravač ima ugovor, tako da je usluga zdravstvene zaštite obuhvaćena pokrićem samo u tim ustanovama. To je jedini modalitet dobrovoljnog zdravstvenog osiguranja koji pružaju samo društva za osiguranje, ne i Republički zavod. Ujedno, to je jedino dobrovoljno zdravstveno osiguranje koje pretenduje da bude *zamena za obavezno zdravstveno osiguranje* i čiji sadržaj nije zakonom ograničen.<sup>40</sup>

## V. Pravna priroda dobrovoljnog zdravstvenog osiguranja

U ZZO stoji da je dobrovoljno zdravstveno osiguranje *vrsta neživotnog osiguranja*.<sup>41</sup> To nije ništa novo. ZO je to već rekao, a mi smo izneli dovoljno argumenata iz kojih proizlazi da ta odredba nije dovoljna za kvalifikaciju dobrovoljnog zdravstvenog osiguranja kao hibridne usluge.<sup>42</sup> ZZO samo potvrđuje naše uverenje da je

<sup>39</sup> Što se tiče naziva privatno zdravstveno osiguranje, on je u neku ruku neprecizan, jer su i paralelno i dodatno osiguranje vrste privatnog osiguranja. Ali s druge strane, jedino privatno osiguranje egzistira samostalno i nezavisno od obavezognog zdravstvenog osiguranje, te je u tom smislu naziv odgovarajući.

<sup>40</sup> Slično iz ugla hrvatskog prava: L. Belanić, str. 118.

<sup>41</sup> ZZO, čl. 6 st. 1.

<sup>42</sup> N. Petrović Tomić, „O pravnoj prirodi dobrovoljnog zdravstvenog osiguranja – Povodom predloga Zakona o zdravstvenom osiguranju“, u: M. Orlić (ur.), *Aktuelna pitanja savremenog zakonodavstva*, Budva, 2019, str. 487–506.

neophodno ugovornim zakonom o osiguranju uvesti podelu prema vrsti prestacije osiguravača. Naime, u čl. 6 st. 5 ZZO izričito stoji da se na odnose između ugovornih strana u dobrovoljnom zdravstvenom osiguranju primenjuju odredbe zakona kojim se uređuju obligacioni odnosi. Taj oblik *renvoi* na opšti ugovorni propis je potencijalno najslabija tačka zakonske regulative dobrovoljnog zdravstvenog osiguranja. ZZO upućuje na ZOO, u kome ovo osiguranje nije ni pomenuto! I zbog čije podnormiranosti je, uostalom, i usvojena najpre Uredba, kasnije i ZZO. S druge strane, takav pristup samo potvrđuje da je neophodno u što kraćem roku usvojiti novi ugovorni zakon o osiguranju. Dobar ugovorni zakon – koji će sadržati norme koje omogućavaju da se prestacija osiguravača kod osiguranja lica ugovori kao svotna ili odštetna – stvoriće temelj razvoja modernog sistema dobrovoljnog zdravstvenog osiguranja.

Da ukratko ukažemo na pravnu prirodu dodatnog i dopunskog dobrovoljnog zdravstvenog osiguranja.

## **1. Neživotno osiguranje**

Da bismo što više ušli u suštinu dobrovoljnog zdravstvenog osiguranja, potrebno je da ukažemo, najpre, na njegovu kategorizaciju polazeći od odredaba ZO. Taj zakon uvodi podelu na životna i neživotna osiguranja, koja uglavnom ima administrativni značaj.<sup>43</sup> U odredbi o vrstama neživotnih osiguranja ZO pominje dobrovoljno zdravstveno osiguranje koje pokriva: 1) ugovorenu novčanu naknadu za slučaj bolesti; 2) naknadu ugovorenih troškova lečenja i 3) kombinaciju isplata po prethodna dva osnova.<sup>44</sup>

Naglašavamo da uvođenje podele na životna i neživotna osiguranja ne znači napuštanje podele na osiguranje imovine i osiguranje lica. Ta podela ostaje u ugovornom izvoru (ZOO). Ono što je na prvi pogled jasno jeste da ZO omogućava da se i u srpskom pravu ugovore različite prestacije osiguravača koji nude dobrovoljno zdravstveno osiguranje. ZO najpre pominje *ugovorenou novčanu naknadu za slučaj*

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<sup>43</sup> Direktivom 73/239 o usaglašavanju zakonskih, podzakonskih i administrativnih akata koji se odnose na otpočinjanje i obavljanje delatnosti direktnog osiguranja, osim osiguranja života (Prva neživotna direktiva) po prvi put je izvršena kategorizacija rizika, što je uticalo na uobičavanje prava osiguranja u formi koju danas pozajmimo. Naime, Aneksom A Prve neživotne direktive nabrojani su ugovori o osiguranju kod kojih se obaveza osiguravača sastoji u naknadi štete. To su ugovori o osiguranju koji pokrivaju sledeće rizike: nesrećni slučaj (uključujući i nezgodu na radu i profesionalno oboljenje), bolest, odgovornost za kopnena vozila, železnička vozila, vazduhoplove, brodove, gubitak ili oštećenje stvari u saobraćaju, odgovornost za požar i druge prirodne sile, odgovornost za ostalu štetu u imovini, odgovornost za upravljanje motornim vozilom, odgovornost za upravljanje avionom (uključujući i odgovornost prevozioca), odgovornost za upravljanje brodovima (uključujući i odgovornost prevozioca), opšta odgovornost, odgovornost za vraćanje kredita i kad nastupi stečaj, odgovornost u vezi sa jemstvom, finansijski gubici i rizik pri zapošljavanju i osiguranje od pravnih troškova. Kao što se može primetiti, bolest je već tada kategorisana kao neživotni rizik.

<sup>44</sup> ZO, čl. 9 st. 2.

*bolesti.* Ugovorom o dobrovoljnom zdravstvenom osiguranju mogu se, dakle, potkriti ugovorene (dnevne) naknade. Iako koristi termin naknada, u pitanju su svotne prestacije, što se dâ zaključiti iz formulacije ugovorena novčana naknada. U oblasti imovinskih osiguranja naknade se ne mogu unapred ugovarati, već se odmeravaju prema određenim pravilima, uz uvažavanje principa obeštećenja.<sup>45</sup> *U ovom osiguranju čak i kada se upotrebi termin naknada, ako je ona ugovorena tj. unapred određena, to nije naknada, već suma koju osiguravač treba da isplati.* ZO pominje te naknade, ali bez preciziranja na koju vrstu naknada se misli. To je učinjeno u ZZO. U ZZO je preciziran pojma novčane naknade. One obuhvataju: *ugovorene troškove lečenja, gubitak zarade odnosno plate i drugih prihoda zbog privremene sprečenosti za rad, troškove prevoza u vezi s lečenjem i druge vrste novčanih naknada u vezi sa ostvarivanjem prava iz dobrovoljnog zdravstvenog osiguranja.*<sup>46</sup> Opštim uslovima osiguranja propisuje se da je osiguravač u obavezi da isplati ugovorene novčane naknade u slučaju gubitka zarade, odnosno plate i drugih primanja, zbog privremene sprečenosti za rad, kao i druge vrste novčanih naknada u vezi sa ostvarenjem prava iz dobrovoljnog zdravstvenog osiguranja koje su definisane ugovorom o osiguranju.<sup>47</sup>

Pođe li se od nemačkog prava kao referentnog, dve vrste naknada mogu biti obuhvaćene pojmom *ugovorene novčane naknade za slučaj bolesti.*<sup>48</sup> Prvo, naknade koje se isplaćuju prema unapred ugovorenom iznosu, koji bi trebalo da kompenziraju gubitak zarade tokom perioda privremene nesposobnosti za rad nastale kao posledica ugovorom obuhvaćenih bolesti (nem.: *Krankentagegeldversicherung*). Sama činjenica da su utvrđene u fiksnom iznosu, odnosno da zavise samo od sprečenosti za rad, a ne od konkretnе štete koju osiguranik trpi usled toga, daje prestaciji osiguravača svotni karakter.<sup>49</sup> Prema preovlađujućem mišljenju u nemačkoj teoriji, u pitanju je svotno osiguranje koje treba da nadomesti gubitak redovnih primanja izazvan određenom bolešću. Drugo, dnevne naknade za vreme boravka u bolnici (nem.: *Krankenhau-stagegeldversicherung*). I ta prestacija osiguravača je fiksna, tj. ne mora da odgovara materijalnim izdacima koje je osiguranik imao za vreme boravka u bolnici. U pitanju je iznos koji se unapred ugovara i koji ne zavisi od konkretnе štete. Kao što ćemo u daljem izlaganju videti, obaveza osiguravača u slučaju isplate dnevnih naknada bilo zbog boravka u bolnici bilo zbog privremene sprečenosti za rad suštinski se razlikuje od njegove obaveze u slučaju pokrića troškova lečenja. Troškovi se pokrivaju prema stvarnom iznosu tj. obaveza osiguravača je usmerena ka saniranju konkretnе štete.

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<sup>45</sup> J. Bigot, „Le règlement du sinistre“, u: Jean Bigot (ed.), *Traité de droit des assurance, Le contrat d'assurance*, Tome 3, 2 édition, L. G. D. J., 2014, str. 942.

<sup>46</sup> ZZO, čl. 10 st. 1 tač. 20.

<sup>47</sup> Čl. 2 st. 12 Opšтиh uslova za dobrovoljno zdravstveno osiguranje, „Generali osiguranje Srbija“.

<sup>48</sup> H. Tschersich, „Krankentagegeld-und Krankenhaustagegeldversicherung“, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *VersicherungsrechtsHandbuch*, 2. Auflage, Verlag C. H. Bech, München 2009, str. 2757–2758.

<sup>49</sup> M. Wandt, str. 459-460.

U pitanju su vrlo korisne prestacije osiguravača, kojima se licu koje je zadela neka bolest i koje je suočeno s prolaznom nesposobnošću za rad omogućava da lakše prebrodi taj period. Dnevne naknade zbog privremene sprečenosti za rad donose potrebnu finansijsku sigurnost. Isti je slučaj i sa naknadama za dane boravka u bolnici, koje znatno olakšavaju svakodnevni život osiguranika koji je usled bolesti hospitalizovan ili primoran na svakodnevno ambulantno lečenje. Time osiguranik obezbeđuje unapred određenu sumu novca koju može koristiti za bilo koju svrhu, a koja mu se isplaćuje u slučaju bolesti.

Drugo, dobrovoljno zdravstveno osiguranje može da pokriva *ugovorene troškove lečenja*. Tokom razvoja dobrovoljnog zdravstvenog osiguranja došlo je do toga da obaveza osiguravača može biti usmerena i ka naknadi troškova lečenja. Tada su nastali uslovi da se to osiguranje kvalifikuje kao mešovita usluga. Naravno, sama obaveza osiguravača koja se odnosi na naknadu ugovorenih troškova lečenja nije precizirana odredbama statusnog zakona (što je očekivano!), tako da osiguravači to čine uslovima osiguranja. Njihova namera je da precizno propišu na pokriće kojih medicinskih tretmana i zahvata ima pravo njihov osiguranik. Osiguravači tako definisu troškove lečenja da se njihova obaveza odnosi samo na one troškove koji su bili *medicinski neophodni u postupku lečenja* dijagnostikovanih bolesti i stanja osiguranika.<sup>50</sup> To bi trebalo da piše i u zakonu koji uređuje materijalopravna pitanja. Da bi se spričile zloupotrebe tog osiguranja, nemački Zakon o ugovoru o osiguranju *explicite* propisuje da osiguravač neće biti obavezan da naknadi troškove u onim slučajevima kada postoji značajna nesrazmerna između nastalih troškova i pružene medicinske usluge.<sup>51</sup>

Najzad, ZO dozvoljava mogućnost kombinacije ugovorene novčane naknade za slučaj bolesti i ugovorenih troškova lečenja. I u našem pravu od osiguranika zavisi kakav će paket dobrovoljnog zdravstvenog osiguranja izabrati.

Ako se u obzir uzmu odredbe ZOO, ZO i ZZO, zaključujemo da je dobrovoljno zdravstveno osiguranje neživotno osiguranje lica. Šta to u stvari znači? Naročito iz ugla prakse. Po čemu se ono razlikuje od osiguranja života? Ili od ostalih neživotnih osiguranja? Posmatrano iz ugla uporednog prava, osiguranje od posledica nesrećnog slučaja i dobrovoljno zdravstveno osiguranje kasnije su se pojavila u odnosu na životno osiguranje, koje je po svim karakteristikama tipično osiguranje lica. Stoga ih je trebalo i jezički razgraničiti od životnog osiguranja s kojim dele pri-padnost istoj vrsti osiguranja lica polazeći od predmeta osiguranja, u ovom slučaju ličnog dobra na kome se realizuje osigurani rizik. Sam naziv neživotna osiguranja lica koji potiče iz francuskog prava (fran.: *les assurances de personnes non-vie*) nastao je kako bi se ukazalo na *razlike u pravnom i tehničkom režimu osiguranja* od posledica nezgode i dobrovoljnog zdravstvenog osiguranja u odnosu na životno

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<sup>50</sup> To je slučaj i u uporednom pravu: H. Müller, str. 2722–2724.

<sup>51</sup> Par. 192 Abs. 2 nemačkog VVG.

osiguranje.<sup>52</sup> Nažalost, o neizgrađenosti našeg regulatornog okvira osiguranja svedoči podatak da ZOO sadrži odeljak posvećen osiguranju lica i u njemu čitav set pravila s intencijom primene i na osiguranje života i na osiguranje od posledica nezgode. Reč je o sledećim pravilima: o osiguranoj sumi, o formi ugovora, nemogućnosti prinudne naplate premije osiguranja,<sup>53</sup> osiguranju za slučaj smrti maloletnika i lica lišenih poslovne sposobnosti, osiguranju za slučaj smrti trećeg lica, kumulaciji osigurane sume i naknade štete, namernom ubistvu osiguranika, isključenju ratnih rizika i pravu osiguravača da ugovorom isključi određene rizike.<sup>54</sup> Na današnjem stupnju razvoja prava osiguranja, savršeno je jasno da je takav pristup neodrživ. Potrebno je zakonodavstvom uvažiti razlike između životnih i neživotnih osiguranja lica i urediti ih posebnim pravilima. Zapravo, po našem mišljenju, najbolje je da se ugovornim zakonom najpre definišu pojedine vrste osiguranja lica, kao i da svakoj od njih bude posvećen poseban odeljak u zakonu.

Iako ne negiramo da je odredbama ZO i ZZO učinjen prvi korak ka rasvetljavanju pravne prirode dobrovoljnog zdravstvenog osiguranja, smatramo da bi ono postalo lakše razumljivo prosečnom pravniku ako se u naše pravo uvede podela osiguranja prema prirodi prestacije osiguravača.

## **2. Osiguranje lica**

Podnormiranost srpskog prava u pogledu dobrovoljnog zdravstvenog osiguranja utoliko je ozbiljniji problem ukoliko znamo da dobrovoljno zdravstveno osiguranje nije tipična usluga osiguranja lica. Da bismo skrenuli pažnju na njegovu osobenu pravnu prirodu i potrebu zakonskog uređenja, najpre ćemo pokušati da ga svrstamo u okviru postojećih podela.

Iz ugla našeg ugovornog prava osiguranja, najstarija je podela na osiguranje imovine i osiguranje lica. Pođemo li od podele na kojoj počiva ZOO, dobrovoljno zdravstveno osiguranje pripada porodici osiguranja lica, iako ga ZOO izričito ne pominje. Zašto? Zato što je bazični rizik koji se osigurava u ovom tipu osiguranja, bolest, primer rizika koji se ostvaruje na ličnim dobrima osiguranika.<sup>55</sup> Taj rizik se ostvaruje na zdravlju kao tipičnom ličnom dobru osiguranika. Iako najčešće dovodi

<sup>52</sup> J. Bigot, P. Baillot, J. Kullmann, L. Mayaux, *Traité de Droit des Assurances, Les assurances de Personnes*, Tome 4, I. G. D. J., Paris 2007, str. 499–503.

<sup>53</sup> Izuzetak o nemogućnosti prinudne naplate premije osiguranja uređen je u opštem odeljku. I izričito se odnosi samo na osiguranje života. U teoriji, a i sudskej praksi, stoga se postavilo pitanje da li se odnosi i na osiguranje od posledica nesrećnog slučaja. U sudskej praksi je u nekoliko navrata ispravno primećeno da zbog razlika između pomenutih osiguranja nema mesta primeni čl. 945 na osiguranje od posledica nezgode.

<sup>54</sup> P. Šulejić, „Osiguranje lica u svetu donošenja Građanskog zakonika Srbije”, *Pravni život*, br. 12/2009, str. 801.

<sup>55</sup> Dobrovoljno zdravstveno osiguranje se i u uporednom pravu navodi kao primer osiguranja lica. U nemačkom pravu, gde postoji podela na lična (nem.: *Personenversicherung*) i nelična (nem.: *Nichtpersonenversicherung*) osiguranja, ovo osiguranje se pominje kao lično osiguranje. V.: E. Lorenz, „Allgemeiner

do materijalnih posledica (tj. izdataka ili gubitka zarade), krucijalna za kvalifikaciju ovog osiguranja kao ličnog jeste činjenica da rizik pogađa ličnu, a ne imovinsku sferu osiguranika.<sup>56</sup> U tom smislu ono je uporedivo sa životnim osiguranjem (rizik se odnosi na smrt ili doživljenje) ili osiguranjem od posledica nesrećnog slučaja (rizik se odnosi na život, telesni integritet ili radnu sposobnost). Dobrovoljno (privatno) zdravstveno osiguranje, naime, pokriva finansijske posledice ugovorom nabrojanih bolesti, uobičajeno je da pokriva farmaceutske troškove, troškove lečenja i hospitalizacije,<sup>57</sup> a može da pokrije i posledice privremene nesposobnosti (invalidnosti) ili rizik od smrti nastao kao posledica bolesti.<sup>58</sup> U osnovi ovog osiguranja je *saniranje ekonomskih posledica ugovorom definisanih bolesti i stanja* (trudnoće, porođaja itd.).<sup>59</sup> Iz tog razloga je neophodno prilagoditi prestaciju osiguravača vrsti posledica koje se pokrivaju konkretnim tipom zdravstvenog osiguranja.

Ako bi se poslo od toga da je dobrovoljno zdravstveno osiguranje vrsta osiguranja lica (iako to u ugovornom zakonu ne piše *explicite*), očekivalo bi se da i u pogledu njega važi načelno pravilo iz odeljka o osiguranju lica. ZOO već u prvom članu odeljka koji nosi naslov osiguranje lica kaže da se visina osigurane svote, koju je osiguravač dužan isplatiti kad nastupi osigurani slučaj, utvrđuje u polisi prema sporazumu ugovornih strana.<sup>60</sup> Iako naslov iznad člana ne ukazuje izričito na to, time je zakonodavac opredelio svrhu osiguranja lica. Iz toga se dâ zaključiti da su *osiguranja lica po zakonskoj percepciji svotna osiguranja*. U našem pravu, dakle, postoji implicitna pretpostavka da su osiguranja lica svotnog karaktera. Iako ZOO *explicite* pominje samo osiguranje života i osiguranje od nesrećnog slučaja, ta odredba morala bi da se odnosi i na dobrovoljno zdravstveno osiguranje. Ono je, dakle, po prepostavci svotno osiguranje.

Međutim, u praksi prestacija osiguravača neće biti u svakom slučaju čisto svotna, već će po načinu utvrđivanja mnogo puta biti sličnija prestacijama kod imovinskih osiguranja (kao što je to slučaj kod troškova lečenja). Iz tog razloga u inostranoj teoriji je uobičajeno da se dobrovoljno zdravstveno osiguranje kvalificuje kao mešovita usluga osiguranja, tačnije kao lično osiguranje koje spaja osobine i svotnih i odštetnih osiguranja. Najbolji primer je pokriće troškova lečenja koji na-

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Teil. Das Privatversicherungsrecht", u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.) *Versicherungsrechts-Handbuch*, Verlag C. H. Bech, München 2009, 21; M. Wandt, str. 459.

<sup>56</sup> J. Bonnard, *Droit des assurances*, 4 édition, LexisNexis, Paris 2012, str. 16.

<sup>57</sup> Ovo osiguranje kreirano je sa vokacijom pokrića svih zdravstvenih troškova. Kako pokriće medicinskih troškova zahteva da se dokaže koliko oni iznose, do izražaja dolazi odštetni karakter prestacije osiguravača.

<sup>58</sup> H. Müller, 2697; J. Bigot, „Les assurances de personnes non-vie, Notions générales”, u: Jean Bigot, Philippe Baillot, Jérôme Kullmann, Luc Mayaux (ed.), *Les assurances de personnes*, Tome 4, L.G.D.J, Paris, 2007, str. 503.

<sup>59</sup> H. Tscherisch, „Krankentagegeld- und Krankenhaustagegeldversicherung”, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *Versicherungsrechts-Handbuch*, München 2015, str. 3060.

<sup>60</sup> ZOO, čl. 942.

staju usled ugovorom obuhvaćenih bolesti i koji se pokrivaju u stvarnom iznosu.<sup>61</sup> Zapravo, najtačnije je reći da je to osiguranje *hibrid*, tj. da ima mešovit karakter i da za njega treba da važi sličan pravni režim kao za osiguranje od posledica nezgode.<sup>62</sup> Tu dolazimo do najvećeg ograničenja našeg regulatornog okvira osiguranja. Pošto dobrovoljno zdravstveno osiguranje uopšte nije pomenuto u odeljku ZOO koji uređuje osiguranje lica, njegova kvalifikacija vrši se samo na osnovu onoga što стоји u uslovima osiguranja.

Suočeni sa tim problemom i svesni činjenice da ZOO nigde direktno ne pominje dobrovoljno zdravstveno osiguranje, domaći osiguravači su problem rešili unošenjem u opšte uslove osiguranja klauzula iz kojih proizlazi da je ovo odštetno osiguranje, bez obzira na to kakva prestacija je *in concreto* ugovorena.<sup>63</sup> Umesto dovitljivosti domaćih osiguravača, zalažemo se za uređenje dobrovoljnog zdravstvenog osiguranja u posebnom zakonu.<sup>64</sup> Ključno je da se ono definiše na jasan način, kao i da se precizno odredi koja pravila iz odeljka o osiguranju lica imaju primenu i na ovo osiguranje, odnosno koja pravila koja inače važe za imovinska osiguranja dolaze u obzir ako priroda prestacije to nalaže.

### **3. Zaključno o pravnoj prirodi dobrovoljnog zdravstvenog osiguranja – osiguranje lica odštetnog karaktera**

Naše je mišljenje da je dobrovoljno zdravstveno osiguranje po svojoj prirodi hibridna usluga osiguranja. I da kao takvo neće biti razvijeno u našem pravu dok se ne izgradi odgovarajuća pravna infrastruktura. Pod tim prvenstveno mislimo na usvajanje sektorskog propisa tj. Zakona o ugovoru o osiguranju, koji bi trebalo da implementira podelu na svotna i odštetna osiguranja. Reč je o podeli prema vrsti prestacije osiguravača, koju uporedno pravo uveliko poznaje, direktno ili indirektno.<sup>65</sup> Za održivi razvoj dobrovoljnog zdravstvenog osiguranja (i uopšte perspektivnih usluga osiguranja) u srpskom pravu bitno je stvoriti uslove da se prestacije

<sup>61</sup> J. Bonnard, str. 316.

<sup>62</sup> Ipak, između ova dva tipa pokrića postoji jedna značajna razlika: osiguranju od posledica nezgode se osporava odštetni, dok se dobrovoljnom zdravstvenom osiguranju osporava svotni karakter. Istina je naravno na sredini. Oba osiguranja mogu podrazumevati različita pokrića, te prema onome što je ugovorenog treba odgovoriti kakav je karakter prestacije osiguravača.

<sup>63</sup> U nekim opštima uslovima sadržana je odredba o regresu koja potvrđuje odštetni karakter ovog tipa osiguranja. Ispravnije bi bilo reći da dolazi do subrogacije osiguravača u prava osiguranika. Tako stoji da se „prava osiguranika, odnosno osiguranog lica prema trećem licu koje je odgovorno za štetu, prenose na osiguravača u visini naknade isplaćene od strane osiguravača, bez pribavljanja posebne saglasnosti osiguranika“. Takođe, u uslovima osiguranja se pominje pravo osiguravača da iznos naknade koji je platio štetnik odbije od iznosa naknade koju treba da plati osiguraniku na osnovu nastalog osiguranog slučaja.

<sup>64</sup> M. Ćurković, *Ugovor o osiguranju osoba, život-nezgoda-zdravstveno*, Inženjerski biro, Zagreb, 2006, str. 209.

<sup>65</sup> N. Petrović Tomic, „O podeli na svotna i odštetna osiguranja – Pravo osiguranja na prekretnici“, u: V. Radović, *Uskladivanje poslovnog prava Srbije sa pravom Evropske unije*, Beograd 2019, str. 415–436.

osiguravača kvalifikuju prema onome što u ugovoru piše. Time se uvažava *princip slobode ugovaranja u pogledu vrste ugovorenih prestacija, čime se ne dovodi u pitanje ograničenje te iste slobode uvođenjem imperativnih normi u pogledu same sadržine ugovora*. Naglašavamo: sama podela prema vrsti prestacije osiguravača ne mora biti zakonom predviđena *expressis verbis*. Uporedno pravo nas uči da je dovoljno da iz svih odredaba koje se odnose na određeni odeljak (npr.: na osiguranje lica) proizlazi da određeni tip osiguranja može da se ugovori kao odštetno ili svotno pokriće. To u kojoj meri pravni poredak izlazi u susret očekivanjima osiguranika najbolje se može proceniti ako se pođe od toga da li je ugovornim stranama dopušteno da odrede hoće li prestacija imati svotni ili odštetni karakter.<sup>66</sup>

Dakle, ključno kod regulative ugovora o dobrovoljnem zdravstvenom osiguranju u novim propisima jeste to da se izbegne usvajanje rešenja kojima se praksa onemogućava da dalje razvija ovu uslugu budućnosti. Pod tim prvenstveno mislimo na dispozitivne norme kojima bi bilo propisano da se dobrovoljno zdravstveno osiguranje može zaključiti kao osiguranje od štete, kao osiguranje određene osigurane sume ili kao kombinacija navedenih osiguranja. Pritom, ako je osiguranje zaključeno kao osiguranje od štete, regulatorni okvir treba da sadrži normu koja osiguravaču daje pravo da se subrogira u prava osiguranika prema licu odgovornom za nastupanje osiguranog slučaja. Time bi se priznao hibridni karakter ovog osiguranja, što bi osiguravačima omogućilo da razvijaju različite pakete dobrovoljnog zdravstvenog osiguranja. Najzad, da kompletira priču, zakonodavac bi *pro futuro* trebalo da usvoji *lex specialis* o dobrovoljnem zdravstvenom osiguranju. Time se stvaraju uslovi za najviši stepen razvoja te vrste osiguranja.

## **VI. Atraktivnost dopunskog zdravstvenog osiguranja**

### **1. Dopunsko osiguranje – dopuna obaveznog zdravstvenog osiguranja**

Po opšteprihvaćenoj definiciji u uporednom pravu, dopunsko zdravstveno osiguranje obezbeđuje pokriće troškova zdravstvene zaštite iz obaveznog zdravstvenog osiguranja u delu *troškova participacije*, tj. u delu usluga zdravstvene zaštite u kome su osigurane osobe dužne da učestvuju u troškovima zdravstvene zaštite, odnosno u ceni lekova.<sup>67</sup> Ono pokriva troškove do pune cene zdravstvene zaštite iz obaveznog zdravstvenog osiguranja u slučajevima kada RFZO ne osigurava plaćanje zdravstvenih

<sup>66</sup> H. Tschersich, str. 2757–2758.

<sup>67</sup> Zdravstvene usluge koje stvaraju obavezu participacije u troškovima razlikuju se od države do države. Na ovom mestu izdvajamo kao referentne: troškove specijalističkih pregleda, različitih pretraga, biotehnologije, alternativne medicine, medicinskih tehničko-tehnoloških pomagala (različitih proteza), zatim okvira za naočare itd.

usluga u celosti.<sup>68</sup> Dopunsko zdravstveno osiguranje se nadovezuje na obavezno zdravstveno osiguranje, koje je na našim prostorima još uvek osnovno zdravstveno osiguranje.<sup>69</sup> Dakle, zdravstvena zaštita je zasnovana na modelu pozajmljenom iz socijalističkog perioda. Ali zbog izraženog starenja stanovništva i finansijskog pritiska koji prati sistem obavezognog osiguranja, u pogledu dela usluga zdravstvene zaštite postoji obaveza osiguranika da učestvuju u troškovima.

Smanjenje troškova obavezognog zdravstvenog osiguranja jedan je od načina rešavanja problema koji se u istom ili sličnom obliku javlja u većini država, što je dovelo do smanjenja obima zdravstvenih usluga koje pokriva ovaj vid socijalne zaštite i prevajdavanja dela usluga na teret samih osiguranika.<sup>70</sup> Kako je danas u mnogim državama izuzetno izraženo starenje stanovništva i kako rizik od bolesti raste s godinama, ne čudi što se danas sve više pažnje posvećuje oblicima privatnog (dobrovoljnog) zdravstvenog osiguranja.<sup>71</sup> Lica koja žele blagovremeno da investiraju u uslugu koja će im omogućiti pokriće troškova lečenja i uopšte medicinskih tretmana, kao i izgubljene zarade, u dobrovoljnom zdravstvenom osiguranju pronalaze željeni ugovor. Na odluku jednog lica odlučujuće deluju najnovija saznanja u medicini, otkrića novih lekova, postupaka lečenja itd. Zahvaljujući današnjoj dinamici razvoja medicine, mnoge bolesti više nisu neizlečive, i posle strašnih saobraćajnih nesreća i uopšte nezgoda oštećeni uspevaju ne samo da prežive, već i da se izleče. U opisanim okolnostima, zdravstveno opismeno lice nastoji da se pobrine za svoju budućnost, te se pravovremeno opredeljuje za dobrovoljno zdravstveno osiguranje.

Tu na scenu stupa dopunsko zdravstveno osiguranje. Pokriće koje se njime pribavlja je funkcionalno povezano s osnovnim zdravstvenim osiguranjem, koje je kod nas još uvek obavezno i čini deo paketa socijalne zaštite.<sup>72</sup> Dopunsko privatno osiguranje u tom smislu je zaista *finansijska dopuna obaveznom osiguranju* i direktno zavisi od onoga što je predviđeno regulatornim okvirom. Drugim rečima, definisanjem prava iz zdravstvenog osiguranja koja se mogu koristiti uz odgovarajuće troškove participacije, zakonodavac ostavlja mogućnost da se u tom segmentu zdravstvene zaštite pozicioniraju privatni osiguravači. I da na taj način obezbede ulazak svežeg kapitala. Ali ono po čemu se taj tip dobrovoljnog zdravstvenog osiguranja razlikuje od paralelnog osiguranja jeste njegov *akcesorni karakter*. Njegova egzistencija prepostavlja kakav-takav sistem bazičnog zdravstvenog osiguranja (obično državnog!), koji u pogledu dela usluga zdravstvene zaštite zahteva učešće osiguranika

<sup>68</sup> L. Belanić, str. 117.

<sup>69</sup> R. Roemer, „Health Legislation as a Tool for Public Health and Health Policy“, *International Digest of Health Legislation*, Vol. 49, br. 1, 1998, str. 95–96.

<sup>70</sup> N. Petrović Tomić, *Pravo osiguranja, Sistem*, str. 708.

<sup>71</sup> G. Pinet, „Health Challenges of 21st Century: a legislative approach to health determinants“, *International Digest of Health Legislation*, Vol. 49, No. 1, 1998, str. 131–178.

<sup>72</sup> V. Gotovec, *Zdravstveno osiguranje – socijalni aspekti*, doktorska disertacija, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2010, str. 211–212.

u troškovima. Budući da dopunjaje obavezno osiguranje u samo jednom segmentu, mogućnosti razvoja tog tipa pokrića skučene su i usmerene samo ka onom krugu korisnika obavezognog zdravstvenog osiguranja koji ima interes da upravlja rizikom troškova participacije. Iz toga nedvosmisleno proizlazi da je krug lica koja mogu biti zainteresovana za taj tip dobrovoljnog zdravstvenog osiguranja određen time da je reč o licima koja nisu oslobođena plaćanja troškova participacije.<sup>73</sup> To ovo osiguranje čini delom socijalne zaštite, pod uslovom da se koncipira na adekvatan način.

U državama koje se suočavaju s naglim odlivom mlađe populacije i istovremenom ekonomskom krizom, obavezno zdravstveno osiguranje opstaje najviše zahvaljujući dopuni koju obezbeđuje dobrovoljno zdravstveno osiguranje po modalitetu dopunskog. Kako troškovi participacije najteže padaju osobama s nižim primanjima (što obuhvata i lica nakon završetka radnog veka), to se dopunskim osiguranjem njima omogućava da plaćanje iz sopstvenog džepa u trenutku kada se ostvari zdravstveni rizik zamene plaćanjem premija dopunskog osiguranja.<sup>74</sup> Premija dopunskog zdravstvenog osiguranja u svakom slučaju je niža od troškovnog rizika koji snosi pojedinac suočen s iznosom participacije, koji varira u zavisnosti od vrste zdravstvene usluge.<sup>75</sup> Da nema te opcije, moglo bi se desiti da lica s natprosečno niskim primanjima u trenutku ostvarenja zdravstvenog rizika moraju da biraju između osiromašenja i nekorisćenja zdravstvene zaštite, što je protivno ciljevima zdravstvene

<sup>73</sup> Po našem pravu, zdravstvena zaštita u punom iznosu iz sredstava obavezognog zdravstvenog osiguranja bez plaćanja participacije obezbeđuje se:

- 1) ratnim vojnim invalidima, mirnodopskim vojnim invalidima i civilnim invalidima rata;
- 2) slepim licima i trajno nepokretnim licima, kao i licima koja ostvaruju novčanu naknadu za pomoći negu drugog lica, u skladu sa zakonom;
- 3) dobrovoljnim davaocima krvi koji su krv dali deset i više puta, osim za lekove sa Liste lekova, kao i za medicinska sredstva;
- 4) dobrovoljnim davaocima krvi koji su krv dali manje od deset puta, osim za lekove sa Liste lekova, kao i za medicinska sredstva, u roku od 12 meseci posle svakog davanja krvi;
- 5) živim davaocima organa, osim za lekove sa Liste lekova, kao i za medicinska sredstva;
- 6) davaocima ćelija i tkiva, osim za lekove sa Liste lekova, kao i za medicinska sredstva;
- 7) osiguranicima iz člana 16 st. 1 i 3 ovog zakona;

8) članovima uže porodice osiguranika iz člana 16 stav 1 tač. 7)-9) i 11) i stav 3 ovog zakona.

<sup>74</sup> Iako dopunsko zdravstveno osiguranje nije obavezno, za lica koja najteže pogodi rizik od troškova participacije, ovo osiguranje je u određenoj meri prinudno, budući da je to jedini način upravljanja troškovima participacije. Upravo takva situacija utiče na zakonodavca da ograniči slobodu ugovaranja i na strani osiguravača, kako bi se dopunsko zdravstveno osiguranje izuzelo od primene čisto tržišnih uslova. Ograničenje se ogleda, primera radi, u obavezi osiguravača da zaključi ugovor sa svakim osiguranikom obavezognog zdravstvenog osiguranja prema uslovima koji nisu isključivo rezultat individualne procene rizika, već se primjenjuje odgovarajuća optimizacija rizika u okviru zajednice rizika.

<sup>75</sup> Ovo zato što osiguranje počiva na zajednici rizika i što je jedno od bazičnih pravila da je teret koji pogodi pojedinca u vidu premije osiguranja manji što je veća zajednica rizika.. Korisnicima zdravstvene zaštite je, dakle, povoljnije da investiraju u taj vid zdravstvene sigurnosti nego da zadrže rizik od troškova participacije.

zaštite i javnom interesu u oblasti zdravlja.<sup>76</sup> U tom smislu je iz aspekta stvaranja uslova za održivi sistem zdravstvene zaštite neophodno promovisati dopunsko zdravstveno osiguranje. Njime se ostvaruje bitna socijalna funkcija zaštite osiguranika obaveznog zdravstvenog osiguranja s nižim primanjima, kojima je povoljnije da investiraju u dopunsko zdravstveno osiguranje nego da snose rizik nesrazmerno velikih troškova participacije. Smanjenje visine troškova iz džepa građana za potrebe zdravstvene zaštite treba smatrati ciljem od opštег interesa. Održivi razvoj u oblasti zdravstvene zaštite iziskuje sveobuhvatnu reformu, koja će na adekvatan način *implementirati različite modalitete dobrovoljnog zdravstvenog osiguranja.*<sup>77</sup>

## 2. Širina pokrića

Šta je, dakle, predmet dopunskog zdravstvenog osiguranja? Osiguranje dopunskog pokrića zdravstvene zaštite, koje omogućava pokriće razlike, odnosno učešća u troškovima zdravstvene zaštite koji padaju na teret osiguranika u pogledu određenih usluga zdravstvene zaštite.<sup>78</sup> Lice koje ugovori dopunsko zdravstveno osiguranje pokriva finansijske gubitke uzrokovane zdravstvenim troškovima nastalim usled učešća u troškovima participacije.<sup>79</sup> Reč je o **pokriću delimično pokrivene zdravstvene zaštite** koja se pruža u okviru sistema obavezne zdravstvene zaštite.<sup>80</sup> Ugovaranjem dopunskog zdravstvenog osiguranja delimično pokrivene zdravstvene usluge se obuhvataju u celosti ili do iznosa koji definitivno prevazilazi onaj obuhvaćen delovanjem obaveznog osiguranja.<sup>81</sup> To učešće u troškovima, poznatije kao troškovi participacije, može biti u fiksnom iznosu (nešto poput administrativne takse) ili procentualni ideo u troškovima zdravstvene zaštite, a u nekim sistemima se koristi i mehanizam odbitne franšize, tako da osiguranik sudeluje u troškovima zdravstvene zaštite do određenog iznosa. Teorijski posmatrano, svi osiguranici obaveznog osiguranja imaju interes da zaključe dopunsko zdravstveno osiguranje, ali je taj interes

<sup>76</sup> V. Gotovac, članak, str. 49.

<sup>77</sup> Kada je reč o dopunskom zdravstvenom osiguranju, sve i da se promoviše i postane popularno, nije realno očekivati veće finansijske učinke. Njegova svrha i nije da prikupi dobit, već da finansijski okrepi javni zdravstveni sistem, kao i da omogući investicije u njega.

<sup>78</sup> J. C. Langenbrunner, „Supplemental Health Insurance: Did Croatia Miss an Opportunity?”, *Croatian Medical Journal*, Vol. 43, br. 4, 2002, str. 404.

<sup>79</sup> Reč je o riziku od plaćanja učešća u troškovima zdravstvene zaštite.

<sup>80</sup> Ovo osiguranje je uvedeno u Sloveniji još 1993. godine za pokrivanje participacije za obavezno zdravstveno osiguranje i procena je da je tokom tri decenije ostvaren sledeći rezultat: kupuje ga oko 73 posto stanovništva i ono pokriva oko polovine privatnih troškova. V.: P. Calcoen, W. P. Van de Ven, „Voluntary Additional Health Insurance in the European Union: Free Market or Regulation?”, *European Journal of Health Law*, Vol. 25 (4), 2017, str. 591–613.

<sup>81</sup> S. Thomson, A. Sagan, E. Mossialos, „Why Private Health Insurance?”, S. Thomson et all (ed.), *Private Health Insurance – History, Politics and Performance*, Cambridge University Press, Cambridge, 2020, str. 3.

najizraženiji kod lica sa skromnijim ili osrednjim prihodima.<sup>82</sup> Njima to osiguranje omogućava da *upravljaju rizikom troškova participacije*, koji mogu poprimiti i veće razmere, već prema tome koji je tip zdravstvene usluge u pitanju. Osim koristi za pojedince, dopunsko zdravstveno osiguranja omogućava *preusmeravanje troškova zdravstvenih usluga na privatni sektor*.<sup>83</sup>

Podvlačimo: dopunsko zdravstveno osiguranje je *komplementarno* obaveznom zdravstvenom osiguranju. Ono pruža pokriće koje se odnosi na zdravstvene usluge koje se i dalje pružaju u okviru javnog sistema zdravstvene zaštite. Samim tim, osigurani rizici i osigurani slučajevi se podudaraju. U pitanju je usluga privatnog osiguranja koja svoju egzistenciju duguje prazninama i ograničenjima socijalnog osiguranja. To znači da je neophodno poznavanje pravnog okvira obaveznog zdravstvenog osiguranja da bi se mogao osmislti *nacionalni tip dopunskog zdravstvenog osiguranja*. Manjkavosti javne zdravstvene zaštite su takve da osiguranici ne uživaju zaštitu za određene zdravstvene usluge ili je uživaju uz obavezu da snose deo troškova zdravstvene zaštite. U prvom slučaju ima mesta za razvoj dobrovoljnog, a u drugom dopunskog zdravstvenog osiguranja.

ZZO u čl. 131 definiše u kojim slučajevima i do kog iznosa se naplaćuju troškovi participacije. Osiguranim licima obezbeđuju se zdravstvene usluge:

**1) U celosti na teret sredstava obaveznog zdravstvenog osiguranja:** (1) mere prevencije i ranog otkrivanja bolesti, (2) pregledi i lečenje u vezi s planiranjem porodice, trudnoćom, porođajem i u postporođajnom periodu, uključujući prekid trudnoće iz medicinskih razloga, (3) pregledi, lečenje i medicinska rehabilitacija u slučaju bolesti i povreda dece, učenika i studenata do kraja propisanog školovanja, a najkasnije do navršenih 26 godina života, odnosno starijih lica koja su teško telesno ili duševno ometena u razvoju, (4) pregledi i lečenje bolesti usta i zuba kod lica iz člana 63 tač. 1), 10) i 11) ovog zakona, kao i pregledi i lečenje bolesti usta i zuba u vezi sa trudnoćom i 12 meseci posle porođaja, (5) pregledi i lečenje u vezi sa zaraznim bolestima za koje je zakonom predviđeno sprovođenje mera za sprečavanje njihovog širenja, (6) pregledi i lečenje od malignih bolesti, šećerne bolesti, psihoze, epilepsije, multipleks skleroze, progresivnih neuromišićnih bolesti, cerebralne paralize, paraplegije, tetraplegije, trajne hronične bubrežne insuficijencije kod koje je indikovana dijaliza ili transplantacija bubrega, sistemskih autoimunih bolesti, reumatske bolesti i njenih komplikacija i retkih bolesti, (7) palijativno zbrinjavanje, (8) pregledi i lečenje u vezi sa uzimanjem, davanjem i razmenom organa, ćelija i tkiva za presadivanje od osiguranih i drugih lica za obezbeđivanje zdravstvene zaštite osiguranih lica, (9) pregledi, lečenje i rehabilitacija zbog profesionalnih bolesti i povreda na radu, (10)

<sup>82</sup> P. Martin, M. Del Sol, „The Uncertain and Differentiated Impact of EU Law on National (Private) Health Insurance Regulations”, C. Benoît et all (ed.), *Private Health Insurance and European Union*, Palgrave Macmillan, Cham, 2021, str. 118.

<sup>83</sup> T. Alberth, M. Kuhar, V. P. Rupel, „Complementary health insurance in Slovenia”, *Health Insurance*, str. 2022.

pružanje hitne medicinske i stomatološke pomoći, kao i hitan sanitetski prevoz, (11) medicinska sredstva u vezi sa lečenjem bolesti i povreda iz ove tačke;

**2) u visini od najmanje 95% od cene zdravstvene usluge iz sredstava obaveznog zdravstvenog osiguranja** za: (1) intenzivnu negu u stacionarnoj zdravstvenoj ustanovi, (2) operativne zahvate koji se izvode u operacionoj sali, uključujući i implantate za najsloženije i najskuplje zdravstvene usluge, (3) najsloženije laboratorijske, rendgenske i druge dijagnostičke i terapijske procedure (magnetna rezonanca, skener, nuklearna medicina i dr.);

**3) u visini od najmanje 80% od cene zdravstvene usluge iz sredstava obaveznog zdravstvenog osiguranja** za: (1) pregledi i lečenje od strane izabranog lekara i lekara specijaliste, (2) laboratorijske, rendgen i druge dijagnostičke i terapijske procedure koje nisu obuhvaćene stavom 1 tačka 2) podtačka (3) ovog člana, (3) kućno lečenje, (4) stomatološke pregledi i lečenje u vezi s povredom Zubā i kostiju lica, kao i stomatološke pregledi i lečenje Zubā pre operacije srca i presađivanja organa, ćelija i tkiva, (5) lečenje komplikacija karijesa kod dece, učenika i studenata do kraja propisanog školovanja, a najkasnije do navršenih 26 godina života, ekstrakcija zuba kao posledice karijesa, kao i izrada pokretnih ortodontskih aparata, (6) stacionarno lečenje, kao i rehabilitaciju u stacionarnoj zdravstvenoj ustanovi, (7) pregledi i lečenje u dnevnoj bolnici, uključujući i hirurške zahvate van operacione sale, (8) medicinsku rehabilitaciju u ambulantnim uslovima, (9) medicinska sredstva koja nisu obuhvaćena stavom 1 tačka 1) podtačka (11) ovog člana;

**4) u visini od najmanje 65% od cene zdravstvene usluge iz sredstava obaveznog zdravstvenog osiguranja** za: (1) izradu akrilatne totalne i suptotalne proteze kod lica starijih od 65 godina života, (2) očna i slušna pomagala za odrasle, (3) promenu pola iz medicinskih razloga, (4) sanitetski prevoz koji nije hitan, (5) lečenje bolesti čije je rano otkrivanje predmet ciljanog preventivnog pregleda, odnosno skrininga, prema odgovarajućim nacionalnim programima, ukoliko se osigurano lice nije odazvalo ni na jedan poziv u okviru jednog ciklusa pozivanja, niti je svoj izostanak opravdalo, a ta bolest je dijagnostikovana u periodu do narednog ciklusa pozivanja.

Zdravstvene usluge koje se obezbeđuju kao pravo iz obaveznog zdravstvenog osiguranja u skladu sa stavom 1 ovog člana, a za koje Republički fond ne vrši plaćanje na osnovu cene zdravstvene usluge, već troškove obračunava i plaća na drugačiji način (po poseti osiguranog lica zdravstvenom radniku, dijagnostički srodnih grupa zdravstvenih usluga, programima, bolesničkom danu i dr.), osiguranim licima obezbeđuje se pravo na zdravstvenu zaštitu na teret sredstava obaveznog zdravstvenog osiguranja u procentima propisanim u stavu 1 ovog člana.

Izuzetno od stava 1 tačka 1) podtačka (4) ovog zakona, za ostvarivanje prava na stomatološku zdravstvenu zaštitu iz obaveznog zdravstvenog osiguranja, opštim aktom iz člana 133 ovog zakona može se utvrditi plaćanje participacije ako se osigurano lice ne odazove pozivu izabranog lekara na preventivni pregled,

odnosno ako ne ostvaruje pravo na preventivne stomatološke usluge u skladu s ovim zakonom, odnosno republičkim programom stomatološke zdravstvene zaštite koji donosi Vlada u skladu sa zakonom.

Zdravstvene usluge koje se plaćaju po dijagnostički srodnim grupama obezbeđuju se osiguranim licima na teret sredstava obaveznog zdravstvenog osiguranja u visini od najmanje 95% od cene dijagnostički srodne grupe, u skladu sa propisom iz člana 133 ovog zakona.

Ministar, na predlog Republičkog fonda, za svaku kalendarsku godinu uređuje sadržaj i obim prava na zdravstvenu zaštitu iz obaveznog zdravstvenog osiguranja iz člana 131 ovog zakona za pojedine vrste zdravstvenih usluga i pojedine vrste bolesti i povreda, procenat plaćanja cene zdravstvene usluge, odnosno cene dijagnostički srodne grupe iz sredstava obaveznog zdravstvenog osiguranja, kao i procenat plaćanja osiguranog lica do punog iznosa cene zdravstvene usluge, odnosno cene dijagnostički srodne grupe.

U propisu iz stava 1 ovog člana, ministar utvrđuje i najviši godišnji iznos, odnosno najviši iznos po određenoj vrsti zdravstvene usluge, odnosno dijagnostički srodne grupe koji osigurano lice plaća iz svojih sredstava, vodeći računa da takav iznos ne sprečava osigurano lice da koristi zdravstvenu zaštitu, odnosno da onemogüćava osiguranom licu uspešno korišćenje zdravstvene zaštite.

Novčani iznos do punog iznosa iz člana 131 stav 1 tač. 2)-4) i stav 2 ovog zakona, kao i novčani iznos iz člana 132 ovog zakona (dalje u tekstu: participacija), plaća osigurano lice koje koristi tu zdravstvenu uslugu, odnosno lek, ako ovim zakonom nije drukčije određeno, odnosno plaća pravno lice koje osiguranom licu obezbeđuje dobrovoljno zdravstveno osiguranje.

Propisom iz člana 133 ovog zakona može se utvrditi da se participacija plaća u fiksnom iznosu, s tim da fiksni iznos ne sme biti veći od procentualnog iznosa određenog u skladu s ovim zakonom.

Propisom iz člana 133 ovog zakona uređuju se način i uslovi za naplaćivanje participacije, kao i povraćaj sredstava uplaćenih iznad najvišeg godišnjeg iznosa, odnosno najvišeg iznosa participacije po određenoj vrsti zdravstvene usluge.

Zabranjeno je da davalac zdravstvene usluge naplati drukčije iznose participacije za pružene zdravstvene usluge koje su obuhvaćene obaveznim zdravstvenim osiguranjem od propisanih u skladu sa čl. 131–133 ovog zakona, kao i da naplati participaciju osiguranom licu koje je platilo najviši godišnji iznos participacije ili najviši iznos participacije po određenoj vrsti zdravstvene usluge.

Osigurano lice može iz svojih sredstava, odnosno iz sredstava dobrovoljnog zdravstvenog osiguranja da ostvari pravo na veći sadržaj, obim i standard usluga iz člana 131 ovog zakona, koje se obezbeđuju iz sredstava obaveznog zdravstvenog osiguranja u skladu s ovim zakonom i propisima donetim za sprovođenje ovog zakona, na taj način što plaća razliku od cene utvrđene u skladu s ovim zakonom

i propisima donetim za sprovođenje ovog zakona i cene zdravstvene usluge koja se pruža osiguranom licu, a koja je utvrđena cenovnikom davaoca zdravstvene usluge.

Bliži uslovi i način ostvarivanja doplate iz stava 5 ovog člana uređuju se propisom iz člana 124 ovog zakona.

Davalac zdravstvene usluge dužan je da osiguranom licu izda račun o naplaćenoj participaciji.

Obrazac računa iz stava 1 ovog člana uređuje ministar propisom iz člana 133 ovog zakona.

Osigurano lice dužno je da čuva sve račune o naplaćenoj participaciji u toku jedne kalendarske godine, koji služe kao dokaz u postupku utvrđivanja prava na povraćaj sredstava uplaćenih iznad najvišeg godišnjeg iznosa, odnosno najvišeg iznosa participacije po određenoj vrsti zdravstvene usluge, kao i druge račune za naplaćene zdravstvene usluge radi ostvarivanja prava iz dobrovoljnog zdravstvenog osiguranja.

### **3. Prognoza pravaca razvoja dopunskog zdravstvenog osiguranja u Republici Srbiji**

Kada se razmatraju mogući pravci razvoja dopunskog zdravstvenog osiguranja u Srbiji, akcenat treba staviti na *održivi razvoj u domenu zdravstvene zaštite*. Kad se kao target postavi održivi razvoj u domenu zdravstva, jasno je da je rešenje u kombinovanom *javno-privatnom partnerstvu države i osiguravača*. Drugim rečima, neophodno je uspostaviti saradnju obaveznog i privatnog zdravstvenog osiguranja, povezivanje državnih i privatnih zdravstvenih ustanova, povećanje zdravstvene pismenosti stanovništva, kao i promociju različitih paketa usluga dobrovoljnog zdravstvenog osiguranja.<sup>84</sup>

Dobrovoljno zdravstveno osiguranje u mnogim državama jedan je od modaliteta finansiranja zdravstvenog sistema. Pružanjem zaštite od visokih troškova lečenja naročito se licima s nižim prihodima omogućava korišćenje zdravstvene zaštite u situacijama kada bi alternativa bila odustanak od nje zbog visokih troškova. Time se doprinosi ostvarenju prava na zdravstvenu zaštitu kao jednog od elementarnih prava. Da bismo došli do željenog učešća dobrovoljnog, a naročito dopunskog zdravstvenog osiguranja u portfelju domaćeg tržišta osiguranja, ključno je da se sprovede akcija u cilju povećanja zdravstvene pismenosti stanovništva. *Zdravstvena pismenost stanovništva je od krucijalnog značaja za održivost zdravstvenog osiguranja*. Svetska zdravstvena organizacija definiše zdravstvenu pismenost kao znanje pojedinca i sposobnost da razume i primeni informacije o zdravlju kako bi mogao da donosi odluke

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<sup>84</sup> J. Kočović, T. Rakonjac Antić, V. Rajić, „Dobrovoljno zdravstveno osiguranje kao dopuna obaveznom zdravstvenom osiguranju u Srbiji“, *Ekonomski teme*, Vol. 51(3), 2013, str. 541–560.

vezane za zdravlje i time utiče na održavanje i/ili poboljšanje zdravlja tokom života. Veća je verovatnoća da će lica koja su zdravstveno opismenjena uvideti prednosti dobrovoljnog zdravstvenog osiguranja. To pod prepostavkom da je kampanja u vezi sa ovim osiguranjem fundirano sprovedena.

## **VII. Zaključno o perspektivama usluga dobrovoljnog zdravstvenog osiguranja u Srbiji**

Pravo na zdravstvenu zaštitu, koje predstavlja jedno od elementarnih ljudskih prava, u većini država ostvaruje se posredstvom etatističkog, javnog sistema zdravstvene zaštite. Tokom XX veka, a u XXI još više, države se suočavaju s ogromnim pritiskom koji prati državni fond zdravstvene zaštite, zbog čega se razvija ideja privatnog, premijskog zdravstvenog osiguranja. Dobrovoljno zdravstveno osiguranje igra značajnu ulogu u omogućavanju prilagođavanja sistema obaveznog zdravstvenog osiguranja pravilima igre koje karakteriše starenje stanovništva, odliv mlađe populacije i uticaj inflacije i uopšte faktora obezvređivanja novca. Ono treba da omogući širem krugu lica da koriste usluge zdravstvene zaštite u privatnim zdravstvenim ustanovama, čime bi se značajno rasteretio državni fond zdravstvenog osiguranja. Time bi se stekli uslovi za ravnometerno opterećenje državnog i privatnog zdravstvenog sistema, što je *conditio sine qua non* održive zdravstvene zaštite.

Dobrovoljno zdravstveno osiguranje u srpskom pravu decenijama je podnormirano. Takva situacija ima za posledicu da se, s jedne strane, nedostatan regulatorni okvir dopunjuje uslovima osiguranja, dok se, s druge strane, potrošačima ne garantuje isti nivo zaštite kao u drugim vrstama osiguranja. Osiguravači, naime, koriste zakonski vakuum kako bi uslovima osiguranja uredili sva pitanja ugovornog odnosa ovog osiguranja. To neretko dovodi do unošenja klauzula kojima se prejudicira karakter obaveze osiguravača, bez obzira na to što je u konkretnom slučaju obuhvaćeno pokrićem i kako je to ugovoren. Za razumevanje pravne prirode dobrovoljnog zdravstvenog osiguranja ključno je da predstavlja hibridnu vrstu osiguranja. Kakva će biti obaveza osiguravača, trebalo bi da zavisi isključivo od onoga što je ugovoren.

Stoga je neophodno što pre modernizovati naš regulatorni okvir i učiniti ga kompatibilnim s modernim pravnim sistemima osiguranja. Tome će doprineti usvajanje Zakona o ugovoru o osiguranju, kojim bi se – *explicite* ili *implicite* – uvela podela na odštetna i svotna osiguranja. Ono što trenutno imamo – ZZO – samo je u izvesnoj meri korak napred u smislu regulative dobrovoljnog zdravstvenog osiguranja. Pozdravljamo samo usvajanje zakona kojim je materija zdravstvenog osiguranja uređena na zakonodavnom nivou. Ali po mnogim rešenjima, pomenuti zakon je za uzor imao Uredbu, što ne možemo oceniti kao dobru polaznu osnovu. Ostaje, dakle, da se u budućnosti radi na poslednjoj fazi u razvoju dobrovoljnog zdravstvenog

osiguranja, a to je usvajanje *lex specialis* propisa, kojim bi se dobrovoljno zdravstveno osiguranje i zakonski emancipovalo od obaveznog zdravstvenog osiguranja.

Dobrovoljno i dopunsko zdravstveno osiguranje – ako se kreira favorabilan regulatorni okvir – nose potencijal kompletiranja sistema obaveznog zdravstvenog osiguranja. Sistem socijalne zaštite u pogledu zdravstvene zaštite može i mora da počiva na principu održivosti. Održiva zdravstvena zaštita nije moguća u XXI veku ako se u priču ne uključe privatni osiguravači. Njima treba prepustiti deo kolača, a zadatok zakonodavca je da ne uvodi neracionalna ograničenja u pogledu širine pokrića. Kao naročito značajnu ocenjujemo ulogu dopunskog zdravstvenog osiguranja, iz ugla korisnika zdravstvene zaštite kojima je rizik od troškova participacije neprihvatljiv i od koga se korisnik štiti zaključenjem ovog osiguranja. Ono vrši značajnu socijalnu funkciju, budući da zahvaljujući tom osiguranju osiguranici obaveznog zdravstvenog osiguranja ostvaruju zdravstvenu zaštitu u situaciji kada bi je troškovi participacije mogli učiniti nedostupnom licima s niskim primanjima.

Smatramo da privatni osiguravači imaju značajnu ulogu u unapređenju zdravstvene zaštite, što proizlazi i iz Zakona o zdravstvenoj zaštiti kao obaveza svih privrednih društava. Osiguravači su u poziciji koja im dopušta da ostvare doprinos u ovom pogledu, bilo da su partner ili konkurenca RFZO. To će, zapravo, zavisiti od vrste usluga koje nude. Ponudom preventivnih usluga iz domena primarne zdravstvene zaštite (godišnji sistematski pregledi, doplate za veći obim i standard usluga odabranog lekara itd) osiguravači stupaju u partnerstvo sa RFZO, što *in ultima linea* čini plodno tlo za ulaganja u sekundarni i tercijarni segment zdravstvene zaštite. *A contrario*, ponudom osiguranja lica koja nisu uključena u obavezno zdravstveno osiguranje, osiguravači postaju konkurenca RFZO.<sup>85</sup>

Održivi razvoj sistema zdravstvene zaštite i uopšte socijalnih davanja zahteva sveobuhvatnu reformu, čiji je nezaobilazni segment dobrovoljno zdravstveno osiguranje. Dok smo o dodatnom zdravstvenom osiguranju više puta pisali, u ovom radu fokus je na dopunskom zdravstvenom osiguranju, koje ocenjujemo kao uslugu koja je u našim prilikama prilično neiskorišćena. Etatistički sistem zdravstvene zaštite forsira obavezno zdravstveno osiguranje, dok dobrovoljno prvi put zakonski uređuje tek 2019. godine. Dok je dobrovoljno zdravstveno osiguranje još i uhvatilo korena, dopunsko tek treba da se promoviše. Njegov potencijal je utoliko veći ukoliko znamo da troškovi participacije rastu dok je pod uticajem ekonomске krize veći broj lica suočen s osiromašenjem. Održivi razvoj u oblasti zdravstva zahtevaće promociju dopunskog zdravstvenog osiguranja kako bi se premije prikupljene po osnovu ovog osiguranja koristile za pokriće rashoda državnog osiguravača, a u budućnosti i za investiranje u njega.

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<sup>85</sup> U stranoj praksi se sreće osnivanja klinika od strane osiguravajućih društava, pri čemu te klinike pružaju usluge licima s kojima je zaključeno privatno zdravstveno osiguranje. Takva praksa je krajnje rizična za osiguravače.

Da zaključimo: dopunsko dobrovoljno zdravstveno osiguranje predstavlja najbolji način da se pomogne građanima da smanje izdatke/troškove koji nastaju pri korišćenju usluga zdravstvene zaštite koje uključuju troškove participacije. Umesto da plaćaju iz sopstvenog džepa, korisnici usluga mogu da investiraju u paket osiguranja koji će olakšati ostvarenje prava na zdravstvenu zaštitu.

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## **SUPPLEMENTARY HEALTH INSURANCE AS A CONTRIBUTION TO DEVELOPMENT OF A SUSTAINABLE HEALTHCARE SYSTEM IN THE REPUBLIC OF SERBIA**

**SCIENTIFIC PAPER**

### **Abstract**

Law on Health Insurance regulates three types of voluntary health insurance – complementary, supplementary and private health insurance. These are promising insurance products and the author selected supplementary health insurance. What is the potential of this type of cover? What are conditions for its development? Are the institutional prerequisites for creating a sustainable healthcare system fulfilled in our legislation? After analyzing the relationship between supplementary and voluntary health insurance, the author singles out the health literacy of citizens, potential service users as a prevailing factor in the current regulatory framework. By promoting supplementary health insurance as a product directly linked to compulsory health insurance a message is being sent that the healthcare cost risk in one part of compulsory healthcare can be transferred to insurers offering voluntary health insurance. Author proves that this encourages the inclusion of private insurers in financing the costs of compulsory healthcare, thus achieving cooperation between the private and state sectors with the aim of sustainable development of the healthcare system.

**Keywords:** voluntary health insurance, supplementary health insurance, regulatory framework, perspective insurance services

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## I. Introduction

Voluntary health insurance in a broader sense provides financial protection against the risk of an illness and its consequences.<sup>2</sup> This insurance, which is created according to wishes and needs of the insured – can be used in different ways as a regular insurance (completely replaces compulsory health insurance) or as a supplement to the existing healthcare system.<sup>3</sup> Having in mind that the 21<sup>st</sup> century is characterized by the ageing of the population, financial pressure on public health insurance funds and unsuspected options of treatment and prevention, it is clear that one of the primary tasks of every state is to *complete the healthcare package*. Therefore, in recent decades, much attention was paid to voluntary health insurance. It was observed that the existing systems can survive only if compulsory and voluntary insurance are combined, which will ensure combined use of the state and private health institutions. A prerequisite for this is the *health literacy* of the citizens, and simultaneous pointing out the potential of timely investments in voluntary health insurance. Citizens, that is, potential patients, should be able to take care of their health and make decisions that will achieve *health risk management* as one of the main and existential risks.<sup>4</sup>

What is the status of the health literacy of citizens in Serbia? Is there an *adequate healthcare strategy* including voluntary health insurance? There are currently numerous problems in Serbia, starting from terminological doubts to the

<sup>2</sup> H. Müller, „Private Krankenversicherung“, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *Versicherungsrechts-Handbuch*, Verlag C. H. Beck München 2009, p. 2697; J. Bigot, „Les assurances de personnes non-vie, Notions générales“, u: Jean Bigot, Philippe Baillet, Jérôme Kullmann, Luc Mayaux (ed.), *Les assurances de personnes*, Tome 4, L.G.D.J, Paris, 2007, p. 503.

<sup>3</sup> „Dobrovoljno (privatno) zdravstveno osiguranje pokriva finansijske posledice ugovorom nabrojanih bolesti, uobičajeno je da pokriva farmaceutske troškove, troškove lečenja i hospitalizacije, a može da pokrije i posledice privremene nesposobnosti (invalidnosti) ili rizik od smrti nastao kao posledica bolesti.“ – N. Petrović Tomić, *Pravo osiguranja, Sistem*, Knjiga prva, Službeni glasnik, Beograd, 2019, p. 708. U.: I. Spasić, „Mesto dopunskog i privatnog zdravstvenog osiguranja u uporednom pravu i predlozi za reformu sistema zdravstvenog osiguranja u Srbiji“, *Revija za pravo osiguranja*, br. 1/2, 2004, pp. 1–13; J. Slavnić, „Ugovor o dobrovoljnem zdravstvenom osiguranju kao predmet zakonskog regulisanja – prilog raspravi o regulisanju ugovora o osiguranju u novom Gradsanskom zakoniku Srbije“, *Evropske (EU) reforme u pravu osiguranja Srbije*, Palić 2010, p. 2.

<sup>4</sup> Health risk management involves several measures, of which we particularly highlight healthcare prevention. Preventive medical examinations are valuable in the process of early detection of illnesses and conditions that require long-term and expensive treatment. Preventive medical examinations of employees are a legal duty of healthcare institutions. This results from the regulatory framework of the Republic of Serbia that consists of a series of laws, of which we single out the Law on Healthcare (*Official Gazette of the RS*, no. 25/2019 – hereinafter the LHC). Pursuant to this law, healthcare includes implementation of measures for preservation and improvement of the health of citizens of the RS, prevention, control, and early detection of illnesses, injuries, and other health disorders and timely and efficient treatment, healthcare and rehabilitation (Article 2 Para 1). According to the law, healthcare institutions in public and private ownership, as well as private practices, are healthcare providers.

protectionism of the state fund, which threaten to slow down and/or collapse the efforts to establish a public-private partnership between the state and insurers, as the only sustainable model for the implementation of citizens' healthcare.

## **II. Regulatory Framework of Voluntary Health Insurance in Serbia**

### **1. Historical Overview – from Regulation to the Law**

Regulatory framework for private health insurance in Serbia has been unprecisely defined for decades.<sup>5</sup> Namely, at this moment we can only talk about the status part of the regulatory framework, which consists of the Insurance Law (hereinafter the IL)<sup>6</sup> and the Law on Healthcare.<sup>7</sup> The Law of Contract and Torts (hereinafter the LCT)<sup>8</sup> does not contain any special provisions regarding voluntary health insurance.<sup>9</sup> Despite the adoption of *lex specialis* regulations, the contractual part of the regulatory framework of private health insurance has not been developed, which we assess as a major shortcoming of our legislation for years.<sup>10</sup> For most substantive legal issues related to voluntary health insurance, the answer must be sought in the section of the LCT, which contains general rules for insurance, while the LHC only partially and superficially dealt with it. This will lead to legal gaps in many situations, which must be filled by adequate application of general or special rules from the section related to personal insurance. Therefore, *the substantive legal part of the regulatory framework* of private health insurance contracts is missing. The issue can be solved only by adopting a special law on insurance contracts that would contain a section related to voluntary health insurance.

Since the LCT does not mention voluntary health insurance at all, we believe that its general provisions on insurance, and the section with special rules for

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<sup>5</sup> We use the term *private* here in a broader sense as opposed to compulsory health insurance which is public and under the auspices of the state (author's note).

<sup>6</sup> Official Gazette of the RS, no. 139/2014 and 144/2021.

<sup>7</sup> Official Gazette of the RS, no. 25/2019. Until the adoption of the LHI, voluntary health insurance was regulated by a bylaw - the Regulation on Voluntary Health Insurance (Regulation), Official Gazette of the RS, nos. 108/2008, 49/09.

<sup>8</sup> Official Gazette of the RS, no. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, Official Gazette of the FRY, no. 31/93 and Official Gazette of the SMG, no. 1/2003 – the Constitutional Charter.

<sup>9</sup> There is a simple explanation for this. From a historical point of view, this law was adopted during the dominance of the state compulsory healthcare system, so it is logical that there is no mention of the voluntary healthcare system. The situation was not different in terms of comparative law.

<sup>10</sup> In comparative law it is common to adopt laws that regulate only voluntary health insurance, and not compulsory, as in our country. We are, in fact, delighted that finally the voluntary health insurance entered legislation, although it is far from the practice of European and world legal cultures.

personal insurance, must be used *mutatis mutandis* to answer all questions from the contract law, which remained outside the LHC. It is certainly not an easy job, since voluntary health insurance - as well as accident insurance - is a hybrid service and the insurer's obligations cannot be viewed only from the perspective of personal insurance.<sup>11</sup> *In ultima linea*, such legislative framework creates fertile ground for increased importance of insurance conditions. Insurers try to fill the legal vacuum by detailing all issues of insurance conditions. It would be desirable to adopt (at least) common principles of voluntary health insurance contracts. Conditions of our insurers differ in terms of additional and special conditions that they adapt to specific healthcare packages. If we know that it is a new insurance product in our country, we have to consider that insurance service users know even less about it than about other insurance products. Therefore, the typical consumer position is highly affected by the absence of a legal minimum regulation of sensitive issues of the contractual relationship of voluntary health insurance. So, one of the reasons that for years we have been requesting adoption of the insurance contract law is precisely the legal standardisation of the division into indemnity insurance and fixed-sum insurance, which presents *conditio sine qua non* of a precise qualification of obligations in voluntary health insurance.<sup>12</sup>

Let's make a brief historical overview of our legislation. Since the LCT does not contain provisions about voluntary health insurance, the substantive legal regulation of this type of insurance was until recently contained in the by-laws. In fact, we have had such legislative confusion since 2008. By adopting the Regulation on voluntary health insurance, a precedent was set in our law, which should be highlighted as a negative paradigm. Namely, it regulates numerous issues of insurance contract law that constitute *domain réservé* of legislative matter – the procedure for concluding a voluntary health insurance contract, the limitation of the insurer's freedom to contract – although it is not a compulsory insurance (sic!), regulation of insurers' obligations in terms of collective agreements, etc. As such, the Regulation was against the Constitution of the Republic of Serbia and the LCT.<sup>13</sup> In addition, the Regulation defines the content of the voluntary health insurance policy (although

<sup>11</sup> We wrote about it: N. Petrović Tomić, „Hibridni proizvodi osiguranja – stanje i perspektive razvoja“, in: Z. Petrović, V. Čolović, D. Obradović (ured.), *Prouzrokovanje štete, naknada štete i osiguranje*, XXIV međunarodni naučni skup, Beograd – Mionica 2021, pp. 325–341.

<sup>12</sup> According to comparative law, the section on voluntary health insurance should include the minimum protection not only of the insured, but also of the insurance company itself. That means restricting insurers to determine the basis of pricing insurance premiums. The premium must not be calculated only based on the access age and health status of the insured, because such calculation method favours younger insureds, and may mean rejection of older insureds. Insurers must not be given complete freedom in terms of regulating the waiting period; bonus and malus should be defined as to encourage the insured to reduce the probability of risk occurrence; deductibles are common etc.

<sup>13</sup> For a detailed criticism of the Regulation: J. Slavnić, „Pogled na regulisanje ugovora o dobrovoljnном здравственом осигуруванju“, *Pravni život*, No. 12/2009, pp. 807–823.

it is a legal matter of the LCT), lists the rules related to voluntary health insurance (including general and special conditions), etc.

According to the Constitution of Serbia (Article 68, Paragraph 3), health insurance should be regulated by the law. We therefore welcome the adoption of a special law on health insurance which has a section dedicated to voluntary health insurance. However, that would have to be a **temporary solution**. Namely, in relevant legislations voluntary health insurance is regulated by the *lex specialis* regulation, which does not include compulsory health insurance in the same package. We will present several reasons why we believe that the legal regulation of this insurance type is essential, that is, the separation of compulsory and voluntary health insurance. First, because of the *usefulness* of the said insurance type. Risk of an illness is one of those risks that every person is faced with, which is also stressed in the 21<sup>st</sup> century – a century characterized by a pronounced aging of the population. It is a *risk of an existential nature* whose coverage is not possible only on the basis of compulsory health insurance.<sup>14</sup> A person's decision to invest in this cover is decisively influenced by the knowledge that, due to new discoveries, medicine has advanced so much that many illnesses are no longer incurable, and that even after severe accidents and injuries, people can count on recovery and continuation of life if they are able to afford modern treatment methods. Therefore, such useful insurance should be regulated by the law since it covers a risk that affects the public interest as well as an individual. The state has a clear interest in taking care of the population's health, which displaces that risk from the free disposition of service users. Second, although models differ among countries, in general it can be said that the principle of coexistence of the private and the public sector in the healthcare is dominant. Thus, voluntary insurance exists **in parallel** with compulsory health insurance and serves as a **supplement** to the compulsory healthcare system. Due to simultaneous reduction in the number of employees and the aging of the population in most countries, compulsory health insurance system is faced with major limitations. It is crucial that persons who are beneficiaries of compulsory healthcare are encouraged to allocate funds for insurance from the earliest days, which will reduce the pressure on the compulsory healthcare funds. Only a well-designed voluntary health insurance package can replace limited capacities of compulsory health insurance.

Third, the need to protect the insured as a weaker side of the insurance contract is even more stressed with new insurance types, with which they are even less familiar than with the contracts they have been buying for years. They will be better protected if the majority of issues relevant to the insurance contract are regulated by legal imperative or semi-imperative norms. This narrows the maneuvering space for insurers. Protective function of legal norms is more expressed if it is known that

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<sup>14</sup> M. Wandt, *Versicherungsrecht*, 5. neu bearbeitete Auflage, Carl Heymanns Verlag, Köln 2010, p. 462.

in this insurance type there is a risk of anti-selection of risks. Therefore, the insurer is obliged by law to conclude an insurance contract with each person who sends an offer to conclude the contract, and the circumstances upon which the risk will be assessed and the premium will be determined are defined in advance by the law.<sup>15</sup>

Fourth, we have already pointed out the specificity of this insurance type and various obligations the insurer can assume under the contract.<sup>16</sup> With such insurance services, it is in the insurer's interest that certain obligations are defined by law. Fifth, it will be incomparably easier for case law to resolve disputes arising from this insurance type if there is a clear and modern regulatory framework. Sixth, voluntary health insurance recorded excellent sale in developed markets not only as a basic contract but also as a supplementary contract to life or accident insurance. When the death risk is included, since it can also occur as a result of an accident or an illness, insurers offer favourable packages that combine life and voluntary health insurance. Favourable regulation of that insurance can, stimulate development of other insurance services with similar risk.

Seventh, personal insurance (especially accident insurance and health insurance) has a significant role in improving the *social welfare* system. Any accident or more severe illness is easier to overcome if a person has invested in an adequate insurance package in advance. Therefore, in developed markets, employers compete to attract skilled (or scarce) labour with good packages of combined accident and health insurance.<sup>17</sup> Having in mind multiple benefits of personal insurance, the legislators of developed countries – that plan to encourage the expansion of insurance products – introduce *tax incentives* for personal insurance, especially for life insurance. In many countries, the life insurance premium tax does not exist or is such that it does not present an additional financial burden on insurance service users.

## **2. Overview of the LHC**

The LHC contains provisions identical to those contained in the Regulation. In our opinion, Articles 6 and 7 of the LHC do not bring the necessary progress to this

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<sup>15</sup> This is about the limitation of freedom of contracting that is common with compulsory insurance types. However, taking into account the social function of voluntary health insurance, the legislator could not let the insurers to apply a purely market approach when assuming risks. For the same reasons, the contractual content is largely regulated by the law itself. More details on the limitation of the principle of freedom of contracting in insurance law: N. Petrović Tomić, „O ograničenju i usmerenju slobodi ugovaranja u ugovornom pravu osiguranja: fenomen ‘pokoravanja’ ugovora o osiguranju”, u M. Karanikić Mirić, M. Đurđević (ured.), Zbornik radova sa Druge regionalne konferencije iz obligacionog prava održane 14. i 15. novembra 2019. godine na Pravnom fakultetu Univerziteta u Beogradu, Beograd 2020, pp. 318-343.

<sup>16</sup> N. Petrović Tomić, „O pravnoj prirodi dobrovoljnog zdravstvenog osiguranja – Povodom predloga Zakona o zdravstvenom osiguranju”, u: M. Orlić (ur.), *Aktuelna pitanja savremenog zakonodavstva*, Budva, 2019, pp. 487-506.

<sup>17</sup> J. M. Binon, *Droit des assurances de personnes, Aspects civils, technique et sociaux*, Larcier, Bruxelles, 2007, p. 20.

sector. Namely, Article 7 stipulates that compulsory health insurance is organized and implemented by the Republic Fund of Health Insurance (RFHI), while voluntary health insurance can be organized and implemented by legal entities dealing with insurance activities (insurance companies), in addition to the RFHI, in accordance with the LHC and the law regulating insurance.<sup>18</sup> This is confirmed by Article 10 Paragraph 1 Point 15. According to the LHC, an insurance company can provide all types of voluntary health insurance, while the RFHI cannot provide private health insurance. The LHC expressly stipulates that the provisions of the law regulating insurance are applied to the organization and implementation of voluntary health insurance. This raises the question of whether the provisions of the IL apply equally to the RFHI when the Fund itself is the insurer of voluntary health insurance. The question is not only of theoretical importance.

This can be answered by a systematic interpretation of the LHC. Although based only on introductory provisions, one could think that every insurer of voluntary health insurance – including the RFHI – should meet the requirements of the IL, such conclusion does not result from what is written in the third part dedicated to voluntary health insurance. Article 177, entitled Conditions of voluntary health insurance, expressly states the difference between the conditions to be met by the insurer and those to be met by the RFHI. While the RFHI makes a decision on the organization and implementation of voluntary health insurance (underlined by N.P.T.) – a double licence system applies for private insurers. Namely, in addition to the opinion of the Ministry of Health on the fulfilment of the conditions for organizing and implementing voluntary health insurance, they should also obtain a licence from the National Bank of Serbia. The opinion of the relevant ministry is given on the basis of the LHC, and the NBS licence is obtained on the basis of the IL.

What will differentiate the operations of companies established for voluntary health insurance is obtaining of licences. Namely, the relevant ministry issues an opinion on the fulfilment of the conditions for organizing and implementing voluntary health insurance. However, private insurers have to submit a copy of the NBS licence for performing insurance activities in accordance with the insurance law along with the request for the issuance of that opinion. Since voluntary health insurance is a subtype of non-life insurance, it is handled by composite insurance companies, as well as those with a licence to perform non-life insurance business. Exceptionally, voluntary health insurance can also be carried out by companies dealing with life insurance in the part that covers medical expenses, provided that this insurance refers to the person with whom a life insurance contract was concluded.<sup>19</sup> Additional clause requires special record-keeping of these contracts.

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<sup>18</sup> Compulsory health insurance is done by the Republic Fund of Health Insurance, which provides a basic package of coverage.

<sup>19</sup> IL, Article 22 paragraph 1.

It turns out that the special law only copied the Regulation! It is a weak point of the statutory part of the regulatory framework of voluntary health insurance. In addition, the said solution of the Regulation is contrary to the provisions of the current IL (and of course the EU directives on non-life insurance). This created a double exception in voluntary health insurance. First, the RFHI, which is *ex lege* the exclusive insurer for compulsory health insurance, was granted the right to deal with some voluntary health insurance – without the prior approval of the supervisory body for insurance sector. This set a precedent not only from the point of view of our law, but also in general. In the insurance sector, the licence system can be called an achievement. Second, since the RFHI does not apply the IL, it seems to be an even more dangerous deviation from the legal system, which – according to good European practice – should be applicable to all insurance service providers. This literally enables the RFHI not to form the necessary reserves, and prevents the NBS from supervising the voluntary health insurance. The only thing stipulated by the LHC is that the RFHI manages voluntary health insurance funds separately from compulsory health insurance funds and accounts, according to the voluntary health insurance types which have separate accounts (Article 193, Paragraph 2). Apart from not being in the interest of insurance service users, the situation repeated by the LHC, which already exists based on the Regulation, is extremely unincentive for private insurers that are in a less favourable position than the RFHI.<sup>20</sup>

It is certain that the regulatory framework for health insurance in Serbia is limited, and that insurers who try to develop this type of insurance face numerous restrictions. The equality of voluntary (premium) insurers and compulsory health insurance funds is not ensured, nor is business security. According to the LHC, this will not happen in the future either. Favouring the RFHI in relation to private insurers is more problematic when we know that it does not have a developed sales network, which, in our opinion, is one of the long-term reasons why voluntary health insurance has not taken roots. Even if a sales network is hastily built, the question is whether it will consist only of entities with a licence to sell insurance products? Is the RFHI above and beyond the IL in this regard? In addition, the law creates a conflict of interest, since the rights from compulsory insurance and the rights from voluntary insurance (which is paid!) are decided in the same place!!

Private health insurance should be modelled according to the German law.<sup>21</sup> The Law on Insurance Supervision stipulates that health insurance cannot be provided by an insurer dealing with property or life insurance.<sup>22</sup> The Law on Insurance

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<sup>20</sup> N. Botica Jukić, „Usklađenost Zakona o dobrovoljnom zdravstvenom osiguranju s pravnom stičevinom Europske unije“, *Osiguranje*, No. 1/2015, pp. 30–33.

<sup>21</sup> R. Müller-Stein, „Krankenversicherung“, u: H. W. Van Bühren, *Handbuch Versicherungsrecht*, 4. Auflage, Deutscher AnwaltVerlag, Bonn, 2009, pp. 2119–2128.

<sup>22</sup> This provides the highest degree of financial protection of the insured with health insurance.

Contracts contain substantive legal provisions. That law enables voluntary health insurance to be contracted as property or personal insurance, depending on the type of health insurance. Implementation of the law on insurance contracts is in any case limited (e.g. norms on increased risk do not apply, but the insurer's subrogation applies even if health insurance is concluded as personal insurance). In addition, in German law there are also model conditions for certain types of health insurance, which were adopted by the association of insurers and which individual insurers accept and accordingly provide this type of insurance.

### **III. Voluntary Health Insurance Types in Serbia – Did the Legislator Mixed Things up?**

The LHC contains a special section about voluntary health insurance. Actually, the subject of that law make two types of health insurance – compulsory and voluntary insurance. The fact that the voluntary health insurance was regulated for the first time in our country deserves to be highlighted as a step forward in the development of this type of insurance, which in developed countries is experiencing a large expansion. However, whether due to insufficient knowledge or intention to avoid the pitfalls of legal definitions, the legislator uses the *generic term voluntary health insurance* in order to use it to regulate three types of covers. Therefore, the task of the theory is to first divide related modalities of covers encompassed by the same legal term.

The LHC recognises the following types of voluntary health insurance 1) **supplementary** health insurance – insurance covering the healthcare costs arising when the insured person supplements the rights from compulsory health insurance in terms of content, scope and standards; 2) **complementary** health insurance – insurance covering the share in the healthcare costs, that is, healthcare service costs, medicines, medical devices, i.e. money that is not covered by rights from compulsory health insurance; 3) **private** health insurance – insurance of persons not covered by compulsory health insurance, to cover costs for the type, content, scope and standard of rights that are contracted with the insurer.<sup>23</sup>

Generally speaking, voluntary health insurance enables a higher level of healthcare services for users, and the provision of services not included in the compulsory health insurance system.<sup>24</sup> It is common to refer to the first modality of private (voluntary) health insurance as complementary voluntary health insurance,<sup>25</sup>

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<sup>23</sup> LHC, Article 6 Paragraph 2 Points 1 to 3 regarding Article 174.

<sup>24</sup> By providing users with choice, voluntary health insurance affects the reduction of excessive use of compulsory healthcare services, reduction of corruption, investment in healthcare, etc. V.: T. Rakonjac Antić, *Penzijsko i zdravstveno osiguranje*, Ekonomski fakultet u Beogradu, Belgrade, 2018.

<sup>25</sup> For example, the Croatian Law on Voluntary Health Insurance states that complementary health insurance ensures a higher standard of healthcare compared to the standard of healthcare from compulsory health insurance, and a greater scope of rights compared to rights from compulsory health insurance (Article 6).

and the second one as supplementary voluntary health insurance,<sup>26</sup> while the third one is called private voluntary health insurance.<sup>27</sup> This is the case in comparative law, while in our country the terms complementary or supplementary health insurance are used in the wrong context. The point is that the legislator mixed-up titles of voluntary health insurance types, while the comparative law recognises examples of overlapping of covers of complementary and supplementary health insurance.<sup>28</sup> Having in mind that users do not know much about these insurance products, which affects their interest, we believe that the legislator's omission is even greater. As part of the *health literacy of the population*, an element that should be taken into account is voluntary health insurance.<sup>29</sup> Healthcare users should be explained the potential of voluntary health insurance, which seems like an impossible mission if an error was made already in the product's name.

#### **IV. Supplementary versus Complementary Health Insurance – Two Pillars of Private Healthcare**

According to comparative law and practice, the first association with voluntary health insurance is *complementary health insurance*. This insurance covers healthcare costs arising when the insured person extends the healthcare package in terms of content, scope and standards. At first glance, it is clear that it is a rather vague insurance whose scope may cause doubts. This insurance emerges when the insured uses healthcare covered by compulsory health insurance in a way and according to a procedure that are different from the way and procedure of exercising rights from compulsory health insurance prescribed by the law regulating health insurance and the regulations adopted for implementation of the law. Complementary health insurance, as the name suggests, is designed as a complement to the existing system of compulsory health insurance. It unquestionably provides a wider scope of rights than compulsory health insurance, although there may be

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<sup>26</sup> Supplementary health insurance is insurance intended to cover healthcare costs provided under mandatory health insurance referred to in article 16 paragraphs 3 and 4 and article 17 paragraph 5 of Mandatory Health Insurance Act (Croatian Voluntary Health Insurance Act, article 5).

<sup>27</sup> The EU law: E. Mossialos, S. Thomson, *Voluntary Health Insurance in the European Union*, European Observatory on Health Systems and Policies, Brussels, 2004, pp. 51–67.

<sup>28</sup> Some authors prefer the term *voluntary additional health insurance* that includes all voluntary health insurance types, except for private health insurance that has a completely different function. V.: P. Calcoen, W. P. M. M. van de Ven, „Voluntary Additional Health Insurance in the European Union: Free Market or Regulation”, *European Journal of Health Law*, Vol. 24 /2017, p. 2.

<sup>29</sup> Health literacy of the population is crucial for sustainability of health insurance. *The WHO defines health literacy as the ability of individuals to understand and use information on health in order to make decisions in ways which promote and/or maintain good health for themselves.* V.: H. D. C. Roscam Abbing, „Health, human rights and health law: The move towards internationalizam, with special emphasis on Europe”, *International Digest of Health Legislation*, Vol. 49, No. 1, 1998, pp. 101–112.

differences between legislations as to what exactly is meant by this.<sup>30</sup> The answer to that question can only be obtained based on the insurance terms and conditions.

In order to divide application of complementary voluntary health insurance, we will compare it with supplementary health insurance. Although the LHC uses the wrong name for this insurance type, it is defined in a way that is usually found in comparative law. Supplementary health insurance covers the healthcare costs, i.e. healthcare services, medicines, medical devices,<sup>31</sup> rehabilitation and monetary compensations, which are not covered by compulsory health insurance. *Complementary health insurance*, in fact, complements the compulsory health insurance in the part of healthcare services known as out-of-pocket costs.<sup>32</sup> On the contrary, if someone wants to extend the scope of additional cover, and not only to cover out-of-pocket costs, they will opt for complementary and not supplementary health insurance.

Essentially, two types of similar covers can be obtained through voluntary health insurance. Similarity is reflected in the fact that they rely to a greater or lesser extent on compulsory health insurance, so without it it is not possible to determine their scope of cover, while the third modality (private health insurance) is completely independent.<sup>33</sup> After all, the insured person is a natural person who concluded a voluntary health insurance contract or for whom the contract was concluded, and who exercises the rights provided in the contract, as well as a member of his family. The LHC set a limit regarding the capacity of insureds of complementary and supplementary health insurance. In complementary and supplementary insurance the insured can only be a person who has the compulsory health insurance. Therefore, a person who is not covered by compulsory health insurance cannot buy complementary or supplementary voluntary health insurance in Serbia. In addition, the LHC prescribes that a person who loses the status of the insured in the compulsory insurance loses the same status in both complementary and supplementary health insurance. This clearly indicates the connection between the said types of voluntary health insurance and compulsory health insurance.<sup>34</sup>

Let's start with the cover referring to that part of healthcare costs that, according to the rules of compulsory health insurance, is borne by the insured himself

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<sup>30</sup> E. Mossialos, S. Thomson, pp. 66-67.

<sup>31</sup> Medical and technical aids and implants were mentioned in the Regulation, which is now omitted. We believe that this will limit the scope of cover, that is, reduce the level of healthcare of the population.

<sup>32</sup> E. Mossialos, S. Thomson, p. 67.

<sup>33</sup> B. Nikolić, „Slovenian Complementary Health Insurance as a Service of General Economic Interest“, *International Public Administration Review*, Vol. 13 (1), 2015, 49-67.

<sup>34</sup> In addition, there is a subsidiarity clause in general terms and conditions of voluntary health insurance. According to that clause, the insured is entitled to a cover of treatment costs based on voluntary health insurance only if he is not entitled to reimbursement of those costs on the basis of compulsory health insurance. Only private health insurance has autonomy from compulsory health insurance. Complementary and supplementary health insurance are considered in interaction with compulsory health insurance. This is useful when interpreting unclear issues, such as the scope of complementary insurance and its distinction from supplementary health insurance.

(the so-called out-of-pocket costs).<sup>35</sup> Although the law mentions it as another type of voluntary health insurance, its content can be determined more easily. Regarding out-of-pocket costs there is no problem,<sup>36</sup> but the second type of cover – which brings "greater content, scope and standard of rights" compared to rights from compulsory health insurance – is rather vague. The law did not define the higher standard of protection and a greater scope of rights. In order to define it, it is important to know the regulations governing compulsory health insurance. Generally speaking, *a higher healthcare standard usually refers to medical examinations and diagnostic procedures without waiting lists, a higher standard of hospital accommodation, a possibility of choosing a specialist or a surgeon, an expanded list of medicines whose purchase is financed by the insurer.*<sup>37</sup> In addition, the insurance terms and conditions state that *complementary health insurance can also include the costs of an annual medical examination, the costs of various specialist examinations, the costs of additional laboratory analyses, etc.*<sup>38</sup> What is certain, at least from a professional point of view, is that both types of cover can be called complementary or supplementary in a broader sense since they complete the healthcare provided by the state healthcare system. However, the linguistic distinction is not insignificant, so in practice it is common to use the term supplementary health insurance for cover that includes out-of-pocket costs.

It sounds frivolous that our legislator decided to use a different terminology than that widely adopted in comparative law and practice. The question is how many problems such approach will cause since the terminological definition is the identity card of each insurance product. If doubts arise during the translation (in this case completely justified), it can be expected that foreign business partners (investors in insurance sector) will show a certain amount of mistrust. The last thing a serious legislator should do is to resort to some kind of originality when arranging insufficiently known types of insurance, which can cost him dearly. Terminological apparatus is the alphabet of the regulations of each company, and this is truer in globalization and expansion of foreign investments.

*Private health insurance* is designed as a solution for persons who are not covered by compulsory health insurance or have not joined compulsory health insurance.<sup>39</sup>

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<sup>35</sup> Details on out-of-pocket costs: L. Belanić, „Ugovor o dobrovoljnom zdravstvenom osiguranju u hrvatskom pravu s osvrtom na njemačko pravo“, Palić 2017, p. 117.

<sup>36</sup> Introduction of out-of-pocket costs resulted from the reduction of costs in the compulsory health insurance system. By transferring a part of the healthcare costs to the burden of citizens, efforts are being made to ensure the rationalization of costs.

<sup>37</sup> V. Bradić, „Privatno zdravstveno osiguranje“, *Osiguranje*, No. 3/2002, pp. 51–52.

<sup>38</sup> However, costs of dental treatments, organ transplants, cosmetic procedures, dialysis, gender reassignment, IVF, termination of pregnancy that is not medically indicated, etc. are excluded from cover. U: L. Belanić, 124.

<sup>39</sup> As for the name private health insurance, it is somewhat imprecise, because both complementary and supplementary insurance are private insurance types. However, only private insurance exists independently of compulsory health insurance, and in that sense the name is appropriate.

On the basis of private health insurance, they can obtain a narrower or wider cover package, depending on the insurance premium. Thus, private insurance can cover only medical expenses or hospital stays, various types of compensations, etc. Healthcare service is provided only in those institutions with which the insurer had concluded a contract. It is the only modality of voluntary health insurance provided only by insurance companies, not by the RFHI. At the same time, it is the only voluntary health insurance aiming to be a *substitute for compulsory health insurance* and whose content is not limited by the law.<sup>40</sup>

## **V. Legal Nature of Voluntary Health Insurance**

The LHC defines the voluntary health insurance as a *type of non-life insurance*.<sup>41</sup> It's nothing new. The IL has already stated that and we presented sufficient arguments that this provision is not sufficient for the qualification of voluntary health insurance as a hybrid service.<sup>42</sup> The LHC only confirms our belief that it is necessary to introduce a division according to the type of the insurers' obligation in the insurance contract law. Namely, Article 6 Paragraph 5 of the LHC expressly states that the provisions of the law regulating the obligations are applied to the relations between the contracting parties in voluntary health insurance. That form *renvoi* to the general contractual regulation is potentially the weakest point of the legal regulation of voluntary health insurance. The LHC refers to the LCT where this insurance is not even mentioned! The Regulation was first adopted, and later the LHC due to its unprecise definition. On the other hand, such approach only confirms that it is necessary to adopt a new insurance law as soon as possible. A good law – which will contain norms that allow the insurers' obligations in personal insurance to be contracted as a fixed-sum or an indemnity insurance – will create the foundation for development of a modern system of voluntary health insurance.

Let us briefly point out the legal nature of complementary and supplementary voluntary health insurance.

### **1. Non-life Insurance**

In order to explain the essence of voluntary health insurance, we need to point out, first of all, its categorization based on the provisions of the IL. That law introduces the division into life and non-life insurance, which mainly has administrative

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<sup>40</sup> Similar in the Croatian law: L. Belanić, p. 118.

<sup>41</sup> LHC, Article 6 Paragraph 1.

<sup>42</sup> N. Petrović Tomić, „O pravnoj prirodi dobrovoljnog zdravstvenog osiguranja – Povodom predloga Zakona o zdravstvenom osiguranju“, u: M. Orlić (ur.), *Aktuelna pitanja savremenog zakonodavstva*, Budva, 2019, pp. 487–506.

significance.<sup>43</sup> In the provision on non-life insurance types, the IL mentions voluntary health insurance that covers 1) contracted monetary compensation in case of an illness; 2) reimbursement of contracted treatment costs and 3) a combination of payments according to the previous two bases.<sup>44</sup>

We emphasize that introducing the division into life and non-life insurance does not mean abandoning the division into property insurance and personal insurance. That division remains in the LCT. What is clear at first glance is that the IL enables to contract different obligations of insurers that offer voluntary health insurance. The IL first mentions the *agreed monetary compensation in case of an illness*. The voluntary health insurance can therefore cover the contracted (daily) compensations. Although the term compensation is used, it is an obligation from fixed-sum insurance, which can be concluded from the wording of the agreed monetary compensation. In the property insurance, compensations cannot be agreed in advance, but are determined according to certain rules, observing the indemnity principle.<sup>45</sup> *In this insurance, even when the term compensation is used, if contracted, it is not a compensation, but an amount that the insurer should to pay.* The IL mentions these compensations, but without any specific details. This was done in the LHC. The concept of monetary compensation is specified in the LHC. They include *contracted medical costs, loss of earnings or salary and other income due to temporary incapacity for work, transportation costs related to treatment and other types of monetary compensations related to exercising rights from voluntary health insurance.*<sup>46</sup> General insurance terms and conditions stipulate that the insurer is obliged to pay the agreed monetary compensations in case of loss of earnings or salary and other income, due to temporary incapacity for work, as well as other types of monetary compensations related to exercising rights from voluntary health insurance that are defined by an insurance contract.<sup>47</sup>

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<sup>43</sup> Directive 73/239 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 (the first non-life directive), for the first time, categorised the risk, which influenced the formation of insurance rights in the form we know today. Namely, Annex A of the First Non-Life Directive lists insurance contracts where the insurers' obligation consists of compensation for damages. These are insurance contracts covering the following risks – accident (including industrial injury and occupational diseases), illness, land vehicles, railway rolling stock, aircraft, ships, damage to or loss of items in traffic, fire and natural forces, other damage to property, motor vehicle liability, aircraft liability (including carrier's liability), liability for ships (including carrier's liability), general liability, credit - insolvency liability, suretyship, financial loss and employment risks and legal expenses. As you can see, the illness was even then categorized as a non-life risk.

<sup>44</sup> IL, Article 9 Paragraph 2.

<sup>45</sup> J. Bigot, „Le règlement du sinistre”, u: Jean Bigot (ed.), *Traité de droit des assurance, Le contrat d'assurance*, Tome 3, 2 édition, L. G. D. J., 2014, p. 942.

<sup>46</sup> LHC, Article 10 Paragraph 1 Item 20.

<sup>47</sup> Article 2 paragraph 12 of the General Voluntary Health Insurance Terms and Conditions, Generali osiguranje Srbija.

German law recognizes two types of compensations in the concept of *contracted monetary compensations in case of an illness*.<sup>48</sup> First, the compensations paid according to the amount agreed in advance, which should compensate for the loss of earnings during the period of temporary incapacity for work as a result of illnesses covered by the contract (*Krankentagegeldversicherung*). The fact that they are determined as a fixed amount, i.e. that they depend only on the incapacity for work and not on the specific damage sustained by the insured, makes the insurer's obligation as the fixed-sum insurance.<sup>49</sup> According to the prevailing opinion in German theory, it is a fixed-sum insurance that should compensate for the loss of regular income caused by an illness. Second, daily compensations during hospital stay (*Krankenhaustagegeldversicherung*). That insurer's obligation is fixed, i.e. it does not have to correspond to the expenses incurred by the insured during his stay in the hospital. It is an amount agreed in advance that does not depend on a specific damage. As we will see, the insurer's obligation in case of payment of daily compensations either due to a hospital stay or a temporary incapacity for work is fundamentally different from its obligation in case of covering the treatment costs. Costs are covered according to the actual amount, i.e. the insurer's obligation is aimed at remediating a specific damage.

These are useful insurer's obligations which enable a person who has suffered an illness and who is faced with temporary incapacity for work to get through that period more easily. Daily compensations due to temporary incapacity for work bring necessary financial security. It is the same with compensations for hospital stays, which greatly facilitate the daily life of the insured who is hospitalized or forced to undergo daily outpatient treatment due to an illness. In this way, the insured provides a predetermined amount of money that he can use for any purpose, which is paid to him in case of an illness.

Second, voluntary health insurance can cover *contracted medical expenses*. During development of voluntary health insurance, it came to the point that the insurer's obligation can be aimed at reimbursement of medical costs. At that moment, conditions enabled that insurance to be qualified as a mixed service. Of course, the insurer's obligation to reimburse contracted medical costs was not specified by the provisions of the law (which was expected!), so insurers defined it in the insurance terms and conditions. Their intention was to prescribe precisely which medical treatments and procedures are included in the cover their insured is entitled to. Insurers define medical costs so that their obligation refers only to those costs that were *medically required during treatment* of the insured's diagnosed illnesses and

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<sup>48</sup> H. Tschersich, „Krankentagegeld-und Krankenhaustagegeldversicherung“, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *VersicherungsrechtsHandbuch*, 2. Auflage, Verlag C. H. Bech, München 2009, pp. 2757–2758.

<sup>49</sup> M. Wandt, pp. 459–460.

conditions.<sup>50</sup> This should also be written in the law governing substantive legal issues. In order to prevent abuses of this insurance, the German Insurance Contract Act explicitly stipulates that the insurer shall not be liable to reimburse costs in cases where there is a significant disproportion between the costs incurred and the medical service provided.<sup>51</sup>

Finally, the IL enables the option of combining the contracted monetary compensation in case of an illness and contracted treatment costs. In our law, the insured chooses a type of voluntary health insurance package.

If the provisions of the LCT, the IL and the LHC are taken into account, we conclude that voluntary health insurance is a non-life personal insurance. What does that actually mean? Particularly regarding practice. How is it different from life insurance? Or other non-life insurances? In terms of comparative law, accident insurance and voluntary health insurance emerged later in relation to life insurance, which is a typical personal insurance by all its characteristics. Therefore, they should linguistically differ from life insurance, since they are in the same group of personal insurance, in this case the personal rights that sustained the insured risk. The name non-life personal insurance, which originated from the French law (*les assurances de personnes non-vie*), was created to indicate the *differences in the legal and technical scheme* of accident insurance and voluntary health insurance in relation to life insurance.<sup>52</sup> Unfortunately, the incompleteness of our insurance regulatory framework is evidenced by the fact that the LCT contains a section dedicated to personal insurance and in it a whole set of rules intended to apply to both life assurance and accident insurance. It is about the following rules – the sum insured, the form of the contract, the impossibility of compulsory collection of the insurance premium,<sup>53</sup> insurance in case of death of minors and persons deprived of business capacity, insurance in case of death of a third party, cumulation of the sum insured and damage indemnity, intentional killing of the insured, exclusion of war risks and the insurer's right to exclude certain risks by contract.<sup>54</sup> At today's level of development of insurance law, it is perfectly clear that such approach is not sustainable. Legislation needs to recognize the differences between life and non-life insurance and regulate them with special rules. In our opinion, it is best that the contract law first defines certain

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<sup>50</sup> That is the case in the comparative law: H. Müller, pp. 2722–2724.

<sup>51</sup> Par. 192 Abs. 2 VVG.

<sup>52</sup> J. Bigot, P. Baillot, J. Kullmannn, L. Mayaux, *Traité de Droit des Assurances, Les assurances de Personnes*, Tome 4, I. G. D. J., Paris 2007, pp. 499-503.

<sup>53</sup> The exception on the impossibility of compulsory collection of the insurance premium is defined in the general section. It specifically refers only to life insurance. Theory and case law question whether it also referred to accident insurance. In case law it was correctly observed on several occasions that due to the differences between the said insurances, there is no place to apply Article 945 for accident insurance.

<sup>54</sup> P. Šulejić, „Osiguranje lica u svetlu donošenja Građanskog zakonika Srbije”, *Pravni život*, No. 12/2009, p. 801.

types of personal insurance, and that each type of personal insurance is defined in a separate section.

Although we do not deny that the provisions of the IL and the LHC are the first steps towards clarifying the legal nature of voluntary health insurance, we believe that it would be more understandable to an average lawyer if the division of insurance according to the nature of the insurers' obligations is introduced into our law.

## **2. Personal Insurance**

Non-specific definition of voluntary health insurance in Serbian law is a more serious problem when we know that voluntary health insurance is not a typical personal insurance. In order to emphasize its special legal nature and the need for legal regulation, we will first try to classify it within the existing divisions.

From the point of view of our insurance contract law, the oldest division is into property insurance and personal insurance. According to the division in the LCT voluntary health insurance belongs to personal insurance, although the LCT does not explicitly mention it. Why? Because the basic risk insured in this insurance type, an illness, is an example of a risk realised on the insured's personal rights.<sup>55</sup> That risk is realised on health as a typical personal right of the insured. Although it most often leads to material consequences (i.e. expenses or loss of earnings), the fact that the risk affects the insured's personal and not property sphere is crucial for the qualification of this insurance as personal.<sup>56</sup> In this sense, it is comparable to life insurance (the risk is related to death or survival) or accident insurance (the risk is related to life, physical integrity or work capacity). Voluntary (private) health insurance, namely, covers the financial consequences of illnesses listed in the contract, and it usually covers pharmaceutical costs, medical and hospitalization costs,<sup>57</sup> and it can also cover the consequences of temporary incapacity (disability) or the risk of death as a result of the illness.<sup>58</sup> The basis of this insurance is the *remediation of the economic consequences of contractually defined illnesses and conditions* (pregnancy, childbirth, etc.).<sup>59</sup> For this

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<sup>55</sup> Voluntary health insurance is cited in comparative law as an example of personal insurance. In the German law there is division into personal (*Personenversicherung*) and non-personal insurances (*Nicht-personenversicherung*), this insurance is stated as personal insurance. V.: E. Lorenz, „Allgemeiner Teil. Das Privatversicherungsrecht“, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.) *Versicherungsrechts-Handbuch*, Verlag C. H. Bech, München 2009, p. 21; M. Wandt, p. 459.

<sup>56</sup> J. Bonnard, *Droit des assurances*, 4 édition, LexisNexis, Paris 2012, p. 16.

<sup>57</sup> This insurance was created with the purpose of covering all medical expenses. As the cover of medical expenses requires proving their exact amount, the compensatory nature of the insurer's obligation is expressed.

<sup>58</sup> H. Müller, 2697; J. Bigot, „Les assurances de personnes non-vie, Notions générales“, u: Jean Bigot, Philippe Baillot, Jérôme Kullmann, Luc Mayaux (ed.), *Les assurances de personnes*, Tome 4, L.G.D.J, Paris, 2007, p. 503.

<sup>59</sup> H. Tscherisch, „Krankentagegeld- und Krankenhaustagegeldversicherung“, u: Roland Michael Beckmann, Annemarie Matusche-Beckmann (hrsg.), *Versicherungsrechts-Handbuch*, München 2015, p. 3060.

reason, it is necessary to adjust the insurer's obligation to the type of consequences covered by the specific type of health insurance.

If it were assumed that voluntary health insurance is a type of personal insurance (although this is not explicitly stated in the law), it would be expected that the general rule from the section on personal insurance would also apply to it. The first article of the LCT, titled personal insurance, states that the sum insured, which the insurer is obliged to pay in case of occurrence, is determined in the policy according to the agreement of the contracting parties.<sup>60</sup> Although the title above the article does not explicitly indicate this, the legislator determined the purpose of personal insurance. Accordingly, it can be concluded that *personal insurances are fixed-sum insurances*. In our law, it is implied that personal insurances are fixed-sum insurances. Although the LCT explicitly mentions only life insurance and accident insurance, that provision should also apply to voluntary health insurance. It is, therefore, by assumption a fixed-sum insurance.

However, in practice, the insurer's obligation will not always be purely fixed-sum, but according to the determination method it will often be more similar to property insurance obligations (as with medical expenses). For this reason, foreign theory regularly classified voluntary health insurance as a mixed insurance, more precisely as a personal insurance that combines features of both fixed-sum insurance and indemnity insurance. The best example is the cover of treatment expenses arising from illnesses stated in the contract which are covered at the actual amount.<sup>61</sup> In fact, it is most accurate to say that this insurance is a *hybrid, i.e. that it has a mixed character* and that it should be subject to a similar legal regulation as the accident insurance.<sup>62</sup> Here we come to the biggest limitation of our insurance regulatory framework. Since voluntary health insurance is not mentioned at all in the section of the LCT regulating personal insurance, it is qualified based on the insurance terms and conditions.

Faced with this problem and aware of the fact that the LCT does not directly mention voluntary health insurance anywhere, domestic insurers solved the problem by introducing clauses in the general insurance terms and conditions which state that this is indemnity insurance, regardless of what obligation was actually contracted.<sup>63</sup>

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<sup>60</sup> LCT, Article 942.

<sup>61</sup> J. Bonnard, 316.

<sup>62</sup> However, there is one significant difference between these two types of cover – accident insurance is contested as indemnity insurance, while voluntary health insurance is contested as fixed-sum insurance. The truth is in the middle. Both insurances can include different covers, and what is contracted defines the nature of the insurer's obligation.

<sup>63</sup> Certain general terms and conditions contain a recourse provision that confirms the nature of this type of insurance. It would be correct to say that there is a subrogation of the insurer to the insured's rights. Thus, it is stated that "the insured's rights against a third party that is responsible for the damage are transferred to the insurer at the amount of compensation paid by the insurer, without obtaining

Instead of the ingenuity of domestic insurers, we are advocating for the regulation of voluntary health insurance in a separate law.<sup>64</sup> It is crucial that it is defined in a clear way, as well as to determine precisely the rules from the personal insurance section that apply to this insurance, i.e. rules that normally apply to property insurance.

### **3. Conclusion on the Legal Nature of Voluntary Health Insurance – Personal Indemnity Insurance**

In our opinion voluntary health insurance is a hybrid insurance by its nature, and as such it will not be developed in our law until the appropriate legal infrastructure is built. We primarily mean the adoption of insurance regulations, i.e. the Law on Insurance Contracts, which should implement the division into fixed-sum insurance and indemnity insurance. It is a division according to the type of the insurer's obligation, which comparative law is aware of, directly or indirectly.<sup>65</sup> For a sustainable development of voluntary health insurance (and perspective insurance products in general) it is important to create in the Serbian law the conditions for the insurer's obligations to be qualified according to the wording of the contract. Thus, *the principle of freedom of contracting with regard to the type of contracted obligations is accepted, which does not question the limitation of that freedom by introducing imperative norms regarding the content of the contract itself*. We emphasize – the division according to the type of insurer's obligation does not have to be explicitly stipulated by the law. Comparative law teaches us that it is sufficient that all the provisions relating to a certain section (e.g. personal insurance) show that a certain insurance type can be contracted as an indemnity insurance or a fixed-sum insurance. The extent to which the legal system meets the expectations of the insured can best be assessed by starting with whether the contracting parties are enabled to determine whether the obligation will be within a fixed-sum insurance or an indemnity insurance.<sup>66</sup>

Therefore, it is crucial to avoid adopting solutions that prevent further development of this service in the regulation of voluntary health insurance contracts. We primarily mean the dispositive norms that would prescribe that voluntary health insurance can be concluded as an indemnity insurance, as a fixed-sum insurance or as a combination of the aforementioned insurances. At the same time, if the insurance is concluded as an indemnity insurance, the regulatory framework should contain

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the insured's special consent". In addition, the insurance terms and conditions state the insurer's right to deduct the amount of compensation paid by the tortfeasor from the amount of compensation to be paid to the insured based on occurrence.

<sup>64</sup> M. Ćurković, *Ugovor o osiguranju osoba, život-nezgoda-zdravstveno*, Inženjerski biro, Zagreb, 2006, p. 209.

<sup>65</sup> N. Petrović Tomić, „O podeli na svotna i odštetna osiguranja – Pravo osiguranja na prekretnici“, u: V. Radović, *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije*, Belgrade 2019, pp. 415–436.

<sup>66</sup> H. Tschersich, pp. 2757–2758.

a norm that gives the right to the insurer to subrogate the insured's rights against the person responsible for the occurrence. Thus, the hybrid nature of this insurance would be recognized, which would enable insurers to develop different packages of voluntary health insurance. Finally, to complete the story, the legislator should *pro futuro* adopt the *lex specialis* on voluntary health insurance. This would create the conditions for the highest level of development of this type of insurance.

## **VI. Attractiveness of Supplementary Health Insurance**

### **1. Supplementary Health Insurance – Supplement to Compulsory Health Insurance**

According to the generally accepted definition in comparative law, supplementary health insurance provides cover of healthcare costs from compulsory health insurance in the part of the *out-of-pocket costs*, i.e. in the part of healthcare services where insured persons are obliged to participate in the healthcare costs, i.e. in the price of medicines.<sup>67</sup> It covers costs up to the full cost of healthcare from the compulsory health insurance in cases where the RFHI does not ensure payment of healthcare services in full.<sup>68</sup> Supplementary health insurance is added to compulsory health insurance, which is still the main health insurance in our region.<sup>69</sup> Therefore, healthcare is based on a model borrowed from the socialist period. However, due to a prominent aging of the population and the financial pressure on the compulsory insurance system, with regard to a part of the healthcare services, there is an insured's obligation to participate in the costs.

Reducing the costs of compulsory health insurance was one of the ways to solve problems occurring in the same or similar form in most countries, which led to a reduction in the scope of healthcare services covered by this type of social protection and the transfer of a part of the services to the insureds themselves.<sup>70</sup> Since the aging of the population is extremely pronounced in many countries today and the risk of illnesses increases with age, it is not surprising that more and more attention is being paid to private (voluntary) health insurance.<sup>71</sup> Persons who wish to invest in a timely manner in a product that will enable them to cover medical costs

<sup>67</sup> Healthcare services creating out-of-pocket costs vary from state to state. Here we will single out as reference – costs of specialist examinations, various tests, biotechnology, alternative medicine, medical technical-technological aids (various prostheses), eyeglass frames, etc.

<sup>68</sup> L. Belanić, p. 117.

<sup>69</sup> R. Roemer, „Health Legislation as a Tool for Public Health and Health Policy”, *International Digest of Health Legislation*, Vol. 49, No. 1, 1998, pp. 95-96.

<sup>70</sup> N. Petrović Tomić, *Pravo osiguranja, Sistem*, p. 708.

<sup>71</sup> G. Pinet, „Health Challenges of 21st Century: a legislative approach to health determinants”, *International Digest of Health Legislation*, Vol. 49, No. 1, 1998, pp. 131-178.

and medical treatments in general, as well as lost earnings, will buy voluntary health insurance. The latest findings in medicine, discoveries of new drugs, treatment procedures, etc. have a crucial effect on a person's decision. Owing to today's dynamics of medical development, many illnesses are no longer incurable, and after terrible traffic accidents and accidents in general, the injured manage not only to survive, but also to be cured. In described circumstances, a health-literate person tries to take care of own future and opts for voluntary health insurance in a timely manner.

This is where supplementary health insurance becomes an important factor. The cover it provides is functionally linked to the main health insurance, which is still compulsory in our country and is the part of the social protection package.<sup>72</sup> Supplementary private insurance in this sense is really a *financial supplement to compulsory insurance* and directly depends on what is stipulated by the regulatory framework. In other words, by defining rights from health insurance that can be used with adequate out-of-pocket costs, the legislator leaves the option for private insurers to position themselves in that segment of healthcare. Thus, they ensure the entry of fresh capital. This type of voluntary health insurance differs from complementary insurance in its *accessory character*. Its existence assumes some kind of the main health insurance system (usually the state!), which in terms of a part of the healthcare services requires the insured's participation in costs. Since it complements compulsory insurance in only one segment, the possibilities of developing this type of cover are limited and directed only to the group of compulsory health insurance users who have an interest in managing the risk of out-of-pocket costs. It unequivocally means that the group of persons who may be interested in this type of voluntary health insurance is determined by the fact that they are not exempted from paying out-of-pocket costs.<sup>73</sup> This makes this insurance a part of social protection, provided that it is designed adequately.

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<sup>72</sup> V. Gotovec, *Zdravstveno osiguranje – socijalni aspekti*, doktorska disertacija, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2010, pp. 211–212.

<sup>73</sup> According to our law, healthcare in the full amount from the compulsory health insurance funds without any out-of-pocket costs is provided to:

- 1) disabled war veterans, disabled military persons in peacetime and war-disabled civilians;
- 2) the blind and permanently disabled persons as well as persons receiving pecuniary benefits for assistance and care by other person, in accordance with the law;
- 3) voluntary blood donors who gave blood ten or more times, except for medicines from the List of medicines as well as for medical-technical devices and implants;
- 4) voluntary blood donors who gave blood less than ten times, within 12 months after each blood donation, except for medicines from the List of medicines, as well as for medical-technical devices and implants;
- 5) living donors, except for medicines from the List of medicines, as well as for medical-technical devices and implants;
- 6) tissue and cell donors, except for medicines from the List of medicines, as well as for medical-technical devices and implants;
- 7) insureds under Article 16 Paragraph 1 and 3 of this law;

In countries facing a sudden outflow of younger population and a simultaneous economic crisis, compulsory health insurance survives mostly owing to the supplement provided by voluntary health insurance. Since out-of-pocket costs fall hardest on people with lower income (including people after the end of working life) the supplementary insurance enables them to replace out-of-pocket costs when a health risk occurs by paying the supplementary insurance premium.<sup>74</sup> Supplementary health insurance premium is in any case lower than out-of-pocket costs borne by an individual, which vary depending on the type of health service.<sup>75</sup> Without that option, it could happen that persons with above-average low income at the occurrence of a health risk have to choose between poverty and not using healthcare, which is against the goals of healthcare and the public interest in the healthcare.<sup>76</sup> In this sense, in order to create conditions for a *sustainable healthcare system*, it is necessary to promote supplementary health insurance. It achieves the important social function of protecting compulsory health insurance policyholders with lower income, for whom it is more favourable to invest in supplementary health insurance than to bear the risk of disproportionately large out-of-pocket costs. Reducing the amount of out-of-pocket healthcare costs should be considered a goal of general interest. Sustainable development in the healthcare requires a *comprehensive reform* that will adequately *implement various modalities of voluntary health insurance*.<sup>77</sup>

## **2. Scope of Coverage**

What is the subject of supplementary health insurance? Supplementary health insurance enables cover of the difference, i.e. out-of-pocket healthcare costs

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<sup>74</sup> members of the insured's nuclear family under Article 16 Paragraph 1 Item 7)-9) and 11) and Paragraph 3 of this law.

<sup>75</sup> Although supplementary health insurance is not compulsory, for persons most affected by out-of-pocket costs, this insurance is to some extent compulsory, since it is the only way to manage out-of-pocket costs. It is precisely this situation that influences the legislator to limit the insurer's freedom of contracting in order to exempt supplementary health insurance from the application of purely market conditions. The limitation is reflected, for example, in the insurer's obligation to conclude a contract with each compulsory health insurance policyholder according to conditions that are not solely the result of an individual risk assessment, but an appropriate risk optimization is applied within the risk community.

<sup>76</sup> V. Gotovac, article, 49.

<sup>77</sup> Even if supplementary health insurance is promoted and becomes popular, it is not realistic to expect greater financial effects. Its purpose is not to collect profit, but to financially strengthen the public healthcare system, as well as to enable investments in it.

borne by the insured regarding certain healthcare services.<sup>78</sup> A person who contracts supplementary health insurance covers financial losses caused by healthcare costs incurred as a result of out-of-pocket costs.<sup>79</sup> It is a **cover of partially covered healthcare** provided within the system of compulsory healthcare.<sup>80</sup> By contracting a supplementary health insurance, partially covered healthcare services are included in their entirety or up to the amount that definitely exceeds the one covered by compulsory insurance.<sup>81</sup> These out-of-pocket costs can be a fixed amount (something like an administrative fee) or a percentage share in healthcare costs, and in some systems a deductible is also used, so that the insured participates in healthcare costs up to a certain amount. Theoretically, all insured persons of compulsory insurance have an interest in concluding supplementary health insurance, but this interest is most pronounced among persons with modest or moderate incomes.<sup>82</sup> This insurance enables them to *manage the risk of out-of-pocket costs*, which can take on even greater proportions, depending on the type of healthcare service. In addition to the benefits for individuals, supplementary health insurance allows the *redirection of healthcare costs to the private sector*.<sup>83</sup>

We emphasize – supplementary health insurance is *complementary* to compulsory health insurance. It provides cover for healthcare services that continue to be provided within the public healthcare system. Therefore, insured risks and insured events match. It is a private insurance that owes its existence to gaps and limitations of social insurance. This means that knowledge of the legal framework of compulsory health insurance is necessary in order to design a *national type of supplementary health insurance*. The shortcomings of public healthcare are such that insured persons do not have protection for certain healthcare services or have it with the obligation to bear a part of the healthcare costs. In the first case, there is room for the development of voluntary, and in the second case, supplementary health insurance.

Article 131 of the LHC specifies situations and maximum amount out-of-pocket costs that are charged. Insured persons are provided with healthcare services:

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<sup>78</sup> J. C. Langenbrunner, „Supplemental Health Insurance: Did Croatia Miss an Opportunity?”, *Croatian Medical Journal*, Vol. 43, No. 4, 2002, p. 404.

<sup>79</sup> It is the risk of out-of-pocket healthcare costs.

<sup>80</sup> This insurance was introduced in Slovenia in 1993 to cover out-of-pocket costs for compulsory health insurance and it is estimated that over three decades the following result was achieved: it is bought by about 73 percent of the population and it covers about half of private expenses. V.: P. Calcoen, W. P. Van de Ven, „Voluntary Additional Health Insurance in the European Union: Free Market or Regulation?”, *European Journal of Health Law*, Vol. 25 (4), 2017, pp. 591-613.

<sup>81</sup> S. Thomson, A. Sagan, E. Mossialos, „Why Private Health Insurance?”, S. Thomson et all (ed.), *Private Health Insurance – History, Politics and Performance*, Cambridge University Press, Cambridge, 2020, p. 3.

<sup>82</sup> P. Martin, M. Del Sol, „The Uncertain and Differentiated Impact of EU Law on National (Private) Health Insurance Regulations”, C. Benoît et all (ed.), *Private Health Insurance and European Union*, Palgrave Macmillan, Cham, 2021, p. 118.

<sup>83</sup> T. Alberth, M. Kuhar, V. P. Rupel, „Complementary health insurance in Slovenia”, *Health Insurance*, p. 2022.

**1) Entirely at the expense of compulsory health insurance funds** – (1) prevention and early detection of diseases, (2) medical examinations and treatment related to family planning, pregnancy, childbirth and the postpartum period, including termination of pregnancy for medical reasons, (3) medical examinations, treatment and medical rehabilitation in case of illnesses and injuries of children, pupils and students until the end of the prescribed education, and at the latest until the age of 26, i.e. elderly persons who are severely physically or mentally disabled, (4) medical examinations and treatment of diseases of the mouth and teeth in persons referred to in Article 63 Item 1), 10) and 11) of this law, as well as examinations and treatment diseases of the mouth and teeth related to pregnancy and 12 months after a childbirth, (5) medical examinations and treatment related to infectious diseases for which the law provides measures to prevent their spreading, (6) medical examinations and treatment for malignant diseases, diabetes, psychosis, epilepsy, multiple sclerosis, progressive neuromuscular diseases, cerebral palsy, paraplegia, tetraplegia, permanent chronic renal insufficiency in which dialysis or kidney transplantation is indicated, systemic autoimmune diseases, rheumatic diseases and their complications and rare diseases, (7) palliative care, (8) medical examinations and treatment in connection with the taking, giving and exchange of organs, cells and tissues for transplantation from insured persons and other persons to provide the healthcare of insured persons, (9) medical examinations, treatment and rehabilitation due to occupational diseases and injuries at work, (10) emergency medical and dental aid, as well as emergency medical transport, (11) medical means related to the treatment of diseases and injuries from this point;

**2) at the amount of at least 95% of the price of the healthcare service from the compulsory health insurance funds** for (1) intensive care in a stationary healthcare institution, (2) surgical procedures performed in the operating room, including implants for the most complex and the most expensive healthcare services, (3) the most complex laboratory, X-ray and other diagnostic and therapeutic procedures (MRI, scanner, nuclear medicine, etc.);

**3) at the amount of at least 80% of the price of the healthcare service from the compulsory health insurance funds** for (1) medical examinations and treatment by a selected physician and a specialist physician, (2) laboratory, X-ray and other diagnostic and therapeutic procedures not included under paragraph 1 item 2) sub-item (3) of this article, (3) home care, (4) dental examinations and treatment related to injury to teeth and facial bones, as well as dental examinations and dental treatment before heart surgery and organ, cell and tissue transplants, (5) treatment of caries complications in children, pupils and students until the end of the prescribed education, and at the latest until the age of 26, dental extraction as a result of caries, as well as manufacture of mobile orthodontic apparatuses, (6) inpatient treatment and rehabilitation in an inpatient healthcare facility, (7) medical

examinations and treatment in a day hospital, including surgical procedures outside the operating room, (8) medical rehabilitation in outpatient facilities, (9) medical means not included under paragraph 1 item 1) sub-item (11) of this article;

**4) at the amount of at least 65% of the price of the healthcare service from the compulsory health insurance funds** for (1) total and partial acrylic prosthesis for persons over the age of 65; (2) eye and hearing aids for adults, (3) gender changing for medical reasons, (4) non-emergency medical transport, (5) treatment of an illness whose early detection is the subject of a targeted preventive examination, i.e. screening, according to appropriate national programmes, if the insured person did not respond to a single call within one call cycle, nor did he/she justify his/her absence, and the illness was diagnosed in the period until the next call cycle.

Healthcare services provided as a right from compulsory health insurance in accordance with paragraph 1 of this article, and for which the RFHI does not make payment based on the price of the healthcare service, but calculates and pays the costs in a different way (after the visit of the insured person to a healthcare worker, diagnostically related groups of healthcare services, programmes, sick days, etc.), insured persons are guaranteed the right to healthcare at the expense of compulsory health insurance funds in the percentages prescribed in paragraph 1 of this article.

As an exception to paragraph 1 item 1) sub-item (4) of this law, in order to exercise the rights to dental healthcare from compulsory health insurance, a general act from Article 133 of this law can determine the payment of out-of-pocket costs if the insured person does not respond to the call of the selected physician for a preventive examination, that is, if he/she does not exercise the right to preventive dental services in accordance with this law, that is, with the republic programme of dental healthcare adopted by the Government in accordance with the law.

Healthcare services paid by diagnostically related groups are provided to insured persons at the expense of compulsory health insurance funds at the amount of at least 95% of the price of a diagnostically related group, in accordance with the regulation from Article 133 of this law.

The Minister, upon the proposal of the RFHI, for each calendar year regulates the content and scope of rights to healthcare from the compulsory health insurance under Article 131 of this law for certain types of healthcare services and certain types of illnesses and injuries, the percentage of the price of the healthcare service, i.e. the price of diagnostically related group from the compulsory health insurance funds, as well as the percentage of the insured person's payment up to the full amount of the price of the healthcare service, i.e. the price of a diagnostically related group.

In the regulation from paragraph 1 of this article, the minister determines the highest annual amount, i.e. the highest amount for a specific type of healthcare service, i.e. diagnostically related group that the insured person pays from own funds,

taking into account that such amount does not prevent the insured person from using healthcare, that is, it prevents the insured person to successfully use healthcare.

Monetary amount up to the full amount from Article 131 paragraph 1 item 2)-4) and paragraph 2 of this law, as well as the monetary amount from Article 132 of this law (hereinafter out-of-pocket costs), is paid by the insured person who used that healthcare service, i.e. medicine, unless otherwise specified by this law, i.e. legal entity providing voluntary health insurance to an insured person is in charge of paying.

The regulation from Article 133 of this law can determine that out-of-pocket costs are paid in a fixed amount, provided that the fixed amount must not be higher than the percentage amount determined in accordance with this law.

The regulation from Article 133 of this law defines the manner and conditions for charging out-of-pocket costs, as well as the return of funds paid above the highest annual amount, that is, the highest out-of-pocket costs for a certain type of healthcare service.

It is prohibited for the healthcare provider to charge different out-of-pocket costs for the provided healthcare services included in compulsory health insurance than those prescribed in accordance with Articles 131-133 of this law, as well as to charge out-of-pocket costs to the insured person who paid the highest annual out-of-pocket costs or the highest out-of-pocket costs for a certain type of healthcare service.

The insured person can use own funds or voluntary health insurance funds to exercise the right to a greater content, scope and standard of services from Article 131 of this law, which are provided from compulsory health insurance funds in accordance with this law and regulations adopted for the implementation of this law, by paying the difference between the price determined in accordance with this law and regulations adopted for the implementation of this law and the price of the healthcare service provided to the insured person, which is determined by the pricelist of the healthcare service provider.

Detailed conditions and method of obtaining the additional payment from paragraph 5 of this article are prescribed by the regulation from article 124 of this law.

Healthcare service provider is obliged to issue an invoice for charged out-of-pocket costs to the insured person.

The invoice form referred to in paragraph 1 of this article shall be regulated by the minister with the regulation referred to in article 133 of this law.

The insured person is obliged to keep all out-of-pocket costs' invoices charged in one calendar year, which serve as evidence in the procedure for determining the right to refund of funds paid above the highest annual amount, i.e. the highest out-of-pocket costs for a certain type of healthcare service, as well as other invoices for healthcare services in order to exercise rights from voluntary health insurance.

### **3. Forecast of the Direction of Development of Supplementary Health Insurance in the Republic of Serbia**

When considering possible directions for development of supplementary health insurance in Serbia, the emphasis should be on a *sustainable development of healthcare*. When sustainable development of healthcare is set as a target, it is clear that the solution lies in a combined *public-private partnership between the state and insurers*. In other words, it is necessary to establish a cooperation between compulsory and private health insurance, linking state and private healthcare institutions, increasing health literacy of the population, and promoting various voluntary health insurance packages.<sup>84</sup>

Voluntary health insurance in many countries is one of the modalities of financing the healthcare system. By providing protection against high treatment costs, especially people with lower income are enabled to use healthcare when the alternative would be to give it up due to high costs. This contributes to the exercise of the right to healthcare as one of the elementary rights. In order to reach the desired share of voluntary, and especially supplementary health insurance in the portfolio of the domestic insurance market, it is crucial to conduct a campaign aimed at increasing the health literacy of the population. *Health literacy of the population is crucial for the sustainability of health insurance*. The World Health Organization defines health literacy as an individual's knowledge and ability to understand and apply health information in order to make health-related decisions and thereby influence the maintenance and/or improvement of health throughout life. People who are health literate are more likely to acknowledge the benefits of voluntary health insurance. Assuming that the campaign related to this insurance was soundly implemented.

## **VII. Conclusion on Perspectives of Voluntary Health Insurance in Serbia**

The right to healthcare, which is one of the elementary human rights, is exercised in most countries through the state, public healthcare system. During the 20<sup>th</sup> century, and even more in the 21<sup>st</sup>, states faced enormous pressure on the state healthcare fund, which is why the idea of a private, premium health insurance was developed. Voluntary health insurance has a significant role in enabling adaptation of the compulsory health insurance system to the rules of the game, which is characterized by the ageing of the population, the outflow of younger population, and the impact of inflation and the devaluation of money in general. It should enable

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<sup>84</sup> J. Kočović, T. Rakonjac Antić, V. Rajić, „Dobrovoljno zdravstveno osiguranje kao dopuna obaveznom zdravstvenom osiguranju u Srbiji“, *Ekonomski temi*, Vol. 51(3), 2013, pp. 541–560.

a wider range of people to use healthcare services in private healthcare institutions, which would significantly relieve the state health insurance fund. This would create conditions for an equal load on the state and private healthcare systems, which is a *conditio sine qua non* of a sustainable healthcare.

Voluntary health insurance in the Serbian law has not been precisely regulated for decades. Such situation resulted in, on one hand, insufficient regulatory framework that is supplemented by insurance terms and conditions, while, on the other hand, consumers are not guaranteed the same level of protection as in other insurance types. Insurers use the legal vacuum in order to regulate all contractual relations of this insurance. This often leads to introduction of clauses that presume the nature of the insurer's obligation, regardless of what is included in the cover in the specific case and how it was contracted. To understand the legal nature of voluntary health insurance, it is crucial that it is a hybrid type of insurance. The insurer's obligation should depend solely on what is contracted.

Therefore, it is necessary to modernize our regulatory framework as soon as possible and make it compatible with modern legal insurance systems. Adoption of the Law on Insurance Contracts will contribute to this, which would – explicitly or implicitly – introduce the division into an indemnity and a fixed-sum insurance. What we currently have – the LHC – is only to an extent a step forward in terms of regulation of voluntary health insurance. We only welcome the adoption of the law regulating the matter of health insurance. However, according to many solutions, the said law was modelled after the Regulation, which we cannot consider a good starting point. Therefore, it remains to work on the last stage in development of voluntary health insurance in the future, which is the adoption of *lex specialis* regulations, which would legally separate voluntary health insurance from compulsory health insurance.

Voluntary and supplementary health insurance – if a favourable regulatory framework is created – have the potential to complete the compulsory health insurance system. The social protection system in terms of healthcare can and must be based on the principle of sustainability. Sustainable healthcare is not possible in the 21<sup>st</sup> century if private insurers are not included. They should be given a share, and the legislator's task is not to introduce irrational limitations regarding the scope of cover. We consider the role of supplementary health insurance to be particularly significant, from the point of view of healthcare users for whom the risk of out-of-pocket costs is unacceptable and from whom the user is protected by concluding this insurance. It has an important social function, since owing to this insurance, compulsory health insurance policyholders obtain healthcare when out-of-pocket costs could make it unaffordable for people with low income.

We believe that private insurers have a significant role in the improvement of healthcare, which also results from the Law on Healthcare as an obligation of all

companies. Insurers are in a position that allows them to make a contribution in this regard, whether they are partners or competitors of the RFHI. It will actually depend on the type of services they offer. By offering preventive services from the primary healthcare (annual medical examinations, additional payments for a larger scope and standard of services of the selected doctor, etc.), insurers enter into a partnership with the RFHI, which ultimately creates a fertile ground for investments in the secondary and tertiary segments of healthcare. On the contrary, by offering insurance to persons who are not included in compulsory health insurance, insurers become competitors of the RFHI.<sup>85</sup>

Sustainable development of the healthcare system and social benefits in general requires a comprehensive reform, with voluntary health insurance as an indispensable segment. We have written about complementary health insurance several times, but in this paper the focus is on supplementary health insurance which we assess as a service that is quite unused in our circumstances. The state healthcare system imposes compulsory health insurance, while voluntary health insurance is legally regulated for the first time in 2019. While voluntary health insurance has been accepted, supplementary health insurance has yet to be promoted. Its potential is greater if we know that out-of-pocket costs are increasing, while under the influence of the economic crisis a greater number of people are facing poverty. Sustainable development in the healthcare system will require promotion of supplementary health insurance so that insurance premiums are used to cover the expenses of the state insurer, and in future also to invest in it.

We concluded that supplementary voluntary health insurance was the best way to help citizens reduce expenses/costs incurred when using healthcare services that include out-of-pocket costs. Instead of paying out of pocket, service users can invest in an insurance package that will facilitate exercise of the right to healthcare.

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<sup>85</sup> In foreign practice, clinics are established by insurance companies, and these clinics provide services to persons with whom private health insurance has been concluded. Such practice is extremely risky for insurers.

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## KARAKTERISTIKE UGOVORA O ZDRAVSTVENOM OSIGURANJU

PREGLEDNI RAD

### Apstrakt

Problemi zdravstvene zaštite i upravljanja zdravstvenom zaštitom gotovo su neodvojivo vezani za analizu zdravstvenog osiguranja, dok se slične teme retko javljaju u analizi osiguranja života. Možda su ta dva tipa pokrića slična u jednom pogledu: većina zahteva za osiguranje života i zdravstveno osiguranje proističe od pojedinaca kao izolovanih jedinki, a ne od kolektiva radi osiguranja njegovih članova. U drugom pogledu, ta dva tipa pokrića malo podsećaju jedno na drugo.

Predmet ovog rada je zdravstveno osiguranje, a njegov cilj je da ukaže na društveni značaj te vrste osiguranja. Dramatičan porast troškova pružanja usluga zdravstvene zaštite, koji je pratilo promenu tereta snošenja tih troškova, doprineo je da pitanja zdravstvene zaštite i zdravstvenog osiguranja postanu glavna tema zainteresovanosti osiguravajućih društava.

**Ključne reči:** Zdravstvena zaštita, osiguranje, ugovor, pružalac usluga zdravstvene zaštite, pokriveno

JEL: G22, I13

### I. Definicije i istorijski kontekst

Univerzalna zdravstvena zaštita predstavlja program zdravstvenog osiguranja koji je naložila vlada i u kojem gotovo cela populacija stiče pravo na pokriće

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zdravstvenih usluga. Pružalac zdravstvene zaštite je fizičko ili pravno lice koje se bavi pružanjem zdravstvenih usluga korisnicima. Osiguranje prihoda u slučaju invaliditeta zapravo je polisa osiguranja koja pruža naknadu u vidu zamene prihoda ako osigurano lice postane invalid. Ugovor o pružanju usluga je vrsta pokrića za zdravstvene usluge po osnovu kojeg se usluge pružaju u naturi umesto u vidu novčanih beneficija. Ugovor o nadoknadi troškova medicinskih usluga jeste vrsta pokrića za zdravstvene usluge po osnovu kojeg se naknađuju troškovi zdravstvenih usluga, umesto pružanja samih usluga. Naziva se još i osiguranje od troškova lečenja. Zdravstveno osiguranje organizovano je kroz udruženje ljudi radi pokrivanja rizika koji su usmereni na zdravlje ljudi i njihove sposobnosti. Posledice tih rizika, takvog stanja, uglavnom su troškovi lečenja.<sup>2</sup> Organizacija takve zaštite moguća je putem obaveznih i fakultativnih vrsta zdravstvene zaštite. Same organizacije mogu biti osnovane s ciljem ostvarivanja dobiti ili podređivanja njihove funkcije socijalnoj zaštiti građana. Koncept zdravstvenog osiguranja osmislio je Hju Čemberlen, iz porodice Pitera Čemberlena, u 17. veku, tačnije 1694. godine. Taj program zdravstvene zaštite pokriva je od rizike od nesreće sa posledicama invaliditeta, privremenog ili trajnog.<sup>3</sup>

Koncept obaveznog zdravstvenog osiguranja razvio se u prvoj polovini 20. veka. Prve organizacije osnovane su i razvijane od 1929. godine. Prvi putevi naplate bolničkih usluga zasnivali su se na pretplati korisnika tih usluga. Na osnovu toga, razvija se i organizacija Plavi krst.

Polisa koju su overili osiguravajuća kuća i korisnik usluge predstavlja dokaz postojanja zdravstvenog osiguranja. Ta polisa obično se zaključuje na period od jedne godine zdravstvenog osiguranja i tako se i obnavlja. Može trajati kraće ili duže. Polisa osiguranja definiše pokrivenе rizike, kao i iznos troškova koje pokriva osiguravajuća kuća.<sup>4</sup> Na osnovu ugovora o zdravstvenoj zaštiti, obaveze korisnika zdravstvenih usluga odnose se na sledeće:

1. uplata premije osiguranja kompaniji;<sup>5</sup>
2. plaćanje troškova koje osiguravajuća kuća nije obavezna da plati prema ugovoru, na primer, za osiguranu sumu od 30.000 EUR, osiguranik je obavezan da pokrije troškove do 50 EUR;
3. participacija kao deo pristupa zdravstvenom sistemu, koju u određenom iznosu plaća osiguranik, na primer u iznosu od 50 RSD;
4. saosiguranje: Učešće u pojedinim troškovima medicinskog lečenja ako ih osiguravajuća kuća ne pokriva u potpunosti, na primer pokriće troškova

<sup>2</sup> K. Aase, *Life insurance and pension contracts II: The life cycle model with recursive utility*. ASTIN Bulletin, 46, 2016, str. 71–102.

<sup>3</sup> K. Aase, *Life insurance and pension contracts II: The life cycle model with recursive utility*. ASTIN Bulletin, 46, 2016, str. 71–102.

<sup>4</sup> N. Žarković, „Mere sprečavanja u životnim osiguranjima – Živeti zdravije“, *Svet osiguranja*, 2017, str. 1–2.

<sup>5</sup> N. Žarković, „Mere sprečavanja u životnim osiguranjima – Živeti zdravije“, *Svet osiguranja*, 2017, str. 1–2.

operacije ugovoreno je na 20% prema 80%, gde osiguranik plaća manji iznos kao doprinos;

5. *isključenja*: Nisu svi rizici i usluge pokriveni, a osiguranici se obavezuju da namire razliku;

6. *ograničenja u vezi s trajanjem i vrednošću pokrića*. Ugovara se određeni iznos pokrića. To je jedan od faktora koji utiče na iznos premije. Drugi faktor je vreme, jer za duži period, premija je viša u apsolutnom iznosu, ali kao cena usluge, niža je po jedinici vremena. Osim ta dva faktora, postoje i drugi faktori koji utiču na iznos premije;<sup>6</sup>

7. *maksimalno pokriće iz sopstvenog džepa osiguranika* implicira da neke od usluga pokriva sam osiguranik, a sve ostalo plaća osiguravajuća kuća;

8. *kapitacija*: kada zdravstvena zaštita obuhvata članove porodice osiguranika;<sup>7</sup>

9. *mreža zdravstvenih ustanova*, plan ili mreža zdravstvenih ustanova omogućava bolji kvalitet usluge i niže troškove pružanja tih usluga, tako da je moguće očekivati popuste na premiju;

10. *sertifikat ili kartica zdravstvenog osiguranja* znači da je osiguravač prihvatio troškove pre pružanja zdravstvenih usluga;

11. *potvrda o popustima, pogodnostima i obračunu troškova*, kojom se osiguraniku pruža pismeni obračun pogodnosti i troškova, iz čega proizlazi objašnjenje za plaćanje i obaveze osiguranika.

Razlika u troškovima za kupovinu lekova nalazi se na listama lekova. Neki lekovi su na listi s popustom, dok neki nisu.

## **II. Zdravstveno osiguranje i moralni rizici**

Odredbe o uključenosti u programe pružanja zdravstvene zaštite često su osmišljene da stvore finansijske podsticaje ili nametnu ograničenja ponašanja osiguranih lica i pružaoca zdravstvenih usluga. Te odredbe usmerene su na kontrolisanje problema koji je ranije opisan kao moralni rizik, što može biti naročito izraženo u zdravstvenom osiguranju.<sup>8</sup> Naravno, moralni rizici javljaju se praktično u svim vrstama osiguranja. Mnoge odredbe ugovora o osiguranju mogu se objasniti kao metod kontrole mogućih moralnih rizika (npr. franšiza u imovinskom osiguranju i isključenje samoubistva u osiguranju života). Međutim, u zdravstvenom osiguranju, kontrola moralnih rizika dobija poseban značaj, a u nekim slučajevima predstavlja primarni parametar koji treba imati u vidu prilikom oblikovanja pokrića.<sup>9</sup>

<sup>6</sup> M. Batty, & A. Kroll, *Automated Life Underwriting*, 2009, str.18–22.

<sup>7</sup> R.G. Eccles, & M. Vollbracht, „Media Reputation of the Insurance Industry: An Urgent Call for Strategic Communications Management“. *The Geneva Papers*, 31, 2006, str. 395–408.

<sup>8</sup> O. Gürsezen, *Marine insurance law*, London: Routledge, 2015, str. 211–212.

<sup>9</sup> H. Gründl, M.I. Dong, J. Gal, „The evolution of insurer portfolio investment strategies for long-term investing“. *OECD Journal: Financial Market Trends*, 2016(1), str. 1–57.

U osiguranju zdravstvenih usluga, kontrola ponašanja pružalaca zdravstvene zaštite i korisnika dobija naročit značaj. Važna razlika koja između te vrste osiguranja i drugih ugovora o osiguranju, uključujući osiguranje prihoda za slučaj invaliditeta, jeste prisustvo pružalaca zdravstvene zaštite, kao što su bolnice i lekari. Pružaoci zdravstvenih usluga stupaju u interakciju s korisnicima zdravstvene zaštite i sa osiguravajućim društvima. Te interakcije stvaraju mogućnost moralnih rizika koji su kompleksni i teški za kontrolu, u poređenju s moralnim rizicima koji proizlaze iz drugih vrsta osiguranja u kojima je jedina interakcija ona između osiguravača i osiguranika.<sup>10</sup>

Neretko, događaj koji pokreće osiguravajuće pokriće jeste usluga koju osiguranom licu obezbeđuje pružalac zdravstvene zaštite. Obično su znanje i informacije pružalaca zdravstvene zaštite o stanju zdravlja osiguranika, mogućim efektima navika osiguranika na njegovo ili njeno zdravstveno stanje, te alternativnim metodama otkrivanja i lečenja zdravstvenih stanja superiorni u odnosu na znanje i informacije korisnika zdravstvene zaštite. Te superiornije informacije stavljaju pružaoce usluga zdravstvene zaštite u poziciju da mogu snažno da utiču na korisnike zdravstvenih usluga.

U odsustvu osiguranja zdravstvenih usluga, ograničenja finansijskih resursa korisnika i njegova ili njena volja da ih opredeli na usluge zdravstvene zaštite predstavljaju prirodno ograničenje protiv neekonomične potrošnje zdravstvenih usluga. Osiguranje koje omogućava pristup zdravstvenoj zaštiti može ukloniti ta ograničenja. Ako osiguravajuće pokriće pružaocu zdravstvene zaštite nadoknađuje finansijske iznose bez zahteva za bilo kakvu uplatu od strane korisnika, takvo pokriće uklanja ta ograničenja, a pritom ne umanjuje motiv pružaoca da podstiče dalju potrošnju zdravstvenih usluga. Čak i pod univerzalnim pokrićem, efekat odredaba o pokriću na korisnike i pružaoce zdravstvenih usluga verovatno neće nestati kao problem sve dok nadoknada pružaocima ne bude zasnovana na nivou usluga.

Međutim, prisustvo zdravstvenog profesionalca nije uslov za pojavu moralnih rizika. Polisa osiguranja prihoda u slučaju invaliditeta kojom se pruža naknada prihoda u slučaju da osiguranik postane invalid, može uticati na volju osiguranika da nastavi s radom.<sup>11</sup> Volja osiguranika za radom postaje slabija kako se naknade prihoda iz svih izvora, uključujući osiguranje prihoda u slučaju invaliditeta, povećavaju u odnosu na zaradu. Stoga osiguravajuća društva koja zaključuju osiguranje prihoda za slučaj invaliditeta uzimaju u obzir naknade iz svih izvora, uključujući i druge polise osiguranja prihoda u slučaju invaliditeta i socijalno osiguranje, prilikom zaključenja pokrića. Pored toga, polise osiguranja prihoda u slučaju invaliditeta mogu sadržati odredbu po osnovu koje se umanjuje naknada kada ukupne nadoknade prihoda iz

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<sup>10</sup> N. Coe, & A. Belbase, *How do people decide on life insurance and long-term disability insurance coverage?* Working Paper, No. 2015-4, Boston: Center for Retirement Research at Boston College, 2015.

<sup>11</sup> N. Coe, & A. Belbase, *How do people decide on life insurance and long-term disability insurance coverage?* Working Paper, No. 2015-4, Boston: Center for Retirement Research at Boston College, 2015.

svih izvora premašće određeni procenat (npr. 70 procenata) zarade ostvarivane pre nastupanja invaliditeta.

Takođe, problem može nastati ako stanje koje pokreće isplatu naknada (za invaliditet) nema jasno značenje; povreda ruke može onesposobiti hirurga, ali ne i izvršnog direktora firme. Očekuje se da se okolnosti koje dovode do invaliditeta razlikuju među pojedincima i zanimanjima, što stvara mogućnost sporova između osiguravajućih društava i njihovih osiguranika, u slučaju da stanja koja pokreću isplatu naknade nisu jasno definisana. Nažalost, definicije sa najjasnijim značenjem često su najrestriktivnije.<sup>12</sup> Definisane invaliditeta kao „hospitalizacije“, na primer, ostavlja malo prostora za spor oko značenja termina, ali širina pokrića nije značajna. Obično samo najozbiljnija medicinska stanja dovode do hospitalizacije, pri čemu je prosečan period boravka u bolnici samo nekoliko dana. Definisane invaliditeta kao „nemogućnost obavljanja dužnosti osiguranikovog zanimanja“ pruža pokriće za stanje koje je bliže povezano s gubitkom prihoda, ali subjektivni aspekti definicije povećavaju verovatnoću sporova.

### **III. Osiguranje zdravstvenih usluga**

Analiza osiguravajućeg pokrića za zdravstvene usluge može pratiti isti okvir koji se koristi za pokriće imovine i odgovornosti: određivanje događaja koji su obuhvaćeni i posledični iznos nadoknade. Kod osiguranja zdravstvenih usluga, oblik nadoknade postaje važan parametar za razmatranje, pogotovo kada je osiguranje namenjeno pružanju usluga umesto nadoknade troškova usluga. Taj okvir može se koristiti za analizu pokrića koje se predlaže ili je propisano u okviru univerzalnih programa, kao i privatnih programa.

Po osnovu osiguranja zdravstvenih usluga, događaj koji pokreće pokriće jeste pružanje zdravstvene usluge osiguranom licu u pokrivenih okolnostima. Nivo beneficia takođe može zavisiti od okolnosti koje dovode do aktiviranja pokrića. Stoga je značenje termina „osigurano lice“ i „pokrivene okolnosti“ važno. Na primer, nedavno je razlika između povreda na radu i drugih medicinskih stanja postala važna, jer je nadoknada troškova zdravstvenih usluga povezanih s povredama na radu bila povoljnija u poređenju s nadoknadom troškova zdravstvenih usluga generalno. Ta razlika, koja bi verovatno nestala po osnovu univerzalnog pokrića, predstavlja primer usko definisanog niza okolnosti koje utiču na nivoe naknada po osnovu osiguranja zdravstvenih usluga.

Taj tip razlike može i dalje uticati na nivoe naknada, čak i pod univerzalnim pokrićem. Često se po osnovu osiguranja zdravstvenih usluga naknađuju povrede

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<sup>12</sup> Odluka o sadržaju i izgledu obrazaca finansijskih izveštaja za društva za osiguranje, *Službeni glasnik RS*, br. 135/2014, 141/2014 i 102/2015.

usled nezgode na povoljnijoj osnovi u poređenju s drugim stanjima. Logika iza te razlike je ta što korisnik ima manje kontrole nad nivoom medicinskih usluga pruženih pri povredi usled nezgode nego u drugim okolnostima.

Osiguranje od bolesti, koje obuhvata širok spektar okolnosti koje aktiviraju plaćanje naknade, ipak zahteva prisustvo bolesti da bi se pokriće primenilo. Po osnovu osiguranja od bolesti, dijagnoza medicinskog stanja predstavlja tipičan uslov za pokriće. Na primer, elektrokardiogram koji se vrši radi istraživanja sumnje na srčani šum može biti pokriven odredbama polise koje se odnose na bolesti, dok isti pregled vršen kao deo rutinskog pregleda može biti pokriven pod manje povoljnim uslovima osim ako ne otkrije abnormalno stanje.

Najširi opseg pokrića odnosi se na opšte zdravstvene usluge, uključujući preventivnu negu. Osiguranje preventivne nege često je detaljno i složeno, sa ograničenim naknadama koje variraju po kategoriji usluga čak i među specifičnim uslugama. Eksplizitna ograničenja učestalosti često se pojavljaju za usluge u vezi s kojima osiguranik i pružalac nege imaju određenu diskreciju. Na primer, polisa može nametnuti ograničenje učestalosti rutinskih fizičkih pregleda zasnovanih na životnom dobu, kao što je jednom u dve godine pre navršene 40. godine i jednom godišnje za lica starija od 40 godina.

Po pravilu, gotovo sva pokrića zdravstvenih usluga pružaju naknade na koje utiču okolnosti pod kojima se pružaju medicinske usluge.<sup>13</sup> Kada je obim pokrića uzak (npr. kod osiguranja za slučaj nezgode), definicija stanja koje dovodi do naknada postavlja prirodna ograničenja na pokrivene usluge. Kada je obim pokrića širok (npr. uključenje preventivne nege), češće je oslanjanje na eksplizitne kontrole, kao što su ograničenja učestalosti pružanja pokrivenih usluga ili ograničenja iznosa plaćenih za usluge u vezi s kojima pružalac i korisnik medicinskih usluga imaju određeni stepen diskrecije.

Osiguranje zdravstvenih usluga često sadrži isključenja, kao što su kozmetičke operacije po sopstvenom izboru ili povrede nastale kao posledica pokušaja samoubistva. Isključenje za kozmetičke operacije po sopstvenom izboru može opstati i nakon promene u sistemu obaveznog opštег osiguranja, iako je malo verovatno da će isključenje za samoubistvo opstati. Nema očigledne logike za isključenje samoubistva iz pokrića zdravstvenih usluga, jer mnoge iste polise pružaju naknade za duševne bolesti. Očekuje se da samo najozbiljnija duševna poteškoća dovodi do pokušaja samoubistva, a postavljanje granice na toj tački može stvoriti dodatne podsticaje. Prisustvo isključenja stvara podsticaj za pružaoce zdravstvene zaštite koji pružaju prvi nivo usluga nakon pokušaja samoubistva (npr. lekare hitne službe u bolnici) da zamene neku drugu dijagnozu (npr. nesrećan slučaj) koju žrtva verovatno neće osporiti.

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<sup>13</sup> N. Coe, & A., Belbase, *How do people decide on life insurance and long-term disability insurance coverage?* Working Paper, No. 2015-4, Boston: Center for Retirement Research at Boston College, 2015.

U nekim slučajevima, pokriće možda neće važiti za usluge iz kategorije pružalaca medicinskih usluga ili za medicinske procedure koje se smatraju eksperimentalnim. Umesto potpunih isključenja, mogu se pojaviti ograničenja naknada za te vrste usluga.<sup>14</sup> Potpuna isključenja mogu dovesti do sporova, dok je manje verovatno da će ograničenja ili druge vrste finansijskih podsticaja dovesti do sporova.

Isključenje prethodnih stanja bilo je uobičajeno u pokriću po osnovu zdravstvenog osiguranja. To isključenje obično se odnosi na medicinsko stanje koje je već dijagnostikovano pre početka važenja pokrića, kao što je hronična bolest ili alergija. Često se lečenje prethodnog stanja ne pokriva sve dok polisa već izvesno vreme ne bude na snazi, nakon čega je i to stanje pokriveno pod istim uslovima kao i ostala stanja. Takvo isključenje nastalo je jer osiguravači i poslodavci ne žele da snose troškove zdravstvenih stanja koja su nastupila pre aktuelnog pokrića i koja su bila poznata osiguraniku u trenutku izdavanja polise.

Takvo isključenje verovatno će nestati pod opštim pokrićem. Kako se teret finansiranja zdravstvene zaštite bude konsolidovan preko sve većih garancija, zadržavajući tako opredeljenja troškova za određeno lice ili stanje imaće tendenciju da gubi na značaju. Stoga je malo verovatno da će isključenje prethodnih zdravstvenih stanja biti važno pitanje u okviru osiguranja koje nude organizacije za finansiranje zdravstvene zaštite koje vrše konsolidaciju pokrića na velikim geografskim područjima.

#### **IV. Oblik naknade**

Pokriće zdravstvene zaštite može se grupisati u dve široke kategorije prema obliku naknade:

- ugovori o pružanju usluga, po osnovu kojih se pružaju zdravstvene usluge;
- ugovori o naknadi troškova lečenja (ili nadoknadi iz osiguranja), po osnovu kojih se naknaduju troškovi lečenja.

U Sjedinjenim Američkim Državama, Plavi krst i Plavi štit nudili su ugovore o pružanju usluga kao rane oblike zdravstvenog osiguranja. Osiguranje troškova lečenja, koje je nastalo nešto kasnije, dobilo je na važnosti od 1950. do 1980. godine. Od 1980. godine, osiguranje troškova lečenja izgubilo je na važnosti u odnosu na programe pružanja usluga. Međutim, čak i po osnovu opštih pokrića, osiguranje troškova lečenja može opstati u obliku pokrića koje se odnosi na rupu u osiguranju gde se zahteva da osigurano lice samo plati troškove.<sup>15</sup> Štaviše, mnogi ugovori o

<sup>14</sup> EIOPA Financial Stability Report, December 2016. Frankfurt: European Insurance and Occupational Pensions Authority (EIOPA).

<sup>15</sup> R. Chen, & K.A. Wong, „The Determinants of Financial Health of Asian Insurance Companies“, 2004, *The Journal of Risk and Insurance*, 71(3), 2004, str. 469-499.

pružanju usluga su hibridni oblici osiguranja kojima se zahteva finansijski doprinos u troškovima usluga putem odbitaka i drugih odredaba o participaciji.<sup>16</sup>

Pod čistim ugovorom o pružanju usluga, osiguravajuća organizacija obećava da će pružiti paket medicinskih usluga osiguraniku. Korisnik medicinskih usluga možda nikada neće biti uključen u finansijsku transakciju između osiguravača i pružaoca medicinskih usluga. Umesto toga, osiguravač direktno nadoknađuje pružaocu medicinskih usluga za pružene usluge osiguranom licu (nadoknada „po usluzi“) ili plaća organizaciji pružaoca fiksnu nadoknadu po pokrivenom licu u zamenu za obećanje pružaoca da će pružiti medicinske usluge tim licima (aranžman „kapitacije“).

Ugovorom o nadoknadi troškova lečenja, osiguravajuća organizacija obavezuje se da će naknaditi troškove medicinskih usluga, radije nego samo pružanje tih usluga. Većina osiguravajućih pokrića koja se odnose na zdravstvene usluge jesu hibrid između ugovora o pružanju usluga i ugovora o nadoknadi troškova lečenja. Hibridizacija može biti rezultat finansijske participacije navedene gore ili toga što se pokrićem naknađuju troškovi lečenja, *a ne pružanje same usluge u pojedinim slučajevima*, dok se u drugim slučajevima plaća direktno pružaocu usluga. Neki pružaoci zdravstvenog osiguranja omogućavaju prenos prava odabirom korisnika polise za direktno plaćanje naknada pružaocu medicinskih usluga.<sup>17</sup> Pokriće može takođe biti ugovor o pružanju usluga ako korisnik polise koristi određenu kliniku ili bolnicu, ali postaje ugovor o nadoknadi troškova ako korisnik polise koristi druge pružaoce van date klinike ili bolnice.

## V. Oblici naknade i vrste osiguravajućih organizacija

Iako se razlika između oblika nadoknade može činiti uglavnom semantička, ona može imati značajan uticaj na nadoknadu medicinskih usluga. Osiguravajuća kuća koja zaključuje ugovor o pružanju usluga često pregovara s pružaocem medicinskih usluga, i možda dobija popuste na redovne cene pružaoca za njihove usluge koje se nude javnosti (i drugim osiguravačima). Zauzvrat, osiguravajuća organizacija pruža finansijske podsticaje kako bi usmerila preplatnike ka mreži, odnosno odabranom skupu pružalaca sa kojima ima zaključene ugovore.<sup>18</sup>

Opšta zapažanja o uticaju osiguravajuće organizacije na oblik i iznos nadoknade mogu biti zavaravajuća, jer terminologija za opisivanje organizacionih oblika nije standardizovana. Neizvesno je u kojoj će meri navedene razlike opstati nakon

<sup>16</sup> FERMA, European Risk and Insurance Report 2016, Paris: *Federation of Risk Management Insurance Associations* (FERMA).

<sup>17</sup> FERMA. European Risk and Insurance Report 2016. Paris: *Federation of Risk Management Insurance Associations* (FERMA).

<sup>18</sup> R. Chen, & K.A. Wong, „The Determinants of Financial Health of Asian Insurance Companies“, 2004, *The Journal of Risk and Insurance*, 71(3), 2004, str. 469–499.

usvajanja univerzalnog pokrića. Na primer, osiguravajuće kuće već administriraju određene delove programa Medicare, i prepostavlja se da će administrirati neke univerzalne programe zdravstvene zaštite kada oni budu usvojeni.

Jedan od oblika osiguravajuće organizacije predstavlja i Organizacija za održavanje zdravlja (*Health Maintenance Organization – HMO*), generički termin koji se primenjuje na kolektivni sporazum između grupe pružalaca zdravstvene zaštite i uključenih korisnika. Otvoreni panel HMO nastoji da uključi veliki broj pružalaca zdravstvene zaštite u tu zajednicu, dok zatvoreni panel pregovara s manjom mrežom pružalaca. HMO mogu biti organizovani od strane samih pružalaca zdravstvenih usluga, kao i od drugih organizacija, npr. društava za životno i zdravstveno osiguranje. Osiguravajuće kuće takođe prodaju ugovore o nadoknadi troškova lečenja, a osiguravajuća kuća može služiti i kao treće lice administrator (TPA) za programe zdravstvenih naknada koje finansiraju poslodavci ili druge organizacije. U programu kojim upravlja TPA, uloga TPA je da upravlja planom prema uslovima koje postavlja finansijer tog plana. Finansijer plana (npr. poslodavac) je u suštini osiguravajuća organizacija, osim ako TPA takođe pruža finansijske garancije u okviru svoje uključenosti u program.<sup>19</sup>

U oblasti zdravstvenog osiguranja i finansiranja zdravstvene zaštite, organizacije Plavi krst i Plavi štit zaslužuju posebnu pažnju zbog svoje veličine i dugo-godišnjeg trajanja. Planovi Plavog krsta i Plavog štita slični su otvorenim panelima HMO u smislu da te organizacije pokušavaju da postignu sporazum s većinom pružalaca zdravstvenih usluga u dатој oblasti. Ugovori o pružanju usluga oduvek su bili dominantan tip pokrića koje se nudi po osnovu planova Plavog krsta i Plavog štita. Mnoge organizacije Plavog krsta i Plavog štita osnovane su tridesetih godina dvadesetog veka, kao lokalna udruženja pružalaca zdravstvenih usluga, koja su prvenstveno kontrolisali pružaoci. Plavi krst je prvobitno predstavljao druženje za bolničke usluge, dok je Plavi štit predstavljao udruženje koje pokriva usluge lekara.

Današnje organizacije Plavi krst i Plavi štit malo podsećaju na mala lokalna udruženja, jer nisu ni lokalna ni mala. Iako su prvobitni planovi Plavih bili lokalno određeni, niz spajanja i pripajanja doveo je do jednog ili nekoliko planova koji su i dalje na snazi za svaku državu do 1990. godine. Mnoge organizacije Plavog krsta i Plavog štita i dalje uživaju podršku pružalaca medicinskih usluga. Organizacije i dalje nude ugovore o pružanju usluga, obično direktno pružajući naknadu pružaocu medicinskih usluga. Organizacije Plavog krsta i Plavog štita služe kao TPA za programe koje finansiraju poslodavci i druge organizacije, a administriraju i delove Medicare-a. Organizacije Plavog krsta i Plavog štita i dalje su važna snaga koja utiče na pružanje i finansiranje zdravstvene zaštite u Sjedinjenim Američkim Državama.

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<sup>19</sup> Insurance Europe, A Blueprint for Pensions: Saving enough, saving well, saving wisely. Brussels: Insurance Europe, 2017.

Na ugovorima o pružanju usluga, finansijski podsticaji za korišćenje pružalaca u mreži obično se manifestuju kroz povoljniju nadoknadu za usluge koje pružaju pružaci u mreži u odnosu na usluge pružene van mreže. U planu organizacije ekskluzivnih pružalaca usluga (*Exclusive provider organization – EPO*), ti podsticaji prilično su jaki; usluge koje pružaju pružaci van mreže možda neće biti uopšte nadoknađene. Nešto blaži set podsticaja može se naći u planu organizacije preferentnih pružalaca usluga (*preferred provider organization – PPO*), u kojem usluge od pružalaca u mreži dobijaju povlašćeni tretman. Na primer, usluge od pružalaca u mreži mogu biti nadoknađene po stopi od 80% od tarifa koje već uključuju ugovorene popuste, dok usluge od pružalaca van mreže mogu biti nadoknađene po stopi od 60% od redovnih cena.

Kada član programa koristi zdravstvene usluge pružaoca van mreže, plaćanje za neobuhvaćene troškove obično je odgovornost samog člana. Ako specijalista van mreže naplati 100 dolara za pregled u ordinaciji, a *PPO* plan obezbeđuje nadoknadu od 60 dolara, plaćanje razlike od 40 dolara je odgovornost pacijenta, a specijalista ima slobodu da izbalansira račun na ime tih 40 dolara. *PPO* je možda ugovorila cenu od 60 dolara za pregled u ordinaciji kod svog specijaliste u mreži, u kojem slučaju je puni trošak pregleda od strane pružaoca u mreži pokriven.

Pokriće usluga može dovesti do dodatnih razlika između pružalaca u mreži, često kako bi se podstakli obrasci korišćenja medicinskih usluga unutar same mreže. Na primer, *PPO* u vezi s mestom pružanja usluge može pružiti povoljniju nadoknadu kada je inicijalni kontakt člana koji traži zdravstvene usluge napravljen s lekarom opšte prakse. Kasniji kontakt sa specijalistima nadoknađuje se povoljno ako je taj kontakt rezultat upućivanja od strane lekara opšte prakse, koji funkcioniše kao „čuvar kapije“. *PPO* u vezi s mestom pružanja usluge može u potpunosti nadoknaditi troškove pregleda u ordinaciji kod lekara opšte prakse u mreži i platiti 90 odsto troškova narednog pregleda u ordinaciji kod specijaliste u mreži ako je pregled po uputu lekara opšte prakse. Ako je početni pregled u ordinaciji kod specijaliste, nadoknada može pasti na 80 odsto za specijalistu u mreži i na 60 odsto za specijalistu van mreže. Razlog za taj obrazac nadoknade je podsticanje inicijalnog kontakta s lekarima opšte prakse u mreži, koji se mogu smatrati jeftinijim od specijalista i manje sklonim upućivanju na dodatne skupe testove.

Između različitih vrsta pokrića za usluge često se pravi kompromis balansiranjem cene<sup>20</sup> i slobode izbora pružalaca zdravstvenih usluga i kontrole nad pružanjem zdravstvenih usluga. Tradicionalno, planovi koji pružaju najširi izbor i najmanje ograničenja obično su najskuplji. Međutim, sloboda izbora pružalaca zdravstvenih usluga je opcija koju mnogi korisnici zdravstvene zaštite cene. Osiguranje troškova lečenja i organizacija Plavi krst i Plavi štit tradicionalno nisu nametali velika ograničenja

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<sup>20</sup> Insurance Europe. Why Insurers Differ from Banks. Brussels: *Insurance Europe*, 2014.

pri izboru pružalaca u poređenju sa HMO, PPO i EPO planovima. Međutim, u nekim državama, organizacije Plavi krst i Plavi štit formirale su HMO planove koristeći manje mreže. Ti HMO planovi organizacija Plavi krst i Plavi štit ponuđeni su javnosti zajedno s pokrićem koje nameće manje ograničenja u izboru pružalaca medicinske nege.

## **VI. Ugovorne odredbe koje utiču na visinu nadoknade**

Osiguranje troškova lečenja uključuje ugovorne odredbe poput maksimalnih limita pokrića i franšiza, koje veoma podsećaju na odredbe istih naziva koje se nalaze u ugovorima o osiguranju imovine i osiguranju od odgovornosti. Ugovori o pružanju usluga takođe imaju mnoge od tih istih odredaba, iako se mogu činiti nespojivim s pristupom naknade za usluge. Kada se te odredbe pojave u ugovorima o pružanju usluga, motiv za njihovu upotrebu je stvaranje finansijskih podsticaja koji utiču na ponašanje korisnika i pružalaca medicinskih usluga na načine za koje se veruje da smanjuju troškove zdravstvene zaštite. Na primer, polisa zdravstvenog osiguranja može nametnuti franšizu od 100 dolara za korišćenje hitne bolničke službe koja ne dovodi do prijema u bolnicu. Hitne bolničke službe često su skupe za korišćenje, i franšiza od 100 dolara verovatno će odvratiti ljude od korišćenja hitne službe za stanja koja ne zahtevaju hitno lečenje.

Kada je jedno nastupanje zdravstvene nege pokriveno po osnovu većeg broja polisa zdravstvenog osiguranja, odredba o koordinaciji naknada (*Coordination of benefits – COB*) može služiti istoj svrsi kao i klauzula o „drugom osiguranju“ koja se nalazi na polisama osiguranja imovine i odgovornosti. COB odredba sprečava dvostruko nadoknađivanje za isti skup medicinskih troškova ili isti postupak. COB odredba uobičajena je u zdravstvenom osiguranju koje finansiraju poslodavci i često se koristi kada i supružnici rade za poslodavce koji obezbeđuju pokriće po osnovu zdravstvenog osiguranja. COB odredba određuje koja od dve polise će se primeniti. Za same zaposlene, polisa za osiguranje zaposlenog je primarna, a druga polisa je sekundarna. Što se tiče dece zaposlenog para, primarna polisa obično je osiguranje zaposlenog čiji rođendan pada najranije u kalendarskoj godini. Konsolidacija finansiranja zdravstvene zaštite preko širokih geografskih regiona koja je predviđena u predlogu za univerzalno pokriće verovatno će eliminisati potrebu za COB odredbama.

Maksimalni limit(i) po polisi određuju maksimalnu nadoknadu za pokrivene troškove lečenja tokom perioda koji može trajati za životnog veka osiguranika. Ako se pojavi doživotni limit, polisa takođe može uključivati godišnje obnavljanje. Na primer, polisa može sadržati doživotni limit od 500.000 dolara za pokrivene troškove s godišnjim obnavljanjem od 10.000 dolara. Ako operacija ugradnje bajpasa srca osiguranog lica dovede do isplate naknade od 65.000 dolara, preostali limit se smanjuje na 435.000 dolara. Naredne godine limit bi se povećao na 445.000 dolara

ako nijedna naknada nije isplaćena ili samo na 440.000 dolara ako se dodatne medicinske naknade od 5.000 dolara isplate tokom te godine.

Na ugovorima o pružanju usluga, limit može biti naveden u jedinicama pruženih usluga, poput 120 dana u bolnici. Taj pristup koristio se u osiguranju Plavog krsta i Medicare-a; njegovo pojavljivanje u Medicare-u sugerije da limiti imaju svrhu koja će se verovatno nastaviti i pod univerzalnim pokrićem. Ugovori o pružanju usluga takođe mogu propisivati ograničenja u dolarima umesto ograničenja u jedinicama usluga. Umesto primene na određeni period, ograničenje polise može se primenjivati na nekom drugom osnovu, poput svakog nastupanja bolesti ili povrede. U tom slučaju, pokriće će sadržati ugovorni jezik koji definiše šta čini „nastupanje bolesti ili povrede“. Često se primenjuju odvojena ograničenja na kategorije troškova, poput mentalne zdravstvene zaštite, za koju se veruje da je kod nje posebno teško upravljati moralnim rizicima. Na primer, polisa sa doživotnim ograničenjem od 500.000 dolara za troškove lečenja može dodatno propisati ograničenje od 100.000 dolara za mentalnu zdravstvenu zaštitu u bolnici, s dodatnim ograničenjem da ne sme biti više od 30 dana bolničkog lečenja u jednoj godini. Štaviše, stroža ograničenja mogu se primeniti na naknade za mentalnu zaštitu pruženu izvan bolnice.

Kao i u osiguranju imovine, franšiza predstavlja iznos koji se odbija od pokrivenog troška kako bi se odredila nadoknada. Ako je pokriveni trošak manji od iznosa franšize, nikakva naknada se ne isplaćuje. Franšiza može da se primeni na svako nastupanje bolesti, na svakog osiguranog pojedinca, na ukupne troškove nastale tokom godine ili po nekom drugom osnovu. Neretko, pokriće po osnovu zdravstvenog osiguranja koje se pruža članovima iste porodice propisuje godišnju franšizu za svakog člana porodice, pri čemu se veća franšiza primenjuje na ukupne troškove porodice tokom godine.<sup>21</sup> Na primer, godišnja franšiza od 100 dolara može se primeniti na svakog člana porodice s godišnjim franšizom od 300 dolara koja se primenjuje na celokupne troškove porodice tokom godine. Pokriće se aktivira kada pokriveni troškovi pojedinca premašte 100 dolara u godini ili kada pokriveni troškovi porodice premašte 300 dolara u godini. Na primer, ako svih pet članova porodice ostvare pokrivenе troškove od po 80 dolara,  $5(\$80) - \$300$ , ili 100 dolara, biće predmet pokrića.

*Učešće u troškovima* (ili *saosiguranje*) predstavlja proporcionalno deljenje troškova lečenja u višku iznad bilo koje franšize. Deljenje 80/20 dovodi do toga da osiguravajuća kuća nadoknadi 80 procenata iznosa u višku iznad franšize, dok osiguranik odgovara za preostalih 20 procenata. Stopa učešća osiguranika obično iznosi između 10 i 50 procenata, pri čemu je 20 procenata uobičajeno.

*Limit troškova iz sopstvenog džepa ili ograničenje troškova iz sopstvenog džepa* uobičajen je po polisama u kojima se koriste franšize i procentualna učešća.<sup>22</sup>

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<sup>21</sup> P. Kaye, Risk measurement in Insurance: A Guide to Risk Measurement, Capital Allocation and Related Decision Support Issues, CAS Discussion Paper Program, Arlington: Casualty Actuarial Society (CAS), 2005.

<sup>22</sup> Insurance Europe, Why Insurers Differ from Banks. Brussels: *Insurance Europe*, 2014.

Ograničenje troškova iz sopstvenog džepa predstavlja gornju granicu plaćanja od strane osiguranika na ime franžize i procentualnog učešća. Na primer, ograničenje od 1.000 dolara za troškove iz sopstvenog džepa na polisi sa franžizom od 100 dolara i učešćem od 20 procenata dostiže se kada pokriveni troškovi lečenja dosegnu 4.600 dolara;  $100 \text{ dolara} + 0,2 (4.600 \text{ dolara} - 100 \text{ dolara}) = 1.000 \text{ dolara}$ . Iznad te tačke, polisa osiguranja pokriva pun iznos svih daljih pokrivenih troškova lečenja. Tabela 19.1 prikazuje kombinovane efekte franžize od 200 dolara, učešća od 20 procenata i ograničenja troškova iz sopstvenog džepa od 1.000 dolara na polisi osiguranja troškova lečenja s limitom po polisi od 100.000 dolara.<sup>23</sup> Ograničenje troškova iz sopstvenog džepa postiže se na pokrivenim troškovima od 4.200 dolara, ali ukupan limit po polisi nastupa kada pokriveni troškovi premaže 101.000 dolara.

*Participacija* je naknada koju osigurano lice plaća kako bi imalo pravo na medicinsku uslugu. U zdravstvenom osiguranju, termin „participacija“ koristi se u opštem smislu da označi sporazum o deljenju troškova, poput odbitne franžize ili procenta učešća, iako se značenje termina postepeno razvilo da označava naknadu koja se nameće pre primene drugih odredaba pokrića. Na primer, politikom zdravstvene zaštite može se tražiti participacija od 10 dolara za rutinsku posetu lekarskim ordinacijama, pored odbitka od 100 dolara i učešća od 20 procenata. Prema takvoj politici, poseta od 25 dolara koja dovodi do 175 dolara troškova laboratorijskih analiza dovela bi do troškova od 15 dolara za posetu ordinaciji i troškova od 175 dolara za laboratorijske analize, ukupno 190 dolara koji podležu pokriću. Nakon što se primeni odbitna franžiza od 100 dolara, preostaje 90 dolara za nadoknadu. Stvarna nadoknada iznosi  $(0,8)(90 \text{ dolara})$ , ili 72 dolara. Bez participacije, nadoknada bi bila 80 dolara; tj.  $[(0,8)(100 \text{ dolara})]$ .

Ugovori o pružanju usluga često uključuju participaciju. Nivoi participacije često se postavljaju kako bi se oblikovali finansijski podsticaji koji utiču na ponašanje osiguranih lica ili pružalaca usluga. Na primer, nivo participacije za korišćenje hitne bolničke sobe koja ne podrazumeva prijem u bolnicu može biti postavljen na 50 dolara, dok participacija koja se odnosi na druge ustanove hitne medicinske pomoći može biti 10 dolara. Tako izdiferencirani nivoi participacije predstavljaju podsticaj da se koriste druge ustanove pružanja hitne medicinske zaštite osim bolničkih urgentnih odeljenja, kada su takve druge ustanove dostupne. Ostale ustanove za hitnu medicinsku pomoć obično su manje skupe od bolničkih urgentnih odeljenja.

Takođe, *tarifni sistem* je skup ograničenja koja se odnose na određene vrste usluga ili dijagnoza. Tarifni sistem postavlja ograničenje na *dopuštenu naknadu* koja će se uzeti u obzir prilikom obračuna nadoknade za pokrivene medicinske usluge, što je karakteristika koja razlikuje tarifni sistem od drugih vrsta ograničenja po polisi. Troškovi iznad tarifnog sistema ne uzimaju se u obzir prilikom određivanja naknada.

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<sup>23</sup> Insurance Europe, European Insurance in Figures 2015 Data, Brussels: *Insurance Europe*, 2016.

Na primer, ako specijalista naplati 100 dolara za pregled u ordinaciji, a tarifni sistem ima ograničenje od 40 dolara za pregled u ordinaciji specijaliste, samo će se 40 dolara uzeti u obzir prilikom obračuna naknade. Ako polisa koristi odbitnu franšizu od 100 dolara, ostaje 60 dolara odbitne franšize nakon pregleda kod specijaliste, iako je osigurano lice možda platilo punih 100 dolara za pregled u ordinaciji. Praksa naplate razlike između stvarnih troškova i dopuštenih troškova naziva se „fakturisanje razlike“.

U pokriću gde osiguravač ima ugovorene povoljne cene kod mreže pružalaca zdravstvenih usluga, tarifni sistem može se postaviti na nivou koji je ugovoren sa tom mrežom. Kada nije uključena mreža pružalaca, tarifni sistemi mogu se zasnovati na podacima iz anketa o cenama usluga pružalaca datih zdravstvenih usluga, kao što su dnevni troškovi smeštaja i ishrane u bolnicama.<sup>24</sup> Podaci iz anketa rangiraju troškove pružalaca, pri čemu osiguravajuća organizacija bira prag iznad kojeg se troškovi neće uzimati u obzir. Na primer, osiguravač može smatrati da osamdeseti procenat troškova u zajednici predstavlja granicu „opravdanih“ troškova.

Kretanje troškova pružalaca u zajednici takođe može uticati na ograničenja dopuštenih troškova, što rezultira „običnim, uobičajenim i razumnim“ (*usual, customary and reasonable – UCR*) troškovima. Tim metodom postavljanja ograničenja može se stvoriti podsticaj za pružače zdravstvenih usluga da redovno povećavaju nominalne troškove svojih usluga, iako pružaoci, kao članovi mreže, mogu biti spremni da prihvate manji iznos od svojih punih troškova. Ta razlika između nominalnih troškova i iznosa koje su pružaoci spremni da prihvate kao nadoknadu mogla bi nestati pod šemom *jednog platioca*, terminom koji se odnosi na sistem u kojem se sva finansiranja naknada za zdravstvene usluge kanališu kroz istu organizaciju, poput državne agencije. Sistem jednog platioca može koristiti više izvora sredstava, poput toga da pojedinci budu odgovorni za prvi 250 dolara troškova tokom kalendarske godine. Kada se koristi više izvora sredstava, pretpostavlja se da će ista cena važiti za sve kategorije potrošača i platilaca, bez obzira na krajnji izvor sredstava. Budući da bi ista cena važila za sve korisnike, pristupom jednog platioca mogli bi se eliminisati problemi povezani sa *fakturisanjem razlike*.

Preduslov za korišćenje pristupa jednog platioca u univerzalnom osiguranju postoji u delu saveznog Medicare programa koji se odnosi na usluge lekara.

Pokriće po osnovu ovog dela Medicare-a zabranjuje fakturisanje razlike za pružaoce koji pristaju da prihvate dodelu Medicare naknada. U mnogim slučajevima, Medicare potpuno odbacuje naplate za usluge koje smatra nepotrebним, ostavljajući pružaoca koji prihvata takvu dodelu bez regresa. Budući da metode koje se biraju da regulišu naknade i troškove direktno utiču na prihode pružalaca zdravstvene nege, taj aspekt bilo kog predloženog sistema univerzalnog pokrića verovatno će izazvati kontroverze.

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<sup>24</sup> A. Gepp, J.H., Wilson, K., Kumar, & Bhattacharya, S., „A comparative analysis of decision trees vis-à-vis other computational data mining techniques in automotive insurance fraud detection“, *Journal of data science*, 10(3), 2012, str. 537–561.

Navedena ograničenja imaju zajedničko oslanjanje na metodu naknade po usluzi za određivanje nadoknade. Sistem grupa povezanih dijagnoza (DRG) za naknadu usvojen je sredinom 1980-ih umesto metode naknade po usluzi u delu Medicare-a koji se odnosi na naknadu bolnica. DRG sistem takođe je privukao pažnju privatnih osiguravajućih zdravstvenih kuća. DRG sistem, koji plaćanje bolnici zasniva na kompleksnom sistemu klasifikacije medicinskih dijagnoza, usvojen je u uverenju da je sistem naknade po usluzi delimično odgovoran za rastuće troškove bolnica. Pod sistemom naknade po usluzi, bolnici se naknađivala svaka medicinska usluga, tako da sistem ne nudi finansijski podsticaj za kontrolu korišćenja medicinskih usluga. Međutim, pod sistemom DRG-a, bolnica ne dobija dodatnu naknadu kada se pružaju dodatne usluge, već se plaćanje zasniva na dijagnozi.<sup>25</sup>

Na primer, bolnica bi dobila istu naknadu za dva pacijenta sa identičnim dijagnozama, iako je jedan pacijent bio hospitalizovan 10 dana, dok je drugi bio hospitalizovan samo pet dana. U tom konceptu, pružalač medicinskih usluga pod sistemom DRG nema motiv da podstiče korišćenje medicinskih usluga čija je ekonom-ska vrednost upitna. Postavljanjem finansijskog tereta dodatnih usluga na pružaoca, sistem DRG je osmišljen da podstakne pružaoce da naruče samo one medicinske usluge koje su neophodne za lečenje medicinskog stanja.<sup>26</sup>

Godine 1992, Medicare je počeo da nadoknađuje lekare koristeći sistem relativne vrednosti resursa (RBRVS), koji dodeljuje numeričku vrednost nastojanjima lekara u pružanju medicinske usluge i troškovima održavanja medicinske prakse. Naknada se određuje primenom numeričke tehnike umesto postavljanja od strane lekara i osiguravajućih kompanija na tržištu. U poređenju s postojećim nivoima naknada i troškova, RBRVS je osmišljen da poveća naknadu za lekare primarne zdravstvene zaštite u odnosu na specijaliste.

## Zaključci

Osim finansijskih podsticaja osmišljenih da oblikuju ponašanje pružalaca i korišnika medicinskih usluga, pokriće može nametnuti direktnu kontrolu nad korišćenjem zdravstvenih usluga<sup>27</sup>. Na primer, *zahtev za prethodnu prijavu* može nalagati hirurgu koji planira da izvrši elektivnu hiruršku proceduru da prvo podnese plan osiguravaču i sačeka odobrenje pre operacije. U okviru programa zdravstvene zaštite takođe se koriste i *upravljanja slučajevima* kako bi se kontrolisali troškovi skupih medicinskih procedura, a uključuje se i medicinski direktor određenog programa (koji može biti lekar) u svakodnevne odluke koje se odnose na sprovođenje medicinskih procedura

<sup>25</sup> Havenlife, *You Have Life Insurance Questions. We Have Life Insurance Answers*, 2017.

<sup>26</sup> E. Kay, IFRS 17 (IFRS 4 Phase II) Insurance Contracts, Dublin: Milliman, 2016.

<sup>27</sup> P. Kaye, Risk measurement in Insurance: A Guide to Risk Measurement, Capital Allocation and Related Decision Support Issues, CAS Discussion Paper Program, Arlington: Casualty Actuarial Society (CAS), 2005.

prema osiguranom licu čiji troškovi zdravstvene zaštite premašuju prag. Zahtev za drugo mišljenje se koristi u programima zdravstvene zaštite, gde se od drugog hirurga traži da se složi da je operacija neophodna za stanje koje ne zahteva hitnu negu.

U odsustvu pokrića za zdravstvene usluge, tržišne sile i ograničenja resursa pojedinaca regulišu cene i korišćenje zdravstvenih usluga. Pokrivenost za te usluge, bilo da je kupljena od strane poslodavaca ili pružena od strane države, ima tendenciju da ublaži prirodna ograničenja. Kao posledica toga mogu biti nametnute druge metode raspodele, poput finansijskih podsticaja ili direktnih kontrola. Tipično osiguranje zdravstvenih usluga je složeno. Ta složenost će verovatno opstati nakon uvođenja univerzalnog pokrića, iako bi odredbe o pokrivenosti mogле postati uniformnije preko različitih planova. Odredbe koje se nalaze u programima zdravstvene zaštite uključuju se kao odgovor na probleme koje nosi pokriće zdravstvenih usluga. Osim ako univerzalna pokrivenost ne eliminiše te probleme, mehanizmi za njihovu kontrolu opstaće u nekom obliku.

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## **CHARACTERISTICS OF HEALTH INSURANCE CONTRACTS**

**REVIEW ARTICLE**

### **Abstract**

The problems of health care and its management are almost inseparable from the analysis of health care coverage, while comparable issues hardly ever arise in the analysis of life insurance. Perhaps, in one respect, the two types of coverage are similar: most demands for life and health insurance spring from individuals as isolated entities, not as groups - members of organizations. In other respects, the two types of coverage bear little resemblance to each other.

The subject of this paper is health insurance, and the goal of the paper is to point out the importance of this type of insurance, socially speaking. The dramatic rise in the cost of providing health care that accompanied the shifting burden has placed the issues of health care and health insurance coverage at the forefront of organizations concerns.

**Key words:** *Health care, insurance, contract, health care provider, covered.*

**JEL:** G22, I13

### **I. Definitions and Historical Background**

Universal health care is a program of health insurance mandated by the federal government, in which virtually the entire population becomes entitled to coverage for health care services. Health care provider is an individual or entity engaged in the

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business of providing health care services to consumers. Disability income insurance is an insurance policy that provides income replacement benefits if the insured becomes disabled. Service contract is a type of coverage for health care services that stipulates the provision of services in kind, rather than cash benefits. Medical expense reimbursement contract is a type of coverage for health care services that stipulates the reimbursement of the costs of medical services rather than the provision of the services, and is also known as medical expense insurance. Health insurance is organized through the association of people for the purpose of covering the risks jeopardising human health and abilities. The consequences of such risks and of such a condition are mainly the costs of treatment.<sup>2</sup> Organization of the above mentioned protection is possible through mandatory and non-mandatory types of health care. The organizations themselves can be founded with the aim of making a profit or subordinating their function to the social protection of citizens. The concept of health insurance was developed in the 17th century, more precisely in 1694, by its founder, Hugh Chamberlain, from the family of Peter Chamberlain.. This health care program covered the risks of an accident with consequences of disability, temporary and permanent.<sup>3</sup>

The concept of compulsory health insurance was developed in the first half of the 20th century. The first organizations were created and developed as of 1929. The first forms of billing for hospital services were based on the subscription of users of those services. Based on that, the Blue Cross organization has been developed.

As evidence of the existence of health care insurance, there is a policy certified by the insurance company and the user of the service. The policy generally includes one year of health insurance and is renewable. It can last shorter and longer than a year. The insurance policy defines the risks covered and the amount of costs covered by the insurance company.<sup>4</sup> Based on the health care contract, the obligations of the health care user refer to the following:

1. *Payment of the premium* to the insurance company,<sup>5</sup>
2. *Payment of expenses* that the insurance company is not obliged to pay according to the contract, e.g. for the sum insured of EUR 30,000.00, the insured is obliged to cover costs up to EUR 50.00,
3. *Co-payment* as part of access to the healthcare system, which is paid by the insured to a particular amount, e.g. from 50.00 rsd.
4. *Coinurance*: Participation in some costs of health treatments, if the insurance company does not cover the full amount thereof, for example,

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<sup>2</sup> J. Banyar, *Life insurance*. Budapest: Corvinus University of Budapest + Central Administration of National Pension Insurance, 2003

<sup>3</sup> J. Yoder, Rao, A., Bajowala, M., & Sunder, A. (2012). Life insurance 2020: Competing for a future. PricewaterhouseCoopers (PWC), 2020

<sup>4</sup> K. Aase, *Life insurance and pension contracts II: The life cycle model with recursive utility*. ASTIN Bulletin, 46, 2016, pp. 71-102

<sup>5</sup> Ž. Vojinović, N. Žarković, *Osiguranje*, Ekonomski fakultet u Subotici, 2016, pp. 98-100

the surgery costs coverage is contracted at 20% versus 80%, the insured being obliged to pay a lower amount as a contribution.

5. *Exclusions:* not all risks and services are covered and the policyholders are obliged to pay the balance
6. *Limitations regarding the period and amount of coverage.* A certain amount of coverage is contracted. It is one of the factors that affects the level of premium. Another factor is time, the premium being higher for a longer period of time, , in absolute terms; however, as a service price, the premium is lower as per unit of time. In addition to these two factors, there are others that affect the premium level;<sup>6</sup>
7. *Maximum coverage out of the insured's pocket,* implies that some of the services are covered by the insured himself and everything else is paid by the insurance company;
8. *Capitation:* when health care includes family members of the insured;<sup>7</sup>
9. *A network of health institutions,* a plan or a network of health institutions allows for higher quality services and lower costs of service provision, so that it is possible to expect premium discounts;
10. *A health insurance certificate or card means* that the insurer accepted the costs before the health services were provided;
11. *Confirmation of discounts, benefits and calculation of costs, a document providing the insured with a written statement of benefits and costs showing the obligations and entitlements of the insured.*

The difference in costs for purchasing medicines arises from the lists of medicines. Some medicines are on the discounted list, while the others are not discounted.

## **II. Health insurance and moral hazards**

Coverage provisions under the health care plans are often designed to create financial incentives or impose restrictions on the behaviour of insured persons and providers of medical services. These provisions are directed toward controlling a problem that was previously described as a *moral hazard*, which can be especially strong in health insurance.<sup>8</sup> It goes without saying that moral hazards are present in virtually all lines of insurance. Many insurance contract provisions can be explained as methods to control eventual moral hazards (e.g., deductibles on property coverage and the suicide exclusion in life insurance). In health insurance, however,

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<sup>6</sup> N. Žarković, Mere sprečavanja u životnim osiguranjima - Živeti zdravije. Svet osiguranja, 2017, pp. 1-2

<sup>7</sup> K. Monks, & Risk, C. (2016). Automating Life Insurance Underwriting – A Closer Look, <https://captricity.com/blog/automating-life-insuranceunderwriting-a-closer-look>, 2016

<sup>8</sup> M. Batty, & Kroll, A., *Automated Life Underwriting*, 2009, pp. 18-22

control of moral hazards takes on a special importance, in some cases being the primary consideration driving the design of the coverage.<sup>9</sup>

With coverage for health care services, control of behaviour of health care providers and consumers takes on a special relevance. An important difference that distinguishes this type of coverage from other insurance contracts, including disability income insurance, is the presence of *health care providers*, such as hospitals and physicians. Health care providers interact with consumers of health care services and with health care insurers. These interactions create the possibility of moral hazards that are complex and difficult to control, as compared with moral hazards arising in other types of coverage where the only interaction is between the insurer and the insured.<sup>10</sup>

The event triggering coverage is often a service provided by a health care provider to the insured person. Typically, the knowledge and information of health care providers about the insured's state of health, possible effects of the insured's habits on his or her state of health, and alternative methods for discovering and treating health conditions are superior to those of consumers of health care services. This superior information places health care providers in a position to strongly affect the consumption of health care services.

In the absence of health care insurance, limits on the consumer's financial resources and his or her willingness to allocate them to the consumption of health care services provide natural restraints against uneconomic usage of health care services. Insurance that provides an access to health care can remove those restraints. If the insurance coverage reimburses the health care provider without requiring any payment from the consumer, the coverage removes the mentioned restraints while not diminishing any financial incentive for the provider to discourage further consumption of health care services. Even under universal coverage, the effect of coverage provisions on the consumers and providers of medical services is unlikely to disappear as an issue as long as the reimbursement to providers is based on the level of services.

However, for moral hazards to occur, it is not necessary to have a health care professional A *disability income insurance* policy providing income replacement benefits in case of disability of the insured may affect the insured's willingness to continue working.<sup>11</sup> The insured's willingness to work becomes weaker as income replacement benefits from all sources, including the disability income coverage, increase relative to earnings. Therefore, insurers writing disability income coverage

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<sup>9</sup> R.G. Eccles, & M. Vollbracht, „Media Reputation of the Insurance Industry: An Urgent Call for Strategic Communications Management“, *The Geneva Papers*, 31, 2006, pp. 395-408

<sup>10</sup> G. Dickinson, *Encouraging a dynamic life insurance industry: economic benefits and policy issues*, 2012, <http://www.oecd.org/finance/insurance/1857811.pdf>.

<sup>11</sup> O. Gursez, *Marine insurance law*. London: Routledge, 2015, pp. 211-212

consider benefits from all sources, including other disability income policies and Social Security, when they underwrite coverage. Moreover, disability income policies may include a provision that reduces the benefit when total income replacement benefits from all sources exceed a stated percentage (e.g., 70 per cent) of earnings before disablement.

Also, a problem could arise if the condition triggering the benefit (disability) is not explicit in meaning; a hand injury might disable a surgeon, but it will not disable a business executive, for example. The circumstances leading to disability would be expected to vary among individuals and occupations, which creates the possibility of disputes between the insurers and their insureds if the conditions triggering the benefit are not defined clearly. Unfortunately, definitions with the clearest meaning often are the most restrictive.<sup>12</sup> Defining disability as "hospital-confined", for example, leaves little room for dispute over the meaning of the term, but the coverage is not significant. Typically, only the most serious medical conditions lead to hospitalization, with the average confinement period being only a few days. Defining disability as "unable to perform duties of the insured's occupation" provides coverage for a condition more closely related to loss of income, but subjective aspects of the definition increase the likelihood of disputes.

### **III. Insurance for health care services**

The analysis of insurance coverage for health care services can follow the same framework used for property and liability coverage: determining the events covered and the resulting amount of recovery. In coverage for health care services, the form of recovery becomes an important consideration, especially when the coverage is to provide the services in kind, rather than reimburse the cost of the services provision. This framework can be used to analyse coverage proposed or mandated under universal programmes and/or private schemes.

Under the coverage for health care services, the event triggering coverage is the delivery of a health care service to a covered person under covered circumstances. The level of benefits may also depend on circumstances giving rise to coverage. Hence the meaning of "covered person" and "covered circumstances" is relevant. For example, the distinction between work-related injuries and other medical conditions has become relevant recently, because reimbursement of health care services arising from occupational injuries has been more generous than reimbursement of health care services generally. This distinction, which is likely to disappear under universal coverage, is an example of a narrowly defined set of circumstances affecting benefit levels under the health care coverage.

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<sup>12</sup> H. Gründl, M.I. Dong, J. Gal, The evolution of insurer portfolio investment strategies for long-term investing. OECD Journal: *Financial Market Trends*, 2016(1), pp. 1-57

This type of distinction may continue to affect benefit levels, even under universal coverage. Often coverage for health care services provides an indemnity for *accidental injuries* on a more favourable basis than other terms and conditions. The logic behind this distinction is that the consumer has less control over the level of medical services provided because the injury is accidental.

Coverage for *illness*, which includes a broad range of circumstances triggering benefits, still requires an occurrence of illness for a coverage to apply. Under the illness coverage, a diagnosis of a medical condition is a typical requirement for coverage. For example, an electrocardiogram performed to investigate a suspected heart murmur may be covered by provisions of a policy applying to illness, while the same examination performed as a part of a routine physical examination may be covered under less favourable terms and conditions, unless it reveals an abnormal condition.

The broadest scope of the coverage is provided under the health care services generally, including *preventive care*. Coverage for preventive care often is detailed and complex, with limits on benefits that vary by category of service, even among specific services. Explicit limits on frequency are often imposed on services over which the insured and the care provider have some discretion. For example, a policy may impose an age-based limit on the frequency of routine check-ups, such as once every two years before the age of 40 and once a year for persons aged 40 and above.

As a rule, nearly all coverages for health care services have benefits that are affected by the circumstances under which medical services are provided.<sup>13</sup> When the scope of coverage is narrow (e.g., accident coverage), the definition of the conditions giving rise to benefits places natural limits on covered services. When the scope of coverage is broad (e.g., the inclusion of preventive care), greater reliance is placed on explicit controls, such as limits on the frequency of covered services, or limits on the amount payable for services over which the provider and the consumer of medical services have some degree of discretion.

Coverage for health care services often contains *exclusions*, such as elective cosmetic surgery or injury resulting from an attempted suicide. An exclusion of optional cosmetic surgery could well survive a change to a system of mandatory universal coverage, although a suicide exclusion is unlikely to persist. The logic behind suicide exclusions from a health care coverage is not evident, as many of the same policies provide benefits for mental conditions. Only the most severe mental distress would be expected to result in an attempted suicide and drawing the line at this point may create additional incentives. The presence of the exclusion creates an incentive for the health care providers who provide the first level of services following the suicide attempt (e.g., hospital emergency room attendants) to substitute some other diagnosis (e.g., accident) that is not likely to be disputed by the victim.

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<sup>13</sup> N. Coe, & A. Belbase, *How do people decide on life insurance and long-term disability insurance coverage?* Working Paper, No. 2015-4, Boston: Center for Retirement Research at Boston College, 2015

In some cases, coverage may not apply for services provided by those categories of medical providers or medical procedures that are deemed experimental. In place of outright exclusions, limits on benefits for these types of services may appear.<sup>14</sup> Outright exclusions can lead to disputes, while limits or other types of financial incentives may be less likely to lead to disputes.

An exclusion of a *pre-existing condition* has been common in health insurance coverage. Typically, this exclusion applies to a medical condition that already was diagnosed before the commencement of coverage, as an example by a chronic illness or an allergy. Treatment of a pre-existing condition is often not covered during some initial period of a policy validity, after which the subject condition is covered under the same terms and conditions as other conditions. This type of exclusion has been developed because insurers and employers do not want to bear the cost of medical conditions that developed before the inception of coverage and which were known to the insured at the time the coverage was issued.

This type of exclusion is likely to disappear under universal coverage. As the burden of financing health care is consolidated across the ever larger groups, the concern with allocating the costs of a specific individual or condition tends to decline in importance. Hence an exclusion for pre-existing conditions is unlikely to be an important issue in coverage offered by health care financing organizations consolidating coverage across large geographic areas.

#### **IV. Form of recovery**

Coverage for health care can be grouped into two broad categories according to the form of recovery:

- service contracts, which provide medical services;
- medical expense reimbursement (or indemnity) contracts, which reimburse the cost of medical services.

In the United States, Blue Cross and Blue Shield offered service contracts as early forms of coverage for health care. Medical expense insurance, which was developed later, grew in importance from 1950 through 1980. Since 1980, medical expense insurance has lost in significance relative to service plans. Even under universal coverage, however, medical expense insurance may survive in the form of coverage applying to "gaps" in coverage requiring payments from the covered person.<sup>15</sup> Furthermore, many service contracts provide for a hybrid coverage requiring

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<sup>14</sup> Decision on the Content and Layout of Financial Statement Forms for Insurance Undertakings. *RS Official Gazette*, No. 135/2014, 141/2014 and 102/2015

<sup>15</sup> N. Coe, & A. Belbase, *How do people decide on life insurance and long-term disability insurance coverage?* Working Paper, No. 2015-4, Boston: Center for Retirement Research at Boston College, 2015

financial contribution of the costs of services through deductibles and other cost-sharing provisions.<sup>16</sup>

Under a pure service contract, the insuring organization undertakes to provide a package of medical services to the subscriber. The consumer of medical services may never become involved in the financial transaction between the insurer and the provider of medical services. Instead, the insurer reimburses the provider directly for medical services provided to the covered person ("fee-for-service" reimbursement) or pays to an organization of providers a fixed amount per covered individual in return for the provider's promise to render medical services to these individuals (a "capitation" arrangement).

Under a medical expense reimbursement contract, the insuring organization undertakes to reimburse for the costs of medical services rather than provide the services in kind. Most coverages applying to health care services is a hybrid of a service contract and an expense reimbursement contract. The hybridization may be a result of the financial participation mentioned above or by the coverage reimbursing the cost of medical services in some cases and directly paying the provider in others. Some medical expenses coverages provide for assignment by allowing the policyholder to elect payment of benefits directly to a provider of medical services<sup>17</sup>. Coverage may also be a service contract, if the policyholder uses a particular clinic or hospital, but it shall become the expense reimbursement coverage if the policyholder uses other providers outside the network of clinics or hospitals.

## **V. Forms of recovery and types of insuring organizations**

Although the distinction between the form of recovery may seem largely semantic, it can have important effects on the recovery of medical services. The insuring organization writing a service contract often negotiates with the provider of medical services, perhaps receiving discounts from the providers' regular *charges* to the public (and to other insurers) for their services. In return, the insuring organization provides financial incentives to attract subscribers to the *network*, the selected set of providers with whom the insuring organization has contractual agreements.<sup>18</sup>

Generalizations about the effect of the insuring organization on the form and amount of recovery can be misleading, because terminology for describing organizational forms is not standard. The extent to which the distinctions noted

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<sup>16</sup> EIOPA Financial Stability Report. December 2016. Frankfurt: European Insurance and Occupational Pensions Authority (EIOPA).

<sup>17</sup> R. Doff, The Final Solvency II Framework: Will It Be Effective? *The Geneva Papers on Risk and Insurance - Issues and Practice*, 41(4), 2016, pp. 587-607

<sup>18</sup> R. Chen, & K.A. Wong, The Determinants of Financial Health of Asian Insurance Companies, 2004, *The Journal of Risk and Insurance*, 71(3), 2004, pp. 469-499

below will survive the enactment of universal coverage is uncertain. Insurance companies already administer portions of Medicare, for example, and presumably will administer some universal health care programmes when they come into effect.

One form of insuring organization is the *Health Maintenance Organization (HMO)*, a generic term applied to a collective agreement between a group of medical care providers and subscribers. An *open panel* HMO attempts to include a large proportion of the medical providers into a community, while a *closed panel* plan negotiates with a smaller network of providers. HMOs can be organized by medical providers themselves or by other organizations, such as life and health insurance companies. Insurance companies also sell medical expense reimbursement contracts, and an insurance company may serve as a *third-party administrator (TPA)* for health benefit programmes sponsored by employers or other organizations. In a programme managed by a TPA, the role of the TPA is to administer the plan according to terms set by the plan sponsor. The plan sponsor (e.g., the employer) effectively is the insurer, unless the TPA provides financial guarantees as well., as part of its involvement in the program.<sup>19</sup>

In the area of health insurance and health care financing, Blue Cross/Blue Shield organizations deserve special attention, because of their size and long history. Blue Cross/Blue Shield plans resemble open-panel HMOs in that the Blue Cross/Blue Shield organizations attempt to reach an agreement with the majority of medical providers in an area. Service contracts have always been the dominant type of coverage offered by Blue Cross/ Blue Shield plans. Many Blue Cross/Blue Shield organizations were founded in the 1930s as local associations of health care providers, controlled primarily by the providers. Initially, Blue Cross was the hospital service association, while the Blue Shield was the association covering physicians' services.

The Blue Cross/ Blue Shield organizations today bear little resemblance to small local associations, as they are neither local nor small. Although the early Blues plans were local, a series of mergers and consolidations had by 1990 led to a single or a few surviving plans for each state. Many Blue Cross/Blue Shield organizations continue to enjoy support from providers of medical services. The organizations continue to offer service contracts, typically reimbursing the provider of medical services directly. Blue Cross/Blue Shield organizations serve as TPAs for plans sponsored by employers and other organizations, and they also administer portions of Medicare. Blue Cross/Blue Shield organizations continue to be an important force affecting the delivery and financing of health care in the United States.

On service contracts, financial incentives to use in-network providers usually take the form of services from network providers being reimbursed more favourably than services provided out-of-network. In an *exclusive provider organisation (EPO)*

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<sup>19</sup> FERMA. European Risk and Insurance Report 2016. Paris: Federation of Risk Management Insurance Associations (FERMA).

*plan*, these incentives are quite strong; services from out-of-network providers may receive no reimbursement. A somewhat less severe set of incentives is found in a *preferred provider organization (PPO)* plan, in which services from in-network providers receive favoured treatment. For example, services from network providers may be reimbursed at 80 per cent of rates that already reflect negotiated discounts, while services from out-of-network providers may be reimbursed at 60 per cent of charges.

When the subscriber receives medical services from an out-of-network provider, payment for the uncovered charges shall usually be the liability of the subscriber. If an out-of-network medical specialist charges \$100 for an office visit for which a PPO plan provides a \$60 reimbursement, payment of the \$40 balance is the patient's liability and the specialist may be free to *balance-bill* for the \$40 difference. The PPO may have negotiated a \$60 rate for an office visit to its in-network specialist, in which case the full cost of the office visit with the network provider is covered.

Service coverage may make further distinctions between in-network providers, often to encourage patterns of medical service utilization within the network itself. For example, a *point-of-service PPO* may provide more favourable reimbursement when the initial contact of the subscriber seeking health care service is with a general practice physician. Later contact with specialists shall be reimbursed favourably if the contact is the result of a referral issued by the general practitioner, who serves as a "gatekeeper". The point-of-service PPO may fully reimburse the cost of an office visit with an in-network general practitioner and pay 90 per cent of the cost of a subsequent office visit with an in-network specialist if the visit is ordered by the general practitioner. If the subscriber's initial office visit is with the specialist, the reimbursement may drop to 80 per cent for an in-network specialist and to 60 per cent for an out-of-network specialist. The rationale for the pattern of reimbursement is to encourage initial contact in-network general practitioner who may be regarded as less expensive than specialists and less likely to refer to additional expensive testing.

The trade-off between different types of service coverage often balances price against<sup>20</sup> the subscriber's freedom of choice of medical care providers and control over the delivery of health care services. Historically, plans providing the widest range of choices and fewest restrictions tend to be the most expensive. However, freedom to choose among providers of medical services is an option valued by many consumers of health care. Traditionally, medical expense insurance and Blue Cross/ Blue Shield plans have imposed few restrictions on the choice of providers as compared with HMO, PPO and EPO plans. In some states, however, Blue Cross/ Blue Shield organizations have formed HMO plans using smaller networks. These Blue Cross/Blue Shield HMOs are offered to the public alongside coverage imposing fewer restrictions on the subscriber's choice of medical care providers.

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<sup>20</sup> R. Chen, & Wong, K.A., The Determinants of Financial Health of Asian Insurance Companies, 2004, *The Journal of Risk and Insurance*, 71(3), 2004, pp. 469-499

## **VI. Contractual provisions affecting amount of recovery**

Medical expense reimbursement insurance includes contractual provisions such as policy limits and deductibles, that closely resemble provisions carrying the same titles that are found in property and liability insurance contracts. Service contracts also have many of the same provisions, although they may seem inconsistent with the service benefit approach. When these provisions appear in service contracts, the motive for their application is the creation of financial incentives affecting the behaviour of consumers and providers of medical services in ways believed to reduce health care costs. For example, a health care policy may impose a \$100 deductible for use of a hospital emergency room that shall not result in admission to the hospital. Hospital emergency rooms often are expensive to use, and the \$100 deductible is likely to deter the use of the emergency room for conditions not requiring urgent treatment.

When more than one policy providing health care benefits applies to an occurrence of health care, a *coordination of benefits (COB)* provision can serve the same function as the "other insurance" clause found in the property and liability coverage. The COB provision prevents duplicate recovery for the same set of medical expenses or the same procedure. A COB provision is common in employer-sponsored health care coverage and often is invoked when a husband and wife both work for employers who provide health care coverage. The COB provision determines which of the two policies is primary. For the employees themselves, the employee insurance policy is primary and the other policy is secondary. Concerning the working couple's dependent children, the primary policy typically is the employee's coverage for the employee whose birthday falls earliest in the calendar year. The consolidation of health care financing across wide geographic regions stipulated within the proposal for universal coverage is likely to eliminate the need for COB provisions.

*Policy limit(s)* specify a maximum recovery for covered medical expenses during a period, which may be as long as the lifetime of the covered individual. If a lifetime limit appears, the policy also may include an annual restoration. For example, a policy may contain a \$500,000 lifetime limit for covered expenses with a \$10,000 annual restoration. If a heart bypass surgery for a covered individual results in the payment of a \$65,000 benefit, the remaining limit is reduced to \$435,000. The next year the limit would be increased to \$445,000 if no claims are paid, or to only \$440,000 if additional medical expense benefits of \$5,000 are paid during that year.

Under the service contracts, the limit may be stated within the in-service units, such as 120 days in the hospital. This approach has been used in Blue Cross coverage and Medicare; its appearance in Medicare suggests that limits serve as a purpose that is likely to continue under universal coverage. Service contracts also may impose dollar limits rather than limits on service units. Instead of applying to

a period, a policy limit may apply on some other basis, such as to each episode of illness or injury. In this case, the coverage will contain contractual language defining what constitutes a "spell of illness or injury". Often, separate limits apply to categories of expense, such as mental health care, in which moral hazard problems are believed especially difficult to manage. For example, a policy with a \$500,000 lifetime limit for medical expenses may further impose a \$100,000 lifetime limit on in-hospital mental health care, with a further restriction of no more than 30 days confinement in a single year. Further, more restrictive limits may apply to benefits for mental care provided outside a hospital.

As in property insurance, the *deductible* is an amount subtracted from the covered expense to define the recovery. If the covered expense is less than the deductible amount, no benefit is paid. The deductible may apply to any one illness occurrence, any one insured person, to total expenses incurred in a year, or on some other basis. Often, health insurance coverage provided to members of the same family will impose a per-year deductible for each family member with a larger deductible applying to the family's total expenses during the year.<sup>21</sup> For example, a \$100 per-year deductible may apply to each family member with a \$300 per-year deductible applying to the entire family. The coverage is triggered when an individual's covered expenses exceed \$100 in a year or when the family's covered expenses exceed \$300 in a year. For example, if all five members of a family were to each incur \$80 of covered expenses,  $5(\$80) = \$400$ , or \$100, would be subject to coverage.

The *participation percentage (or coinsurance)* is a proportionate sharing of medical expenses that exceed any deductible. An 80/20 sharing results in the insurer reimbursing 80 per cent of the amount by which the expense exceeds the deductible, with the insured responsible for the remaining 20 per cent. The insured's participation rate usually is between 10-50 per cent, with 20 per cent being common.

An *out-of-pocket limit or limit on out-of-pocket expenses* is common in policies using deductibles and participation percentages.<sup>22</sup> The limit on out-of-pocket expenses represents an upper limit on payments by the insured on account of the deductible and participation percentage. For example, a \$1000 limit on out-of-pocket expenses under a policy with a \$100 deductible and 20 per cent participation is reached when covered medical expenses reach \$4600;  $\$100 + 0.2(\$4600 - \$100) = \$1000$ . Beyond this point, the insurance policy provides coverage for the full amount of any further covered medical expenses. Table 19.1 illustrates the combined effects of a \$200 deductible, 20 per cent participation, and a \$1000 limit on out-of-pocket expenses under a medical expenses insurance policy with a \$100,000 policy limit.<sup>23</sup>

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<sup>21</sup> Insurance Europe. A Blueprint for Pensions: Saving enough, saving well, saving wisely, Brussels: *Insurance Europe*, 2017

<sup>22</sup> Insurance Europe. Why Insurers Differ from Banks, Brussels: *Insurance Europe*, 2014

<sup>23</sup> Insurance Europe. European Insurance in Figures 2015 Data, Brussels: *Insurance Europe*, 2016

The limit on out-of-pocket expenses is reached at covered expenses of \$4200, but the overall policy limit is encountered when covered expenses exceed \$101,000.

A *co-payment* is a fee paid by an insured person in order to become entitled to a medical service. In health insurance, the term "co-payment" has been used in a generic sense to denote a cost-sharing agreement, such as a deductible or participation percentage, although the meaning of the term gradually evolved to mean a fee imposed before other coverage provisions may apply. For example, a health care policy may impose a \$10 co-payment for a routine visit to a physician in addition to a \$100 deductible and a 20 per cent participation. Under such a policy, a \$25 office visit leading to \$175 of fees for laboratory work would result in \$15 of the cost for the office visit and \$175 of the laboratory fees, a total of \$190 being subject to coverage. After the \$100 deductible is applied, \$90 remains eligible for reimbursement. The actual reimbursement is  $(0.8)(\$90)$ , or \$72. Without the co-payment, the reimbursement would have been \$80; i.e.,  $[(0.8)(\$100)]$ .

Service contracts often impose co-payments. Co-payment levels often are set to create financial incentives shaping the behaviour of covered individuals or providers. For example, the co-payment level for the use of a hospital emergency room not followed by a hospital admission may be set at \$50, while the co-payment applying to other urgent care facilities may be \$10. The differential co-payment levels create an incentive to use urgent care facilities other than hospital emergency rooms when these other facilities are available. Other urgent care facilities tend to be less expensive than hospital emergency rooms.

A *fee schedule* is a set of limits applying to specific types of services or diagnoses. The fee schedule sets a limit on the *allowable charge* that will be considered in computing reimbursement for covered medical services, a feature that distinguishes the fee schedule from other types of policy limits. Charges beyond the fee schedule are not considered when establishing benefits. For example, if a specialist charges \$100 for an office visit and the fee schedule has a \$40 limit for an office visit with a specialist, only \$40 is considered in computing the benefit. If the policy stipulates a \$100 deductible, \$60 of deductible shall remain after the visit to the specialists, even though the insured may have paid the full \$100 price of the visit. The practice of billing the patient for the balance between actual charges and allowable charges is called "*balance billing*".

For the coverages where the insurer has negotiated favourable rates with a network of medical providers, the fee schedule may be set at the level negotiated with the network. When a network of providers is not included, fee schedules may be based on survey data on charges of medical providers for categories of service such as daily room and board charges by hospitals.<sup>24</sup> The survey data rank charges

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<sup>24</sup> A. Gepp, Wilson, J.H., Kumar, K., & Bhattacharya, S., A comparative analysis of decision trees vis-à-vis other computational data mining techniques in automotive insurance fraud detection, *Journal of data science*, 10(3), 2012, pp. 537-561

of providers, with the insuring organization choosing a cut-off point beyond which charges will not be considered. For example, an insurer may believe that the 80<sup>th</sup> percentile of charges in a community represents a limit on "reasonable" charges.

Historical patterns of charges by providers in a community may also affect the limits on allowable charges, resulting in "*usual, customary, and reasonable*" (UCR) charges. This method of creating limits can allow an incentive for health care providers to regularly increase nominal charges for their services, even while the providers, as members of a network, are willing to accept a smaller amount than their full charges. This discrepancy between nominal charges and the amount providers are willing to accept as compensation could disappear under a *single-payer* approach, a term applied to a system in which all financing of health benefits is channelled through the same organization, such as a government agency. A single-payer system could use more than one source of funds, such as having individuals be responsible for the first \$250 of expense during a calendar year. When more than one source of funds is used, presumably the same charge would apply across all categories of consumers and payers, regardless of the ultimate source of funds. Because the same price would apply to all users, a single-payer approach could eliminate problems related to balance-billing.

A precedent for using a single-payer approach in universal coverage exists in the portion of the Federal Medicare program applying to physician's services.

The coverage of this portion of Medicare prohibits balance-billing for providers who agree to accept the assignment of Medicare benefits. In many cases, Medicare completely disallows charges for services it deems unnecessary, leaving the provider who accepts assignment no recourse. Because the methods are chosen to regulate fees and charges that directly affect the income of medical care providers, this aspect of any proposed system of universal coverage is likely to be controversial.

The foregoing limitations share a common reliance on a fee-for-service method for determining the reimbursement. The *diagnosis-related groups (DRG)* system of reimbursement was adopted in the mid-1980s in place of the fee-for-service method under the portion of the Medicare applying hospital reimbursement. The DRG system also has received attention of private care health insurers. The DRG system, under which the payment to the hospital is based on a complex system for classifying medical diagnoses, was adopted in the belief that the fee-for-service system was partly responsible for rising hospital costs. Under a fee-for-service system, the hospital was reimbursed for each medical service, so the system offered no financial incentive to control the use of medical services. Under a DRG system, however, no additional payment is received when additional services are provided, but the payment is based on the diagnosis instead.<sup>25</sup>

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<sup>25</sup> Havenlife, *You Have Life Insurance Questions, We Have Life Insurance Answers*, 2017

For example, a hospital would receive the same reimbursement for two patients with the identical diagnoses, even though one patient is confined for 10 days while the other is confined for only 5 days. Generally speaking, a provider for medical services under a DRG system has no incentive to encourage the consumption of medical services whose economic value is doubtful. By placing the financial burdens of additional services on the provider, the DRG system was designed to encourage providers to undergo only those medical services that are essential for the treatment of a medical condition.<sup>26</sup>

In 1992, Medicare began reimbursing physicians using a *resource-based relative value scale (RBRVS)*, which assigns a numerical value to the effort of the physicians in providing a medical service, and to the expenses of maintaining the medical practice. The reimbursement is determined by applying the numerical technique rather than that set by physicians and insurers in the market. Compared to the prevailing levels of fees and charges, RBRVS is designed to increase reimbursement of primary care physicians relative to specialists.

## VII. Conclusions

In addition to financial incentives designed to influence the behavior of providers and consumers of medical services, coverage may also impose direct controls on the utilization of healthcare services<sup>27</sup>. For instance, a prior notification requirement may mandate that a surgeon planning to perform an elective surgical procedure must first submit a plan to the insurer and await approval before proceeding with the surgery. Health benefits also employ case management to manage the costs of expensive medical procedures by involving the plan's medical director (who may be a physician) in day-to-day decisions regarding the administration of medical procedures to an insured individual whose healthcare expenses have surpassed a certain threshold. A second-opinion requirement has been utilized in medical benefit programs to ensure that a second surgeon agrees that surgery is necessary for a condition not requiring urgent care.

In the absence of coverage for healthcare services, market forces and limitations on individual resources regulate prices and consumption of healthcare services. However, coverage for these services, whether purchased by employers or provided by governments, tends to reduce these natural constraints. Consequently, other methods of rationing, such as financial incentives or direct controls, may be implemented. The typical coverage for healthcare services is intricate, and this complexity is likely to persist even after the implementation of universal coverage,

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<sup>26</sup> E. Kay, IFRS 17 (IFRS 4 Phase II) Insurance Contracts, Dublin: Milliman, 2016

<sup>27</sup> P. Kaye, Risk measurement in Insurance: *A Guide to Risk Measurement, Capital Allocation and Related Decision Support Issues*, CAS Discussion Paper Program, Arlington: Casualty Actuarial Society (CAS), 2005.

although coverage provisions may become more standardized across different plans. The provisions found in health benefits are devised in response to inherent problems associated with coverage for healthcare services. Unless universal coverage resolves these issues, mechanisms to control them will likely continue in some form.

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## PRAVNE DILEME U VEZI S NAČINIMA ZAKLJUČENJA UGOVORA O OSIGURANJU NA DALJINU – PUTEM MOBILNE APLIKACIJE I INTERNET PREZENTACIJE

ORIGINALNI NAUČNI RAD

### Apstrakt

Autor u ovom radu konstatiše da su se u praksi pojavile dve dileme u vezi sa zaključenjem ugovora o osiguranju na daljinu putem mobilne aplikacije i internet prezentacije kao sredstava komunikacije na daljinu. Prva dilema odnosi se na upotrebu dvostrukе autentifikacije kao načina zaključenja ugovora o osiguranju na daljinu, dok se druga dilema tiče dozvoljenosti korišćenja uplate premije osiguranja kao načina zaključenja ugovora na daljinu. Obe dileme autor razrešava funkcionalnim i sistemskim tumačenjem odredaba Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu i Zakona o obligacionim odnosima. Zaključuje da je dozvoljeno odstupanje od pismene forme ugovora, u smislu da je za zaključenje ugovora dovoljna dvostruka autentifikacija ugovarača osiguranja, te da nije potrebna i upotreba kvalifikovanog elektronskog potpisa druge ugovorne strane kad se ugovor zaključuje upotrebom mobilne aplikacije i internet prezentacije osiguravača ili distributera. Takođe, zaključuje da uplata premije osiguranja jeste dozvoljen način zaključenja ugovora na daljinu. Naposletku, autor nastoji da pruži kriterijume za uspostavljanje odnosa između načina zaključenja ugovora na daljinu putem dvostrukе autentifikacije i uplate premije kao načina zaključenja ugovora, konstatujući da se ta dva načina zaključenja ugovora ne isključuju, već da se dopunjuju.

**Ključne reči:** ugovor o osiguranju, ugovor na daljinu, uplata premije, dvostruka autentifikacija, način zaključenja ugovora

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<sup>1</sup> Autor je direktor Direkcije za pravne poslove Generali Osiguranja Srbija a.d.o. Beograd, imejl: nenad.grujic@generalis.rs.

Rad je primljen: 06.02.2024.

Rad je prihvaćen: 18.02.2024.

## I. Načini zaključenja ugovora o osiguranju na daljinu

Pre skoro pet godina autor je objavio rad u kojem se bavio pravima korisnika usluge osiguranja na jednostrani raskid ugovora o osiguranju na daljinu.<sup>2</sup> U uvodnim izlaganjima tog rada pored pojma ugovora na daljinu<sup>3</sup> dotakao se i načina zaključenja ugovora o osiguranju na daljinu.<sup>4</sup> Tada nije imao dilemu da ugovor o osiguranju na daljinu može da se zaključi na četiri načina, u zavisnosti od sredstva komunikacije na daljinu koje se koristi u tu svrhu. Ti načini su: (i) *potpisom ugovornih strana*; (ii) *upotrebom kvalifikovanog elektronskog potpisa*, u kom se slučaju ugovor zaključuje u formi elektronskog dokumenta;<sup>5</sup> (iii) *upotrebom najmanje dva elementa za potvrđivanje korisničkog identiteta (autentifikacije)* ili korišćenjem šema elektronske identifikacije visokog nivoa pouzdanosti (u kom se slučaju ugovor takođe zaključuje u formi elektronskog dokumenta), uz određena ograničenja u vezi s vrednošću tako zaključenih ugovora;<sup>6</sup> (iv) *uplatom premije osiguranja*, u kom se slučaju zaključuje tzv. osiguranje bez polise.<sup>7</sup> Takav stav bila je autorova prva reakcija na novu zakonsku regulativu odnosno na Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu (dalje u radu: ZZKFU), koji je stupio na snagu nepunih godinu dana preписанog tog rada.

Međutim, pet godina nakon objavljivanja tog rada i šest godina od primene ZZKFU, praksa<sup>8</sup> je iznudriла određene dileme u vezi s načinima zaključenja ugovora o osiguranju na daljinu. Zbog toga je autorova namera da ovim radom pokuša odgovoriti na te dileme.

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<sup>2</sup> Nenad Grujić, „Pravo korisnika usluge osiguranja na jednostrani raskid ugovora o osiguranju zaključenog na daljinu“, *Pravo i privreda*, 7-9/2019, str. 525–538.

<sup>3</sup> Za pojam ugovora na daljinu videti: N. Grujić, str. 526–527; Katarina Ivančević, „Zaštita korisnika finansijske usluge osiguranja pri zaključenju ugovora na daljinu u Srbiji“, *Evropska revija za pravo osiguranja*, br. 1/2016, str. 12.

<sup>4</sup> Detaljnije o zaključenju ugovora na daljinu: Andrej Pak, *Zaključenje i prestanak ugovora o osiguranju*, Novi Sad, 2016, str. 97–106.

<sup>5</sup> Videti: Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, *Službeni glasnik RS*, br. 44/2018, čl. 3. st. 2.

<sup>6</sup> Videti: Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, čl. 3 st. 3.

<sup>7</sup> U skladu sa: Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003 – Ustavna povelja i *Službeni glasnik RS*, br. 18/2020, čl. 903.

<sup>8</sup> Interesantno je da su dileme nastale u praksi a da pravna nauka i sudovi nisu pružili odgovore na te dileme, niti su na drugi način pomogli praksi u njihovom rešavanju. To, čini se, dovoljno govori koliko su pravna nauka i sudska praksa kod nas udaljeni od realnih praktičnih potreba, uz određene izuzetke, naravno. Slično tome u vezi s potrošačkim sporovima i sudske praksom: Marija Karanikić Mirić, „Zakonodavna hiperaktivnost i delotvorna zaštita potrošača“, *Perspektive implementacije evropskih standarda u pravni sistem Srbije*, Knjiga 11 (Stevan Lilić), Beograd, 2021, str. 5.

## **II. Prva dilema – da li je dvostruka autentifikacija ugovarača osiguranja dovoljna za zaključenje ugovora o osiguranju na daljinu ili je neophodan i kvalifikovani elektronski potpis osiguravača odnosno distributera**

### **1. Praksa upotrebe dvostrukе autentifikacije kao načina zaključenja ugovora o osiguranju na daljinu i rađanje dileme**

U praksi se najpre pojavila dilema u vezi s upotrebom najmanje dva elementa za potvrdu korisničkog identiteta (autentifikacije) korisnika usluge osiguranja, odnosno, jednostavnije rečeno, za upotrebom dvostrukе autentifikacije. Naime, praksa tj. osiguravači i distributeri usluge osiguranja<sup>9</sup> stidljivo su, u poslednjih nekoliko godina, počeli da koriste dvostruku autentifikaciju kao način zaključenja ugovora o osiguranju na daljinu. Pri tome, taj način zaključenja upotrebljava se uglavnom kada se kao sredstvo komunikacije za zaključenje ugovora o osiguranju na daljinu koristi elektronska pošta, mobilna aplikacija ili internet prezentacija osiguravača ili distributera usluge osiguranja. Ti pionirski poduhvati osiguravača i distributera otvorili su i pitanje da li je za zaključenje ugovora o osiguranju dovoljno da samo jedna strana, ugovarač osiguranja, svoju volju za zaključenje ugovora izrazi upotrebom dvostrukе autentifikacije ili je, pored toga, potrebno da i osiguravač odnosno distributer kvalifikovanim elektronskim potpisom potpiše tako zaključeni ugovor o osiguranju koji ima formu elektronskog dokumenta. U odgovoru na to pitanje treba, s jedne strane, poći od regulatornog okvira, a s druge strane od sredstva komunikacije na daljinu koje se koristi.

### **2. Regulatorni okvir za upotrebu dvostrukе autentifikacije kao načina zaključenja ugovora o osiguranju na daljinu**

Podsećamo, Zakon o obligacionim odnosima (ZOO) propisuje pisani formu ugovora o osiguranju,<sup>10</sup> a ZZKFU odredbom čl. 3 st. 2 propisuje da se pisana forma,

<sup>9</sup> Pod distributerom usluge osiguranja, za potrebe ovog rada, podrazumevam društva za zastupanje, zastupnika u osiguranju, lica iz čl. 98 st. 2 Zakona o osiguranju – ZO, *Službeni glasnik RS*, br. 139/2014 i 44/2021, i lica koja uslugu osiguranja nude u skladu s odredbom čl. 113 ZO. Ovo zbog toga što samo ta lica od svih distributeru usluge osiguranja imaju mogućnost zaključenja ugovora o osiguranju na daljinu u ime i za račun osiguravača upotrebom sredstava komunikacije na daljinu – mobilna aplikacija, elektronska pošta i internet prezentacija. O pojmu distributera usluge osiguranja, videti: Nataša Petrović Tomić, *Pravo osiguranja, Sistem, Knjiga I*, Službeni glasnik, prvo izdanje, Beograd, 2019, str. 242–243.

<sup>10</sup> Videti: ZOO, čl. 901 st. 1. „Pismena forma je najčešći oblik formalnih ugovora koji je danas u upotrebi. Ona iziskuje dva uslova: 1) pismeni tekst (sadržinu) ugovora, i 2) svojeručni potpis isprave.“ Jakov Radišić, *Obligaciono pravo (opšti deo)*, šesto izdanje, Beograd, 2000, str. 116.

prilikom zaključenja ugovora na daljinu u formi elektronskog dokumenta, postiže upotrebo kvalifikovanih elektronskih potpisa obe ugovorne strane.<sup>11</sup> Dalje, odredba čl. 3 st. 3 ZZKFU izričito propisuje da se dvostruka autentifikacija može koristiti kao način zaključenja ugovora o osiguranju zaključenih na daljinu u elektronskoj formi, samo od strane ugovarača osiguranja.<sup>12</sup> Za osiguravača ili distributera, upotreba kvalifikovanog elektronskog potpisa ostaje obaveza. Drugačije rečeno, ako osiguravač ili distributer nudi zaključenje ugovora o osiguranju na daljinu, i pri tome daje mogućnost ugovaraču osiguranja da volju za zaključenje ugovora izrazi upotrebo dvostrukе autentifikacije, dužan je da obezbedi da ugovor s njegove strane bude potpisani kvalifikovanim elektronskim potpisom, dok druga strana, ugovarač osiguranja, može da ili upotrebi kvalifikovani elektronski potpis ili dvostruku autentifikaciju (uz određena ograničenja u vrednosti tako zaključenog ugovora).

### **3. Praksa vs regulativa**

Međutim, ova zakonska odredba, iako veoma jasna, makar kada se upotrebljava jezička metoda tumačenja, sasvim očigledno pada na testu praktičnosti. Barem kada je reč o mobilnoj aplikaciji i internet prezentaciji kao sredstvima komunikacije na daljinu koji služe zaključenju ugovora o osiguranju na daljinu, jer kod elektronske pošte kao sredstva komunikacije dilema ne postoji, odnosno ne bi trebalo da postoji. Koji su razlozi za to? Bez namere da se pruže potpuni razlozi za to, čini se da je ovo stoga što ni odredbe čl. 3 st. 2 i st. 3 ZZKFU nisu „kompatibilne“ sa sredstvima komunikacije na daljinu koja se zovu mobilna aplikacija i internet prezentacija.<sup>13</sup> Oba ta sredstva komunikacije na daljinu, nesumnjivo, mogu poslužiti kao način zaključenja ugovora o osiguranju na daljinu, ali nijedno od ta dva sredstva ne može da posluži kao sredstvo zaključenja ugovora o osiguranju na daljinu u skladu sa odredbom čl. 3 st. 2 i st. 3 ZZKFU. Ovo stoga što ta sredstva komunikacije na daljinu podrazumevaju dostupnost usluge osiguranja 24 časa dnevno sedam dana u nedelji, i to u realnom vremenu. Prosečan korisnik usluge osiguranja koji namerava da pribavi uslugu upotrebom mobilne aplikacije ili internet prezentacije, očekuje da to može uraditi u bilo koje doba dana.<sup>14</sup> Još važnije, očekuje pribavljanje usluge brzo, efikasno i pouzdano. Međutim, odredbe čl. 3 st. 2 i 3 ZZKFU to ne omogućavaju.

<sup>11</sup> Videti: Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, čl. 3 st. 2.

<sup>12</sup> Zakon koristi termin *korisnik*.

<sup>13</sup> U slučaju upotrebe elektronske pošte ili sličnog sredstva komunikacije na daljinu, gde se podrazumeva učešće fizičkog lica na strani osiguravača ili distributera, upotreba kvalifikovanog elektronskog potpisa od strane osiguravača ili distributera nije upitna. Ta obaveza jasno proizlazi iz odredbe čl. 3 st. 3 Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu.

<sup>14</sup> Slično tome, videti: EIOPA, EIOPA's Digital Strategy, Support consumers, markets and the supervisory community through digital transformation, 2023, <https://www.eiopa.europa.eu/system/files/2023-10/EIOPA%20Digital%20Strategy.pdf>, pristupljeno: 6. 2. 2024, str. 3. U: Piotr Teresziewicz, Katarzyna

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Ako svaki put kada ugovarač osiguranja pokrene proces zaključenja ugovora o osiguranju preko mobilne aplikacije ili internet prezentacije, osiguravač ili distributer mora u realnom vremenu da učestvuje u tom procesu te da obezbedi kvalifikovani elektronski potpis, to dovodi do ekonomske neisplativosti tako zaključenog ugovora o osiguranju.<sup>15</sup> Ovo zbog toga što tada osiguravač ili distributer mora da obezbedi dovoljan broj stručnih lica sa ovlašćenjima za zaključenje ugovora o osiguranju, sa kvalifikovanim elektronskim potpisima i dežurstvima 24 časa dnevno sedam dana u nedelji, uključujući praznike i neradne dane. Tako nešto, iako teorijski jeste moguće, suštinski nije moguće jer podrazumeva nesrazmerno visoke troškove koji će svakako uticati na visinu premije osiguranja, a posredno **če imati** i odvraćajući uticaj na korisnike usluge osiguranja<sup>16</sup> od pribavljanja usluge upotrebom sredstava komunikacije na daljinu – mobilne aplikacije i internet prezentacije.<sup>17</sup> To svakako ne bi bilo prihvatljivo ni osiguravačima, ni distributerima, ni ugovaračima osiguranja,<sup>18</sup> a šire posmatrano, ni zakonodavcu, jer intencija zakonodavca zasigurno nije destimulacija digitalnih kanala distribucije usluge osiguranja.<sup>19, 20</sup> Naprotiv, čini mi

Poludniak-Gierz, „Consumer Protection in Polish Insurance Law“, in: Piotr Tereszkiewicz, Mariusz J. Golecki (ed.), *Protecting Financial Consumers in Europe*, Leiden Boston, 2023, str. 25–45.

<sup>15</sup> Zakonodavac je snižavanje troškova ugovornih strana (finansijske institucije i korisnika) proklamovao kao jedan od glavnih pozitivnih efekata donošenja Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu. Videti: Narodna skupština Republike Srbije, Obrazloženje Predloga zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, [http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi\\_zakona/1274-18.pdf](http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/1274-18.pdf), pristupljeno: 6. 2. 2024, str. 16.

<sup>16</sup> Što je u suprotnosti sa članom (5) preamble Direktive 2002/65/EZ Evropskog parlamenta i veća o trgovini na daljinu finansijskim uslugama namenjenim potrošačima. Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu donet je pod neposrednim uticajem te direktive, u cilju ispunjavanja obaveze usklađivanja domaćeg prava s pravom Evropske unije. Videti: Zakon o potvrđivanju sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, s jedne strane, i Republike Srbije, s druge strane, *Službeni glasnik RS* – Međunarodni ugovori, br. 83/2008, čl. 91. Narodna skupština Republike Srbije, Obrazloženje Predloga Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, str. 19.

<sup>17</sup> Pri tome se isključuje mogućnost da kvalifikovani elektronski potpis određenog lica bude sistemski generisan od strane softvera, bez učešća tog lica u postupku potpisivanja dokumenta. Iako takvo rešenje obezbeđuje kvalifikovani elektronski potpis na dokumentu, činjenica da ga je generisao računarski program a ne čovek oduzima takvom potpisu svojstvo potpisa u smislu odredbe čl. 50 st. 2 Zakona o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju, *Službeni glasnik RS*, br. 94/2017 i 52/2021.

<sup>18</sup> Moderan regulatorni okvir prava osiguranja odlikuje zaštita interesa i osiguravača i ugovarača osiguranja. Videti: Nataša Petrović Tomić, „O hitnosti usvajanja izmjena regulatornog okvira osiguranja – prijedlog izmjena Zakona o obveznim odnosima Republike Hrvatske“, *Hrvatski časopis za OSIGURANJE*, No. 7, 2022, str. 50.

<sup>19</sup> O značaju digitalnih kanala distribucije osiguranja u savremenom svetu, videti: Miro Stipić, Marinko Jurilj, „Pravci razvoja alternativnih prodajnih kanala na hrvatskom tržištu osiguranja“, *Zbornik radova Veleučilišta u Šibeniku*, Vol. 9 No. 3-4, 2015, str. 95-106. Maja Mihelja Žaja, Ljubica Milanović Glavan, Mateja Grgić, „Digitalna tehnologija kao čimbenik razvoja kanala distribucije u osiguranju“, *Hrvatski časopis za OSIGURANJE*, No. 3, 2020, str. 199–202.

<sup>20</sup> Štaviše, Predlog zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu podnet je u cilju unapređenja korišćenja informaciono-komunikacionih tehnologija u oblasti finansijskih usluga.

se da je zakonodavac izmenama i prilogođavanjima regulative u poslednjih deset godina značajno doprineo razvoju digitalnih kanala distribucije usluge osiguranja.<sup>21</sup>

Dakle, dosledna primena odredbe čl. 3 st. 3 ZZKFU preko mobilne aplikacije ili internet prezentacije, barem kada su u pitanju ugovori o osiguranju, imala bi suprotan efekat, bila bi naglašeno na štetu korisnika i dovela bi do značajnog poskupljenja usluge osiguranja, a verovatno i do nezadovoljstva brzinom, efikasnošću i pouzdanosti samog procesa.<sup>22</sup> To bi značilo da odredba čl. 3 st. 3 ZZKFU ne bi ostvarila svoju funkciju. Kako je u opravu sve funkcionalno, zakonodavac zasigurno nije imao nameru da odredbu čl. 3 st. 3 ZZKFU učini nefunkcionalnom. **U tom smislu, valjalo bi u jednačinu ubaciti i funkcionalno tumačenje odredbe čl. 3 st. 3 ZZKFU.**

#### **4. Kako pravno pomiriti zahteve prakse i regulative kod ugovaranja na daljinu preko mobilne aplikacije i internet prezentacije**

**Čini se da jedan potencijalni odgovor na** tu dilemu pruža odredba čl. 901 st. 2 i 3 Zakona o obligacionim odnosima (ZOO).<sup>23</sup> Naime, ta odredba dozvoljava da se ugovor o osiguranju zaključi potpisom samo jedne ugovorne strane, i to ugovarača osiguranja. Naime, ako ugovarač osiguranja dâ pisani ponudu osiguravaču, ona ga obavezuje osam dana, a u tom roku on ima mogućnost da odbije ponudu,<sup>24</sup> te ukoliko je ne odbije, ugovor se smatra zaključenim, i to s danom kada je ponuda prispela.<sup>25</sup> U tom smislu, upotreba dvostrukе autentifikacije u skladu sa odredbom čl. 3 st. 3 ZZKFU, čija je funkcija da posluži kao zamena za potpis ugovarača osiguranja, može ostvariti svoju funkciju tako što će zameniti potpis ugovarača osiguranja, samo ne na osiguravajućoj polisi već na ponudi za zaključenje polise osiguranja. Potrebno je samo da osiguravači i distributeri u mobilnim aplikacijama i na internet prezentacijama predvide da dvostrukom autentifikacijom ugovarač osiguranja daje ponudu

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Videti: Narodna skupština Republike Srbije, Obrazloženje Predloga zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, str. 15.

<sup>21</sup> Primera radi, prema podacima dobijenim od „Generali osiguranje Srbija“ a.d.o. Beograd, ovo društvo za osiguranje je u 2023. zaključilo oko čak 110.000 ugovora o osiguranju putem digitalnih kanala distribucije (mobilna aplikacija i internet prezentacija).

<sup>22</sup> Činjenica da zahteva učešće fizičkog lica, na strani osiguravača ili distributera, u procesu zaključenja ugovora sasvim sigurno negativno utiče na brzinu, efikasnost i pouzdanost procesa. Samim tim, korisničko iskustvo neće i ne može biti u skladu s očekivanjima korisnika usluge osiguranja, koji, odlučujući se za pribavu usluge osiguranja putem mobilne aplikacije ili internet prezentacije, sasvim sigurno očekuju digitalno iskustvo sa svim prednostima i pogodnostima koje ono nosi, a koje u velikoj meri nalažu potrebe savremenog potrošača odnosno korisnika usluge osiguranja.

<sup>23</sup> Videti: ZOO, čl. 901 st. 2 i 3.

<sup>24</sup> Tačnije i preciznije, osiguravač može ponudu ugovarača osiguranja odbiti u roku od osam dana, osim u slučaju da je potreban lekarski pregled osiguranika, u kom slučaju taj rok iznosi 30 dana.

<sup>25</sup> Više o načinu zaključenja ugovora o osiguranju, prema odredbi čl. 901 st. 2 i 3 ZOO, videti: N. Petrović Tomić, str. 301–302.

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u skladu sa odredbom čl. 901 st. 2 ZOO. Pri tome, imajući u vidu da odredba čl. 3 st. 1 ZZKFU predviđa shodnu primenu ZOO, nema prepreke za zaključenje ugovora o osiguranju na daljinu na taj način.

Drugi mehanizam za prevazilaženje ovog problema moglo bi da bude upravo pomenuto funkcionalno, ali i sistemsko tumačenje odredbe čl. 3 st. 3 ZZKFU. Naime, imajući u vidu da je cilj i funkcija te odredbe da se korisnicima usluga osiguranja (ugovaračima osiguranja) omogući lakši, jednostavniji i brži pristup usluzi, kao i da odredba čl. 3 st. 1 ZZKFU predviđa shodnu primenu ZOO, čini se da ima mesta primeni odredbe čl. 900 st. 2 ZOO. Ta odredba dopušta odstupanje od pismene forme ugovora ukoliko je to u nesumnjivom interesu osiguranika.<sup>26,27</sup> Čini se da nedvosmislenim kako je u nesumnjivom interesu osiguranika (ugovarača osiguranja) da mu se omogući zaključenje ugovora na brži, efikasniji i pouzdaniji način, a pri tome i značajno jeftinije.<sup>28</sup> U skladu s tim, odstupanje od pismene forme ugovora o osiguranju, u smislu da je za punovažnost ugovora o osiguranju zaključenog upotrebom mobilne aplikacije ili internet prezentacije osiguravač ili distributera usluge osiguranja dovoljan samo potpis jedne ugovorne strane, ugovarača osiguranja, pri čemu on potpisuje tj. izražava svoju volju za zaključenjem ugovora putem dvostrukе autentifikacije koja zamenjuje potpis (u skladu sa odredbom čl. 3 st. 3 ZZKFU), čini se mogućim, dozvoljenim i opravdanim u skladu sa odredbom čl. 900 st. 2 ZOO.<sup>29</sup> Štaviše, čini se da se opravdano može postaviti i pitanje da li bi takav način zaključenja ugovora o osiguranju predstavlja odstupanje od pismene forme ugovora. Ovo zbog odredbe čl. 72 st. 4 ZOO, koja dozvoljava da se zahtev pismene forme ugovora zadovolji izjavama volje datim „sredstvom koje omogućava da se sa izvesnošću utvrdi sadržina i davalac izjave“.<sup>30,31</sup> Mobilna aplikacija i internet prezentacija, sasvim sigurno, jesu takva sredstva kada ih koristi osiguravač ili distributer, jer nesumnjivo i pouzdano može da se utvrdi davalac izjave volje kao i sadržina te izjave, jednako kao što za ugovarača osiguranja jeste dvostruka autentifikacija.

<sup>26</sup> Videti: ZOO, čl. 900 st. 2. Više o domenu primene i ograničenjima odredbe čl. 900 st. 2 ZOO, videti: Nataša Petrović Tomić, „O ograničenoj i umerenoj slobodi ugovaranja u ugovornom pravu osiguranja: fenomen ‘pokoravanja’ ugovora o osiguranju, *Anal Pravnog Fakulteta u Beogradu*, 1/2020, str. 113–114.

<sup>27</sup> Za stav da je odstupanje od pismene forme ugovora o osiguranju moguće po osnovu odredbe čl. 900 st. 2 ZOO, videti: Predrag Šulejić, *Pravo osiguranja*, Pravni Fakultet Univerziteta u Beogradu, Beograd, 2005, str. 190.

<sup>28</sup> Podsećam da je uključenje ljudskog faktora u proces zaključenja ugovora o osiguranju na daljinu, u skladu sa odredbom čl. 3 st. 3 Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, značajno poskupljuje proces zaključenja ugovora i ima neželjeni posredan uticaj na visinu premije osiguranja.

<sup>29</sup> Zaštita osiguranika kao osnovni cilj Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu nadopunjuje se zaštitnom funkcijom ugovornog prava osiguranja u domaćem pravu. O odnosu ugovornog potrošačkog prava i ugovornog prava osiguranja videti: Nataša Petrović Tomić, *Zaštita potrošača usluge osiguranja*, Pravni Fakultet Univerziteta u Beogradu, Beograd, 2015, str. 76 i dalje.

<sup>30</sup> Videti: ZOO, čl. 72 st. 4.

<sup>31</sup> Više o zadovoljenju pismene forme ugovora upotrebom sredstva komunikacije na daljinu, videti: Saša Nikšić, „Pisani oblik ugovora i drugih pravnih poslova“, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 72, No. 1-2, 2022, str. 311–315.

U tom smislu, imajući sve navedeno u vidu, jasno je da se ugovorima o osiguranju zaključenim na taj način, dakle na daljinu, preko mobilne aplikacije ili internet prezentacije kao sredstva komunikacije na daljinu, upotrebom samo dvostrukе autentifikacije od strane ugovarača osiguranja kao načina zaključenja ugovora, ne može oduzeti punovažnost zbog odredbe čl. 900 st. 2 ZOO i odredbe čl. 3 st. 1 ZZKFU, ali i zbog odredbe čl. 72 st. 4 ZOO.

Treći, a možda i najsigurniji način prevazilaženja tog problema jeste da osiguravači i distributeri usluge osiguranja, kada koriste mobilnu aplikaciju i internet prezentaciju kao sredstvo komunikacije za zaključenje ugovora o osiguranju na daljinu, kao način zaključenja ugovora koriste uplatu premije osiguranja odnosno da napuste dvostruku autentifikaciju kao način zaključenja ugovora na daljinu. Ipak ne može se tvrditi da taj mehanizam, bez obzira na svoju sigurnost, predstavlja željeni scenario. Ovo stoga što u tom slučaju odredbe čl. 3 ZZKFU ostaju nefunkcionalne, barem kada se kao sredstvo komunikacije na daljinu koriste mobilna aplikacija i internet prezentacija, što nije i ne treba da bude praksa. Međutim, ako bi se pošlo tim putem, neočekivano se otvara nova dilema.

### **III. Druga dilema – da li je uplata premije osiguranja dozvoljen način zaključenja ugovora o osiguranju na daljinu**

Naime, u praksi se postavilo pitanje da li je uplata premije osiguranja koja je kao način zaključenja ugovora o osiguranju predviđena odredbom čl. 903 ZOO uopšte moguća kao način zaključenja ugovora o osiguranju na daljinu nakon stupanja na snagu ZZKFU, budući da ovaj zakon ne pominje uplatu premije osiguranja kao način zaključenja ugovora na daljinu.<sup>32</sup> U skladu s tim, a posmatrajući užu temu ovog rada, dilema je i da li je uplata premije osiguranja mogući način zaključenja ugovora o osiguranju na daljinu ako se kao sredstvo komunikacije na daljinu koriste mobilna aplikacija i internet prezentacija osiguravača ili distributera. U odgovoru na to pitanje, opet prvo treba poći od regulative pa onda od potreba prakse.

#### **1. Uplata premije osiguranja je izvorno nastala baš za zaključenje ugovora na daljinu**

Odredba čl. 903 ZOO, koja predviđa uplatu premije osiguranja kao način zaključenja ugovora o osiguranju, izvorno je i imala funkciju da posluži za zaključenje

<sup>32</sup> Posebno imajući u vidu da Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu ne reguliše formu ugovora na daljinu, već to prepušta zakonima koji uređuju ugovore kojima se pruža finansijska usluga. O tome: Mirjana Radović, „Posebna zaštita korisnika finansijskih usluga kod ugovaranja na daljinu“, *Sloboda pružanja usluga i pravna sigurnost*, Institut za pravne i društvene nauke Pravnog fakulteta Univerziteta u Kragujevcu, 2019, str. 825.

ugovora o osiguranju na daljinu. Uostalom, i sam naslov čl. 903 ZOO glasi *Osiguranje bez polise*, što samo potvrđuje da je intencija zakonodavca bila da se ova odredba koristi u slučajevima kada životne situacije (praksa) ne dozvoljavaju ispunjenje zahteva pisane forme ugovora, a potreba za osiguranjem postoji. Ta funkcija odredbe čl. 903 ZOO ne bi trebalo da bude sporna.<sup>33</sup>

## **2. Zakon o zaštiti korisnika finansijskih usluga kod ugavaranja na daljinu nije isključio primenu odredbe čl. 903 ZOO**

Jezičkim tumačenjem odredaba ZZKFU, čini se očigledno je da je predviđena shodna primena ZOO (čl. 3 st. 1 ZZKFU). S druge strane, kao što smo prethodno rekli, iako propisuje pisani formu ugovora o osiguranju, ZOO ipak dozvoljava tri izuzetka. Jedan je po osnovu odredbe čl. 903 ZOO (tzv. osiguranje bez polise), a drugi po osnovu čl. 900 st. 2 ZOO (kada je odstupanje od pisane forme ugovora o osiguranju dozvoljeno ukoliko je to u nesumnjivom interesu osiguranika), i treći, na osnovu odredbe čl. 901 st. 2 i 3 ZOO (zaključenje ugovora propuštanjem roka od strane osiguravača da odbije prispelu ponudu za zaključenje ugovora).<sup>34</sup> To je važno jer ZZKFU insistira na primeni odredaba čl. 3 st. 2 i 3 samo ako je putem ZOO propisana obavezna pisana forma ugovora o osiguranju. Međutim, s obzirom na to da putem ZOO nije propisana obavezna pisana forma ugovora o osiguranju, već on poznaje čak tri izuzetka od obavezne pisane forme, čini se da nema razloga da se i prilikom primene odredaba **čl. 3 st. 2 i st. 3** ZZKFU takođe prepoznaju i dozvole ta dva izuzetka (pod uslovom da je prva obrađena dilema uopšte izuzetak). U suprotnom, ako bi se zauzeo stav da nakon stupanja na snagu ZZKFU nije dozvoljeno zaključiti ugovor o osiguranju na daljinu uplatom premije osiguranja shodno odredbi čl. 903 ZOO, došli bismo u situaciju da bi ova odredba ostala bez ikakve upotrebine vrednosti, potpuno nefunkcionalna. Ovo zbog toga što je ta odredba (čl. 903 ZOO) pre pojave masovnih (i elektronskih) sredstva komunikacije na daljinu služila kao način zaključenja ugovora o osiguranju u situacijama kada osiguravač i ugovarač osiguranja nisu u neposrednom kontaktu, već za komunikaciju koriste tradicionalna sredstva komunikacije na daljinu (poštu, telefaks ili telefon), što je takve ugovore nesumnjivo činilo ugovorima o osiguranju na daljinu, a to bi prema ovom tumačenju sada bilo nemoguće. Uveren sam da intencija zakonodavca prilikom usvajanja ZZKFU nije bila da onemogući tradicionalne načine zaključenja ugovora o osiguranju na daljinu koji su postojali decenijama.

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<sup>33</sup> U tom smislu, videti: P. Šulejić, str. 190; N. Petrović Tomić, str. 302.

<sup>34</sup> Postojanje izuzetaka od pisane forme ugovora o osiguranju, pogotovo ovog trećeg izuzetka prema odredbama čl. 901 st. 2 i 3 ZOO navela je određene autore da zastupaju stav o neformalnom karakteru ugovora o osiguranju u našem pravu. Videti: Vladimir Kapor, Slavko Carić, *Ugovori robnog prometa*, Deveto izdanje, Novi Sad, 1996, str. 312–313.

Prema tome, čini se da uplata premije osiguranja kao način zaključenja ugovora o osiguranju na daljinu nije u suprotnosti sa odredbama ZZKFU. Pritom je veoma važno imati u vidu da odredba čl. 903 ZOO jeste izuzetak u odnosu na opšte pravilo o pisanoj formi ugovora iz čl. 901 ZOO, te bi trebalo nastojati da se, barem dok se regulativa ugovornog prava osiguranja ne promeni,<sup>35</sup> upotreba uplate premije osiguranja kao načina zaključenja ugovora o osiguranju na daljinu koristi samo u slučajevima u kojima to nalaže životna situacija, potreba osiguranika ili priroda sredstva komunikacije na daljinu. Ovo stoga što uvažavanje raznih životnih situacija i jeste razlog zbog kojeg se odredba čl. 903 našla u tekstu ZOO, pa je tako treba i primenjivati. Takođe, ZOO uvek dozvoljava izuzetke ukoliko je to u nesumnjivom interesu osiguranika, pa nema razloga da tako ne bude i sa upotrebnom uplate premije osiguranja kao načina zaključenja ugovora na daljinu. Na kraju, i ZZKFU u nizu svojih odredaba vodi računa o prirodi sredstva komunikacije na daljinu koje se koristi za zaključenje ugovora na daljinu. Primenom sva tri navedena kriterijuma, čini se očiglednim zaključak da ništa nije prirodnije, razumnije ali i zakonitije nego koristiti uplatu premije osiguranja kao način zaključenja ugovora o osiguranju na daljinu kada se kao sredstvo komunikacije na daljinu koristi mobilna aplikacija ili internet prezentacija.

#### **IV. Umesto zaključka – odnos uplate premije osiguranja i dvostrukе autentifikacije kao načina zaključenja ugovora na daljinu putem mobilne aplikacije i internet prezentacije**

Sada kada smo rešili ove dve dileme, ostaje da vidimo kakav je odnos ova dva načina zaključenja ugovora na daljinu kada se koriste sredstva komunikacije na daljinu – mobilna aplikacija i internet prezentacija. U kojoj meri ta dva načina zaključenja ugovora konkurišu jedan drugom, a u kojoj se nadopunjaju? Iako možda na prvi pogled deluje da su jedan drugom konkurenca odnosno da imaju jednak značaj i da se primenjuju kao način zaključenja ugovora o osiguranju na daljinu u istim činjeničnim situacijama, čini se da to baš i nije tako. Naime, izgleda da u određivanju odnosa ova dva načina zaključenja ugovora treba poći od interesa kojima služe. Podimo od toga da se osnovna razlika između ova dva načina zaključenja ugovora ogleda u momentu plaćanja premije osiguranja. U slučaju zaključenja ugovora uplatom premije osiguranja, očigledno je da se premija u celosti plaća u momentu

<sup>35</sup> Prednacrt građanskog zakonika Srbije (objavljen 29. 5. 2015) ide upravo u tom pravcu i uvodi neformalni karakter ugovora o osiguranju, što je inače u skladu s rešenjima većine država, gde se ugovor o osiguranju smatra zaključenim kada se postigne saglasnost o bitnim elementima ugovora. Više o tome: N. Petrović Tomić, str. 301. O razlozima za uvođenje neformalnog karaktera ugovora o osiguranju u naše pravo i protiv njega, videti: Slobodan Ilijić, „Način zaključenja ugovora o osiguranju u Prednacrtu građanskog zakonika Republike Srbije“, *Pravo i privreda*, 7-9/2017, str. 401-412.

zaključenja ugovora. Iz ugla osiguravača, to je povoljna okolnost jer ne mora da vodi računa o riziku da premija osiguranja neće biti plaćena, dok iz ugla ugovarača osiguranja nekada može biti povoljna okolnost (ako je iznos premije osiguranja umereno nizak i ukoliko time isključuje rizik da ostane bez pokrića zbog neplaćanja premije osiguranja, a potrebno mu je relativno hitno pokriće), a može biti i nepovoljna (ako je iznos premije osiguranja visok, pa mu plaćanje premije osiguranja u celosti u trenutku zaključenja ugovora predstavlja finansijski teret, ili ako, s druge strane, nema potrebu za hitnim pokrićem pa je spremniji na preuzimanje rizika od eventualnog budućeg neredovnog plaćanja premije i posledica koje to može da donese). U slučaju zaključenja ugovora upotrebom dvostrukе autentifikacije kao načina zaključenja ugovora o osiguranju, premija osiguranja plaća se nakon zaključenja ugovora. Iz ugla osiguravača, to može biti povoljna okolnost (kada zbog visine premije osiguranja svesno preuzima rizik od toga da premija osiguranja ne bude plaćena zarad činjenja dostupnijim usluge osiguranja ugovaračima osiguranja i osiguranicima), **a može biti i nepovoljna (ako do ostvarenja tog rizika zaista i dođe<sup>36</sup>)**. Isto tako, iz ugla ugovarača osiguranja, to može biti povoljna okolnost (u slučaju kada zbog visine premije osiguranja lakše dođe do pokrića, jer nema obavezu plaćanja premije osiguranja odmah), a može biti i nepovoljna (kada nakon zaključenja ugovora ipak ostane bez pokrića jer nije redovno plaćao ili nije uopšte plaćao premiju osiguranja).

Prema tome, odgovor na pitanje kada će osiguravač i distributeri koristiti uplatu premije osiguranja, a kada dvostruku autentifikaciju za zaključenje ugovora o osiguranju na daljinu, preko mobilne aplikacije ili internet prezentacije, zavisiće od vrste osiguranja, trajanja osiguranja, visine premije osiguranja, i ostalih specifičnosti koje samo praksa može da nametne. U tom smislu verovatno je da će dvostruka autentifikacija i uplata premije osiguranja u budućnosti prirodnim putem odrediti odnos između sebe i polja primene, i da jedno drugom neće biti konkurenca već dopuna.

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<sup>36</sup> Ovo naročito ako se ima u vidu da dvostruka autentifikacija kao način zaključenja ugovora o osiguranju još uvek nije prošla test sudske prakse. Uzimajući u obzir neka ranija iskustva, kao i druge okolnosti, biće veoma interesantno kako će naši sudovi tumačiti ne samo valjanost ugovora zaključenih na ovaj način, već i kako će ceniti dokaze o zaključenju tj. postojanju ugovora. To je „buduća neizvesna okolnost“ o kojoj bi čitava delatnost osiguranja, uključujući i zakonodavca, trebalo da vodi računa u godinama koje dolaze i da bude spremna na odgovor. Ne samo u smislu promene prakse, već i u smislu izmene propisa, ako to bude bilo potrebno.

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## **LEGAL DILEMMAS REGARDING THE METHODS OF CONCLUDING DISTANCE INSURANCE CONTRACTS – VIA A MOBILE APPLICATION AND A WEBSITE**

**SCIENTIFIC PAPER**

### **Abstract**

In this paper, the author states that there are two dilemmas in practice regarding the conclusion of distance insurance contracts via mobile applications and websites as a remote communication means. The first dilemma refers to the use of a double authentication as a method of concluding distance insurance contracts, while the second one concerns the permissibility of using the insurance premium payment as a method of concluding distance contracts. The author deals with both dilemmas with a functional and systemic interpretation of the provisions of the Law on the Protection of Financial Service Users in Distance Contracts and the Law of Contracts and Torts. The author concludes that a deviation from the written form of a contract is permitted, in the sense that a policyholder's double authentication is sufficient for the conclusion of a contract, and that a qualified electronic signature of the other contracting party is not required when the contract is concluded via a mobile application and a website of an insurer or a distributor. In addition, the author concludes that the insurance premium payment is an adequate method of concluding a distance contract. Finally, the author tries to provide criteria for establishing the relation between concluding a distance contract via a double authentication and the premium payment, noting that these two methods are not mutually exclusive, but complement each other.

**Keywords:** *insurance contract, distance contract, premium payment, double authentication, methods of concluding insurance contracts*

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## I. Methods of Concluding Distance Insurance Contracts

Almost five years ago, the author published a paper in which he dealt with the rights of insurance service users to unilateral termination of distance insurance contracts.<sup>2</sup> In the introduction, in addition to the concept of a distance contract,<sup>3</sup> he addressed the method of concluding distance insurance contracts.<sup>4</sup> He had no dilemma that a distance insurance contract can be concluded in four ways, depending on the distance communication means used for that purpose. Those methods are (i) *signatures of the contracting parties*; (ii) *a qualified electronic signature* when the contract is concluded as an electronic document;<sup>5</sup> (iii) *at least two elements to confirm the user's identity (authentication)* or by using electronic identification schemes of a high reliability level (when the contract is also concluded as an electronic document), with certain limitations regarding the value of such concluded contracts;<sup>6</sup> (iv) *insurance premium payment* when the so-called insurance without a policy is concluded.<sup>7</sup> That was the author's first reaction to the new legal regulation, that is, to the Law on the Protection of Financial Service Users in Distance Contracts (hereinafter referred to as the LPFSUDC), which came into force less than a year before writing that paper.

However, five years after the publication of that paper and six years after the implementation of the LPFSUDC, the practice<sup>8</sup> gave rise to certain dilemmas regarding the methods of concluding distance insurance contracts. Therefore, the author's intention is to try to answer those dilemmas with this paper.

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<sup>2</sup> Nenad Grujić, „Pravo korisnika usluge osiguranja na jednostrani raskid ugovora o osiguranju zaključenog na daljinu“, *Pravo i privreda*, 7-9/2019, pp. 525–538.

<sup>3</sup> For a distance contract see: N. Grujić, pp. 526–527; Katarina Ivančević, „Zaštita korisnika finansijske usluge osiguranja pri zaključenju ugovora na daljinu u Srbiji“, *Evropska revija za pravo osiguranja*, br. 1/2016, p. 12.

<sup>4</sup> Details on distance contracts: Andrej Pak, *Zaključenje i prestanak ugovora o osiguranju*, Novi Sad, 2016, pp. 97–106.

<sup>5</sup> See: Law on the Protection of Financial Service Users in Distance Contracts, *Official Gazette of the RS*, no. 44/2018, article 3 paragraph. 2.

<sup>6</sup> See: Law on the Protection of Financial Service Users in Distance Contracts, article 3 paragraph 3.

<sup>7</sup> In accordance with: Law of Contracts and Torts – LCT, *Official Gazette of the SFRY*, no. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the FRY*, no. 31/93, *Official Gazette of the SMG*, no. 1/2003 – the Constitutional Charter and *Official Gazette of the RS*, no. 18/2020, article 903.

<sup>8</sup> It is interesting that dilemmas arose in practice without legal science and courts providing answers to those dilemmas, nor did they assist in solving them in any other way. It seems to emphasise that our legal science and case law are not realistic in terms of practical needs, with certain exceptions, of course. Similarly in relation to consumer disputes and case law: Marija Karanikić Mirić, „Zakonodavna hiperaktivnost i delotvorna zaštita potrošača“, *Perspektive implementacije evropskih standarda u pravni sistem Srbije*, Knjiga 11 (Stevan Lilić), Beograd, 2021, p. 5.

## **II. The First Dilemma – is a Double Authentication of a Policyholder Sufficient for the Conclusion of a Distance Insurance Contract or is a Qualified Electronic Signature of an Insurer or a Distributor also Required?**

### **1. Practice of Using a Double Authentication as a Method of Concluding Distance Insurance Contracts and Emergence of a Dilemma**

In practice, the first dilemma was about the use of at least two elements to confirm the identity (authentication) of an insurance service user, that is, the use of a double authentication. Namely, practice, i.e. insurers and distributors of insurance services<sup>9</sup> have shyly, in the last few years, started using a double authentication as a method of concluding distance insurance contracts. This method is used mainly when an e-mail, a mobile application or a website of an insurer or a distributor of insurance services is used as a means of communication for concluding an insurance distance contract. Those pioneering endeavors of insurers and distributors opened the question of whether it is sufficient that only one party, a policyholder, expresses own will to conclude the contract by using a double authentication or it is necessary for an insurer or a distributor to use a qualified electronic signature to conclude an insurance contract, which is an electronic document. In order to answer that question one should, on one hand, start with the regulatory framework, and on the other, with the means of long-distance communication.

### **2. Regulatory Framework for a Double Authentication as a Method for Concluding Distance Insurance Contracts**

As a reminder, the Law of Contracts and Torts (LCT) prescribes the written form of the insurance contract,<sup>10</sup> and the LPFSUDC by provision of article 3 paragraph 2 prescribes that the written form, when concluding a distance contract as

<sup>9</sup> An insurance service distributor, for the purposes of this paper, means insurance agencies, an insurance agent from article 98 paragraph 2 of the Insurance Law – the IL, *Official Gazette of the RS*, no. 139/2014 and 44/2021, and persons who offer insurance services in accordance with the provisions of article 113 of the IL. This is due to the fact that only those persons out of all insurance service distributors can conclude distance insurance contracts on behalf of and for the account of an insurer by using a distance communication means – a mobile application, an e-mail and a website. About the concept of an insurance service distributor, see: Nataša Petrović Tomić, *Pravo osiguranja, Sistem, Knjiga I, Službeni glasnik*, prvo izdanje, Beograd, 2019, pp. 242–243.

<sup>10</sup> See: LCT, article 901 paragraph 1. "A written form is the most common form of official contracts used today. It requires two conditions – 1) a written text (contents) of a contract, and 2) a handwritten signature on a document." Jakov Radišić, *Obligaciono pravo (opšti deo)*, šesto izdanje, Beograd, 2000, p. 116.

an electronic document, is achieved by using qualified electronic signatures of both contracting parties.<sup>11</sup> Furthermore, the provision of article 3 paragraph 3 of the LPFSUDC expressly stipulates that a double authentication can be used as a method of concluding distance insurance contracts in the electronic form only by a policyholder.<sup>12</sup> A qualified electronic signature remains an obligation for an insurer or a distributor. In other words, if an insurer or a distributor offers to conclude a distance insurance contract, and at the same time gives a policyholder the option to use a double authentication, he is obliged to ensure that the contract is signed by a qualified electronic signature on his part, while the other party, the policyholder, can either use a qualified electronic signature or a double authentication (with certain limitations on the value of the contract thus concluded).

### **3. Practice versus Regulations**

However, this legal provision, although very clear, failed the test of practicality. At least regarding a mobile application and a website as a remote communication means that serve to conclude distance insurance contracts, because with an e-mail the dilemma does not exist, that is, it should not exist. What are the reasons for that? With no intention to provide reasons for this, it seems that this is because neither the provisions of article 3 paragraphs 2 and 3 of the LPFSUDC are compatible with a remote communication means – a mobile application and a website.<sup>13</sup> Undoubtedly, both distance communication means can serve as a method of concluding distance insurance contracts, but none of those two can serve as a means of concluding distance insurance contracts in accordance with the provision of article 3 paragraphs 2 and 3 of the LPFSUDC. This remote communication means implies the availability of the insurance service 24/7 in real time. An average insurance service user who intends to acquire a service via a mobile application or a website expects to be able to do so at any time of the day.<sup>14</sup> More importantly, he expects to obtain a service quickly, efficiently and reliably. However, the provisions of article 3 paragraphs 2 and 3 of the LPFSUDC do not permit this. If every time a policyholder initiates the

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<sup>11</sup> See: Law on the Protection of Financial Service Users in Distance Contracts, article 3 paragraph 2.

<sup>12</sup> The law uses the term *user*.

<sup>13</sup> In case of an e-mail or a similar remote communication means, when the participation of a natural person on the side of an insurer or a distributor is implied, the use of a qualified electronic signature by an insurer or a distributor is not questionable. This obligation clearly follows from the provision of article 3 paragraph 3 of the Law on the Protection of Financial Service Users in Distance Contracts.

<sup>14</sup> Similarly see: EIOPA, EIOPA's Digital Strategy, Support consumers, markets and the supervisory community through digital transformation, 2023, <https://www.eiopa.europa.eu/system/files/2023-10/EIOPA%20Digital%20Strategy.pdf>, accessed: 6.2.2024, p. 3. U: Piotr Tereszkiewicz, Katarzyna Poludniak-Gierz, „Consumer Protection in Polish Insurance Law”, in: Piotr Tereszkiewicz, Mariusz J. Golecki (ed.), *Protecting Financial Consumers in Europe*, Leiden Boston, 2023, pp. 25-45.

process of concluding an insurance contract via a mobile application or a website, an insurer or a distributor must participate in that process in real time and provide a qualified electronic signature, it leads to the economic unprofitability of thus concluded insurance contract.<sup>15</sup> Then an insurer or a distributor must provide a sufficient number of experts authorised to conclude insurance contracts, with qualified electronic signatures and on duty 24/7, including holidays and non-working days. Although theoretically possible, it is not essentially possible because it implies disproportionately high costs that will certainly affect the insurance premium, and indirectly discourage insurance service users<sup>16</sup> from acquiring a service via a remote communication means – a mobile application and a website.<sup>17</sup> This would certainly not be acceptable to insurers, distributors, or policyholders,<sup>18</sup> and more broadly, neither to the legislator, because the intention of the legislator is certainly not to discourage digital channels for insurance service distribution.<sup>19,20</sup> On the contrary, it seems that the legislator has significantly contributed to the development of digital

<sup>15</sup> The legislator announced the reduction of the costs of contracting parties (financial institutions and users) as one of the main positive effects of the adoption of the Law on the Protection of Financial Service Users in Distance Contracts. See: Narodna skupština Republike Srbije, Obrazloženje Predloga zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu, [http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi\\_zakona/1274-18.pdf](http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/1274-18.pdf), accessed: 6.2.2024, p. 16.

<sup>16</sup> That is contrary to article (5) of the preamble of the Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services. The Law on the Protection of Financial Service Users in Distance Contracts was adopted under the direct influence of that directive, in order to fulfill the obligation of harmonising the domestic law with the EU law. See: Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, *Official Gazette of the RS – International Agreements*, no. 83/2008, article 91. The National Assembly of the Republic of Serbia, Explanation of the Proposal of the Law on the Protection of Financial Service Users in Distance Contracts, p. 19.

<sup>17</sup> The option that a qualified electronic signature of a certain person is systematically generated by a software is excluded without the participation of that person in the process of signing the document. Although such solution provides a qualified electronic signature on a document, the fact that it was generated by a computer programme and not by a human takes away from such signature the property of a signature in terms of provisions of article 50 paragraph 2 of the Law on Electronic Document, Electronic Identification and Trust Services in Electronic Business, *Official Gazette of the RS*, no. 94/2017 and 52/2021.

<sup>18</sup> Modern regulatory framework of insurance law is characterized by the protection of the interests of both insurers and policyholders. See: Nataša Petrović Tomić, „O hitnosti usvajanja izmjena regulatornog okvira osiguranja – prijedlog izmjena Zakona o obveznim odnosima Republike Hrvatske“, *Hrvatski časopis za OSIGURANJE*, No. 7, 2022, p. 50.

<sup>19</sup> On importance of digital insurance distribution channels in modern world see: Miro Stipić, Marinko Jurilj, „Pravci razvoja alternativnih prodajnih kanala na hrvatskom tržištu osiguranja“, *Zbornik radova Veleučilišta u Šibeniku*, Vol. 9 No. 3-4, 2015, pp. 95-106. Maja Mihelja Žaja, Ljubica Milanović Glavan, Mateja Grgić, „Digitalna tehnologija kao čimbenik razvoja kanala distribucije u osiguranju“, *Hrvatski časopis za OSIGURANJE*, No. 3, 2020, pp. 199–202.

<sup>20</sup> Moreover, Proposal of the LPFSUDC was submitted in order to improve the use of information and communication technologies in financial services. See: The National Assembly of the Republic of Serbia, Explanation of the Proposal of the Law on the Protection of Financial Service Users in Distance Contracts, p. 15.

insurance distribution channels in the last ten years by amending and supplementing the regulations.<sup>21</sup>

Therefore, the consistent application of the provision of article 3 paragraph 3 of the LPFSUDC via a mobile application or a website, at least concerning insurance contracts, would have the opposite effect, would be detrimental for users and lead to a significant increase in the price of the insurance product, and probably to dissatisfaction due to the speed, efficiency and reliability of the process itself.<sup>22</sup> This would mean that the provision of article 3 paragraph 3 of the LPFSUDC would not fulfill its function. Since everything is functional in the law, the legislator certainly did not intend to make the provision of article 3 paragraph 3 of the LPFSUDC non-functional. In this sense, it would be appropriate to insert into the equation a functional interpretation of the provision of article 3 paragraph 3 of the LPFSUDC.

#### **4. How to Legally Reconcile the Requirements of Practice and Regulations in Distance Contracts via a Mobile Application and a Website?**

It seems that one potential answer to that dilemma is provided by the provision of article 901 paragraphs 2 and 3 of the Law of Contracts and Torts (LCT).<sup>23</sup> Namely, that provision enables an insurance contract to be concluded with the signature of only one contracting party – a policyholder. Namely, if a policyholder makes a written offer to an insurer, it is binding for eight days during which he has the option to decline the offer,<sup>24</sup> and if he does not decline it, the contract is considered concluded as of the date when the offer arrived.<sup>25</sup> In this sense, the use of a double authentication in accordance with the provision of article 3 paragraph 3 of the LPFSUDC, whose function is to be a substitute for a policyholder's signature, can fulfill its function by replacing a policyholder's signature just not on an insurance policy but on the offer for an insurance policy. It is necessary that insurers and distributors in mobile applications and on websites ensure that a policyholder with a double authentication makes an offer in accordance with the provision of article 901

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<sup>21</sup> For example, according to data obtained from Generali osiguranje Srbija a.d.o. Belgrade, this insurance company concluded around 110,000 insurance contracts in 2023 through digital distribution channels (a mobile application and a website).

<sup>22</sup> The fact that it requires the participation of a natural person, an insurer or a distributor, during conclusion of a contract certainly has a negative effect on the speed, efficiency and reliability of the process. Therefore, a user's experience will not and cannot be in accordance with a user's expectations. When deciding to obtain an insurance product via a mobile application or a website a user most certainly expects a digital experience with all the advantages and benefits, which to a large extent are dictated by the needs of a modern consumer, that is, an insurance service user.

<sup>23</sup> See: LCT, article 901 paragraphs 2 and 3.

<sup>24</sup> More precisely, an insurer can decline the policyholder's offer within eight days, except when a medical examination of the insured is required, in which case that period is 30 days.

<sup>25</sup> More about the method of concluding an insurance contract, according to the provision of article 901 paragraphs 2 and 3 of the LCT see: N. Petrović Tomić, pp. 301–302.

paragraph 2 of the LCT. Having in mind that the provision of article 3 paragraph 1 of the LPFSUDC stipulates a corresponding application of the LCT, there is no obstacle for concluding a distance insurance contract.

Another mechanism for overcoming this problem could be that functional, but also systemic interpretation of the provision of article 3 paragraph 3 of the LPFSUDC. Having in mind that the goal and function of that provision is to provide insurance service users (insurance policyholders) with easier, simpler and faster access to the service, as well as that the provision of article 3 paragraph 1 of the LPFSUDC stipulates a corresponding application of the LCT, it seems that there is room for the application of the provision of article 900 paragraph 2 of the LCT. That provision enables deviation from the written form of a contract if it is in the unquestionable interest of the insured.<sup>26,27</sup> It seems unequivocal that it is in the unquestionable interest of an insured (policyholder) to enable him to conclude a contract in a faster, more efficient and more reliable manner, and at the same time significantly cheaper.<sup>28</sup> Accordingly, deviation from the written form of an insurance contract, in the sense that for the validity of an insurance contract concluded via a mobile application or a website of an insurer or a distributor, only the signature of one contracting party, a policyholder, is sufficient, whereby he signs, i.e. expresses his will to conclude a contract using a double authentication which replaces the signature (in accordance with the provision of article 3 paragraph 3 of the LPFSUDC), seems possible, permitted and justified in accordance with the provision of article 900 paragraph 2 of the LCT.<sup>29</sup> Moreover, it seems reasonable to consider whether such method of concluding an insurance contract would be a deviation from the written form of a contract. The provision of article 72 paragraph 4 of the LCT stipulates that a written form of a contract can be satisfied by declarations of will given "by a means that enables the content and the person giving the declaration to be determined with certainty".<sup>30,31</sup>

<sup>26</sup> See: LCT, article 900 paragraph 2. More about the applicatin and limitations of the provision of article 900 paragraph 2 of the LCT see: Nataša Petrović Tomić, „O ograničenju i umerenoj slobodi ugovaranja u ugovornom pravu osiguranja: fenomen 'pokoravanja' ugovora o osiguranju, *Analji Pravnog Fakulteta u Beogradu*, 1/2020, pp. 113–114.

<sup>27</sup> Deviation from the written form of an insurance contract is possible based on the provision of article 900 paragraph 2 of the LCT see: Predrag Šulejić, *Pravo osiguranja*, Pravni Fakultet Univerziteta u Beogradu, Beograd, 2005, p. 190.

<sup>28</sup> The involvement of the human factor in the process of concluding a distance insurance contract, in accordance with the provision of article 3 paragraph 3 of the LPFSUDC, significantly increases the cost of the conclusion process and has an undesired indirect effect on the insurance premium amount.

<sup>29</sup> Protection of the insured as the main goal of the PFSUDC is complemented by the protective function of the domestic law on insurance contracts. The relation between the consumer law and law on insurance contracts: Nataša Petrović Tomić, *Zaštita potrošača usluge osiguranja*, Pravni Fakultet Univerziteta u Beogradu, Beograd, 2015, p. 76.

<sup>30</sup> See: LCT, article 72 paragraph 4.

<sup>31</sup> More about the satisfaction of the written form of the contract by using a distance communication means: Saša Nikšić, „Pisani oblik ugovora i drugih pravnih poslova“, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 72, No. 1-2, 2022, pp. 311–315.

A mobile application and a website are certainly such methods when used by an insurer or a distributor, because the person giving the declaration of will and the content of that declaration can be undoubtedly and reliably determined, just as a double authentication is to a policyholder.

In this sense, having in mind all of the above, it is clear that distance insurance contracts concluded via a mobile application or a website as a remote communication means, by using only a double authentication by a policyholder as a method of concluding the contract, cannot be revoked due to the provision of article 900 paragraph 2 of the LCT and the provision of article 3 paragraph 1 of the LPFSUDC, but also due to the provision of article 72 paragraph 4 of the LCT.

The third and perhaps the safest way to overcome that problem is that insurers and distributors of insurance products use the payment of insurance premium as a method of concluding a distance insurance contract contract, via a mobile application and a website, that is, they abandon a double authentication as a method of concluding distance contracts. However, it cannot be claimed that this mechanism, regardless of its safety, presents the desired scenario. In that case provisions of article 3 of the LPFSUDC remain non-functional, at least when a mobile application and a website are used as a remote communication means, which is not and should not be the practice. However, if one were to follow that path, a new dilemma unexpectedly opens up.

### **III. The Second Dilemma – is the Insurance Premium Payment a Legitimate Method of Concluding a Distance Insurance Contract?**

In practice, the question arose as to whether the insurance premium payment, as a method of concluding an insurance contract, is stipulated by the provision of article 903 of the LCT, is generally possible as a method of concluding a distance insurance contract after the entry into force of the LPFSUDC, since this law did not mention the insurance premium payment as a method of concluding a distance contract.<sup>32</sup> Accordingly, and having in mind the focus of this paper, the dilemma is whether the insurance premium payment is a possible method of concluding a distance insurance contract if a mobile application and a website of an insurer or a distributor are used as a distance communication means. In order to get an answer to that question, one should first start with the legislation and then the needs of practice.

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<sup>32</sup> Take into account that the Law on the Protection of Financial Service Users in Distance Contracts does not regulate the form of distance contracts, but leaves that to the laws governing financial service contracts. See: Mirjana Radović, „Posebna zaštita korisnika finansijskih usluga kod ugovaranja na daljinu“, *Sloboda pružanja usluga i pravna sigurnost*, Institut za pravne i društvene nauke Pravnog fakulteta Univerziteta u Kragujevcu, 2019, p. 825.

## **1. Insurance Premium Payment was Originally Created Precisely for a Distance Contract Conclusion**

Provision of article 903 of the LCT, which stipulates the insurance premium payment as a method of concluding an insurance contract, originally served for the conclusion of a distance insurance contract. After all, the title of article 903 of the LCT reads *Insurance without a policy*, which only confirms that the legislator's intention was to use this provision when life situations (practice) do not enable fulfillment of the requirements of the written form of the contract, and there is the need for insurance. That function of the provision of article 903 of the LCT should not be disputable.<sup>33</sup>

## **2. Law on the Protection of Financial Service Users in Distance Contracts did not Exempt the Implementation of Article 903 of the LCT**

According to a linguistic interpretation of the provisions of the LPFSUDC, it seems obvious that the corresponding application of the LCT is stipulated (article 3 paragraph 1 of the LPFSUDC). On the other hand, as we said before, although it prescribes the written form of an insurance contract, the LCT still permits three exceptions. One is based on the provision of article 903 of the LCT (the so-called insurance without a policy), and other is based on article 900 paragraph 2 of the LCT (when deviation from the written form of an insurance contract is permitted if it is undoubtedly in the insured's interest), and the third is based on the provision of article 901 paragraphs 2 and 3 of the LCT (conclusion of a contract because an insurer missed the deadline to decline the offer for the conclusion of a contract).<sup>34</sup> This is important because the LPFSUDC insists on applying the provisions of article 3 paragraphs 2 and 3 only if a mandatory written form of an insurance contract is prescribed by the LCT. However, considering that the LCT does not prescribe a mandatory written form of an insurance contract, but it recognizes three exceptions to the mandatory written form, it seems that there is no reason to apply the provisions of article 3 paragraphs 2 and 3 of the LPFSUDC and also recognize and permit those two exceptions (provided that the first addressed dilemma is an exception at all). Otherwise, if the position were taken that after the entry into force of the LPFSUDC, it was prohibited to conclude a distance insurance contract by paying the insurance premium in accordance with the provision of article 903 of the LCT, we would be in a situation where this provision would remain without any useful value,

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<sup>33</sup> In that sense see: P. Šulejić, p. 190; N. Petrović Tomić, p. 302.

<sup>34</sup> Exceptions to the written form of an insurance contract, especially this third exception according to the provisions of article 901 paragraphs 2 and 3 of the LCT led certain authors to advocate the position on the informal nature of insurance contracts in our law. See: Vladimir Kapor, Slavko Carić, *Ugovori robnog prometa, Deveto izdanje*, Novi Sad, 1996, pp. 312–313.

completely non-functional. This provision (article 903 of the LCT) before the mass (and electronic) distance communication means served as a method of concluding an insurance contract when an insurer and a policyholder were not in direct contact, but used traditional distance communication means (mail, fax or telephone), which undoubtedly made such contracts distance insurance contracts, which would now be impossible according to this interpretation. I am convinced that the legislator's intention when adopting the LPFSUDC was not to disable the traditional methods of concluding distance insurance contracts that have existed for decades.

Therefore, it seems that the insurance premium payment as a method of concluding a distance insurance contract is not contrary to the provisions of the LPFSUDC. At the same time, it is important to have in mind that the provision of article 903 of the LCT is an exception to the general rule on the written form of a contract from article 901 of the LCT, and efforts should be made to, at least until the regulation of the law on insurance contracts changes,<sup>35</sup> the insurance premium payment is used as a method of concluding a distance insurance contract only in certain life situations, due to the need of an insured or the nature of the distance communication means. Consideration of various life situations is why the provision of article 903 was entered in the LCT, so it should be applied. In addition, the LCT always permits exceptions if it is undoubtedly in the interest of an insured, so there is no reason not to do so with the insurance premium payment as a method of concluding a distance contract. Finally, the provisions of the LPFSUDC take into account the nature of distance communication means used to conclude distance contracts. Applying all three mentioned criteria, the conclusion seems obvious that nothing is more natural, more reasonable, but also more legal than to use insurance premium payment as a method of concluding a distance insurance contract when a mobile application or a website is used as a distance communication means.

#### **IV. Instead of a Conclusion – the Relation between the Insurance Premium Payment and a Double Authentication as a Method of Concluding a Distance Contract via a Mobile Application and a Website**

Now that we have solved these two dilemmas, it remains to see what the relation is between these two methods of concluding distance contracts via distance

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<sup>35</sup> Preliminary draft of the Civil Code of Serbia (published on May 29, 2015) goes exactly in that direction and introduces the informal character of an insurance contract, which is otherwise in accordance with the decisions of most countries where an insurance contract is considered concluded when agreement is reached on the essential elements. See: N. Petrović Tomić, p. 301. O razlozima za uvođenje neformalnog karaktera ugovora o osiguranju u naše pravo i protiv njega, videti: Slobodan Ilijić, „Način zaključenja ugovora o osiguranju u Prednacrtu građanskog zakonika Republike Srbije“, *Pravo i privreda*, 7-9/2017, pp. 401–412.

communication means – a mobile application and a website. To what extent do these two methods of concluding contracts compete with each other, and to what extent do they complement each other? Although it may seem at first glance that they are competitive, that is, they are equally important and are used as a method of concluding distance insurance contracts in the same factual situations, it seems that this is not exactly the case. Namely, it seems that determining the relation between these two methods of concluding contracts should be based on the interests. Let's start from the fact that the main difference between these two methods of concluding contracts is in the insurance premium payment. If a contract is concluded by paying the insurance premium, it is obvious that the premium is paid in full at the time of concluding the contract. For an insurer, it is a favourable circumstance because it does not have to take into account the risk that the insurance premium will not be paid, while for a policyholder it can sometimes be a favourable circumstance (if the insurance premium is moderately low and excludes the risk of being left without a cover due to non-payment of the insurance premium, and he needs relatively urgent cover), and it can also be unfavourable (if the insurance premium is high, so paying the insurance premium in full at the time of concluding a contract presents a financial burden, or if, on the other hand, there is no need for urgent cover, so he is more willing to take the risk of possible future irregular premium payments and consequences thereof). If a contract is concluded via a double authentication as a method of concluding an insurance contract, the insurance premium is paid after the conclusion. For an insurer it can be a favourable circumstance (due to the insurance premium he consciously assumes the risk that the insurance premium will not be paid for the sake of making the insurance service more accessible to policyholders and insureds), and it can also be unfavourable (in case of occurrence<sup>36</sup>). Likewise, for a policyholder it can be a favourable circumstance (due to the insurance premium it is easier to obtain cover because there is no obligation to pay the insurance premium immediately), and it can also be unfavourable (after concluding a contract he loses a cover because he did not pay regularly or did not pay the insurance premium at all).

Therefore, the answer to the question when will insurers and distributors use insurance premium payment or a double authentication for concluding a distance insurance contract via a mobile application or a website depends on the type of insurance, the insurance period, the insurance premium, and other specifics which only practice can impose. In this sense, it is likely that a double authentication and

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<sup>36</sup> Double authentication as a method of concluding an insurance contract has not yet passed the test of case law. Taking into account some previous experiences and other circumstances, it will be interesting to see how our courts will interpret not only the validity of contracts thus concluded, but also how they will value evidence of the conclusion, i.e. the existence of a contract. It is a future uncertainty that the entire insurance sector, including the legislator, should be aware of in the future and be prepared to react. Not only in terms of changing practice, but also in terms of changing regulations, if necessary.

an insurance premium payment will naturally determine their relation in future, and that they will not be a competition but complement each other.

*Translated by: Jelena Rajković*

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# **DIREKTNO OBRAĆANJE TREĆEG OŠTEĆENOG LICA OSIGURAVAČU I/ILI DIREKTNA TUŽBA – KORAK KA ODRŽIVOM OSIGURANJU OD ODGOVORNOSTI –**

## **PREGLEDNI RAD**

### **Apstrakt**

Cilj rada je detaljna analiza načina na koji oštećeno lice može da ostvari svoje pravo na naknadu štete u osiguranju od odgovornosti vlasnika motornih vozila. U radu je obuhvaćena procedura naknade štete u mirnom (vansudskom) postupku, kao i u sudskom postupku. Cilj rada je analiziranje procedure, prava i obaveza oštećenog lica i osiguravača u postupku naknade štete u osiguranju od odgovornosti vlasnika motornih vozila. Ustanovljenom procedurom naknade štete dolazi se do zaključka da naš zakonodavac pokazuje nastojanje ka smanjenju broja tužbi za naknadu štete uvođenjem obaveze oštećenog lica da se osiguravaču pre svega obrati u mirnom (vansudskom) postupku podnošenjem odštetnog zahteva.

**Ključne reči:** direktna tužba, zahtev, naknada štete, postupak.

### **I. Uvod**

Priznanje prava trećem oštećenom licu da se direktnom tužbom obrati osiguravaču nakon nastanka osiguranog slučaja, kao i zakonsko regulisanje odnosa „treće lice – osiguravač“, tekovina je modernog osiguranja od građanske

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odgovornosti.<sup>2</sup> U početnoj fazi razvoja te specifične vrste osiguranja oštećeno lice nije imalo pravo da se direktno obrati osiguravaču. To pravilo je bilo posledica primene načela relativnog dejstva ugovora. Oštećeni, budući da nije u ugovornom odnosu s osiguravačem, nije imao pravni osnov da od njega potražuje naknadu štete. Tek tokom dvadesetog veka, kako je osiguranje od građanske odgovornosti dobijalo na značaju kao instrument zaštite oštećenih lica, to pravilo je napušteno. Iako nije ugovorna strana ugovora o osiguranju od građanske odgovornosti, niti ima položaj korisnika osiguranja, oštećenom je na osnovu zakona priznato pravo na direktnu tužbu.<sup>3</sup> Oštećeni time dobija dva dužnika. Takođe, zaključenje ugovora o osiguranju od odgovornosti ne utiče na prirodu zahteva protiv štetnika. On odgovara prema oštećenom po pravilima odgovornosti za štetu, dok osiguravač odgovara prema odredbama ugovora o osiguranju, što znači da njegova odgovornost može biti uža od odgovornosti njegovog osiguranika, u ovom slučaju štetnika.<sup>4</sup>

Direktna tužba predstavlja veliko dostignuće modernog osiguranja od odgovornosti, kao i ključnu tačku vezivanja ove vrste osiguranja sa institutom naknade štete, te je gotovo svuda u svetu prihvaćena u osiguranju od odgovornosti vlasnika motornih vozila.<sup>5</sup> Jedna od glavnih karakteristika osiguranja od odgovornosti jeste pravo oštećenog lica na direktno obraćanje osiguravaču za naknadu štete. Ako osiguravač ne isplati štetu, u potpunosti ili delimično, oštećeno lice može iskoristiti svoje pravo na podnošenje direktne tužbe protiv osiguravača. Direktnom tužbom na strani tuženih mogu biti obuhvaćeni osiguravač i osiguranik ili samo osiguravač, što se u praksi najčešće i dešava.

Osnovna korist od direktne tužbe ogleda se u ubrzanju i pojednostavljenju procedure obeštećenja. Oštećenom se omogućava da se na efikasniji način obeštet, od solventnijeg dužnika.<sup>6</sup> Takođe, uvođenjem prava na direktну tužbu, postiže se i veći stepen sigurnosti naplate potraživanja naknade štete. Efikasnim delovanjem osiguranja od odgovornosti omogućava se primena pravila o građanskoj odgovornosti. Iz tih razloga, pravo na neposredan zahtev protiv osiguravača danas postoji u svim državama u oblasti obaveznog osiguranja od odgovornosti vlasnika motornih vozila, a u našoj državi u svim vrstama osiguranja od odgovornosti. Odredba koja reguliše podnošenje direktne tužbe definiše to pravo kao pravo koje proizlazi iz same vrste osiguranja, ali i kao sopstveno pravo oštećenog lica.

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<sup>2</sup> Marija Karanikić Mirić, *Objektivna odgovornost za štetu*, Pravni fakultet u Beogradu 2021.

<sup>3</sup> Ivica Jankovec, *Obavezno osiguranje za štete od motornih vozila*, Savremena administracija, Beograd, 1977, str. 7.

<sup>4</sup> Mihajlo Konstantinović, „Odnos između prava na naknadu štete i prava na osiguranu sumu”, *Anal Pravnog fakulteta u Beogradu* br. 3–4, 1982, str. 496–505.

<sup>5</sup> Vladimir Čolović, Ana Opačić, *Direktna tužba kod osiguranja od odgovornosti*, Institut za uporedno pravo, *Pravna riječ* 2015, str. 142–143.

<sup>6</sup> Nataša Petrović Tomić, *Pravo osiguranja-sistem*, 2019, Beograd, Službeni glasnik, str. 576.

Zakon o obligacionim odnosima definiše da oštećeno lice kod osiguranja od odgovornosti osiguravajućem društvu može neposredno podneti zahtev za naknadu štete koju mu je načinio osiguranik, ali do sume osiguranja koja je određena ugovorom, odnosno, najviše do iznosa osiguravačeve obaveze. Lice koje je pretrpelo štetu ima sopstveno pravo na naknadu štete iz osiguranja, tako da svaka kasnija promena koja se tiče prava osiguranika prema osiguravaču nije od značaja za pravo lica koje je pretrpelo štetu, to jest oštećenog lica.<sup>7</sup> Oštećeno lice to pravo ima od trenutka kada se dogodio osigurani slučaj. Prema zakonu, osiguravač i osiguranik su solidarni dužnici prema trećem licu.<sup>8</sup>

## **II. Sličnosti i razlike direktnog (odštetnog) zahteva i direktne tužbe oštećenog lica**

Bez obzira na predmet osiguranja, kod osiguranja od odgovornosti, oštećenom licu pripada pravo na direktno obraćanje osiguravaču za naknadu štete.<sup>9</sup> Treba praviti razliku između direktnog zahteva i direktne tužbe. Pod direktnim zahtevom podrazumeva se odštetni zahtev koji oštećeno lice može direktno uputiti osiguravaču u mirnom postupku kako bi izbegli sudski postupak i predstavlja primarni korak kojim oštećeni zahteva naknadu pretrpljene štete. Direktnim zahtevom oštećeno lice obrazlaže način nastanka štete, kao i visinu pretrpljene štete, te potražuje odgovarajuću naknadu od osiguravača.<sup>10</sup>

Direktna tužba je sredstvo kojim se oštećeni može koristiti ako osiguravajuće društvo njegov odštetni zahtev odbije ili delimično usvoji, i tom prilikom oštećeni će direktnom tužbom potraživati razliku traženog iznosa od iznosa koji mu je osiguravajuće društvo isplatilo. Sličnost direktnog zahteva i direktne tužbe ogleda se u tome što je i u jednom i u drugom postupku cilj oštećenog naknada štete. To pravo oštećeni može ostvariti prema osiguraniku ili osiguravaču, a prema kome će ga ostvariti, odlučuje oštećeni.<sup>11</sup>

Direktnu tužbu oštećeni može podneti protiv osiguravača ili i osiguranika, u kom slučaju osiguravač i osiguranik predstavljaju solidarne dužnike, tj. takvom direktnom tužbom oštećeni traži da sud obaveže tužene (osiguravača i osiguranika) da solidarno isplate iznos naknade pretrpljene štete.

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<sup>7</sup> Nataša Petrović Tomić, *Osiguranje od odgovornosti direktora i članova upravnog odbora akcionarskog društva*, Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo i informisanje, 2011, str. 109–119.

<sup>8</sup> Zakon o obligacionim odnosima *Službeni glasnik RS*, br. 18/2020, čl. 941. st. 1.

<sup>9</sup> Vitomir Boić, „Osiguranik kao umešać“, *Zbornik 17. savjetovanja o obradi i likvidaciji automobilskih šteta*, Opatija 2009, str. 93–99.

<sup>10</sup> Predrag Šulejić, *Pravo osiguranja*, Službeni list SFRJ, 1980, str. 410.

<sup>11</sup> Zakonom može biti propisano prethodno mirno obraćanje oštećenog osiguravaču putem odštetnog zahteva. Našim zakonom o obaveznom osiguranju u saobraćaju to je učinjeno.

Tumačenjem pravne prirode tužbenog zahteva koji se ostvaruje direktnom tužbom dolazi se do zaključka da ona ne proističe iz ugovora o osiguranju, već iz deliktne odgovornosti. Međutim, o direktnoj tužbi i pravu trećeg oštećenog lica ne bismo mogli govoriti bez zaključenog ugovora, iako u pojedinim slučajevima oštećeno lice može nadoknaditi štetu i bez postojanja ugovora. Naime, osnov postojanja osiguranja od odgovornosti upravo je u mogućnosti oštećenog lica da podnese neposredan zahtev za štetu (*actio directa*), uključujući i procesno ovlašćenje za podnošenje direktne tužbe, odnosno mogućnost da pokrene parnicu protiv osiguravača. Time se ostvaruje javni interes za sigurnu zakonsku zaštitu trećeg lica i ispunjava svrha ovog osiguranja.<sup>12</sup>

Treća oštećena lica, kao što je navedeno, stoje van konkretnog obligacionopravnog odnosa, ali su ona ipak zaštićena, tako da možemo reći da je pravilno regulisanje i sprovođenje ugovora o osiguranju od odgovornosti važno za sprovođenje sistema osiguranja u jednoj državi. Takođe treba ukazati na specifičnosti koje karakterišu direktну tužbu u sudskom postupku a naročito u drugostepenom postupku po žalbi tuženog. U slučaju da je direktna tužba podneta protiv osiguravača i osiguranika, a žalba osiguravača protiv prvostepene presude bude usvojena, odgovornost osiguranika nije po automatizmu isključena. Naime, postoji mogućnost da osiguranik uprkos usvojenoj žalbi bude odgovoran. U slučaju da bude usvojena žalba osiguranika kojom se on oslobođa odgovornosti, obavezno će i osiguravač biti oslobođen od odgovornosti. Može se zaključiti da će obaveza osiguravača postojati samo kada se utvrdi građanska odgovornost osiguranika.<sup>13</sup> Ako osiguranik nije odgovoran, to jest ako postoji osnov za isključenje iz osiguranja, onda ni osiguravač neće biti obavezan prema trećem licu.

### **III. Pravna priroda direktne tužbe trećeg oštećenog lica u osiguranju od odgovornosti vlasnika motornih vozila**

Postoje različita tumačenja same prirode direktne tužbe, a prema jednom tumačenju, direktna tužba je produkt ugovora o osiguranju. To tumačenje je neprihvatljivo, jer oštećeni nije u ugovornom odnosu sa osiguravačem, ukoliko nije u pitanju osiguranje u korist trećeg lica. Po drugom tumačenju, izvor direktne tužbe je pretrpljena šteta. Dakle, pravna priroda direktne tužbe proističe iz prava na naknadu štete oštećenog koju je prouzrokovao osiguranik.

Osnov spora pokrenutog direktnom tužbom je naknada štete, visina naknade i obaveza osiguravača.<sup>14</sup> U slučaju kada su direktnom tužbom obuhvaćeni

<sup>12</sup> Zakon o obaveznom osiguranju u saobraćaju čl. 24 (Sl. glasnik RS br. 51/2009, 78/2011, 101/2011, 93/2012 i 7/2013-odлуka US).

<sup>13</sup> N. Petrović Tomić (2019), str. 530.

<sup>14</sup> Predrag Četković, Miloš Radovanović, „Veštačka tačka vezivanja za zasnivanje mesne nadležnosti za tužbu protiv osiguravajućeg društva“, Privreda i pravo br. 7-9, 2017, str. 432–446; praksa je iznadrila novi

i osiguravač i osiguranik, oni nisu jedinstveni već obični suparničari. Osiguranik i osiguravač su samostalne stranke u postupku, a u slučaju da jedna stranka propusti neku radnju u postupku, to neće doneti ni štetu ni korist za drugu stranku. Čak i u slučaju priznanja odgovornosti osiguranika za nastalu štetu, osiguravač može da ospori da se dogodio osigurani slučaj.<sup>15</sup>

Kod osiguranja od odgovornosti vlasnika motornih vozila utvrđuje se zabrana prigovora oštećenom licu, kad ono podnese zahtev za naknadu štete osiguravajućem društvu. Radi se o prigovorima koje osiguravajuće društvo ne bi moglo isticati osiguraniku zbog nepridržavanja zakona ili ugovora.

Važno pitanje koje se odnosi na direktну tužbu i koje definiše odnos osiguravača i trećeg lica jeste pitanje zastarelosti potraživanja. U odnosu između trećeg lica i osiguravača, postavlja se pitanje da li će se primeniti opšta pravila o zastarelosti prava na direktnu tužbu ili pravila o zastarelosti koja su određena u propisima o osiguranju. Veliki problem predstavljaju nejednaki rokovi zastarelosti, koji mogu dovesti do toga da direktna tužba oštećenog zastari pre negoli njegova tužba prema osiguraniku koji je odgovoran za pretrpljenu štetu. Da bi se taj problem rešio, Zakon o obligacionim odnosima propisuje isti rok zastarelosti za direktan zahtev oštećenog lica prema osiguravaču i za njegov zahtev prema osiguraniku koji je odgovoran za pretrpljenu štetu.

#### **IV. Pravo na naknadu štete i podnošenje direktne tužbe i u slučaju nepostojanja ugovora o osiguranju**

Karakteristična za osiguranje od odgovornosti vlasnika motornih vozila jeste mogućnost oštećenog lica da nadoknadi štetu nastalu u osiguranom slučaju i kada ne postoji ugovor o osiguranju od odgovornosti vlasnika motornih vozila. Zakonom o obaveznom osiguranju u saobraćaju propisana je mogućnost oštećenog lica da zahteva naknadu štete od Garantnog fonda.<sup>16</sup>

Članom 73. i 74. Zakona o obaveznom osiguranju u saobraćaju navedeno je da je Garantni fond pravno lice čija je nadležnost ekomska zaštita putnika u javnom prevozu i oštećenih lica u slučaju kada je šteta naneta od strane vozila koje

osnov mesne nadležnosti u sporovima iz osiguranja od odgovornosti vlasnika motornog vozila koji se odnose na naknadu nematerijalne štete. To je mesto gde je oštećeno lice platilo advokatu naknadu za sastavljanje vansudskog odštetnog zahteva. Ideja je da se na osnovu poznavanja neujednačene sudske prakse u pogledu visine naknade za nematerijalnu štetu obezbedi mesna nadležnost suda za koji se prepostavlja da će biti darežljiviji.

<sup>15</sup> Osiguravač snosi odgovornost za štetu prouzrokovanoj upotrebom motornog vozila samo u slučaju kada se utvrdi građanskopravna odgovornost njegovog osiguranika.

<sup>16</sup> Marijan Ćuković, *Međunarodna karta osiguranja motornog vozila*, drugo izmenjeno i dopunjeno izdanje, Zagreb, Croatia osiguranje, 1990, str. 16.

nije osigurano ili je nepoznato, kao i za štetu za čiju je naknadu odgovorno osiguravajuće društvo nad kojim je pokrenut stečajni postupak.<sup>17</sup>

Osnovna funkcija Garantnog fonda je da nadoknadi štetu nastalu usled saobraćajne nezgode koju je prouzrokovalo neosigurano vozilo.<sup>18</sup> Šteta se nadoknađuje pod istim uslovima i u istom obimu kao da je na dan saobraćajne nezgode bio zaključen ugovor o osiguranju vlasnika motornih vozila. Zakon o obaveznom osiguranju u saobraćaju takođe definiše mogućnost regresnog potraživanja Garantnog fonda prema vlasniku vozila koji je prouzrokovao štetu, za iznos isplaćene naknade, zakonsku zateznu kamatu od dana isplate jer se smatra da je tada nastala šteta po Garantni fond, kao i troškove postupka. Potpuna zakonska zaštita koju ima oštećeno lice ogleda se i u tome što će mu Garantni fond nadoknaditi štetu čak i u slučaju da je vozilo koje je štetu prouzrokovalo nepoznato. Međutim, Zakon o obaveznom osiguranju u saobraćaju navodi da će u slučaju da je štetu prouzrokovalo nepoznato vozilo, štetu oštećenom licu Garantni fond isplatići samo onda kada je usled saobraćajne nezgode nastupila smrt, telesna povreda ili narušavanje zdravlja.

Naime, u svim slučajevima u kojima je došlo do smrti, telesnih povreda ili narušavanje zdravlja, za koju je odgovorno nepoznato vozilo može doći i do materijalne štete, međutim zakon oštećeno lice ovde štiti ograničeno.<sup>19</sup> Oštećeni nema pravo na naknadu materijalne štete. Na kraju, zakon reguliše slučaj kada je za štetu odgovorno vozilo koje je osigurano od strane društva za osiguranje protiv kojeg je pokrenut stečajni postupak.<sup>20</sup> Naime štetu nadoknađuje odmah Garantni fond, koji nakon toga dobija svojstvo poverioca u stečajnom postupku protiv osiguravajućeg društva za iznos koji je isplatio oštećenom licu.<sup>21</sup> Garantni fond postaje nosilac prava oštećenog lica prema osiguravaču, to jest prema stečajnoj masi. Sve do okončanja stečajnog postupka protiv osiguravajućeg društva, Garantni fond može prijaviti svoje potraživanje.<sup>22</sup>

## V. Zaključak

Imajući u vidu napred navedeno, dolazimo do zaključka da je osiguranjem od odgovornosti vlasnika motornih vozila položaj trećeg oštećenog lica dosta

<sup>17</sup> N. Petrović Tomić (2019), str. 535.

<sup>18</sup> Razlika u računanju roka zastarelosti postoji kod osiguranja od odgovornosti u slučaju regresnog potraživanja osiguravača prema osiguraniku, po zakonu a i po stavu sudske prakse neophodno je dokazati kada je osiguranik saznao za regresno potraživanje osiguravača.

<sup>19</sup> ZOOS čl. 92. st. 2.

<sup>20</sup> Naknada štete prouzrokovane upotrebom nepoznatog motornog vozila ZOOS član 92 stav 1: „Šteta zbog smrti, povrede tela ili narušavanja zdravlja prouzrokovana upotrebom nepoznatog motornog vozila, vazduhoplova i čamca naknađuje se do iznosa na koji je ovim zakonom ograničena obaveza društva za osiguranje za štetu prouzrokovana upotrebom tih prevoznih sredstava, na dan nastanka štetnog događaja.“

<sup>21</sup> V. Čolović, A. Opačić, str. 154

<sup>22</sup> ZOOS čl. 74, 75.

povoljniji nego da tog osiguranja nema. Stremljenje regulatornog okvira svakako je da oštećenog usmerava da se pre pokretanja sudskog postupka obrati direktno osiguravaču odštetnim zahtevom, što je u skladu s principom ekonomičnosti i održivosti osiguranja od odgovornosti vlasnika motornih vozila. Putem podnošenja odštetnog zahteva od strane trećeg oštećenog lica dolazi se i do poboljšanja odnosa saradnje između osiguravača i oštećenog lica, kao i do efikasnijeg rešavanja problema koji nastaju na svakodnevnom nivou u saobraćaju.

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- Zakon o obligacionim odnosima (*Sl. glasnik RS* br. 18/2020).

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## **THIRD-PARTY CLAIMS AND/OR DIRECT-ACTION LAWSUITS AGAINST INSURERS – A STEP TOWARD SUSTAINABLE LIABILITY INSURANCE –**

**REVIEW ARTICLE**

### **Abstract**

This paper aims to provide a detailed analysis of how an injured party can assert their right to compensation in motor vehicle liability insurance. It covers the procedures for compensating damages both in extrajudicial (out-of-court) processes and in judicial proceedings. The goal is to examine the procedures, rights, and obligations of both the injured party and the insurer in the compensation process for motor vehicle liability insurance. The established procedure for compensation indicates that the Serbian legislator leans towards reducing the number of compensation lawsuits by mandating that the injured party first address the insurer in an extrajudicial (out-of-court) process by filing a claim for compensation.

**Keywords:** direct-action lawsuit, claim, claim compensation, proceedings.

### **I. Introduction**

Recognition of the right for a third-party claimant to directly sue the insurer following the occurrence of the insured event, as well as the statutory regulation of the relationship between the “third party - insurer,” is a hallmark of modern civil

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<sup>1</sup> loncarni97@gmail.com, this article stems from a master's thesis defended on November 27, 2023, at the Faculty of Law, University of Belgrade, before a commission consisting of Prof. Nataša Petrović Tomić, PhD and prof. Marija Karanikić Mirić, PhD.

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liability insurance.<sup>2</sup> Initially, in this type of insurance, injured parties could not directly approach the insurer. This stemmed from the “relative effect of contracts” principle. As the injured party was not part of the insurance contract, they lacked legal grounds to claim from the insurer. However, during the 20th century, as liability insurance grew in importance for protecting injured parties, this rule was abandoned. Despite not being a party to the contract nor a beneficiary, the law now recognizes the injured party’s right to direct action.<sup>3</sup> The injured party thereby acquires two debtors. Importantly, obtaining insurance does not alter the nature of the injured party’s claim against the tortfeasor. The tortfeasor remains directly liable to the injured party according to the general rules of liability for damages. However, the insurer’s liability stems from the insurance contract, potentially limiting its scope compared to the tortfeasor’s broader legal responsibility.<sup>4</sup>

The direct-action lawsuit represents a significant advancement in modern liability insurance, serving as a crucial link between this type of insurance and the principle of compensation for damages. This legal tool has earned widespread adoption, becoming nearly universal in motor vehicle liability insurance worldwide.<sup>5</sup> A defining feature of this approach is the injured party’s direct right to claim compensation from the insurer. If the insurer fails to fulfill its obligation, either partially or fully, the injured party can resort to a direct-action lawsuit. This lawsuit can name either both the insurer and the insured party as defendants, or, more commonly, solely the insurer.

The primary benefit of direct action lies in its ability to accelerate and simplify the compensation process. By allowing the injured party to pursue claims against the insurer directly, it offers a more efficient path to compensation and facilitates recovery from a financially sounder entity.<sup>6</sup> Furthermore, it contributes to a higher degree of certainty in securing compensation for damages. By ensuring the effective operation of liability insurance, direct action helps enforce the principles of civil liability. These factors explain why the right to pursue direct claims against insurers is now universally recognized in compulsory motor vehicle liability insurance, and, in Serbia, it even extends to all forms of liability insurance. Importantly, the legal framework governing direct action defines it as a right inherent to the nature of the insurance itself, while also recognizing it as an independent right held by the injured party.

The Serbian Law of Contract and Torts outlines that in liability insurance, an injured party can directly pursue compensation from the insurer for damages caused

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<sup>2</sup> Marija Karanikić Mirić, *Objektivna odgovornost za štetu*, Faculty of Law in Belgrade, 2021.

<sup>3</sup> Ivica Jankovec, *Obavezno osiguranje za štete od motornih vozila*, Savremena administracija, Beograd, 1977, p. 7.

<sup>4</sup> Mihajlo Konstantinovic „Odnos između prava na naknadu štete i prava na osiguranu sumu”, *Annals of the Faculty of Law in Belgrade* no. 3–4, 1982, pp. 496–505.

<sup>5</sup> Vladimir Čolović, Ana Opačić, „Direktna tužba kod osiguranja od odgovornosti”, Institute of Comparative Law, *Pravna riječ* 2015, pp. 142–143.

<sup>6</sup> Nataša Petrović Tomić, *Pravo osiguranja-sistem*, 2019 Beograd, Official Gazette, p. 576.

by the insured party. However, the compensation is limited to the agreed-upon insurance amount specified in the policy or the maximum liability of the insurer, whichever is lower. The injured party has an independent right to insurance compensation, so any later change that affects the insured's rights towards the insurer is irrelevant to the rights of the injured party.<sup>7</sup> The injured party has this right from the moment the insured event occurs. According to the law, the insurer and the insured are jointly and severally liable towards the third party.<sup>8</sup>

## **II. Similarities and Differences between Direct Claims and Direct-Action Lawsuits**

Regardless of the insurance subject matter, in liability insurance, the injured party has the right to directly approach the insurer for compensation.<sup>9</sup> However, it is crucial to distinguish between a direct claim and a direct-action lawsuit. Direct claim refers to a compensation request the injured party submits directly to the insurer out of court. It aims to avoid litigation and serves as the initial step for seeking compensation.. In a direct claim, the injured party explains how the damage occurred, the extent of the loss, and demands the corresponding compensation from the insurer.<sup>10</sup>

A direct-action lawsuit is a legal action an injured party can take if the insurance company refuses their claim or only partially grants it. In this lawsuit, the injured party seeks the difference between the amount they requested and the amount paid by the insurer. Similarities between a direct claim and a direct-action lawsuit lies in the fact that in both cases, the injured party's goal is to receive compensation for their damages. The injured party has the choice to pursue either the insured or the insurer for compensation.<sup>11</sup>

A direct-action lawsuit can be filed against the insurer, the insured, or both. In the case where the lawsuit targets both parties, the insurer and the insured become jointly and severally liable. This means that the injured party, through the lawsuit, is requesting the court to oblige the defendants (insurer and insured) to jointly pay the amount of compensation for the suffered damages.

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<sup>7</sup> Nataša Petrović Tomić, *Osiguranje od odgovornosti direktora i članova upravnog odbora akcionarskog društva*, Faculty of Law of the University of Belgrade, Centre for Publishing and Information, 2011, pp. 109–119.

<sup>8</sup> Law of Contract and Torts Art. 941 paragraph 1. (*Official Gazette RS* no. 18/2020).

<sup>9</sup> Vitor Boić „Osiguranik kao umešač“, Zbornik 17. savjetovanja o obradi i likvidaciji automobilskih šteta, Opatija 2009, 93–99.

<sup>10</sup> Predrag Šulejić, *Pravo osiguranja*, Official Gazette SFRY, 1980, p. 410.

<sup>11</sup> Additionally, the law may require the injured party to first attempt a peaceful resolution with the insurer through a claim for compensation. This is precisely what is mandated by the Serbian Law on Compulsory Traffic Insurance.

Analyzing the legal nature of a direct-action lawsuit reveals that it does not stem from the insurance contract itself, but rather from the tort liability of the insured party. However, the concept of a direct-action lawsuit and the rights of a third-party claimant wouldn't exist without the insurance contract, even though in some cases, the injured party can seek compensation even without a contract. Namely, the fundamental purpose of liability insurance is to allow the injured party to directly pursue compensation for damages (*actio directa*), including the procedural right to file a direct-action lawsuit against the insurer. This mechanism achieves the public interest in secure legal protection for third parties and fulfills the objective of liability insurance itself.<sup>12</sup>

While third-party injured parties stand outside the specific contractual relationship between the insured and the insurer, they are still protected. This highlights the importance of proper regulation and implementation of liability insurance contracts for the overall effectiveness of an insurance system within a country. It's crucial to note specific details regarding direct action lawsuits in court proceedings, particularly at the second-instance level when the defendant appeals. Even if the insurer's appeal against the initial judgment is successful, the insured's liability isn't automatically excluded. Indeed, there is a possibility that despite the insured's appeal being accepted, they may still be held liable. In the event that the insured's appeal, which absolves them of liability, is granted, the insurer will also be released from liability. It can be concluded that the insurer's obligation will exist only when the insured's civil liability is established.<sup>13</sup> If the insured is not liable, that is, if there is a ground for exclusion from insurance coverage, then the insurer will not be obliged towards the third party.

### **III. Legal Nature of a Third-Party Direct-Action Lawsuit in Motor Vehicle Liability Insurance**

There are various interpretations regarding the nature of the direct-action lawsuit, and according to one interpretation, the direct-action lawsuit is a product of the insurance contract. This interpretation is unacceptable because the injured party is not in a contractual relationship with the insurer unless it involves insurance for the benefit of a third party. According to another interpretation, the source of the direct-action lawsuit is the suffered damage. Therefore, the legal nature of the direct-action lawsuit arises from the right to compensation for the damage suffered by the injured party caused by the insured.

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<sup>12</sup> Law on Compulsory Traffic Insurance Art. 24 ( Official Gazette RS no. 51/2009, 78/2011,101/2011, 93/2012 and 7/2013-decision of CC).

<sup>13</sup> N. Petrović Tomić (2019), p. 530.

The basis of a dispute initiated by a direct-action lawsuit is compensation for damages, the amount of compensation, and the insurer's liability.<sup>14</sup> In cases where both the insurer and the insured are named as defendants, they are not considered joint defendants but rather co-litigants. The insured and the insurer are independent parties in the proceedings, and if one party fails to take any action in the proceedings, it will neither benefit nor harm the other party. Even in the case of the insured admitting liability for the damage, the insurer may dispute that an insured event occurred.<sup>15</sup>

In motor vehicle liability insurance, a prohibition of objections to the injured party is established when they submit a claim for compensation to the insurance company. These are objections that the insurance company would not be able to raise against the insured due to non-compliance with the law or the contract.

An important question surrounding direct action lawsuits and the relationship between the insurer and the injured party is the issue of claim expiration. Specifically, the question arises as to whether general expiration rules concerning direct action lawsuits or expiration rules specified in insurance regulations apply in the relationship between the injured party and the insurer. A major concern exists due to potentially different expiration periods. This could lead to a situation where the injured party's direct-action lawsuit against the insurer expires sooner than their lawsuit against the insured party responsible for the damages. To address this issue, the Law of Contract and Torts prescribes the same expiration period for both the injured party's direct claim against the insurer and their claim against the insured party responsible for the damage.

#### **IV. Right to Compensation and Filing a Direct-Action Lawsuit Even in the Absence of an Insurance Contract**

Characteristic of motor vehicle liability insurance is the possibility for the injured party to be compensated for damages incurred in an insured event even when there is no insurance contract for motor vehicle liability. The Law on Compulsory Traffic Insurance provides for the possibility for the injured party to claim compensation from the Guarantee Fund.<sup>16</sup>

<sup>14</sup> Predrag Ćetković, Miloš Radovanović, „Veštačka tačka vezivanja za zasnivanje mesne nadležnosti za tužbu protiv osiguravajućeg društva“, *Privreda i pravo* no. 7-9, 2017, 432–446; practice has given rise to a new basis for jurisdiction in disputes arising from motor vehicle liability insurance related to compensation for non-material damage. This is where the injured party has paid their lawyer a fee for drafting an out-of-court compensation claim. The idea is to secure the jurisdiction of a court based on knowledge of the inconsistent judicial practice regarding the amount of compensation for non-material damage, assuming that the chosen court will be more generous.

<sup>15</sup> The insurer bears liability for damage caused by the use of a motor vehicle only in cases where the civil liability of their insured is established.

<sup>16</sup> Marijan Ćurković, *Međunarodna karta osiguranja motornog vozila*, second revised and expanded edition, Zagreb, Croatia osiguranje, 1990, p. 16.

Article 73 and 74 of the Law on Compulsory Traffic Insurance define the Guarantee Fund as a legal entity responsible for the economic protection of passengers in public transport and injured parties when the damage is caused by a vehicle that is not insured or the responsible vehicle is unknown, as well as when the damage is the responsibility of an insurance company facing bankruptcy proceedings.<sup>17</sup>

The primary function of the Guarantee Fund is to compensate for damages resulting from a traffic accident caused by an uninsured vehicle.<sup>18</sup> Compensation is provided under the same conditions and to the same extent as if an insurance contract for motor vehicle liability had been concluded on the day of the traffic accident. The Law on Compulsory Traffic Insurance also defines the possibility of the Guarantee Fund's recourse claim against the vehicle owner who caused the damage, for the amount of the paid compensation, statutory interest from the date of payment, as the damage is considered to have occurred to the Guarantee Fund at that time, as well as the costs of the proceedings. The complete legal protection available to the injured party is reflected in the fact that the Guarantee Fund will compensate for the damage even in the case where the vehicle causing the damage is unknown. However, the Law on Compulsory Traffic Insurance states that in the event that the damage is caused by an unknown vehicle, the Guarantee Fund will only compensate the injured party if the traffic accident resulted in death, bodily injury, or impairment of health.

In all cases where there has been death, bodily injury, or impairment of health caused by an unknown vehicle, there may also be material damage. However, the law provides limited protection to the injured party in this regard.<sup>19</sup> The injured party is not entitled to compensation for material damage. Furthermore, the law regulates the situation when the damage is caused by a vehicle insured by an insurance company against which bankruptcy proceedings have been initiated.<sup>20</sup> In this case, the Guarantee Fund immediately compensates for the damage and subsequently becomes a creditor in the bankruptcy proceedings against the insurance company for the amount it paid to the injured party.<sup>21</sup> The Guarantee Fund becomes the holder of the injured party's rights against the insurer, or in other words, against the

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<sup>17</sup> N. Petrović Tomić (2019), p. 535.

<sup>18</sup> There is a difference in calculating the statute of limitations for insurance claims in cases where the insurer has a recourse claim against the insured. Both law and judicial practice require proof of when the insured became aware of the insurer's recourse claim.

<sup>19</sup> Law on Compulsory Traffic Insurance Art. 92 paragraph 2.

<sup>20</sup> Compensation for damage caused by the use of an unknown motor vehicle is regulated by Article 92, paragraph 1 of the Law on Compulsory Traffic Insurance: "Damage resulting from death, bodily injury, or impairment of health caused by the use of an unknown motor vehicle, aircraft, or boat shall be compensated up to the amount to which the obligation of the insurance company for damage caused by the use of these means of transport is limited by this law, as of the day of the occurrence of the insured event."

<sup>21</sup> V. Čolović, A. Opačić, p. 154

bankruptcy estate. Until the bankruptcy proceedings against the insurance company are concluded, the Guarantee Fund can assert its claim.<sup>22</sup>

## V. Conclusion

Based on the aforementioned advantages, it is clear that the position of the third-party claimant in motor vehicle liability insurance is much more favorable than if such insurance did not exist. The regulatory framework clearly encourages injured parties to file claims directly with insurers before initiating legal proceedings, which aligns with the principles of efficiency and sustainability of motor vehicle liability insurance. By injured parties filing claims, cooperation between the insurer and the injured party is enhanced, and traffic-related disputes are resolved more efficiently.

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<sup>22</sup> Law on Compulsory Traffic Insurance Art. 74, 75.

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## **IDENTIFIKACIJA I SPREČAVANJE PREVARNOG FINANSIJSKOG IZVEŠTAVANJA**

PREGLEDNI RAD

### **Apstrakt**

Efikasno otkrivanje prevarnog (lažnog) finansijskog izveštavanja zahteva integrativni konceptualni okvir. Ovaj rad predstavlja opšti okvir za proučavanje faktora povezanih s uzrocima nastanka prevarnog finansijskog izveštavanja. Cilj je da se izoštiri naše razmišljanje o sprovođenju istraživanja modaliteta za definisanje okvira za efikasno upravljanje rizikom od nastanka prevarnog finansijskog izveštavanja i da pomogne naučnicima, profesionalnim računovođama, regulatorima i kreatorima politike da bolje razumeju pokrećače prevarnog finansijskog izveštavanja i kontekst u kome ono nastaje. Razmatramo karakteristike kompanija koje se bave prevarnim finansijskim izveštavanjem, kako su identifikovane u literaturi i u istraživanjima povezanim s „trouglom prevare“ i etičkim aspektima. Takođe, bavimo se uticajem profesionalne i zakonske regulative na oblast efikasnog upravljanja rizikom od nastanka prevara. Na kraju, sažimamo prethodna saznanja i iznosimo zaključke i sugestije za oblasti u kojima je potrebno dalje istraživanje.

**Ključne reči:** prevarno finansijsko izveštavanje, profesionalna regulativa, etika, pravni okvir

**JEL klasifikacija:** G22, M41, K20

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## I. Uvod

Učestalost prevare, korupcije i mita nije novost u poslovnom svetu, ali su te radnje postale kompleksnije s pojavom sofisticiranije tehnike. Javljuju se u svakoj vrsti preduzeća, nevezano za vrstu delatnosti kojom se preduzeće bavi, pravnu formu organizovanja, veličinu itd., iako njihov nivo može da varira od jednog do drugog preduzeća.<sup>4</sup> Prevara je i dalje sveprisutna briga računovođa, revizora i stručnjaka za borbu protiv prevare, tako da ova problematika zaslužuje posebnu pažnju akadem-skih krugova, ali i praktičara. Kako je na međunarodnom nivou rasla svest o šteti koju izazivaju finansijske prevare, paralelno s tim intenzivirani su naporci da se ona suzbije i na adekvatan način kontroliše.

Prema *Websterovom rečniku*,<sup>5</sup> reč prevara se načelno definiše kao „čin obmanjivanja ili lažnog predstavljanja“. Dalje, prevara se može sagledati kao vestešina kojom se povređuje pravo ili interes drugog; lukavstvo usmereno sticanju neke neprikladne prednosti; pokušaj sticanja ili sticanje prednosti nad drugim nemoralnim sredstvima, pogotovo obmanom u ugovorima, ili pogodbom i prodajom, ili pak iznošenjem neistine, ili prikrivanjem istine. Kriminolozi se slažu da tri osnovna elementa pokreću prevaru. Prema konceptualnoj teoriji koju je izneo Kresi 1950-ih,<sup>6</sup> tri ključna elementa u pojavama prevare su: prilika, pritisak i racionalizacija. Današnji izvršioci prevara često opravdavaju (racionalizuju) te postupke na različite načine.

Savremeni organizovani finansijski kriminal obuhvata različite aktivnosti ukazujući na njihovu stalnu evoluciju, čime se naglašava potreba za sveobuhvatnim strategijama njihove prevencije i otkrivanja. Uključuju krađu od strane zaposlenih, prevare na platnom spisku, lažne sisteme naplate, krađu od strane menadžmenta, korporativne prevare, prevare u osiguranju, pronevere, mito, bankrot, bezbednosne prevare. U tom spektru, računovodstvena prevara se izdvaja kao najteži oblik manipulacije finansijskim izveštajima. Prevara je ozbiljna briga koja može imati razorne posledice. Prevara je globalni problem koji često izaziva pitanje „Zašto revizori nisu otkrili prevaru?“, nakon što su se dogodile katastrofalne korporativne prevare. Različiti oblici prevare mogu proizlaziti i iz unutrašnjosti kompanije i izvan njenih zidova, a karakteristike prevare često čine da bude nepredvidiva. Za određene osobe, prevara postaje čak i profesija.

Računovodstveni informacioni sistem je ključna informaciona platforma za poslovne organizacije i stoga je bitno da finansijske informacije koje on generiše budu validne.<sup>7</sup> Da bi se razumeo pojam prevare u finansijskim izveštajima, treba

<sup>4</sup> Abdoulaye N'Guilla Sow, Rohaida Basiruddin, Siti Zaleha, Abdul Rasid, Maizaitulaidawati Md Husin, „Understanding fraud in Malaysian SMEs“, *Journal of Financial Crime*, 25/2018, str. 870–881.

<sup>5</sup> Webster's Dictionary, 1828, <https://webstersdictionary1828.com/Dictionary/fraud>, pristupljeno 5. 1. 2024.

<sup>6</sup> Donald Cressey, *Other People's Money*, Montclair, NJ, Patterson Smith, 1953.

<sup>7</sup> Milena Ilić, Svetlana Andelić, „The role of computerized accounting information system in detecting accounting errors and accounting fraud“, *BizInfo (Blace) Journal of Economics, Management and Informatics*, 8/2017, str. 17–30.

biti svestan šta se smatra prevarom i gde se ona u finansijskim izveštajima uklapa u samu definiciju prevare. Ne postoji, međutim, jedinstvena definicija prevare u finansijskim izveštajima. Stručna tela kao npr. Institut internih revizora (Institute of Internal Auditors – IIA) i Udruženje ovlašćenih istražitelja prevara (Association of Certified Fraud Examiners – ACFE) imaju svoje definicije.<sup>8</sup> Međutim, ono što se ističe kao jedinstveno mišljenje jeste da je menadžment uključen u proces prevarnog finansijskog izveštavanja, da je prevara uvek namerna i da nanosi štetu zainteresovanim stranama. Pored toga, finansijska prevara u izveštajima potkopava celokupno finansijsko izveštavanje.

Korporativne računovodstvene prevare obično uključuju kreativne, složene metode koje za cilj imaju precenjivanje prihoda, potcenjivanje troškova, precenjivanje korporativne imovine i/ili nedovoljno prijavljivanje postojećih obaveza. Ilustracije radi, kreativne računovodstvene prakse koje predstavljaju prevaru podležu istragama koje obično pokreće državni nadzor: Američka komisija za hartije od vrednosti (U.S. Securities and Exchange Commission – SEC), Odbor za nadzor računovodstva javnih kompanija (Public Company Accounting Oversight Board – PCAOB, i Ministarstvo pravde (Department of Justice – DOJ).<sup>9</sup>

Rad je organizovan na sledeći način. Nakon uvodnog dela, bavi se razmatranjem odgovornosti različitih grupa (računovođa, revizora i menadžmenta) kada je u pitanju nastanak prevarnog finansijskog izveštavanja. Treće poglavlje obrađuje značaj etike u prevenciji prevara. Profesionalna regulativa i zakonski okvir predmet su razmatranja u četvrtom poglavlju. U petom poglavlju se sagledava uloga računovodstvenog forenzičara u krivičnom pravosuđu i građanskim parnicama. Šesto poglavlje daje kratak osvrt na prevare u osiguranju. Nakon toga slede zaključna razmatranja i daju se odgovarajuće preporuke.

## **II. Odgovornost računovođa, revizora i menadžmenta za prevarno finansijsko izveštavanje**

Nedostatak adekvatnog nadzora i sprovođenje finansijskog izveštavanja može znatno usporiti otkrivanje prevara, ozbiljno narušavajući poverenje investitora u tržišta kapitala i njihovu funkciju nadzora. S druge strane, efikasan nadzor nad revizorskim procesima može umanjiti podsticaje i prilike za računovodstvene prevare<sup>10</sup>.

Na osnovu objavljene PWC ankete (PricewaterhouseCoopers) koja se odnosi na globalni ekonomski kriminal i prevare, dobijeni rezultati pokazuju da je prosečna

<sup>8</sup> Van Wyk, *Fraud risk assessment: a conceptual framework for internal auditors to detect financial statement fraud*, USA, Institute of Research Engineers and Doctors, 2015.

<sup>9</sup> Ibrahim Badawi, „Motives and consequences of fraudulent financial reporting”, in 17th annual convention of the Global Awareness Society International, 2008, May, str. 110–123.

<sup>10</sup> Domenico Campa, Alberto Quagli, Paola Ramassa, „The roles and interplay of enforcers and auditors in the context of accounting fraud: a review of the accounting literature”, *Journal of Accounting Literature*, 2023.

kompanija doživela šest incidenata prevare u poslednja 24 meseca.<sup>11</sup> Važna činjenica je i to da je ovo drugi na listi najvećih prijavljenih nivoa incidenata u poslednjih 20 godina, što zaista zvuči alarmantno. Ta tendencija uglavnom proizlazi iz dinamičnosti poslovnih modela, promenljivih radnih stilova i stalnih promena u tehnologiji. Lica koja se bave prevarama sve više koriste direktnije metode, kako bi nepravedno izvukli korist od klijenata kompanije, što dovodi do finansijskih i reputacionih gubitaka za organizacije u različitim delatnostima. Većinu prevara i dalje otkrivaju spoljni izvori kao npr. policija, anonimni dojavljivači i kupci. Drugi su otkriveni samo slučajno. To postavlja pitanja o metodi koje revizori primenjuju da traže i istraže prevare, i kako da se nose s hiljadama, čak i milionima transakcija, i izaberu nekoliko onih koje mogu biti lažne.<sup>12</sup>

Federalni istražni biro (Federal Bureau of Investigation – FBI) tražio je proširenu saradnju s ovlašćenim javnim računovođama (Certified Public Accountant – CPA) u borbi protiv korporativnih prevara. FBI je uverenja da uloge, nezavisnost i integritet CPA profesionalaca na jedinstven način odgovaraju partnerstvu. Drugim rečima, oni CPA vide kao treću stranu eksperata ove obaveštajne službe koja ima nadležnost nad preko 2.000 kategorija federalnih zločina. Saradnja se realizuje u nekoliko segmenata: (1) rešavanje obima problema, (2) identifikovanje zajedničkih računovodstvenih šema i (3) delotvorni rad pod uticajem SOX 2002 i srodnih pravila i propisa.<sup>13</sup>

Pregledanje finansijskih izveštaja zahteva od računovođe da se raspita kod menadžmenta koji je odgovoran za finansijska i računovodstvena pitanja, kao i od drugih u okviru entiteta, prema potrebi, o postojanju bilo kakve stvarne prevare, sumnje ili navodne prevare. Kada postoje indicije da je došlo do prevare ili da je mogla da se dogodi – čije efekte treba uzeti u obzir prilikom sastavljanja finansijskih izveštaja, od računovođe se traži da to saopšti što je pre moguće odgovarajućem nivou višeg menadžmenta, po mogućnosti na nivou iznad onih koji su umešani u sumnju na prevaru ili onih koji su zaduženi za upravljanje.

Računovođa treba da prema potrebi zatraži od menadžmenta, pored ostalog, i procenu efekata, ako ih ima, na finansijske izveštaje, i da razmotri efekte, ako postoje. Pored toga, važne su procene menadžmenta za računovođe o efektima prevare na zaključak o finansijskim izveštajima i o izveštaju računovođe, kao i da se utvrdi da li računovođe imaju šire komunikacijske odgovornosti sa bilo kojom stranom izvan subjekta. Budući da potencijalni sukobi sa etičkim i pravnim obavezama računovođe

<sup>11</sup> PwC's Global Economic Crime and Fraud Survey 2022: Protecting the perimeter: A new frontier of platform fraud, <https://www.pwc.com/gx/en/services/forensics/economic-crime-survey.html>, pristupljeno 11. 12. 2023.

<sup>12</sup> Md. Abdul Baten, „Conceptual study of fraud and the accounting system”, International Journal of Multidisciplinary Education and Research, 6/2018, str. 1–5.

<sup>13</sup> Norazida Mohamed, Moorison Handley-Schachelor, „Financial statement fraud risk mechanisms and strategies: the case studies of Malaysian commercial companies”, Procedia-Social and Behavioral Sciences, 145/2014, str. 321–329.

u vezi s poverljivošću mogu biti složeni, računovođa se može konsultovati s pravnim savetnikom pre nego što započne bilo kakve razgovore sa stranama izvan subjekta. Ako prevara rezultira materijalno značajnim pogrešnim prikazivanjem u finansijskim izveštajima ili uključuje menadžment na višem nivou, od računovođe se traži da to saopšti direktno onima koji su zaduženi za upravljanje.<sup>14</sup>

Prevarno finansijsko izveštavanje donosi značajne negativne posledice po kompanije, a neke od njih su smanjenje vrednosti akcija i smanjenje poverenja investitora u kompaniju. Sve izraženija potreba za zaštitom kapitala na tržištima i većem uticaju računovodstvene struke u efikasnom upravljanju rizikom od nastanka prevara potencira važnost jačanja kapaciteta forenzičkog računovodstva kroz obrazovni sistem, s jedne strane, i jačanja veština računovodstvenih forenzičara, s druge strane.

Dostavljanje finansijskih izveštaja uređeno je odredbama čl. 44 do 46 Zakona o računovodstvu. Nezavisno od toga koje lice je potpisalo finansijski izveštaj i drugu računovodstvenu dokumentaciju, „za istinito i poštено prikazivanje finansijskog položaja i uspešnosti poslovanja pravnog lica, propisana je kolektivna odgovornost, tj. odgovorni su zakonski zastupnik, organ upravljanja i nadzorni organ pravnog lica u skladu sa zakonom, odnosno preduzetnik, kao i odgovorno lice iz člana 14 Zakona“.<sup>15</sup>

Uprkos sukobu interesa između menadžera i vlasnika, u osnovi mehanizma korporativnog upravljanja leži intencija da se zaštite sve zainteresovane strane. Neusklađenost interesa između vlasnika preduzeća i menadžera postavlja scenu za manipulaciju profitom, tako da će menadžeri verovatno upravljati profitom u svoju korist. Menadžeri mogu da manipulišu finansijskim izveštajima kako bi postigli specifičan računovodstveni cilj<sup>16</sup> ili radi poboljšanja finansijskog izgleda kompanije.<sup>17</sup> Pored toga, bitno je istaći da menadžeri mogu izvršiti malverzacije u finansijskom izveštavanju tako što će zaobići uspostavljene kontrolne procedure, unosom neovlašćenih ili neprikladnih podataka u poslovne knjige, ili vršeći modifikacije nakon zatvaranja perioda (na primer, reklasifikovanje). Neki oblici ponašanja menadžmenta u finansijskom izveštavanju mogu se smatrati neetičkim, ali ne nužno i lažnim (nezakonitim).<sup>18</sup> Stoga, bitno je pažljivo sagledati i oceniti ponašanje menadžmenta u upravljanju zaradom i potencijalnom uvrštenju prevare.

<sup>14</sup> Dave Arman, „A refresher on fraud and the responsibility for its detection“, *Journal of Accountancy*, 2023, September 14, AICPA & CIMA, str. 1.

<sup>15</sup> Redovni godišnji finanjski izveštaj, <https://www.paragraf.rs/baza-znanja/knjigovodstvo/redovni-godišnji-finanjski-izvestaj-2021-apr.html>, pristupljeno 24. 1. 2024.

<sup>16</sup> Michael Ettredge, Susan Scholz, Kevin Smith, Lili Sun, „How do restatements begin? Evidence of earnings management preceding restated financial reports“, *Journal of Business Finance & Accounting*, 37/2010, str. 332–355.

<sup>17</sup> Michael Fung, „Cumulative prospect theory and managerial incentives for fraudulent financial reporting“, *Contemporary Accounting Research*, 32/2015, pp. 55–75.

<sup>18</sup> Lawrence Kalbers, „Fraudulent financial reporting, corporate governance and ethics: 1987-2007“, *Review of Accounting and Finance*, 8/2009, str. 195.

Jednom identifikovani, rizici od prevare moraju se kontinuirano ocenjivati kako bi se razumeo njihov značaj, kao i da bi se razmatrala efikasnost rizika od prevare. Revizija je važna za donošenje ekonomskih odluka.<sup>19</sup> Važnu ulogu u efikasnom upravljanju rizicima od nastanka prevara ima dobro pozicionirana i efikasna interna revizija, koja predstavlja važan deo strukture korporativnog upravljanja u okviru jedne organizacije. Ona može pomoći menadžerima u postupku preuzimanja odgovornosti.<sup>20</sup>

Još 1997. godine, AICPA je objavila standard SAS No. 82: „Razmatranje prevare u reviziji finansijskih izveštaja“ („Consideration of fraud in a financial statement audit“), koji pravi razliku između grešaka i prevare i zahteva od revizora da planiraju i izvrše reviziju radi sticanja razumnog uverenja o tome da li su finansijski izveštaji oslobođeni materijalne pogrešne izjave, bilo da su uzrokovane greškom ili prevarom. Takođe je dao smernice o tome kako revizor treba ovo da realizuje.<sup>21</sup> Potrebno je da se pažljivo posmatraju oblasti i kategorije povećanog rizika od prevare, i predviđen je način kako da revizori komuniciraju o prevari s menadžmentom, komitetom za reviziju i druge stavke.

### **III. Etički aspekti i prevarne radnje**

O etici se može govoriti u kontekstu različitih profesija.<sup>22</sup> Poznato je da se računovođe u svojoj praksi susreću s raznim dilemama. Važnost etike u računovodstvu uveliko je porasla nakon velikih korporativnih skandala koji su ozbiljno poljuljali poverenje u računovodstvenu profesiju. U računovodstvenoj delatnosti, etika se odnosi na skup moralnih principa i pravila ponašanja koje računovođe primenjuju u svojoj praksi. Ti principi obuhvataju ideale poštenja, pravičnosti, objektivnosti i *accountability* u pružanju finansijskih usluga i informacija. Oni igraju ključnu ulogu u usmeravanju računovođa u realizaciji njihovih svakodnevnih aktivnosti, oblikujući njihove profesionalne odluke i postupke.

Etika u računovodstvu može se sagledati kao skup smernica koje su uspostavila različita računovodstvena tela kako bi sprečila zloupotrebu finansijskih informacija. Te smernice obuhvataju poverljivost, integritet i profesionalnu kompetenciju. Poverljivost zahteva da računovođe ne otkrivaju finansijske informacije trećim licima. Integritet podrazumeva da računovođe budu iskrene u svojim finansijskim poslovima, dok profesionalna kompetencija zahteva od njih da budu obrazovani i iskusni.

<sup>19</sup> Marko Milašinović, Snežana Knežević, Aleksandra Mitrović, „The significance of audit and audit opinions in the contemporary environment“, *Revizor*, 97-98/2022, str. 21-31.

<sup>20</sup> Miloš Milošević, Marija Stojiljković, Jelena Raičević, Stefan Milojević, „Obrazovanje i obuka u oblasti strateškog finansijskog menadžmenta i kontrole: u kom pravcu bi trebalo da idemo?“, *Revizor*, 102-103/2023, str. 25-36.

<sup>21</sup> Michael Ramos, Anita Lyons, „Considering fraud in a financial statement audit: practical guidance for applying SAS no. 82“, *Guides, Handbooks and Manuals* (33), University of Mississippi, 1997.

<sup>22</sup> Aleksandra Mitrović, Snežana Knežević, Marko Milašinović, „The importance of ethics in the auditing profession in contemporary business“, *Revizor*, 97-98/2022, str. 73-79.

Etika je od suštinskog značaja u računovodstvu zato što pruža smernice o tome kako postupati s informacijama i koji tip informacija je neophodan. Ona takođe utvrđuje osnovne vrednosti i principe koje računovođe i revizori treba da poštuju. Na kraju, etika predviđa sankcije za prestupnike, što služi kao sredstvo za rešavanje neetičkog ponašanja. Dalje, ako idemo u detalje, značaj etike u računovodstvu izuzetno je velik iz više razloga. Prvo, ona gradi poverenje i kredibilitet među zainteresovanim stranama, kao što su investitori, kreditori i kupci, koji se oslanjaju na poštene prakse za tačno i objektivno finansijsko izveštavanje. Na primer, kada računovođe slede principe poštenja i objektivnosti, osiguravaju da finansijski izveštaji odražavaju pravo finansijsko stanje preduzeća.

Pored toga, etičko ponašanje štiti preduzeća od pravnih posledica. Računovođe koji poštuju principe poverljivosti štite osetljive finansijske informacije od neovlašćenog otkrivanja. Međutim, ignorisanje tih etičkih normi može imati katastrofalne posledice. Na primer, skandal koji je zadesio kompaniju „Enron“ 2001. godine ilustruje kako neetičke računovodstvene prakse mogu dovesti do ozbiljnih problema. Manipulacija finansijskim podacima i obmanjujući revizorski izveštaji stvorili su lažnu sliku profitabilnosti, što je na kraju dovelo do bankrota „Enrona“ i izazvalo ozbiljne gubitke za akcionare.

Literatura je prepoznala vrste organizacionih faktora koji su povezani sa odsustvom prevare. Neki od njih jesu: delotvornost odbora za reviziju, efikasnost interne revizije, etičke politike i ton top menadžment tima.<sup>23</sup> Načelno govoreći, etika se odnosi na principe ponašanja koje pojedinci koriste u donošenju izbora i usmeravanje njihovog ponašanja u situacijama (okolnostima) koje uključuju koncepte ispravnog i pogrešnog, i kao takva disciplina, neodvojiva je od pitanja efikasnog upravljanja rizikom od nastanka prevarnih radnji.

Etika se može posmatrati ovako: „dogovoren standardi o tome što je poželjno i nepoželjno i ispravno i pogrešno ponašanje osobe, grupe ili entiteta.“<sup>24</sup> Lako se etici posvećuje dosta pažnje u javnom diskursu, živimo u vremenu u kojem je neetičko ponašanje ne samo više prihvaćeno, već je i blizu da postane norma. Oni koji imaju moć da donose odluke o investiranju novca drugih ljudi (tj. korporativni menadžeri i investicioni savetnici) mogu manipulisati investitorima kako bi ostvarili finansijsku dobit.

Prevarne aktivnosti se moraju izbegavati zbog uticaja na performanse kompanije. Dakle, način za rešavanje tog pitanja je nadzor nad onima koji su zaduženi za upravljanje, promovisanjem kulture poštovanja i etičke politike koja bi mogla da motiviše pojedince da ne počine prevaru zbog mogućnosti da ih regulatori

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<sup>23</sup> Philip Law, „Corporate governance and no fraud occurrence in organizations: Hong Kong evidence“, *Journal of Business and Industrial Marketing*, 6/2011, str. 501-518.

<sup>24</sup> Robert Cressy, Douglas Cumming, Christine Mallin, „Entrepreneurship, governance and ethics“, *Entrepreneurship, Governance and Ethics*, 2/2010, str. 117–120.

otkriju i kazne.<sup>25</sup> Na primer, poštenje i integritet u izveštavanju o profitu mogu biti poražavajući za menadžere kada se ne ispune očekivanja. „Štimovanje knjiga“ (engl. „Cooking the books“) – koliko god bilo neetično, poboljšava krajnji rezultat (uspešnost firme), barem kratkoročno.<sup>26</sup> Postavlja se pitanje da li će ugrožene firme u teškim vremenima vrednovati opstanak ili etiku? Takođe, važno pitanje je i kakva je uloga korporativnog upravljanja u poštovanju etičkih vrednosti? U tom kontekstu, korporativno upravljanje se može posmatrati preko etičkih vrednosti i pretpostavke koje su u osnovi određenog režima ili kodeksa korporativnog upravljanja, tzv. „etika upravljanja“, i preko načina na koji se od korporacija očekuje ili zahteva da upravljuju sopstvenim etičkim učinkom, tzv. „upravljanje etikom“<sup>27</sup>.

Ističemo da je u okolnostima kada se razvija korporativna kultura naročito važno postaviti etičku osnovu.<sup>28</sup> Najzad, poštovanje poslovne etike savremenih organizacija utiče na kreiranje njihovog poslovnog imidža.<sup>29</sup> Rezultati istraživanja Ćerdić i Knežević<sup>30</sup> pokazuju da kontinuirana obuka zaposlenih u vezi s adekvatnom primenom etičkog kodeksa dovodi do smanjenja mogućnosti nastanka finansijskih prevara u kompanijama. Nalazi Mayhew & Murphy<sup>31</sup> sugerisu da etičko obrazovanje ne dovodi nužno do internalizovanih etičkih vrednosti, ali može uticati na etičko ponašanje.

#### **IV. Profesionalna regulativa i zakonski okvir: dokle se stiglo?**

Regulatorno okruženje u kojem računovođe posluju prilično je složeno. Pred današnjim računovođama nalaze se mnogi izazovi u dinamičnom okruženju. Oblast forenzičkog računovodstva podiže tu složenost na viši nivo, jer su praktičari u ovoj oblasti usmereni na širok spektar oblasti prevara, komercijalnih sporova i analitike.<sup>32</sup>

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<sup>25</sup> Hafiza Aishah Hashim, Zalailah Salleh, Izzati Shuhaimi, Nurul Ain Najwa Ismail, „The risk of financial fraud: a management perspective“, *Journal of Financial Crime*, 27/2020, str. 1143–1159.

<sup>26</sup> April Knill, „The value of country-level perceived ethics to entrepreneurs around the world“, *The European Journal of Finance*, 18/2012, str. 209–237.

<sup>27</sup> G. J. Rossouw, „Business ethics and corporate governance: A global survey“, *Business & Society*, 44/2005, str. 32–39.

<sup>28</sup> Kimberly Henry, Brittany Dodson, Ethical Education and its Effect on Accounting Fraud, Working Paper, Christopher Newport University, 2009.

<sup>29</sup> Milena Sretić, Vuk Mirčetić, Mlađan Maksimović, Dejan Karabašević, „The impact of ethical internal communication on opinion of public menu“, *BizInfo (Blace) Journal of Economics, Management and Informatics*, 10/2019, str. 43–51.

<sup>30</sup> Ivan Mate Ćerdić, Goranka Knežević, „Ethical dilemma: A pathway to fraud or not?“, *The European Journal of Applied Economics*, 20/2023, str. 79–92.

<sup>31</sup> Brian Mayhew, Pamela Murphy, „The impact of ethics education on reporting behavior“, *Journal of Business Ethics*, 86/2009, str. 397–416.

<sup>32</sup> Jeanette Van Akkeren, Sherrena Buckby, Julie-Anne Tarr, „Forensic accounting: Professional regulation of a multi-disciplinary field“, *Australian Business Law Review*, 44/2016, str. 204–215.

Korporativno upravljanje je, pored ostalog, ključni deo reformskih procesa u javnim preduzećima.<sup>33</sup> Za korporativno upravljanje koje će obezbediti održivo poslovanje u dugom roku važne su valjane finansijske informacije. Korporativni finansijski skandali su na kraju izazvali nekoliko velikih korporativnih bankrota. Različite korporativne zainteresovane strane (npr. akcionari, poverioci i dobavljači, zaposleni i radnici, konkurenti, kupci, penzioneri, državni poreski organi, između ostalih) pretrpele su nepovoljne finansijske posledice. To je podstaklo inicijativu za promenu zakonske i profesionalne regulative u raznim zemljama.

Osnovni princip revizije naglašava da je verovatnije da će se finansijski propusti, odnosno pogrešna finansijska prikazivanja pojaviti kada su interne kontrole neefikasne (SAS No. 55, AICPA 1988;<sup>34</sup> SAS No. 78, AICPA 1997;<sup>35</sup> SAS No. 110, AICPA, 2006<sup>36</sup>). Sarbjens-Okslijev zakon (Sarbanes-Oxley Act) usvojen je kao odgovor na očekivani uticaj veze između interne kontrole i valjanosti finansijskog izveštavanja,<sup>37</sup> kao i porasta računovodstvenih grešaka.<sup>38</sup> Taj zakon zapravo predstavlja sveobuhvatan napor za unapređenje valjanosti finansijskog izveštavanja u Sjedinjenim Američkim Državama, koji je proizašao iz ozbiljnih korporativnih računovodstvenih prevara (finansijskih skandala) što su se desile tokom kasnih 1990-ih i ranih 2000-ih.

Rasprostranjenost lažnih finansijskih aktivnosti zajedno s nedostatkom standarda u domenu definisanja odgovornosti revizora u pogledu otkrivanja prevara, podstakli su nastanak organizacije Association of Certified Fraud Examiners – ACFE, u čijoj je nadležnosti dodeljivanje CFE licence.<sup>39</sup> Iako su regulatori i vlasti izdali niz smernica s ciljem postizanja transparentnosti, sprečavanja prevare i unapređenja valjanosti finansijskih izveštaja, slučajevi prevara u organizacijama i dalje beleže porast. Otprilike 47% organizacija prijavilo je slučajeve prevare u poslednje dve godine, što predstavlja drugi na listi najviših nivoa prevara u protekle dve decenije,

<sup>33</sup> Valentina Mirković, Goran Perić, Aleksandar Jokić, „Possibilities for corporate governance in public enterprises in Serbia”, *BizInfo (Blace) Journal of Economics, Management and Informatics*, 1/2010, str. 23–29.

<sup>34</sup> American Institute of Certified Public Accountants (AICPA), *The Auditor's Considerations of Internal Control Structure in the Financial Statement Audit. Statement on Auditing Standard (SAS) No. 55*, New York, NY, AICPA, 1998.

<sup>35</sup> American Institute of Certified Public Accountants (AICPA), *Consideration of Internal Control in a Financial Statement Audit: An Amendment to Statement on Auditing Standards No. 55. Statement on Auditing Standard (SAS) No. 78*, New York, NY, AICPA, 1997.

<sup>36</sup> American Institute of Certified Public Accountants (AICPA), *Performing Audit Procedures in Response to Assessed Risks and Evaluating the Audit Evidence Obtained. Statement on Auditing Standard (SAS) No. 110*, New York, NY, AICPA, 2006.

<sup>37</sup> U.S. House of Representatives, *The Sarbanes-Oxley Act of 2002, Public Law, 107-204 [H. R. 3763]*. Washington, DC: GPO, 2002.

<sup>38</sup> Yiping Zhao, Jean Bedard, Rani Hoitash, „SOX 404, auditor effort, and the prevention of financial report misstatements”, *Auditing: A Journal of Practice & Theory*, 36/2017, str. 151–177.

<sup>39</sup> Zabihollah Rezaee, James Burton, „Forensic accounting education: insights from academicians and certified fraud examiner practitioners”, *Managerial Auditing Journal*, 12/1997, str. 479–489.

uprkos primeni zakona i propisa.<sup>40</sup> Mala preduzeća su rangirana na najvišem mestu po učestalosti prevara iz ACFE-ovog izveštaja u zemlji od 2002. do 2022. sa kombinovanim prosecima koji pokazuju da je učestalost prevara u malim preduzećima na 28% u poređenju sa većim organizacijama na 22–26%.<sup>41</sup>

Jedno od važnih pitanja u efikasnom upravljanju rizikom od nastanka prevarnih radnji jeste i to koje firme treba da dostave finansijske podatke regulatornim agencijama. Poznato je da za mnoge privatne firme širom sveta nije ustanovljena zakonska obaveza da prosleđuju finansijske podatke regulatornim agencijama (npr. Komisija za hartije od vrednosti u Sjedinjenim Državama / Securities Exchange Commission – SEC). Stoga, kada se razmatraju etička pitanja, bitno je pažljivo pratiti firme prema pravnoj formi organizovanja. Primera radi, neke od studija pokazale su da su preduzetnici generalno više etični nego menadžeri javnih preduzeća (public companies).<sup>42,43</sup>

Kada je reč o Srbiji, Zakonom o računovodstvu<sup>44</sup> obuhvaćen je privredni pristup koji je vezan za računovodstvena pitanja tj. finansijske podatke (finansijsko izveštavanje). Prema članu 57., novčanom kaznom od 100.000 do 3.000.000 dinara kazniće se za privredni prestup pravno lice ako: vrši obradu podataka na računaru, a ne obezbedi računovodstveni softver koji omogućava funkcionisanje sistema internih računovodstvenih kontrola i onemogućava brisanje proknjiženih poslovnih promena (član 8 stav 4); ne sastavlja i ne prikazuje finansijske izveštaje u skladu sa ovim zakonom (čl. 23–26.); 18) ne sastavlja finansijske izveštaje u skladu sa ovim zakonom (čl. 29 i 31); ne izvrši reviziju finansijskih izveštaja (član 33). Takođe, za radnje iz stava 1 ovog člana kazniće se za privredni prestup i odgovorno lice u pravnom licu, novčanom kaznom od 20.000 do 150.000 dinara.

Imajući u vidu prošle izmene Krivičnog zakona koje se odnose na poresku utaju, „predviđeno je da se utaja poreza tretira kao krivično delo u slučaju da obveznik izbegava da plati ili obračuna porez u iznosu od milion dinara, a ukoliko je utaja do milion dinara, onda se smatra privrednim prestupom ili prekršajem“.<sup>45</sup> Postavlja se pitanje da li su zaprećene kazne jaka prevencija. Odgovor na to pitanje zahteva opsežno istraživanje na osnovu podataka iz različitih agencija, službi i ustanova.

<sup>40</sup> PwC's Global Economic Crime and Fraud Survey, 2020, <https://www.global-screeningsolutions.com/industries/global-economic-crime-and-fraud-survey-2020>, pristupljeno 11. 12. 2023.

<sup>41</sup> Current fraud statistics, Business Fraud Prevention, Inc. (BFP), <https://businessfraudprevention.org/about-us/>, 2002, pristupljeno 14. 12. 2023.

<sup>42</sup> Elisabeth Teal, Archie Carroll, „Moral reasoning skills: Are entrepreneurs different?“, *Journal of Business Ethics*, 19/1999, str. 229–240.

<sup>43</sup> Branko Bucar, Rober Hisrich, „Ethics of business managers vs. Entrepreneurs“, *Journal of developmental entrepreneurship*, 6/2001, str. 59–83.

<sup>44</sup> Zakon o računovodstvu, *Službeni glasnik RS*, 73/2019 i 44/2021, čl. 57.

<sup>45</sup> Zakon o krivičnom postupku, *Službeni glasnik RS*, br. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

## **V. Uloga računovodstvenog forenzičara u krivičnom pravosuđu i građanskim parnicama**

Upravljujući biznisom, menadžeri su često u situaciji da shvate kolike su potencijalne opasnosti povezane s prevarnim aktivnostima. Međutim, postoje praktični koraci koji se mogu preduzeti radi zaštite sopstvenog poslovanja od finansijskih malverzacija. Uključivanje stručnjaka iz oblasti forenzičkog računovodstva ključno je za otkrivanje eventualnih finansijskih zloupotreba i prevara. Forenzičko računovodstvo kao brana računovodstva bavi se detaljnim istraživanjem i analizom finansijskih informacija radi otkrivanja prevara ili finansijskih manipulacija. Forenzičke računovođe često se angažuju za pripremu za sudske sporove u slučajevima koji uključuju *divorces, embezzlement, fraud, skimming, insurance, nesolventnost, i druge oblike finansijskih prevara.*

Pored tradicionalnih računovodstvenih tehnika, forenzičke računovođe primenjuju raznovrsne vrste alata i softvere za istraživanje i analizu finansijskih podataka. Taj alat obuhvata softvere za analizu podataka, kompjuterski forenzički alat, softvere za rudarenje podataka i prediktivnu analitiku. Rezultat rada forenzičkih računovođa su forenzički izveštaji koji se koriste od strane naručioca forenzičko-računovodstvene analize. U okviru tih izveštaja prikazuju se njihovi nalazi, uključujući prirodu zloupotrebe i prevare, pojedince koji su uključeni i finansijski uticaj. Prevarne radnje potrebno je specifikovati i prema delatnosti u kojoj su nastale. Naime, potrebno je da finansijski forenzičar u dovoljnoj meri poznaje delatnost u kojoj je nastala neka korporativna prevara. Konačno, finansijski forenzičari mogu biti pozvani da pruže ekspertsко svedočenje pred sudom, prezentujući svoje zaključke i objašnjavajući kompleksne finansijske teme kako bi podržali pravni proces. Veliki broj finansijskih forenzičara ima iskustvo *in testifying as expert witnesses* za razne finansijske slučajeve u oblasti bankarstva, osiguranja, poreske problematike, i mnogih drugih.

Poslednjih godina komplikovana priroda moderne prevare pokrenula je rast forenzičkog računovodstva, oblasti koja se često pominje kao istražna. Tri oblasti forenzičkog računovodstva vezuju se za praksu: kao što je već pomenuto, podrška u sudskim sporovima, svedočenje veštaka i nazad, revizija prevare. Forenzičke računovođe danas imaju veoma značajnu ulogu u krivičnom pravosuđu i građanskim parnicama i stoga je važno uspostaviti adekvatnu vezu sa praksom.<sup>46</sup> Advokati najčešće koriste forenzičke računovođe u slučajevima koji uključuju finansijske izveštaje, ekonomske štete i prevare.<sup>47</sup> Rešavanje složenih slučajeva finansijskih prevara ili drugih nezakonitih aktivnosti zahteva interdisciplinarna znanja od računovodstvenih forenzičara

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<sup>46</sup> Snežana Knežević, Stefan Milojević, Marko Špiler, „Edukacija o forenzičkom računovodstvu i veza s praksom”, *Revizor*, 95-96/2021, str. 35–49.

<sup>47</sup> Charles Davis, Ramona Farrell, Suzanne Ogilby, *Characteristics and skills of the Forensic Accountant*, American Institute of Certified Public Accountants, 2010, str. 11–26.

koji finansijska i nefinansijska merenja, analize i ekonomski koncepte pretvaraju u materijal koji drugi sa manje iskustva i znanja mogu razumeti.<sup>48</sup>

Standard SAS 99 (zamena za SAS 82) ne zahteva korišćenje forenzičkih stručnjaka, ali preporučuje razmišljanje, povećan profesionalni skepticizam i nepredvidive testove revizije.<sup>49</sup> Inače, SAS 99 definiše prevaru kao „namerni čin koji dovodi do značajnog pogrešnog prikazivanja u finansijskim izveštajima koji su predmet revizije“. Sertifikovane forenzičke računovođe će i dalje biti tražene da dopune napore internih i eksternih revizora u identifikovanju prevara. Zbog multidisciplinarnе i tehnički intenzivne prirode profesije, forenzičke računovođe su u značajnoj opasnosti da pomešaju etiku sa poštovanjem zakona.<sup>50</sup>

Od forenzičkog računovođe kao profesionalca očekuje se da postupa etički i u javnom interesu. Uloga računovodstvenog forenzičara u krivičnim postupcima sve je važnija, različite su uloge koje on može da ima – finansijski forenzičar, veštak, svedok i stručni savetnik. Važno je istaći i činjenicu „da je Zakonikom o krivičnom postupku definisana uloga stručnog savetnika okriviljenog ili oštećenog kao tužioca, ali ne i finansijskog forenzičara, koji je stručni asistent tužioca“<sup>51</sup> Naime, na glavnom pretresu, računovodstveni forenzičar kao sudski veštak može da se pojavi i u ulozi svedoka. Veština objektivnog komuniciranja o kompleksnim pitanjima ključna je veština za stručnjake u oblasti forenzičkog računovodstva u sudskom postupku.<sup>52</sup>

## VI. Prevare u osiguranju

Nemoguće je osigurati efikasno funkcionisanje osiguravajućih društava i održavanje adekvatnog nivoa njihove finansijske stabilnosti bez uspostavljanja i sprovođenja delotvornog sistema za otkrivanje i suzbijanje prevare u osiguranju. Takve prevare imaju negativne posledice ne samo za same kompanije već i za njihove klijente, druge ugovorne strane i tržište osiguranja u celosti, pa čak i za državu. Prevare u osiguranju su sve veći problem s velikim finansijskim i društvenim uticajem. Neprekidna pojava prevare, ukoliko se ne kontroliše, ozbiljno će uticati na likvidnost osiguravajućih kuća, što će dalje imati negativan uticaj na njihove finansijske performanse.

<sup>48</sup> James DiGabriele, Lester Heitger, Richard Riley, Jr., „A synthesis of non-fraud forensic accounting research“, *Journal of Forensic Accounting Research*, 5/2020, str. 257–277.

<sup>49</sup> Statement on Auditing Standards – 99 (SAS 99), Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA), October 2002.

<sup>50</sup> Bryan Howieson, „What is the ‘good’ forensic accountant? A virtue ethics perspective“, *Pacific Accounting Review*, 2/2018, str. 155-167.

<sup>51</sup> Bojan Janković, Snežana Knežević, Stefan Milojević, „Uloga računovodstvenog forenzičara u krivičnom postupku“, *Revizor*, 101/2023, str. 6.

<sup>52</sup> Madeline Ann Domino, Matthew Stradiot, Mariah Webinger, „Factors which may bias judges decisions to exclude accounting expert witnesses testimony“, *Accounting Research Journal*, 28/2015, str. 59–77.

Generalno, prevare u osiguranju mogu se podeliti u tri kategorije, koje se odnose na počinioca (insajder ili autsajder), fazu prevare (ugovaranje ili potraživanje) i prirodu prevare (meka ili tvrda).<sup>53</sup> Prevara insajdera je daleko najrasprostranjenija vrsta prevare, a kada je reč o Sjedinjenim Američkim Državama, preusmeravanje premija je najčešći tip prevare u osiguranju. Zanimljivo je istaći da je veća verovatnoća da će osiguravajuće kuće biti prevarene od strane svojih zaposlenih ili poslovnih insajdera nego od strane sopstvenih klijenata.

Poseban izazov predstavljaju finansijske usluge kojima se obezbeđuje osiguranje od potencijalnih životnih ili tržišnih događaja u relativno dalekoj budućnosti, kao što su planovi penzijske štednje ili životnog osiguranja. Budući da koristi od takvih usluga postaju jasne tek nakon dugog vremenskog raspona od nastanka same transakcije, procena njihove korisnosti za kupca uključuje mnogo spekulacija. Prodavci često koriste obmanjujuće promotivne materijale, taktike prodaje pod pritiskom i nedovoljno tačne ili sugestivne izjave kako bi prenaglasili povoljne scenarije, dok minimizuju one koji su manje korisni za kupce. U mnogim slučajevima, prodajni agenti ne istražuju dovoljno profil rizika klijenta, ne uspevaju adekvatno objasniti rizike, pružaju previše optimistične projekcije budućeg učinka ili netransparentno iznose naknade i provizije. S druge strane, moguće je scenario u kome i strane kojima je potrebno osiguranje pogrešno prikazuju pravo stanje stvari kako bi ostvarile bolje uslove za sticanje polise osiguranja.<sup>54</sup>

Načelno, prema dosadašnjim istraživanjima, postoje dve vrste prevara u osiguranju: oportunistička prevara u osiguranju i planirana prevara u osiguranju, pri čemu su učestalije oportunističke prevare.<sup>55</sup> Oportunistička prevara u osiguranju odnosi se na *post hoc* spoznaju pojedinca da se osigurani slučaj može iskoristiti za ličnu korist pružanjem lažnih informacija ili preuveličavanjem legitimnog potraživanja. Planirana prevara u osiguranju odnosi se na namerni pokušaj da se izmisli rizični događaj koji bi bio pokriven polisom osiguranja.<sup>56</sup>

Računovodstvene prevare u osiguranju obuhvataju manipulativne prakse osiguravača, osiguranika ili drugih zainteresovanih strana koje se koriste radi sticanja nezakonite koristi manipulacijom finansijskim podacima. Takve prevare uključuju manipulaciju rezervama, obmanu u reosiguranju, nedovoljno prijavljene štete i generisanje fiktivnih polisa osiguranja. Te prevare u osiguranju izazivaju sve veću zabrinutost, jer ugrožavaju pouzdanost finansijskog izveštavanja i poverenje u finansijski sektor, što u krajnjoj liniji negativno utiče na poverenje investitora, kreditora i drugih interesnih

<sup>53</sup> Insurance fraud: issues and challenges, *The International Association for the Study of Insurance Economics*, 2014.

<sup>54</sup> Arjan Reurink, „Financial Fraud: A Literature Review”, *Contemporary Topics in Finance*, 2019, pp. 79–115.

<sup>55</sup> Sharison Tennyson, „Insurance experience and consumers' attitudes toward insurance fraud”, *Journal of Insurance Regulation*, 2/2002, str. 35–56.

<sup>56</sup> Richard A. Derrig, Valerie Zicko, „Prosecuting insurance fraud – a case study of the Massachusetts experience in the 1990s”, *Risk Management and Insurance Review*, 2/2002, str. 77–104.

grupa. Međunarodni standard finansijskog izveštavanja 17 – Ugovori o osiguranju (MSFI 17) predstavlja važan korak u borbi protiv tih prevara u delatnosti osiguranja. Taj standard uključuje zahteve vezane za transparentno izveštavanje o finansijskoj poziciji i riziku kompanije i zahteva značajnu promenu računovodstva osiguravača.

Unapređenje mera za merenje, otkrivanje i sprečavanje prevara u osiguranju postiže se kroz primenu statističkih modela i inteligentnih tehnologija na obimne baze podataka, kako bi se osigurala efikasna identifikacija prevarnih aktivnosti. Takođe, strateška analiza se primenjuje na situacije vezane za imovinsko osiguranje, odgovornost i zdravstveno osiguranje.<sup>57</sup> U tom kontekstu, značajno je pomenuti i važnu ulogu koju imaju interna revizija i interna kontrola, kao dva stuba za efikasno upravljanje rizikom od nastanka zloupotreba i prevara u osiguravajućim kućama.

## VI. Zaključak

Etičko finansijsko izveštavanje i računovodstvena praksa od vitalnog su značaja jer odgovaraju osnovnim potrebama javnosti i zaposlenih. Oni grade kreditibilitet poverenja među njima. Etika u računovodstvu postoji kako bi zaštitila javnost od neetičkih postupaka korporacija. Preduzeća imaju etičku i pravnu odgovornost u vezi s finansijskim upravljanjem. Nažalost, pojedine računovođe ponekad prikrivaju ili manipulišu informacijama. Većina računovodstvenih skandala nastaje upravo zbog lažnog finansijskog izveštavanja, kada rukovodstvo kompanije u finansijskim izveštajima prikazuje netačne podatke.

Prevara ima štetan i dalekosežan uticaj, koji se proteže na milione pojedinača, kompanija i njihovih klijenata prodirući kroz različite delatnosti, a od negativnih posledica se u mnogim situacijama navedene strane teško oporavljaju. Pogrešno finansijsko predstavljanje u finansijskom računovodstvu, i za eksterni i interni nivo, može imati neželjene uticaje na integritet i tačnost finansijskog izveštavanja organizacije i njenog celokupnog korporativnog imidža.

Uočava se da veliki broj studija iz oblasti upravljanja rizikom od nastanka prevarnih radnji daje presek stanja, mnoge su metodološki slabe i, uglavnom pružaju samo ograničene informacije o efikasnosti ili troškovima mera koje se sprovode protiv prevara. Kada je reč o osiguranju, to je još izraženije. U tom kontekstu se ističe potreba da se intenziviraju oštriba istraživanja u ovoj oblasti. Dalje, sprečavanjem prevarnih radnji u realnom ambijentu povećava se vrednost usluge računovodstvene profesije.

Potrebno je dalje jačati sisteme interne kontrole i etičke politike koji će obeshrabriti prevaru i smanjiti njenu pojavu u kompanijama. U mnogim slučajevima finansijskog kriminala, računovodstveni forenzičari rade zajedno s istražiteljima, advokatima i sudskim organima, kako bi obezbedili relevantne podatke i analize

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<sup>57</sup> Richard Derrig, „Insurance fraud”, *Journal of Risk and Insurance*, 3/2002, str. 271–287.

koje podržavaju krivični postupak. Njihov doprinos može biti ključan za donošenje pravednih presuda. Pored toga, potrebno je pažljivo sagledati i evaluirati kvalifikacije veštaka kada su u pitanju nove tehnologije, uz napomenu da tradicionalne tehnike forenzičkog računovodstva mogu biti korišćene kao provere razumnosti u odnosu na ishode dobijene veštačkom inteligencijom (tj. mašinskim učenjem), a očekuje se da će tako biti i u praksi. Stoga, ako se uspostavi licenciranje stručnjaka u oblasti forenzičkog računovodstva u Srbiji, ovo je jedno od važnijih pitanja.

Prevarne aktivnosti u osiguranju uzrokuju stvarne gubitke za osiguravajuće kuće, ali takođe značajno utiču i na potrošače, budući da se troškovi otkrivanja prevara i očekivanih gubitaka prenose preko premija osiguranja. Stoga, važno je uvesti adekvatne kontrolne mehanizme i obezbediti poštovanje procedura u organizacijama koje se bave osiguranjem.

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## **IDENTIFICATION AND PREVENTION OF FRAUDULENT FINANCIAL REPORTING**

**REVIEW ARTICLE**

### **Abstract**

Effective detection of fraudulent (false) financial reporting requires an integrative conceptual framework. This paper presents a general framework for studying factors related to the causes of fraudulent financial reporting. The purpose is to sharpen our thinking on conducting research modalities for defining a framework for effective risk management of fraudulent financial reporting and to assist scholars, professional accountants, regulators, and policymakers to better understand the drivers of fraudulent financial reporting and the context in which it occurs. We examine the characteristics of companies engaged in fraudulent financial reporting, as identified in the literature, through research related to the fraud triangle, and ethical aspects. We also address the impact of professional and legal regulations on the area of effective fraud risk management. Finally, we summarize previous findings and present conclusions and suggestions for areas requiring further research.

**Keywords:** *fraudulent financial reporting - professional regulation - ethics - legal framework.*

**JEL classification:** G22, M41, K20

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## I. Introduction

The frequency of fraud, corruption, and bribery is not a global novelty, but they become increasingly complex with the emergence of more sophisticated techniques. They occur in every type of enterprise, regardless of the type of activity the enterprise engages in, its legal organizational form, size, etc., although the level may vary from one enterprise to another<sup>4</sup>. Fraud remains a pervasive concern for accountants, auditors, and fraud prevention experts, so this issue deserves special attention from academic circles as well as practitioners. As awareness of the damage caused by financial fraud has grown internationally, efforts to combat it and control it adequately have intensified.

According to Webster's Dictionary<sup>5</sup>, fraud is generally defined as "an act of deceiving or misrepresenting." Furthermore, fraud can be seen as a skill used to infringe upon the rights or interests of others; cunning aimed at gaining some inappropriate advantage; an attempted or actual gain of an advantage over others by imposition or immoral means, especially by deception in contracts, negotiations, and sales, either by either falsehood or by concealing the truth. Criminologists agree that three basic elements drive fraud. According to the conceptual theory proposed by Cressey in the 1950s<sup>6</sup>, the three key elements in fraud incidents are: opportunity, pressure, and rationalization. Today's fraud perpetrators often justify (rationalize) these actions in various ways.

Contemporary organized financial crime encompasses various activities, indicating their constant evolution, emphasizing the need for comprehensive strategies for their prevention and detection. These activities include employee theft, payroll fraud, false billing schemes, management fraud, corporate fraud, insurance fraud, embezzlement, bribery, bankruptcy, and security fraud. Within this spectrum, accounting fraud stands out as the most severe form of manipulation of financial statements. Fraud is a serious concern that can have devastating consequences. Fraud is a global problem that often prompts the question "Why didn't auditors detect fraud?" after the occurrence of catastrophic corporate frauds. Various forms of fraud can arise both internally and out of a company, and the characteristics of fraud often make it unpredictable. For certain individuals, fraud has even become a profession.

The accounting information system is a key information platform for business organizations, and it is essential that the financial information it generates is valid<sup>7</sup>.

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<sup>4</sup> Abdoulaye N'Guilla Sow, Rohaida Basiruddin, Siti Zaleha, Abdul Rasid, Maizatulaidawati Md Husin, "Understanding fraud in Malaysian SMEs", Journal of Financial Crime, 25/2018, pp. 870-881.

<sup>5</sup> Webster's Dictionary, 1828, <https://webstersdictionary1828.com/Dictionary/fraud>, pristupljeno 5. 1. 2024.

<sup>6</sup> Donald Cressey, *Other People's Money*, Montclair, NJ, Patterson Smith, 1953.

<sup>7</sup> Milena Ilić, Svetlana Andelić, "The role of computerized accounting information system in detecting accounting errors and accounting fraud", *BizInfo (Blace) Journal of Economics, Management and Informatics*, 8/2017, pp. 17–30.

To understand the concept of fraud in financial statements, one must be aware of what constitutes fraud and where financial statement fraud fits into the definition of a fraud. There is no single definition of financial statement fraud, and professional bodies such as the Institute of Internal Auditors (IIA) and the Association of Certified Fraud Examiners (ACFE) have their own definitions<sup>8</sup>. However, what stands out as a unanimous opinion is that management is involved in the process of fraudulent financial reporting, fraud is intentional, and it causes harm to stakeholders. Additionally, financial statement fraud undermines the integrity of financial reporting as a whole.

Corporate accounting fraud typically involves creative, complex methods aimed at overestimating revenue, underestimating expenses, overvaluing corporate assets, and/or underreporting existing liabilities. For example, creative accounting practices that constitute fraud are subject to investigations typically initiated by government authority: the U.S. Securities and Exchange Commission (SEC), the Public Company Accounting Oversight Board (PCAOB), and the Department of Justice (DOJ)<sup>9</sup>.

The paper is organized as follows: After the introduction, it delves into examining the responsibilities of different groups (accountants, auditors, and management) regarding the occurrence of fraudulent financial reporting. The third chapter focuses on the significance of ethics in fraud prevention. Professional regulations and legal framework are the subject-matter of the fourth chapter. The fifth chapter considers the role of forensic accountants in criminal justice and civil litigations. The sixth chapter provides a brief overview of insurance fraud. Further on, there are the concluding remarks and appropriate recommendations.

## **II. Responsibility of Accountants, Auditors, and Management for Fraudulent Financial Reporting**

The lack of adequate supervision and implementation of financial reporting can significantly slow down the detection of fraud, seriously undermining investors' trust in capital markets and their supervisory function. On the other hand, effective implementation and supervision of auditing processes can reduce triggers and opportunities for accounting frauds<sup>10</sup>.

According to a published survey by PricewaterhouseCoopers (PwC) on global economic crime and fraud, the results show that the average company has

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<sup>8</sup> Van Wyk, *Fraud risk assessment: a conceptual framework for internal auditors to detect financial statement fraud*, USA, Institute of Research Engineers and Doctors, 2015.

<sup>9</sup> Ibrahim Badawi, "Motives and consequences of fraudulent financial reporting", in 17th annual convention of the Global Awareness Society International, 2008, May, pp. 110-123.

<sup>10</sup> Domenico Campa, Alberto Quagli, Paola Ramassa, "The roles and interplay of enforcers and auditors in the context of accounting fraud: a review of the accounting literature", *Journal of Accounting Literature*, 2023.

experienced 6 fraud incidents in the last 24 months<sup>11</sup>. An important fact is that this is the second-highest reported level of incidents in the last 20 years, which sounds truly alarming. This trend mainly stems from the dynamism of business models, changing work styles, and constant changes in technology. Perpetrators of fraud are increasingly using more direct methods to unfairly benefit from the company's clients, which leads to financial and reputational losses for organizations in various industries. Most frauds are still detected by external sources such as the police, anonymous tips, and customers. Others are discovered only by chance. This raises questions about the methods auditors employ to detect and investigate fraud, and how they cope with thousands, even millions, of transactions, and select a few that may be fraudulent<sup>12</sup>.

The Federal Bureau of Investigation (FBI) has sought expanded collaboration with Certified Public Accountants (CPAs) in the fight against corporate fraud. The FBI believes that the roles, independence, and integrity of CPA professionals uniquely lend themselves to partnership. In other words, they see CPAs as expert third-party partners of this intelligence agency, which has jurisdiction over more than 2,000 categories of federal crimes. Collaboration is carried out in several segments: (1) addressing the scope of the problem, (2) identifying common accounting schemes, and (3) effective operation under the influence of the Sarbanes-Oxley Act of 2002 and related rules and regulations<sup>13</sup>.

Reviewing financial statements requires accountants to inquire with management responsible for financial and accounting matters, as well as with others within the entity, as needed, about the existence of any actual fraud, suspicion, or alleged fraud. When there are indications of fraud or the potential for it to occur — the effects of which need to be considered when preparing financial statements — accountants are required to communicate this as soon as possible to the appropriate level of senior management, preferably at a level above those implicated in the suspected fraud or those responsible for governance.

Accountants should, as necessary, request from management, among other things, an assessment of the effects, if any, on the financial statements, and consider those effects, if present. Additionally, management's assessments are important for accountants to consider regarding the effects of fraud on the conclusion

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<sup>11</sup> PwC's Global Economic Crime and Fraud Survey 2022: Protecting the perimeter: A new frontier of platform fraud, <https://www.pwc.com/gx/en/services/forensics/economic-crime-survey.html>, pristupljeno 11. 12. 2023.

<sup>12</sup> Md. Abdul Baten, "Conceptual study of fraud and the accounting system", International Journal of Multidisciplinary Education and Research, 6/2018, pp. 1-5.

<sup>13</sup> Norazida Mohamed, Moorison Handley-Schachelor, "Financial statement fraud risk mechanisms and strategies: the case studies of Malaysian commercial companies", Procedia-Social and Behavioral Sciences, 145/2014, pp. 321-329.

of the financial statements and the accountant's report, as well as to determine whether accountants have broader communication responsibilities with any parties outside the entity. Since potential conflicts with accountants' ethical and legal obligations regarding confidentiality can be complex, accountants may consult with legal counsel before engaging in any discussions with parties outside the entity. If fraud results in materially misstated financial statements or involves higher-level management, accountants are required to report directly to those responsible for governance<sup>14</sup>.

Fraudulent financial reporting brings significant negative consequences to companies, including a decrease in stock value and a loss of investor confidence in the company. The growing need to protect capital in markets and the increasing influence of the accounting profession in effectively managing the risk of fraud emphasizes the importance of strengthening the capacity of forensic accounting through the education system on the one hand, and enhancing the skills of forensic accountants on the other.

The submission of financial reports is regulated by provisions of Articles 44 to 46 of the Accounting Law. Regardless of who signed the financial statements and other accounting documentation, "collective responsibility is prescribed for the true and fair presentation of the financial position and performance of the legal entity, namely the legal representative, the management body, and the supervisory body of the legal entity in accordance with the law, or the entrepreneur, as well as the responsible person from the Article 14 of the Law."<sup>15</sup>

Despite the conflict of interest between managers and owners, the fundaments of mechanism of corporate governance is the intention to protect all stakeholders. Misalignment of interests between company owners and managers sets the stage for profit manipulation, with managers likely managing profits for their gain. Managers may manipulate financial statements to achieve specific accounting goals<sup>16</sup> or to improve the company's financial appearance<sup>17</sup>. Furthermore, it is essential to note that managers can engage in financial reporting malpractices by bypassing established control procedures, entering unauthorized or inappropriate data into the books, or making modifications after the period closes (e.g., reclassification). Some forms of management behavior in financial reporting may be considered

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<sup>14</sup> Dave Arman, "A refresher on fraud and the responsibility for its detection", *Journal of Accountancy*, 2023, September 14, AICPA & CIMA, p. 1.

<sup>15</sup> Regular annual financial statement, <https://www.paragraf.rs/baza-znanja/knjigovodstvo/redovni-godisnji-finansijski-izvestaj-2021-apr.html>, accessed on 24. 1. 2024.

<sup>16</sup> Michael Ettredge, Susan Scholz, Kevin Smith, Lili Sun, "How do restatements begin? Evidence of earnings management preceding restated financial reports", *Journal of Business Finance & Accounting*, 37/2010, pp. 332-355.

<sup>17</sup> Michael Fung, "Cumulative prospect theory and managerial incentives for fraudulent financial reporting", *Contemporary Accounting Research*, 32/2015, pp. 55-75.

unethical but not necessarily false (illegal)<sup>18</sup>. Therefore, it is crucial to carefully assess and evaluate management behavior in earnings management and potential frauds.

Once identified, the risks of fraud must be continuously assessed to understand their significance and to evaluate the effectiveness of fraud risk management. Audits play a crucial role in guiding economic decisions<sup>19</sup>. A well-established and efficient internal audit, which is a key component of the corporate governance framework within an organization, plays a vital role in effectively managing fraud risks. It can aid managers in assuming responsibility<sup>20</sup>.

As early as 1997, the AICPA issued standard SAS No. 82: "Consideration of fraud in a financial statement audit," which distinguishes between errors and fraud. It mandates auditors to plan and execute audits to obtain reasonable assurance regarding whether the financial statements are free from material misstatements, whether caused by error or fraud. Additionally, it provides guidance on how auditors should achieve this<sup>21</sup>. It's essential to diligently monitor areas and categories with heightened fraud risk, and a protocol for auditors to communicate about fraud with management, the audit committee, and other relevant parties is envisaged.

### **III. Ethical Aspects and Fraudulent Actions**

Ethics can be discussed in the context of various professions<sup>22</sup>. It is well known that accountants encounter various dilemmas in their practice. The importance of ethics in accounting has greatly increased following major corporate scandals that seriously undermined trust in the accounting profession. In the accounting industry, ethics refers to a set of moral principles and rules of conduct that accountants apply in their practice. These principles encompass ideals of honesty, fairness, objectivity, and accountability in providing financial services and information. They play a crucial role in guiding accountants in the execution of their daily activities, shaping their professional decisions and actions.

Ethics in accounting can be viewed as a set of guidelines established by various accounting bodies to prevent the misuse of financial information. These

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<sup>18</sup> Lawrence Kalbers, "Fraudulent financial reporting, corporate governance and ethics: 1987-2007", *Review of Accounting and Finance*, 8/2009, p. 195.

<sup>19</sup> Marko Milašinović, Snežana Knežević, Aleksandra Mitrović, „The significance of audit and audit opinions in the contemporary environment”, *Revizor*, 97-98/2022, pp. 21-31.

<sup>20</sup> Miloš Milošević, Marija Stojiljković, Jelena Raičević, Stefan Milojević, "Obrazovanje i obuka u oblasti strateškog finansijskog menadžmenta i kontrole: u kom pravcu bi trebalo da idemo?", *Revizor*, 102-103/2023, pp. 25-36.

<sup>21</sup> Michael Ramos, Anita Lyons, Considering fraud in a financial statement audit: practical guidance for applying SAS no. 82, *Guides, Handbooks and Manuals* (33), University of Mississippi, 1997.

<sup>22</sup> Aleksandra Mitrović, Snežana Knežević, Marko Milašinović, „The importance of ethics in the auditing profession in contemporary business”, *Revizor*, 97-98/2022, pp. 73-79.

guidelines include confidentiality, integrity, and professional competence. Confidentiality requires accountants not to disclose financial information to third parties. Integrity implies that accountants be honest in their financial dealings, while professional competence requires them to be educated and experienced.

Ethics is of paramount importance in accounting because it provides guidelines on how to handle the information and what type of information is necessary. It also establishes the fundamental values and principles that accountants and auditors should adhere to. Ultimately, ethics prescribes sanctions for offenders, serving as a means to address unethical behavior. Furthermore, the significance of ethics in accounting is extremely large for several reasons. Firstly, it builds trust and credibility among stakeholders such as investors, creditors, and customers, who rely on honest practices for accurate and objective financial reporting. For example, when accountants adhere to the principles of fairness and objectivity, they ensure that financial statements reflect the true financial position of the company.

Additionally, the ethical behavior protects companies against legal consequences. Accountants who uphold the principles of confidentiality safeguard sensitive financial information from unauthorized disclosure. However, ignoring these ethical norms can have catastrophic consequences. For instance, the scandal that befell Enron in 2001 illustrates how unethical accounting practices can lead to serious problems. Manipulation of financial data and misleading audit reports created a false picture of profitability, ultimately leading to Enron's bankruptcy and causing significant losses for shareholders.

The literature has recognized various types of organizational factors associated with the absence of fraud. Some of them include the effectiveness of the audit committee, the efficiency of internal auditing, ethical policies, and the tone set by top management team<sup>23</sup>. Generally speaking, ethics pertains to the principles of behavior that individuals use in making choices and guiding their behavior in situations (circumstances) involving concepts of right and wrong, and as such, it is inseparable from the issue of effectively managing the risk of fraudulent activities.

Ethics can be viewed as "agreed-upon standards of what is desirable and undesirable, and right and wrong behavior or conduct of a person, group, or entity."<sup>24</sup> Although ethics receives a lot of attention in public discourse, we live in a time where unethical behavior is not only more accepted but is also close to becoming the norm. Those who have the power to make decisions about investing other people's money (i.e., corporate managers and investment advisors) can manipulate investors to achieve financial gain.

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<sup>23</sup> Philip Law, "Corporate governance and no fraud occurrence in organizations: Hong Kong evidence", *Journal of Business and Industrial Marketing*, 6/2011, pp. 501-518.

<sup>24</sup> Robert Cressy, Douglas Cumming, Christine Mallin, "Entrepreneurship, governance and ethics", *Entrepreneurship, Governance and Ethics*, 2/2010, pp. 117-120.

Fraudulent activities must be avoided due to their impact on company performance. Therefore, one way to address this issue is through monitoring those responsible for management, promoting a culture of respect and ethical policies that could motivate individuals not to commit fraud due to the possibility of regulators detecting and penalizing them<sup>25</sup>. For example, honesty and integrity in profit reporting can be devastating for managers when expectations are not met. «Cooking the books» - as unethical as it may be, improves the bottom line (company performance), instead, at least in the short term.<sup>26</sup> The question arises, will struggling firms in difficult times prioritize survival or ethics? Also, an important question is what role corporate governance plays in upholding ethical values? In this context, corporate governance can be viewed through ethical values and assumptions that are fundamental to a particular regime or code of corporate governance, the so-called «governance ethics,» and through the way corporations are expected or required to manage their own ethical impact, known as «ethics management.»<sup>27</sup>

It is emphasized that in circumstances where corporate culture is developing, it is particularly important to establish an ethical foundation.<sup>28</sup> Finally, respect for business ethics in modern organizations affects the creation of their business image.<sup>29</sup> The research findings of Ćerdić and Knežević<sup>30</sup> show that continuous training of employees on the adequate application of the ethical code leads to a reduction in the likelihood of financial fraud in companies. The findings of Mayhew & Murphy<sup>31</sup> suggest that ethical education does not necessarily lead to internalized ethical values, but it can affect the ethical behavior.

#### **IV. Professional Regulation and Legal Framework: Where Are We Now?**

The regulatory environment in which accountants operate is quite complex. Today's accountants face many challenges in a dynamic environment. The field of

<sup>25</sup> Hafiza Aishah Hashim, Zalailah Salleh, Izzati Shuhaimi, Nurul Ain Najwa Ismail, "The risk of financial fraud: a management perspective", *Journal of Financial Crime*, 27/2020, pp. 1143-1159.

<sup>26</sup> April Knill, "The value of country-level perceived ethics to entrepreneurs around the world", *The European Journal of Finance*, 18/2012, pp. 209-237.

<sup>27</sup> G. J. Rossouw, "Business ethics and corporate governance: A global survey". *Business & Society*, 44/2005, pp. 32-39.

<sup>28</sup> Kimberly Henry, Brittany Dodson, Ethical Education and its Effect on Accounting Fraud, Working Paper, Christopher Newport University, 2009.

<sup>29</sup> Milena Sretić, Vuk Mirčetić, Mlađan Maksimović, Dejan Karabašević, "The impact of ethical internal communication on opinion of public menu", *BizInfo (Blace) Journal of Economics, Management and Informatics*, 10/2019, pp. 43-51.

<sup>30</sup> Ivan Mate Ćerdić, Goranka Knežević, "Ethical dilemma: A pathway to fraud or not?", *The European Journal of Applied Economics*, 20/2023, pp. 79-92.

<sup>31</sup> Brian Mayhew, Pamela Murphy, "The impact of ethics education on reporting behavior", *Journal of Business Ethics*, 86/2009, pp. 397-416.

forensic accounting adds another layer of complexity, as practitioners in this field focus on a wide range of areas of fraud, commercial disputes, and analytics.<sup>32</sup>

Corporate governance is, among other things, a crucial part of reform processes in public enterprises.<sup>33</sup> For corporate governance to ensure sustainable long-term operations, high-quality financial information is essential. Corporate financial scandals have ultimately led to several major corporate bankruptcies. Various corporate stakeholders (such as shareholders, creditors and suppliers, employees and workers, competitors, customers, retirees, state tax authorities, among others) have suffered adverse financial consequences. This has triggered an initiative for amendments to the legal and professional regulations in various countries.

The basic principle of audit emphasizes that financial failures, or incorrect financial representations, are more likely to occur when internal controls are ineffective (SAS No. 55, AICPA 1988<sup>34</sup>, SAS No. 78, AICPA 1997<sup>35</sup>; SAS No. 110, AICPA, 2006<sup>36</sup>). The Sarbanes-Oxley Act was enacted in response to the expected impact of the relationship between internal control and the quality of financial reporting<sup>37</sup>, as well as the increase in accounting errors<sup>38</sup>. This law represents a comprehensive effort to enhance the quality of financial reporting in the United States, stemming from serious corporate accounting frauds (financial scandals) that occurred in the late 1990s and early 2000s.

The prevalence of fraudulent financial activities, along with the lack of standards in defining auditors' responsibilities regarding fraud detection, has supported the emergence of the Association of Certified Fraud Examiners - ACFE, which grants the CFE license<sup>39</sup>. Although regulators and authorities have issued a series of guidelines aimed at achieving transparency, preventing fraud, and improving the

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<sup>32</sup> Jeanette Van Akkeren, Sherrena Buckby, Julie-Anne Tarr, "Forensic accounting: Professional regulation of a multi-disciplinary field". *Australian Business Law Review*, 44/2016, pp. 204-215.

<sup>33</sup> Valentina Mirković, Goran Perić, Aleksandar Jokić, "Possibilities for corporate governance in public enterprises in Serbia", *BizInfo (Blace) Journal of Economics, Management and Informatics*, 1/2010, pp. 23–29.

<sup>34</sup> American Institute of Certified Public Accountants (AICPA), The Auditor's Considerations of Internal Control Structure in the Financial Statement Audit. Statement on Auditing Standard (SAS) No. 55, New York, NY, AICPA, 1998.

<sup>35</sup> American Institute of Certified Public Accountants (AICPA), Consideration of Internal Control in a Financial Statement Audit: An Amendment to Statement on Auditing Standards No. 55. Statement on Auditing Standard (SAS) No. 78, New York, NY, AICPA, 1997.

<sup>36</sup> American Institute of Certified Public Accountants (AICPA), Performing Audit Procedures in Response to Assessed Risks and Evaluating the Audit Evidence Obtained. Statement on Auditing Standard (SAS) No. 110, New York, NY, AICPA, 2006.

<sup>37</sup> U.S. House of Representatives, The Sarbanes-Oxley Act of 2002, *Public Law*, 107-204 [H. R. 3763]. Washington, DC: GPO, 2002.

<sup>38</sup> Yiping Zhao, Jean Bedard, Rani Hoitash, SOX 404, auditor effort, and the prevention of financial report misstatements, *Auditing: A Journal of Practice & Theory*, 36/2017, pp. 151-177.

<sup>39</sup> Zabihollah Rezaee, James Burton, "Forensic accounting education: insights from academicians and certified fraud examiner practitioners", *Managerial Auditing Journal*, 12/1997, pp. 479-489.

quality of financial reports, cases of fraud in organizations continue to rise. Approximately 47% of organizations have reported cases of fraud in the last two years, representing the second-highest level of fraud in the past two decades, despite the implementation of laws and regulations<sup>40</sup>. Small businesses have been ranked highest in terms of fraud frequency in the ACFE report in the country from 2002 to 2022, with combined averages showing that the frequency of fraud in small businesses is at 28% compared to larger organizations at 22-26%<sup>41</sup>.

One of the significant questions in effective fraud risk management is determining which companies should provide financial data to regulatory agencies. It is known that many private companies worldwide are not legally obliged to submit financial data to regulatory agencies (e.g., the Securities Exchange Commission - SEC in the United States). Therefore, when considering ethical issues, it is essential to carefully monitor companies according to their legal form of organization. For example, some studies have shown that entrepreneurs are generally more ethical than managers of public companies.<sup>4243</sup>

In Serbia, the Accounting Law<sup>44</sup> covers the economic approach related to accounting issues, i.e., financial data (financial reporting). According to Article 57, "a legal entity shall be fined with a monetary fine ranging from 100,000 to 3,000,000 dinars for an economic offense if it: processes data on a computer and does not provide accounting software that enables the functioning of internal accounting control systems and prevents the deletion of booked/posted business transactions (Article 8, paragraph 4); does not prepare and present financial statements in accordance with this law (Articles 23-26); does not prepare financial statements in accordance with this law (Articles 29 and 31); does not conduct an audit of financial statements (Article 33). Moreover, for actions referred to under the paragraph 1 of the Article hereof, the responsible person in the legal entity shall be fined with a monetary fine ranging from 20,000 to 150,000 dinars."

Taking into account the recent amendments to the Criminal Code related to tax evasion, "tax evasion is treated as a criminal offense if the taxpayer avoids paying or calculating taxes to the amount of one million dinars, and if the evasion is up to one million dinars, it is considered an economic offense or misdemeanor."<sup>45</sup>

<sup>40</sup> PwC's Global Economic Crime and Fraud Survey. 2020, <https://www.global-screeningsolutions.com/industries/global-economic-crime-and-fraud-survey-2020>, accessed on 11. 12. 2023.

<sup>41</sup> Current fraud statistics, Business Fraud Prevention, Inc. (BFP), <https://businessfraudprevention.org/about-us/>, 2002, accessed on 14. 12. 2023.

<sup>42</sup> Elisabeth Teal, Archie Carroll, "Moral reasoning skills: Are entrepreneurs different?", *Journal of Business Ethics*, 19/1999, pp. 229-240.

<sup>43</sup> Branko Bucar, Rober Hisrich, "Ethics of business managers vs. entrepreneurs", *Journal of developmental entrepreneurship*, 6/2001, pp. 59-83.

<sup>44</sup> Accounting Law, *Official Gazette of the Republic of Serbia*, 73/2019 and 44/2021, Article 57.

<sup>45</sup> Law on Criminal Proceedings, *Official Gazette of the Republic of Serbia*, nos. 85/2005, 88/2005 – as amended, 107/2005 – as amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

The question arises whether the prescribed penalties are a strong deterrent. The answer to this question requires extensive research based on data from various agencies, services, and institutions.

## **V. Role of Forensic Accountants in Criminal Justice and Civil Litigations**

Managing a business, managers are often in a position to understand the potential dangers associated with fraudulent activities. However, there are practical steps that can be taken to protect one's business from financial malfeasance. Involving experts in forensic accounting is crucial for detecting any financial abuses and fraud. Forensic accounting, as a branch of accounting, involves detailed investigation and analysis of financial information to uncover fraud or financial manipulations. Forensic accountants are often engaged in preparing for legal disputes in cases involving divorces, embezzlement, fraud, skimming, insurance, insolvency, and other forms of financial fraud.

In addition to traditional accounting techniques, forensic accountants apply various tools and software for investigating and analyzing financial data. These tools include data analysis software, computer forensic tools, data mining software, and predictive analytics. The result of the work of forensic accountants are the forensic reports used by the requester of the forensic accounting analysis. These reports present their findings, including the nature of the abuse and fraud, individuals involved, and financial impact. Fraudulent activities need to be specified according to the industry in which they occurred. Specifically, financial forensic experts need to have sufficient knowledge of the industry in which a corporate fraud occurred. Finally, financial forensic accountants may be called upon to provide expert testimony in court, presenting their findings and explaining complex financial topics to support the legal process. A large number of financial forensic accountants are experienced in testifying as expert witnesses for various financial cases in banking, insurance, tax issues, and many others.

In recent years, the complex nature of modern fraud has spurred the growth of forensic accounting, a niche area often referred to as investigative accounting. Three areas of forensic accounting are tied to practice: as already mentioned, litigation support, expert witness testimony, and finally, fraud examination. Forensic accountants play a very significant role in criminal justice and civil litigation, and it is therefore important to establish an adequate connection with practice.<sup>46</sup> Attorneys most commonly use forensic accountants in cases involving financial statements,

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<sup>46</sup> Snežana Knežević, Stefan Milojević, Marko Špiler, „Edukacija o forenzičkom računovodstvu i veza s praksom“, Revizor, 95-96/2021, pp. 35–49.

economic damages, and fraud.<sup>47</sup> Resolving complex cases of financial fraud or other unlawful activities requires interdisciplinary knowledge of forensic accountants who translate financial and non-financial measurements, analyses, and economic concepts into material that others with less experience and knowledge can understand.<sup>48</sup>

Standard SAS 99 (replacing SAS 82) does not require the use of forensic experts, but it recommends critical thinking, increased professional skepticism, and unpredictable audit tests.<sup>49</sup> Specifically, SAS 99 defines fraud as "an intentional act that results in a material misstatement in the financial statements subject to audit." Certified forensic accountants will still be sought to complement the efforts of internal and external auditors in identifying fraud. Due to the multidisciplinary and technically intensive nature of the profession, forensic accountants are at significant risk of conflating ethics with legal compliance.<sup>50</sup>

Forensic accountants are expected to act ethically and in the public interest as professionals. The role of forensic accountants in criminal proceedings is becoming increasingly important, and there are various roles they can play – financial forensic expert, expert witness, and expert advisor. It is important to note that "the role of the expert advisor of the accused or the injured party as the prosecutor is defined by the Criminal Procedure Code, but not that of the financial forensic expert, who is an expert assistant to the prosecutor."<sup>51</sup> Namely, during the main hearing, a forensic accountant as a court expert may appear in the role of a witness. The skill of objectively communicating complex issues is a key skill for experts in the field of forensic accounting in legal proceedings.<sup>52</sup>

## VI. Insurance Frauds

It is impossible to ensure the efficient functioning of insurance companies and maintain an adequate level of their financial stability without establishing and implementing an effective system for detecting and combating insurance fraud. Such frauds have negative consequences not only for the companies themselves but

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<sup>47</sup> Charles Davis, Ramona Farrell, Suzanne Ogilby, *Characteristics and skills of the Forensic Accountant*, American Institute of Certified Public Accountants, 2010, pp. 11-26.

<sup>48</sup> James DiGabriele, Lester Heitger, Richard Riley, Jr., "A synthesis of non-fraud forensic accounting research", *Journal of Forensic Accounting Research*, 5/2020, pp. 257-277.

<sup>49</sup> Statement on Auditing Standards - 99 (SAS 99), Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA), October 2002.

<sup>50</sup> Bryan Howieson, "What is the 'good' forensic accountant? A virtue ethics perspective", *Pacific Accounting Review*, 2/2018, pp. 155-167.

<sup>51</sup> Bojan Janković, Snežana Knežević, Stefan Milojević, „Uloga računovodstvenog forenzičara u krivičnom postupku”, *Revisor*, 101/2023, p. 6.

<sup>52</sup> Madeline Ann Domino, Matthew Stradiot, Mariah Webinger, "Factors which may bias judges' decisions to exclude accounting expert witnesses testimony", *Accounting Research Journal*, 28/2015, pp. 59-77.

also for their clients, other contracting parties, and the insurance market as a whole, and even for the state. Insurance frauds are becoming an increasingly significant problem with substantial financial and social impacts. The continuous occurrence of fraud, if not controlled, will seriously affect the liquidity of insurance companies, further negatively impacting their financial performance.

In general, insurance frauds can be divided into three categories, relating to the perpetrator (insider or outsider), the stage of fraud (contracting or claims), and the nature of fraud (soft or hard).<sup>53</sup> Insider fraud is by far the most widespread type of fraud, and concerning the United States, premium diversion is the most common type of insurance fraud. Interestingly, there is a greater likelihood that insurance companies will be defrauded by their employees or business insiders than by their own clients.

A particular challenge is posed by financial products that provide insurance against potential life or market events in the relatively distant future, such as pension savings plans or life insurance. Since the benefits of such products only become clear after a long period from the transaction's inception, assessing their usefulness to the buyer involves much speculation and estimation. Sellers often use deceptive promotional materials, pressure sales tactics, and insufficiently accurate or suggestive statements to overemphasize favorable scenarios while downplaying less favorable ones for buyers. In many cases, sales agents fail to adequately investigate the client's risk profile, do not manage to explain the risks adequately, provide overly optimistic projections of future performance, or fail to transparently disclose fees and commissions. On the other hand, there is a possible scenario in which parties in need of insurance may misrepresent the true state of affairs to obtain better terms for acquiring insurance policies.<sup>54</sup>

In principle, according to previous research, there are two types of insurance fraud: opportunistic insurance fraud and planned insurance fraud, with opportunistic fraud being more common.<sup>55</sup> Opportunistic insurance fraud refers to an individual's *post hoc* realization that an insured event can be exploited for personal gain by providing false information or exaggerating legitimate claims. Planned insurance fraud involves a deliberate attempt to fabricate a risky event that would be covered by an insurance policy.<sup>56</sup>

Accounting fraud in insurance encompasses manipulative practices by insurers, policyholders, or other stakeholders used to gain illegal benefits through

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<sup>53</sup> Insurance fraud: issues and challenges, *The International Association for the Study of Insurance Economics*, 2014.

<sup>54</sup> Arjan Reurink, "Financial Fraud: A Literature Review", *Contemporary Topics in Finance*, 2019, pp. 79–115.

<sup>55</sup> Sharison Tennyson, "Insurance experience and consumers' attitudes toward insurance fraud", *Journal of Insurance Regulation*, 2/2002, pp. 35–56.

<sup>56</sup> Richard A. Derrig, Valerie Zicko, "Prosecuting insurance fraud – a case study of the Massachusetts experience in the 1990s", *Risk Management and Insurance Review*, 2/2002, pp. 77–104.

manipulation of financial data. Such frauds include reserves manipulation, deception in reinsurance, underreporting of losses, and generating fictitious insurance policies. These insurance frauds are causing growing concern because they compromise the reliability of financial reporting and trust in the financial sector, ultimately negatively affecting the confidence of investors, creditors, and other stakeholders. International Financial Reporting Standard 17 - Insurance Contracts (IFRS 17) represents an important step in combating these frauds in the insurance industry. This standard includes requirements for transparent reporting on the company's financial position and risk and demands significant changes in insurers' accounting practices.

Improving measures for measuring, detecting, and preventing insurance fraud is achieved through the application of statistical models and intelligent technologies on extensive databases to ensure effective identification of fraudulent activities. Additionally, strategic analysis is applied to situations related to property insurance, liability, and health insurance.<sup>57</sup> In this context, it is important to mention the significant role of internal audit and internal control as two pillars for effectively managing the risk of abuse and fraud in insurance companies.

## VI. Conclusion

Ethical financial reporting and accounting practices are vital as they address the basic needs of the public and employees, building credibility and trust among them. Ethics in accounting exists to protect the public from unethical corporate practices. Companies have ethical and legal responsibilities regarding financial management. Unfortunately, some accountants sometimes conceal or manipulate information. Most accounting scandals arise precisely from false financial reporting, when company management presents inaccurate information in financial statements.

Fraud has an adverse and far-reaching impact, affecting millions of individuals, companies, and their clients across various industries, and the negative consequences are often difficult for the affected parties to recover from. Incorrect financial representation in financial accounting, both at the external and internal levels, can have undesirable effects on the integrity and accuracy of an organization's financial reporting and its overall corporate image.

It is observed that a large number of studies in the field of fraud risk management provide a snapshot of the situation, many of which are methodologically weak and generally provide only limited information on the effectiveness or costs of measures taken against fraud. When it comes to insurance, this is even more pronounced. In this context, there is a need to intensify "sharper" research in this area. Furthermore, by preventing fraudulent activities in the real environment, the value of the accounting profession's services is increased.

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<sup>57</sup> Richard Derrig. Insurance fraud. *Journal of Risk and Insurance*, 3/2002, pp. 271-287.

It is necessary to further strengthen internal control systems and ethical policies that will discourage fraud and reduce its occurrence in companies. In many cases of financial crime, forensic accountants work together with investigators, lawyers, and judicial authorities to provide relevant data and analyses that support criminal proceedings. Their contribution can be crucial for delivering fair judgments. Moreover, it is significant to carefully consider and evaluate the qualifications of experts when it comes to new technologies, noting that traditional forensic accounting techniques can be used as checks of reasonableness in relation to outcomes obtained through artificial intelligence (i.e., machine learning), which is expected to be the case in practice as well. Therefore, if the licensing of forensic accounting experts is established in Serbia, this will be one of the relevant matters to address.

Fraudulent activities in insurance not only cause real losses for insurance companies but also significantly affect consumers, as the costs of detecting fraud and expected losses are passed on through insurance premiums. Therefore, it is important to introduce adequate control mechanisms and ensure compliance with procedures in organizations involved in insurance activity.

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**Dr Miloš M. Petrović<sup>1</sup>**

## **MOTIV OSIGURANJA U NEMAČKOM POLITIČKOM DISKURSU O EVROPSKIM INTEGRACIJAMA**

ORIGINALNI NAUČNI RAD

### **Apstrakt**

Od eskalacije ukrajinske krize 2013. godine, u nekoliko navrata zabeležene su izjave zvaničnika i političara Savezne Republike Nemačke o tome kako saradnja unutar struktura Evropske unije predstavlja neku vrstu polise osiguranja za tu zemlju. Autor navodi da je takva terminologija korišćena u političkoj retorici u prenesenom značenju kako bi se ilustrovala prednost članstva u Evropskoj uniji u kontekstu spolj-nopolitičkih i bezbednosnih izazova. U tom smislu, Evropska unija je prikazivana kao zaštitna mreža za svoje članice u okviru pogoršanih odnosa s Rusijom, zbog uloge te zemlje u izazivanju i dinamici krize u Ukrajini (i izvan nje). Pored toga, predmet analize je i izmenjena percepcija u vezi s politikom proširenja Evropske unije, odnosno način na koji se ta politika sagledava kao sredstvo za unapređenje evropskih bezbednosnih i drugih političkih interesa. Nakon kratkog osvrta na geopolitičku prirodu rizika od rata u Ukrajini, autor analizira izjave državnih zvaničnika SR Nemačke, pokušavajući da ih razjasni kroz teorijske pristupe u domenu međunarodnih odnosa, s jedne strane (npr. konstruktivizam, liberalni međuvladin pristup, realizam), kao i kroz tehničko-konceptualna određenja pojma „osiguranje“ i s tim povezane elemente, s druge strane.

**Ključne reči:** polisa, Nemačka, Evropska unija, članstvo, rat, sigurnost, Rusija

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Rad je prihvaćen: 08.02.2024.

## I. Uvod

„Naše jedinstvo je naše životno osiguranje.“  
Analena Berbok, ministarka spoljnih poslova  
Savezne Republike Nemačke<sup>2</sup>

Od 2022. godine, evropski kontinent pogoden je geostrateškom krizom koju je izazvao napad na Ukrajinu. Ta kriza je ishodovala sveobuhvatnom „sekuritizacijom“ različitih evropskih politika, od napetosti na području energetike (gde je već godina uočljiva),<sup>3</sup> preko odbrane, do politike proširenja Evropske unije. Kad se govori o sekuritizaciji, govorimo zapravo o procesu utvrđivanja pretnje po nacionalnu ili nadnacionalnu bezbednost na osnovu subjektivnih pre negoli objektivnih procena ili percepcije opasnosti, koja se uočava u vojno-bezbednosnom, političkom, ekonomskom, društvenom segmentu i segmentu životne sredine.<sup>4</sup> U toku pandemije kovida 19 uočena je još jedna dodatna dimenzija ovog fenomena – segment javnog zdravlja i izazovi u međunarodnoj saradnji u tom pogledu.<sup>5</sup> Zapravo, ceo taj proces može se pratiti u najmanju ruku od Majdanske revolucije 2013/2014. godine naovamo, od kada su odnosi između Rusije i Evropske unije obeleženi velikim napetostima, sankcijama i sve većim ograničenjima u saradnji. Sekuritacija sve većeg broja politika i segmenata Evropske unije predstavlja širi tematski okvir za razumevanje istraživačkog problema: način i razlozi za korišćenje termina „osiguranje“ u političkom diskursu u Nemačkoj.

Radi se o najuticajnijoj državi članici Evropske unije i zemlji koja je u svojim odnosima s Rusijom napravila kopernikanski obrt koji se u literaturi naziva „Zeitenwende“ (smena epohe).<sup>6</sup> Ta prekretnica u odnosima usledila je nakon decenije dozirane saradnje Moskve i Berlina koja je, tokom mandata kancelarke Angele Merkel, bila obeležena ekonomskim pragmatizmom, uprkos narušenim političkim odnosima. Pojedini autori su razvoj odnosa dve strane u protekloj deceniji slikovito nazvali sintagmom „od istočne politike do mrazne politike“.<sup>7</sup> Naime, dok su političke relacije

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<sup>2</sup> Auswärtiges Amt, Videogrußwort von Außenministerin Annalena Baerbock zur 32. Ostseeparlamentarierkonferenz (BSPC), 2023, <https://www.auswaertiges-amt.de/en/newsroom/news/baerbock-baltic-sea-parliamentary-conference/2613958>, pristupljeno: 30. 11. 2023.

<sup>3</sup> Marco Siddi, „Identities and Vulnerabilities: The Ukraine Crisis and the Securitisation of the EU-Russia Gas Trade“, *Energy Security in Europe. Energy, Climate and the Environment* (editor Kacper Szulecki), Cham, 2018, str. 251–273.

<sup>4</sup> Richard J. Kilroy, „Securitization“, *Handbook of Security Science*, (editor Anthony Masys), Cham, 2018, str. 1–19.

<sup>5</sup> Konsultovati zbornik: *Razvojni pravci Evropske unije nakon pandemije KOVID-19* (urednici Nevena Stanković, Dragana Dabić i Goran Bandov), Beograd, 2020.

<sup>6</sup> Marina Kostić, „Zeitenwende and the German National Security Policy: Analysis of the First National Security Strategy“, *The Review of International Affairs*, 1188, LXXIV/2023, str. 79–105.

<sup>7</sup> Tuomas Forsberg, „From Ostpolitik to ‘frostpolitik’? Merkel, Putin and German foreign policy towards Russia“, *International Affairs* 92: 1, 2016), str. 21–42.

s Rusijom svakako neprestano podvrgavane sve većim ograničenjima (npr. ciljane sankcije spram pojedinaca koji se povezuju sa štetnim aktivnostima po ukrajinski teritorijalni integritet, zamrzavanje njihove imovine i sl.), energetska saradnja, kao važan segment za funkcionisanje najrazvijenije evropske privrede, nastavljena je razvojem megaprojekta Severni tok 2, kao i izgradnjom drugih gasovoda.<sup>8</sup> Energetska zavisnost evropskih zemalja od Moskve predstavljala je, te i dalje verovatno predstavlja, ključni ekonomski izazov u narušenim odnosima dve strane.

Autor navodi da upotrebu termina „osiguranje“ u političkom diskursu nemackih zvaničnika ne treba tumačiti doslovno, u kontekstu osiguravajuće delatnosti, već u prenesenom značenju, kao metaforu za zaštitu i privilegije koje pruža članstvo u Evropskoj uniji. To je jasnije tim pre što u kontekstu osiguravajuće delatnosti ne postoji koncept osiguranja koji bi se odnosio na čitavu zemlju. U daljem toku rada autor će se osvrnuti na konceptualna određenja termina „osiguranje“, njegovu primenu u političkoj retorici, geopolitičke rizike, kao i teorijska pojašnjenja iz kog razloga je taj termin adekvatan za upotrebu u nastupima državnih zvaničnika.

## **II. Geopolitički rizici u kontekstu osiguranja: kratak osvrt**

Pre prelaska na razmatranje upotrebe termina „osiguranje“ u prenesenom značenju kao osnovnog motiva u ovom istraživanju, u ovom delu autor će pružiti kratak osvrt i na geopolitičku prirodu rizika koji se povezuje s ratom u Ukrajini. Rat se percipira kao posebna vrsta geopolitičkog rizika – negativnog fenomena koji se manifestuje u svim granama privredne delatnosti, uključujući i oblast osiguranja. Geopolitički rizik ratnog sukoba je važan za razumevanje uloge i konteksta osiguranja, kako u prenesenom, tako i u privrednom smislu te reći.

Geopolitički rizici podrazumevaju širok spektar događaja koji nije ograničen samo na terorističke napade, političke nemire i druge nepovoljne fenomene, već je primenljiv i na kontekst rata kao najnepovoljnijeg fenomena koji prožima sve oblasti društvenog i ekonomskog života, oblikujući kako unutrašnje tako i prekogranične prilike.<sup>9</sup> Ahmed i ostali navode da napad na Ukrajinu ishoduje udarom na finansijska tržišta koji predstavlja presedan, tim pre što se radi o dve velike zemlje koje su globalni proizvođači hrane i energije.<sup>10</sup> Pored direktnih tragičnih posledica po životu i imovinu u Ukrajini, postoji i niz posrednih ishoda koji mogu opstati više godina,

<sup>8</sup> Andreas Umland, „Germany’s Russia Policy in Light of the Ukraine Conflict: Interdependence Theory and Ostpolitik“, *Orbis*, 66, 1/2022, str. 78–94.

<sup>9</sup> Wael Hemrita, Mohamed Sahbi Nakhlic, Insurance and geopolitical risk: Fresh empirical evidence, *The Quarterly Review of Economics and Finance* 82 (2021) 320–334.

<sup>10</sup> Shamima Ahmed, Rima Assaf, Molla Ramizur Rahman, Fariha Tabassum, „Is geopolitical risk interconnected? Evidence from Russian-Ukraine crisis“, *The Journal of Economic Asymmetries*, Volume 28, 2023, e00306, ISSN 1703-4949, <https://doi.org/10.1016/j.jeca.2023.e00306>.

počevši od onih povezanih s pooštavanjem ekonomskih, finansijskih i trgovinskih ograničenja, preko međunarodnih posledica usled smanjene dostupnosti ključne robe (energenata, đubriva, žitarica), do velikih odštetnih zahteva po različitim osnovama.<sup>11</sup>

Primarne brige kompanija u pogledu budućnosti njihovog poslovanja u datom geografskom regionu tiču se onih oko obima šteta, kao i razmatranja mogućnosti (ili nemogućnosti) daljeg poslovanja u dotadašnjem obliku. U jednom međunarodnom izveštaju o političkim rizicima za 2022. godinu, u kontekstu napada na Ukrajinu, čak 56% ispitanih kompanija izrazilo je bojazan od toga da njihovo poslovanje bude podvrgnuto diplomatskim sporovima.<sup>12</sup> U kontekstu sve obuhvatnijeg distanciranja od Rusije, ali i trgovinskih sporova između Sjedinjenih Američkih Država i Kine, geopolitička zabrinutost zauzima sve prominentnije mesto u proceni adekvatnosti poslovanja, što nije zaobišlo ni osiguravajuću delatnost.

Kako se navodi u analizi *Financial Times*-a (Fajnenšal Tajms), sukob u Ukrajini višestruko će promeniti pristup upravljanju rizicima: (1) dubinsko znanje raznorodnih, složenih i eskalirajućih geopolitičkih rizika postaje suštinski bitno kako bi se izazovi prepoznali pre negoli prerastu u probleme; (2) poimanje najgorih scenarija zahteva ponovno razmatranje, naročito imajući u vidu nedostatak uzimanja u obzir nekog oblika poraza Ukrajine (i zapadnih saveznika), što ima veze i sa višedecenijskim mirnodopskim komformizmom u Evropi; (3) lideri moraju da sagledaju stvari iz što više uglova, budući da je u upravljanju rizicima suštinski važno razmotriti što više scenarija i aktivnosti za predupređivanje štete; (4) stare tehnike upravljanja rizikom postaju relevantnije nego ranije, pogotovo u kontekstu lanaca snabdevanja.<sup>13</sup>

Rastući geopolitički rizici, uključujući i one na istoku Evrope, doprineli su jačanju firmi koje su fokusirane na osiguranje u kriznom kontekstu. Imajući u vidu značaj Ukrajine na svetskom poljoprivrednom tržištu, nakon prvobitne nemogućnosti plasiranja robe usled blokade ukrajinskog dela Crnog mora, došlo je do međunarodnih inicijativa pod pokroviteljstvom Ujedinjenih nacija u nastojanju da se na neki način iznađe barem delimično i privremeno rešenje. To je ishodovalo inicijativom za bezbedni transport žita i namirnica iz ukrajinskih luka, koja je omogućila makar delimično plasiranje poljoprivrednih proizvoda koji su bili zarobljeni u ratnoj zoni.<sup>14</sup> Nakon povlačenja Rusije iz sporazuma 2023. godine, na scenu su stupile firme poput „Marsh McLennan“ (Marš Mek Lenan), s kojima je ukrajinska vlada sklopila javno-privatni

<sup>11</sup> Nick Robson, „How the Russia–Ukraine Conflict Is Impacting Insurance Across Industries“, *BrinkNews*, <https://www.brinknews.com/how-the-russia-ukraine-conflict-is-impacting-industries/>, pristupljeno: 29. 1. 2024.

<sup>12</sup> Sam Wilkin, „2022 Political Risk Survey Report“, 2022, <https://www.wtwco.com/en-au/insights/2022/03/2022-political-risk-survey-report>, pristupljeno: 27. 1. 2024.

<sup>13</sup> Bigger Picture (Financial Times Partner Content), Four ways the conflict in Ukraine will change the approach to risk management, 2023, <https://biggerpicture.ft.com/global-risks/article/four-ways-war-in-ukraine-will-change-approach-to-risk-management>, pristupljeno: 27. 1. 2024.

<sup>14</sup> Videti: Miloš Petrović, Multidimenzionalna priroda rizika u kontekstu rata u Ukrajini, *Tokovi osiguranja* 1/2023, str. 43–58.

sporazum o pružanju velikog osiguravajućeg pokrića po osnovu ratnih rizika, za brodove koji izvoze poljoprivredne proizvode iz ukrajinskih luka.<sup>15</sup> Takvi primeri pokazuju da, naročito u slučaju prolongiranih konflikata poput onog u Ukrajini, i kompanije koje se bave osiguranjem pokazuju veću spremnost za poslovanje u rizičnim okolnostima, što s druge strane doprinosi makar delimičnoj amortizaciji posledica po snabdevanje i lance poslovanja.

### **III. Percepција чланства као полисе осигuranja у немачком политичком дискурсу**

Spoljna politika Nemačke već dugo vremena oblikovana je u kontekstu dva šira procesa: translantski kontekst (bliski odnosi s Vašingtonom, uključujući i članstvo u Severnoatlantskoj alijansi) i evropski kontekst (uloga Nemačke u evropskom povezivanju, u koordinaciji s najvećim i najuticajnjim susedom, Francuskom).<sup>16</sup> Pored toga, kao ekonomski najdominantnija evropska privreda, Nemačka je dugo godina gradila i odnose sa Rusijom kao energetskom silom. U širem pogledu, ta dimenzija se naziva i „Ostpolitik“ (istočna politika), a ogledala se u tome da su Berlin i Moskva pragmatično sarađivali prethodnih decenija na energetskim projektima koji su, na ovaj ili onaj način, snižavali značaj Ukrajine kao tranzitne zemlje za energente iz Rusije.<sup>17</sup> Ti antagonizmi su u političkom smislu postali naročito očigledni pre desetak godina.

Dok u kontekstu napada na Ukrajinu bezbednosni aspekt predstavlja važan segment u razumevanju članstva u Uniji kao okvira za osiguranje blagostanja zemlje (o čemu će više reći biti u narednom poglavljju), motiv osiguranja je i ranije bio korišćen u političkom etru kako bi se istakla prednost članstva u EU. Tako je Michael Roth (Michael Roth), poslanik u Bundestagu, još 2016. godine izjavio: „Evropa – to nije samo igralište za tehnokrate opsednute detaljima. Evropa – to nije ludilo uniformnosti i poravnavanje razlika. Naprotiv: Evropa je naš ostvareni san o raznolikosti, garant naših pojedinačnih životnih planova i naše osiguranje života u burnim vremenima krize! To bi trebalo mnogo češće imati na umu kad ponovo dodemo u sumnju u smisao i vrednost Evrope.“<sup>18</sup>

<sup>15</sup> Ian Smith, Isobel Koskiw, Ukraine reaches deal with insurers for grain shipments, 2023, <https://www.ft.com/content/1b29860d-763d-4157-a816-4eacb868ef23>, pristupljeno: 29. 1. 2024.

<sup>16</sup> Miloš Petrović, „Political relations between Germany and the United States during the Trump presidency“, *Europe in changes: the old continent at a new crossroads* (editors Katarina Zakić and Birgül Demirtaş), Belgrade, 2020, str. 278.

<sup>17</sup> Andreas Umland, „Germany's Russia Policy in Light of the Ukraine Conflict: Interdependence Theory and Ostpolitik“, *Orbis*, 66, 1/2022, str. 78–94.

<sup>18</sup> Michael Roth, Gastbeitrag von staatsminister michael roth: europa – unsere lebensversicherung in stürmischen krisenzeiten, 2016, <https://www.treffpunkteuropa.de/gastartikel-von-staatsminister-michael-roth-europa-unserer?lang=fr>, pristupljeno: 10. 12. 2023.

Od početka ukrajinske krize 2013. godine naovamo, politički odnosi između Rusije i Evropske unije, pa i Nemačke kao njene najuticajnije članice, nazaduju. To nazadovanje treba sagledati u kontekstu sposobnosti političkog međunarodnog uticaja koji svaka od strana poseduje. S jedne strane, Rusija sebe smatra zasebnom silom u međunarodnim odnosima, a njena pozicija mahom počiva na tzv. „tvrdoj moći“ (vojno-bezbednosnim kapacitetima), velikim energetskim potencijalima, kao i zajedničkoj istoriji, tradiciji i kulturnoškoj bliskosti s ostatkom postsovjetskog prostora. S druge strane, moć Evropske unije je „meka“ – ona počiva na „sposobnosti da svoje susede privoli da žele ono što ona želi“. <sup>19</sup> Susedi žele što bliže političke i ekonomске veze sa Unijom, što Brisel uslovjava reformskim procesima; to se odnosi kako na politiku proširenja, odnosno na zemlje koje preduzimaju reforme radi ispunjavanja uslova za pristupanje EU, tako i za najблиže partnerе, s kojima Unija sarađuje na brojnim političkim, ekonomskim, bezbednosnim i drugim pitanjima, čak i izvan članstva (npr. sa Norveškom). Promovisanjem vrednosti, normi i standarda u svom susedstvu, Evropska unija jača i svoju moć.

Upravo u sukobu između „tvrdе“ i „mеке moći“ leži i razumevanje specifične pozicije Evropske unije (i njene najuticajnije zemlje, Nemačke) u okolnostima koje su otpočele 2013. godine, a doživele svoj vrhunac sveobuhvatnim napadom na Ukrajinu 2022. godine, koji je ishodovao zauzimanjem i pripajanjem brojnih teritorija na istoku te zemlje od strane Rusije. S jedne strane, rat ponovo bukti na evropskom kontinentu, velikih je razmera i odvija se nedaleko od samog centra Evrope, duž granica Evropske unije. Rat je zapravo takvih razmera da su usledile tektonske promene u nemačkoj spoljnoj politici (zaustavljanje izgradnje i puštanja u pogon gasovoda Severni tok II, izdvajanje stotinu milijardi evra za naoružavanje, isporuke vojne pomoći Ukrajini i sankcije Rusiji „koje predstavljaju presedan“). <sup>20</sup> Takođe, rat se podudario i sa smenom vlasti u Nemačkoj, tj. okončanjem dugogodišnje vladavine Angele Merkel i samim početkom mandata Olafa Šolca, što je bio delikatan trenutak za tu zemlju u kontekstu preispitivanja odnosa s Moskvom.

„Zajedno smo jači nego ovaj rat“, navela je ministarka spoljnih poslova Nemačke, Analena Berbok, na forumu u Berlinu u oktobru 2022. godine. <sup>21</sup> U istom govoru je navedeno: „Danas, u ovoj situaciji, većina ljudi u Evropi, u Nemačkoj, zna šta je važno. U ovoj situaciji, naša najveća snaga je suštinska: naša evropska kohezija, naša solidarnost s onima kojima je potrebna naša podrška. Solidarnost nije cilj sama po sebi. Ona je osnov naše kolektivne bezbednosti. Ova evropska solidarnost je naše životno osiguranje“<sup>22</sup>.

<sup>19</sup> Joseph Nye, „Soft Power“, *Foreign Policy* 80, 1990, str. 153–171.

<sup>20</sup> Miloš Petrović, Maja Kovačević, Ivana Radić Milosavljević, *Srbija i Evropska unija dve decenije nakon Solunskog samita*, Beograd, 2013, str. 196.

<sup>21</sup> „Deutsche Botschaft Tallinn, Zusammen sind wir stärker als dieser Krieg“ – Außenministerin Baerbock beim Berliner Forum Außenpolitik – Auswärtiges Amt, 2023, <https://tallinn.diplo.de/ee-de/themen/politik/baerbock-berliner-forum/2559528>, pristupljeno: 10. 12. 2023.

<sup>22</sup> • Podvukao autor ovog rada.

Ova izjava može se tumačiti iz više uglova. Najpre, govori se o značaju Evropske unije kao zaštitnom mehanizmu u kontekstu invazije na Ukrajinu. Radi se o političkoj zajednici koja je i sigurnosnog karaktera, u smislu da su njene granice podložne odbrani od strane svih članica. To je naročito važna stvar za istočne članice, poput Poljske, baltičkih država i Rumunije, koje se nalaze u neposrednom susedstvu velikog evropskog rata. Članstvo u Evropskoj uniji predstavlja njihovu bezbednosnu garanciju da se sukob neće preliti preko njihovih granica. Činjenica da su navedene države i članice NATO-a pruža dodatnu garanciju u tom pogledu. U kontekstu izjave nemačke ministarke, članstvo u Evropskoj uniji treba tumačiti u kontekstu privilegija koje se odnose na njihove građane, ali i na obaveze u pogledu solidarnosti.

Osiguranje života vezuje se za osiguranje osobe u kontekstu ugovorenog događaja i vremena važenja polise, pri čemu je, u slučaju nastupanja tog događaja, osiguravač u obavezi da nadoknadi nastalu štetu.<sup>23</sup> Imajući u vidu gorenavedenu izjavu, osiguranje se može izjednačiti s klauzulom o međusobnoj odbrani, kao i drugim privilegijama članstva, dok se pod osiguravačem, odnosno pokroviteljem usluge osiguranja, podrazumeva da se radi o Evropskoj uniji. Evropska unija je garant blagostanja država članica, a države članice su dužne da se pridržavaju svojih obaveza u pogledu harmonizacije s evropskim normama i standardima, kako u političkom, ekonomskom i spoljnopoličkom smislu, tako i u finansijskom. Dodatno simbolično može poslužiti paralela o polisi osiguranja; kao što ugovarači osiguranja zaključivanjem i plaćanjem polise obezbeđuju sebi određeni nivo zaštite, tako i države članice Unije putem godišnjih kontribucija budžetu Evropske unije osiguravaju svoj set privilegija koje proističu iz članstva.

Nemačka ministarka diplomatičke ponovo je, u sličnom kontekstu u toku posete Sloveniji u decembru 2023. godine, govorila o bezbednosti. Ističući potrebu da se politika proširenja Evropske unije načini delotvornijom, Berbokova je istakla da je „svima potrebna EU koja će ostati ‘bezbednosno sidro’ Evrope”, dodavši da su Slovenija i Nemačka ujedinjene u tome da ojačaju zajedničku Evropu, da je učine prikladnom za budućnost i uključe zemlje Zapadnog Balkana u tu sredinu. „Za nas je jaka Evropska unija, baš kao i NATO, nezamenljivo životno osiguranje u neizvesnim vremenima”, rekla je Analena Berbok naglasivši i da zemlje Zapadnog Balkana „potpuno i apsolutno” pripadaju Evropskoj uniji, te da je njihovo priključenje u bezbednosnom interesu svih.<sup>24</sup>

Imajući u vidu navedeno, može se konstatovati da se primena termina „osiguranje“ u retorici nemačkih političara primarno povezuje s kriznim trenucima, gde se Evropska unija posmatra kao neka vrsta zaštitne mreže u slučaju nepredviđenih

<sup>23</sup> Mile Bijelić, *Osiguranje i reosiguranje*, Zagreb, 2002, str. 292–293.

<sup>24</sup> Tanjug, Berbok: Zemlje Zapadnog Balkana „apsolutno i potpuno“ pripadaju EU, 2022, <https://www.rts.rs/lat/vesti/politika/5322303/berbok-zemlje-zapadnog-balkana-apsolutno-i-potpuno-pripadaju-eu.html>, pristupljeno: 10. 12. 2023.

i nepovoljnih situacija. Dodatno, ne samo da se članstvo aktuelnih država članica percipira kao prednost (kako u bezbednosnom tako i u drugom pogledu, npr. u pogledu uživanja pojedinačnih sloboda i privilegija), već se i učlanjenje drugih evropskih država posmatra kao unapređenje prednosti čitavog evropskog prostora. U tom smislu, politika proširenja Evropske unije, čiji je Srbija deo, sagledava se u izmenjenom kontekstu, što pokazuje i širenje njenog opsega na istočnoevropske zemlje poput Moldavije, Gruzije i Ukrajine. U prenesenom značenju, članstvo u Evropskoj uniji se za Nemačku pokazalo kao adekvatna osiguravajuća polisa, pogotovo u aktuelnim geostrateškim prilikama, te se pristupanje novih zemalja posmatra kao rešenje za adekvatan razvoj, stabilnost i prosperitet i tih zemalja.

#### **IV. Teorijsko-konceptualni aspekti**

Konstruktivistički pristup polazi od premise da funkcija teorije nije (samo) da analizira društvene procese, već i da učestvuje u njihovom samom kreiranju i dinamici.<sup>25</sup> Osvrćući se na istraživanja verovatno najeminentnijeg zastupnika tog pristupa, Aleksandra Venta, Koplend (Dave C. Copeland) navodi da se konstruktivizam izdvaja po tri osnova u odnosu na druge teorijske pristupe.<sup>26</sup> Prvo: na tokove globalne politike i ponašanje aktera međunarodnih odnosa utiču ideje, norme i vrednosti (a ne samo sila i interesi, kao što navode pobornici realizma, prim. aut.); drugo, taj ideacijski aspekt ima suštinski značaj na oblikovanje ponašanja i identiteta različitih aktera, koji su podložni promenama; treće, interakcija između skupa ideja i raznih aktera vodi menjanju društvene realnosti, budući da svaka strana na neki način reaguje u međunarodnim odnosima, i na taj način ostavlja svoj trag u njima.<sup>27</sup> Navedeni aspekti vrlo su značajni za razumevanje ne samo država kao osnovnih aktera međunarodnih odnosa već i međunarodnih organizacija, kao i same Evropske unije kao nadnacionalnog entiteta koji je u mnogo čemu jedinstven u svetskoj politici.

Maners (Ian Manners) predstavlja jednog od najuticajnijih istraživača na polju istraživanja dometa i uticaja Evropske unije. Pomoću koncepta „normativne sile“, Maners pojašnjava da regulatorni aspekt ne predstavlja samo puki osnov za povezivanje unutar Unije i rad njenih institucija, već otečelotvoruje i način na koji EU deluje kao uticajni akter u međunarodnim odnosima.<sup>28</sup> U kontekstu ovog rada, Mannersova stanovišta mogu biti posmatrana kao dopunjujuća u odnosu na konstruk-

<sup>25</sup> Videti: Alexander Wendt, „Anarchy is what States Make of it: The Social Construction of Power Politics“, *International Organization* 46, 2/1992, str. 391–425.

<sup>26</sup> Dale Copeland, „The Constructivist Challenge to Structural Realism“, *International Security* 25, 2/2000, str. 189–190.

<sup>27</sup> Ibid.

<sup>28</sup> Ian Manners, „Normative Power Europe: A Contradiction in Terms?“ *Journal of Common Market Studies* 40, 2/2002, str. 252–253.

tivističke elemente pojašnjene u prethodnom delu. Po njegovom mišljenju, pored toga što je važno šta EU zapravo radi<sup>29</sup> u međunarodnim odnosima, kao i kako se po određenim pitanjima izjašnjava, zapravo je još važnije ono što ta organizacija jeste,<sup>30</sup> te prepoznaje tri karakteristike: (1) Unija može biti sagledavana kao stvaralač pravila u međunarodnim odnosima; (2) ona postupa tako da menja međunarodne norme i (3) EU i treba da radi tako da svoje norme proširi izvan svojih granica.<sup>31</sup>

Taj pristup ne samo da je koristan u prikazivanju potencijala Evropske unije da utiče na oblikovanje pravno-političkih sistema u susednim regionima, poput Zapadnog Balkana i istočnog susedstva koji su uključeni u politiku proširenja, već ilustruje i činjenicu da metod integracije koji je ona patentirala beleži velike uspehe i na unutrašnjem planu, u stvaranju veće kohezije među državama članicama. Među najuspešnije aspekte Evropske unije tako treba izdvojiti jedinstveno tržište – najveće na svetu, sa svojim rigoroznim i dalekosežnim pravilima i standardima; činjenicu da se radi o najvećoj svetskoj privredi, gde za oko 440.000.000 stanovnika prosečan BDP po glavi iznosi 25.000 evra. Ali tih aspekata ima i u drugim domenima – Šengensko područje, evrozona, kao i činjenica da je jedinstveni razvoj EU kao mirovnog projekta doprineo mnogodecenijskoj stabilizaciji prilika u velikom delu kontinenta.<sup>32</sup>

Dodatau povoljnost u političkoj i ekonomskoj integraciji koju sprovodi Evropska unija čini činjenica da je jedan važan aspekt povezivanja među članicama i sigurnost koja proističe iz tzv. klauzule o međusobnoj odbrani. Član 47 st. 7 Ugovora o Evropskoj uniji kaže da ukoliko je država članica žrtva vojne agresije na svojoj teritoriji, druge države članice imaju *obavezu*<sup>33</sup> da joj pomognu i podrže je svim mogućim sredstvima u svojoj moći, a u skladu (i) sa članom 51 Povelje Ujedinjenih nacija.<sup>34</sup> Ta klauzula počiva na ideji o solidarnosti među državama članicama Unije, gde napad na jednu od njih sa sobom povlači zajednički odgovor čitave EU, što predstavlja značajan element odvraćanja u kontekstu mogućih napada na najambiciozniju svetsku organizaciju. Pored toga, ta odredba je dopunjena i klauzulom o solidarnosti (član 222 Ugovora o funkcionisanju Evropske unije), koja kaže i da su države članice u obavezi da zajednički delaju u situacijama kada je druga članica pogodžena terorističkim napadom ili katastrofama izazvanim od strane čoveka (pre negoli prirodnim katastrofama, prim. aut).<sup>35</sup>

<sup>29</sup> • Podvukao autor ovog rada.

<sup>30</sup> • Podvukao autor ovog rada.

<sup>31</sup> Ian Manners, *Ibid.*

<sup>32</sup> European Commission, EU position in world trade, 2023, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en), pristupljeno: 10. 12. 2023.

<sup>33</sup> • Podvukao autor ovog rada.

<sup>34</sup> EUR-Lex, Mutual defence clause, 2023, <https://eur-lex.europa.eu/EN/legal-content/glossary/mutual-defence-clause.html#:~:text=The%20Treaty%20of%20Lisbon%20strengthens,the%20Treaty%20on%20European%20Union>), pristupljeno: 10. 12. 2023.

<sup>35</sup> *Ibid.*

Bezbednosna argumentacija može biti tumačena i kroz prizmu neoliberalnog institucionalizma, koji produbljivanje saradnje u Evropskoj uniji posmatra kao način za dugoročnu stabilizaciju prilika na evropskom kontinentu.<sup>36</sup> Širenjem domena i granica Evropske unije, uključujući i njene bezbednosne garancije, mir i prosperitet može da zavlada i u onim delovima Evrope gde pre toga mira nije bilo. Nekadašnja konfliktna područja, poput irskog ostrva, Kipra i zapadnih delova bivše Jugoslavije danas spadaju u mirna područja kontinenta, što može biti slučaj i u drugim regionima pogodjenim nestabilnostima. Međutim, prostor Evropske unije nije jedno od najuređenijih ekonomsko-političkih podneblja na svetu na bazi spontane političke saglasnosti i koordinacije, već je rezultat mnogogodišnje političko-ekonomske i druge harmonizacije i produbljivanja integracija u mnogobrojnim oblastima. To usklađivanje ne samo da ne može biti sprovedeno preko noći, budući da je sveobuhvatno, već je i izuzetno skupo, kako u ekonomskom tako i u političkom smislu, jer ishodi nisu uvek vidljivi u kratkom roku. Pored činjenice da pristupanje Evropskoj uniji podrazumeva ispunjavanje Kopenhaških, Madridskih uslova i uslova koji se odnose na postkonfliktna područja u slučaju Zapadnog Balkana, ono takođe zavisi i od političke volje rukovodilaca zemlje, ali i rukovodstava u samoj Uniji (kako evropskih institucija, tako i svih država članica). Kriza proširenja Evropske unije traje barem jednu deceniju i nije izvesno da će u kratkom roku ta nepovoljna tendencija biti prevaziđena, budući da zahteva i ozbiljno korigovanje mehanizama odlučivanja i funkcionisanja unutar evropskih institucija.

Međutim, činjenica da je politika proširenja Evropske unije u krizi (tj. da se već jednu deceniju EU ne širi u geografskom smislu) ne implicira da je čitav sistem u krizi, kao ni to da je nefunkcionalan (kao ni da se integracija na unutrašnjem planu ne produbljuje). Ono što predstavlja izazov u aktuelnom geopolitičkom momentu jeste činjenica da EU želi da postupa kao normativna sila, koja odlučujuće oblikuje okolnosti i sisteme svog geografskog susedstva, ali da taj oblik „meke moći“ u kontekstu duboke bezbednosne krize nije dovoljan kako bi se stvari u tim regionima u kratkom roku preokrenule. To, uostalom, pokazuje i činjenica da se u Srbiji, kao jednom od vodećih kandidata za članstvo, nivo pripremljenosti za pristupanje nije izmenio još od 2016. godine<sup>37</sup> (što je rezultat mahom unutrašnjih okolnosti, ali i odraz manjka volje Unije da proces načini verodostojnjim i dinamičnjim). Pored toga, od Unije se očekuje da paralelno radi i na korigovanju svojih unutrašnjih mehanizama funkcionisanja (npr. pojednostavljinjanju donošenja odluka na osnovu kvalifikovane većine pre negoli jednoglasnosti u domenima od nacionalnog interesa), kao i na

<sup>36</sup> Mladen Bajagić, „Neoliberalni institucionalizam u međunarodnim odnosima i studijama bezbednosti“, *Srpska politička misao* 39, 1/2013, str. 136.

<sup>37</sup> Strahinja Subotić, Anesa Omeragić, Đorđe Dimitrov, Marko Todorović, „Spremnost i napredak Srbije ka članstvu u EU 2023“, 2023, <https://cep.org.rs/publikacije/spremnost-i-napredak-srbije-ka-clanstvu-u-eu-2023/>, pristupljeno: 10. 12. 2023.

njenoj međunarodnoj ulozi, kako u susednim regionima gde još uvek postoje brojne države koje naginju punopravnom članstvu, tako i izvan tih regiona, s kojima EU tesno sarađuje. Kombinacija reformi koja bi istovremeno poboljšala i unutrašnje funkcionišanje i razvila spoljnopolitičke kapacitete Unije predstavlja veliki izazov, tim pre što ni u prethodnoj deceniji to nije bilo naročito uspešno, barem iz ovog drugog ugla.

Ipak, pojedini autori naglašavaju da su krize u funkcionišanju zapravo inherentne procesu evropskih integracija.<sup>38</sup> Osim toga, geopolitika je mnogo godina predstavljala važan element u donošenju tih odluka i pravljenju strateških planova, a to je možda još i više očekivano u mandatu Evropske komisije koji se naziva „geopolitičkim“.<sup>39</sup> Kad govorimo o politici proširenja kao načinu da se na srednjeročnom planu unaprede sposobnosti Evropske unije u bezbednosnom i spoljnopolitičkom smislu, treba imati u vidu da su sve prethodne runde pristupnih ciklusa u manjoj ili većoj meri imale sigurnosnu konotaciju, te da su u izvesnoj meri uticale i na obezbeđivanje evropskih granica u vojnom pogledu, iako EU u tom pogledu nije uticajan bezbednosni akter. U okolnostima kada besni rat u Ukrajini, susedi poput Rumunije i Poljske, uprkos zabrinutostima, računaju na zaštitnu ulogu članstva u Evropskoj uniji kao faktora odvraćanja od bilo kakvih vojnih intervencija, dok sama Unija, s druge strane, svojim mehanizmima funkcionišanja, ma koliko oni delovali tromo i neprivlačno, osigurava da čitav njen ekonomski i politički prostor funkcioniše kao celina, na bezbednoj udaljenosti od sukoba. Jedina zemlja koja je istupila iz članstva – Ujedinjeno Kraljevstvo (UK) – suočena je sa činjenicom da, prema nalazima ankete YouGov, u oktobru 2023. godine blizu dve trećine ispitanika (62%) smatra da Bregxit predstavlja neuspeh.<sup>40</sup>

Imajući u vidu da se radi o velikom ratu u jednoj od najvećih zemalja kontinenta, ta činjenica nije zanemarljiva, i govori u prilog tome da članstvo u Uniji zaista predstavlja polisu osiguranja za države članice, koje očekuju da i u slučaju nezamislivih i nepredvidivih situacija (poput eventualnih napada s istoka) imaju pokriće i podršku svog matičnog bloka kao nadnacionalnog osiguravača bezbednosti.

## V. Zaključak

Nakon prikazivanja geopolitičkog karaktera rizika u Ukrajini, u ovom radu analizirane su političke izjave nemačkih zvaničnika u kojima je koncept evropskih

<sup>38</sup> Frank Schimmelfennig, „European Integration (Theory) in Times of Crisis“, <https://www.eui.eu/Documents/RSCAS/JMF-25-Presentation/Schimmelfennig-European-Integration-in-Crisis-RSC.pdf>, pristupljeno: 7. 12. 2023.

<sup>39</sup> Ioannis Armakolas, Srdjan Cvijić, Judy Dempsey and Teresa Reiter, „The geopolitics of EU enlargement and democracy“, The geopolitics of EU enlargement and democracy, The State of the Union Conference, 2021, <https://hdl.handle.net/1814/71531>, pristupljeno: 7. 12. 2023.

<sup>40</sup> Shona Murray, „Brits regret Brexit but rejoining the EU is unlikely“, 2023, <https://www.euronews.com/my-europe/2023/09/29/brits-regret-brexit-but-rejoining-the-eu-is-unlikely>, pristupljeno: 7. 12. 2023.

integracija povezivan sa terminom osiguranje. Ta reč se upotrebljava metaforički, kako bi se prikazao izuzetan značaj i prednost članstva u Evropskoj uniji, ne samo u mirnodopskim uslovima, već naročito u okolnostima kada na istoku kontinenta bukti veliki rat. Jedan od ključnih aspekata te povezanosti ogleda se u članu 47 Ugovora o Evropskoj uniji, koji reguliše obavezu drugih država članica da u slučaju napada na jednu od njih stupe u odbranu napadnutog partnera. Ta klauzula predstavlja bezbednosnu garanciju da će u slučaju prelivanja sukoba država članica EU, ma o kojoj zemlji se radilo, ta zemlja imati pomoć drugih članica. Ta „evropska solidarnost“, kako je navela nemačka ministarka spoljnih poslova, predstavlja „životno osiguranje“ država članica. Pored toga, radi se i o izuzetnom sredstvu odvraćanja od mogućih napada bilo kog aktera, što uostalom pokazuje i činjenica da u dosadašnjoj istoriji nije bilo direktnih napada bilo koje druge zemlje na jednu državu članicu EU.

U tom pogledu, analogija članstva u EU i osiguranja poseduje dvostruki značaj u aktuelnim geopolitičkim prilikama. S jedne strane, države članice poput Nemačke, koje su svoj politički i ekonomski razvoj ugradile u evropske okvire i od njih izuzetno zavise, poistovećuju članstvo s privilegijama blagostanja i bezbednosti. S druge strane, učlanjenje novih zemalja, a sadašnjih kandidata za članstvo u Evropskoj uniji, posmatra se kao blagovorno, budući da se taj čin povezuje sa širenjem zone mira i bezbednosti na kontinentu koji je pogoden velikim ratom u svom istočnom delu. S jedne strane se može konstatovati da koncept širenja Unije u bezbednosno-političkom i drugom pogledu ima smisao, što pokazuje i dugogodišnja evolucija EU i njeno prerastanje u najrelevantnijeg aktera na Starom kontinentu. S druge strane, pristupanja novih zemalja zavise i od sposobnosti njih samih, kao i od kapaciteta druge strane, da se u vrlo ograničenom roku izvrše brojne, dubinske i zahtevne reforme (pravne harmonizacije, poboljšanje performansi institucija, načina odlučivanja, koncipiranja budžeta itd), što predstavlja ozbiljan izazov i u mirnodopskim uslovima.

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## **INSURANCE METAPHORE IN GERMAN POLITICAL DISCOURSE ON EUROPEAN INTEGRATION**

ORIGINAL SCIENTIFIC PAPER

### **Abstract**

Since the escalation of the Ukrainian crisis in 2013, there have been repeated statements by officials and politicians of the Federal Republic of Germany highlighting cooperation within the structures of the European Union as a kind of "insurance policy" for each member state. This paper examines the use of this term as a metaphor within political rhetoric to illustrate the perceived benefits of EU membership in the context of foreign policy and security challenges. In this sense, the European Union is portrayed as a safety net for its members amidst strained relations with Russia, given that country's role in triggering and shaping the dynamics of the Ukrainian crisis (and beyond). Additionally, the analysis explores the changing perception regarding EU enlargement policy, specifically how it is increasingly viewed as a tool for advancing European security and other political interests. Following a brief overview of the geopolitical nature of the war risk in Ukraine, the paper analyzes statements by German officials, seeking to clarify them through theoretical approaches in international relations (e.g., constructivism, liberal intergovernmentalism, realism) on the one hand, and through technical-conceptual definitions of the term "insurance" and related elements on the other hand.

**Keywords:** *policy, Germany, European Union, membership, war, security, Russia*

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## I. Introduction

“Our unity is our life insurance.”  
Annalena Baerbock, Minister of Foreign Affairs  
of the Federal Republic of Germany<sup>2</sup>

Since 2022, the European continent has been struck by a geostrategic crisis triggered by the attack on Ukraine. This crisis has resulted in the comprehensive “securitization” of various European policies, ranging from the long-standing tensions in the energy sector,<sup>3</sup> to defense and the EU’s enlargement policy. When we talk about securitization, we are essentially talking about the process of identifying a threat to national or supranational security based on subjective rather than objective assessments or perceptions of danger. These threats can be perceived in the military-security, political, economic, social, and environmental spheres.<sup>4</sup> During the COVID-19 pandemic, another additional dimension of this phenomenon emerged – the public health sector and the challenges of international cooperation in this regard.<sup>5</sup> In fact, this entire process can be traced back at least to the Maidan Revolution of 2013/2014, since when relations between Russia and the European Union have been marked by high tensions, sanctions, and ever-increasing limitations on cooperation. The securitization of an ever-increasing number of EU policies and sectors provides a broader thematic framework for understanding the research problem: the manner and reasons for the use of the term “insurance” in the German political discourse.

This paper focuses on the most influential member state of the European Union, Germany, and its dramatic shift in relations with Russia, often referred to as a “Zeitenwende” (turning point) in literature.<sup>6</sup> This turning point followed a decade of cautious cooperation between Moscow and Berlin, characterized by economic pragmatism under Chancellor Angela Merkel despite deteriorating political relations. Some authors vividly describe the evolution of their relationship in the past

<sup>2</sup> Auswärtiges Amt, Videogrußwort von Außenministerin Annalena Baerbock zur 32. Ostseeparlamentarierkonferenz (BSPC), 2023, <https://www.auswaertiges-amt.de/en/newsroom/news/baerbock-baltic-sea-parliamentary-conference/2613958>, accessed on: November 30, 2023.

<sup>3</sup> Marco Siddi, „Identities and Vulnerabilities: The Ukraine Crisis and the Securitisation of the EU-Russia Gas Trade”, *Energy Security in Europe. Energy, Climate and the Environment* (editor Kacper Szulecki), Cham, 2018, pp. 251–273.

<sup>4</sup> Richard J. Kilroy, „Securitization”, *Handbook of Security Science*, (editor Anthony Masys), Cham, 2018, pp. 1–19.

<sup>5</sup> Consult the Proceedings: *Development Directions of the European Union after the Covid-19 Pandemic* (editors Nevena Stanković, Dragana Dabić i Goran Bandov), Beograd, 2020.

<sup>6</sup> Marina Kostić, „Zeitenwende and the German National Security Policy: Analysis of the First National Security Strategy”, *The Review of International Affairs*, 1188, LXXIV/2023, pp. 79–105.

decade as “from Ostpolitik to Frostpolitik.”<sup>7</sup> While political relations with Russia have been steadily subject to ever-greater restrictions (e.g., targeted sanctions against individuals linked to activities detrimental to Ukrainian territorial integrity, freezing of their assets, etc.), energy cooperation, crucial for the functioning of the most developed European economy, continued with the development of the Nord Stream 2 megaproject and the construction of other gas pipelines.<sup>8</sup> The energy dependence of European countries on Moscow has been, and likely still is, a key economic challenge in the strained relations between the two sides.

The author argues that the term “insurance” used by German officials in political discourse should not be taken literally, in the context of actual insurance services, but rather metaphorically. It refers to the protection and privileges that membership in the European Union offers. This interpretation is further supported by the lack of an insurance concept covering an entire country within the traditional realm of insurance services. The author promises to delve deeper into the conceptual definition of “insurance,” its application in political rhetoric, the geopolitical risks involved, and theoretical explanations justifying its use by state officials in their speeches.

## **II. Geopolitical Risks in the Context of Insurance: A Brief Overview**

Before exploring the metaphorical use of “insurance” as a central theme in this research, the author dedicates this section to briefly examining the geopolitical nature of the risks associated with the war in Ukraine. This conflict is perceived as a specific type of geopolitical risk – a negative phenomenon impacting all branches of economic activity, including the insurance sector. Examining the geopolitical risk of war is crucial to understanding the role and context of “insurance,” both in its metaphorical and financial meanings.

Geopolitical risks go beyond isolated events like terrorist attacks or political unrest, encompassing a wider spectrum of impactful occurrences. War, exemplified by the ongoing conflict in Ukraine, embodies the most severe kind of geopolitical risk, deeply affecting all spheres of social and economic life, both domestically and internationally.<sup>9</sup> Ahmed et al. point out that the attack on Ukraine triggered an unprecedented shock to financial markets, considering the global roles of both

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<sup>7</sup> Tuomas Forsberg, „From Ostpolitik to ‘frostpolitik’? Merkel, Putin and German foreign policy towards Russia”, *International Affairs* 92: 1, 2016), pp. 21–42.

<sup>8</sup> Andreas Umland, „Germany’s Russia Policy in Light of the Ukraine Conflict: Interdependence Theory and Ostpolitik”, *Orbis*, 66, 1/2022, pp. 78–94.

<sup>9</sup> Wael Hemrita, Mohamed Sahbi Nakhlic, Insurance and geopolitical risk: Fresh empirical evidence, *The Quarterly Review of Economics and Finance* 82 (2021) 320–334.

countries as major food and energy producers.<sup>10</sup> Apart from the immediate tragedies of human life and property loss in Ukraine, the war also entails numerous indirect consequences with potential long-term effects. These include: intensified economic, financial, and trade restrictions, international repercussions due to limited access to essential commodities (energy, fertilizers, grains), and substantial compensation claims arising from various sources.<sup>11</sup>

Companies operating in a specific geographical region face primary concerns regarding their future operations, particularly concerning potential damage and the ability (or inability) to continue business as usual. A 2022 international report on political risks, specifically within the context of the Ukraine invasion, revealed that a staggering 56% of surveyed companies expressed fear of their operations becoming entangled in diplomatic disputes.<sup>12</sup> As the wider trend of distancing from Russia unfolds, coupled with trade disputes between the United States and China, geopolitical anxieties are increasingly impacting business operations, including the insurance sector.

According to a Financial Times analysis, the war in Ukraine will bring about significant changes in how businesses manage risk: (1) having an intimate knowledge of these diverse, complex and developing geopolitical risks is critical to identify challenges before they become problem; (2) revisiting worst-case scenarios requires reassessment, particularly in terms of overlooking the possibility of a Ukrainian (and Western allies') defeat, considering Europe's decades of peacetime complacency; (3) leaders need to change their mindsets, as effective risk management involves considering multiple scenarios and proactive damage prevention strategies; (4) traditional risk management techniques, particularly regarding supply chains, regain relevance.<sup>13</sup>

Escalating geopolitical threats, particularly in Eastern Europe, have fueled the growth of firms specializing in crisis-related insurance. Considering Ukraine's critical role in the global agricultural market, the initial blockade of its Black Sea ports prevented crucial exports. To remedy this, under the auspices of the United Nations, an international initiative sought a temporary solution. This resulted in the creation of a "safe passage" for grain and foodstuff exports from Ukrainian ports, enabling the partial movement of agricultural products otherwise trapped in the war zone.<sup>14</sup>

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<sup>10</sup> Shamima Ahmed, Rima Assaf, Molla Ramizur Rahman, Fariha Tabassum, „Is geopolitical risk interconnected? Evidence from Russian-Ukraine crisis”, *The Journal of Economic Asymmetries*, Volume 28, 2023, e00306, ISSN 1703-4949, <https://doi.org/10.1016/j.jeca.2023.e00306>.

<sup>11</sup> Nick Robson, „How the Russia–Ukraine Conflict Is Impacting Insurance Across Industries”, *BrinkNews*, <https://www.brinknews.com/how-the-russia-ukraine-conflict-is-impacting-industries/>, accessed on: 29.01- 2024.

<sup>12</sup> Sam Wilkin, „2022 Political Risk Survey Report”, 2022, <https://www.wtwco.com/en-au/insights/2022/03/2022-political-risk-survey-report>, accessed on: 27.01- 2024.

<sup>13</sup> Bigger Picture (Financial Times Partner Content), Four ways the conflict in Ukraine will change the approach to risk management, 2023, <https://biggerpicture.ft.com/global-risks/article/four-ways-war-in-ukraine-will-change-approach-to-risk-management>, accessed on: 27.01- 2024.

<sup>14</sup> See: Miloš Petrović, Multidimensional Nature of Risks in the Context of War in Ukraine, *Insurance Trends* 1/2023, pp. 43–58.

Following Russia's withdrawal from the 2023 agreement, companies like Marsh McLennan stepped in. They partnered with the Ukrainian government to provide a public-private war-risk insurance scheme for ships exporting agricultural products from Ukrainian ports.<sup>15</sup> These examples demonstrate that, especially in protracted conflicts like Ukraine's, even insurance companies are showing increased willingness to operate in high-risk environments. This, in turn, helps mitigate the impact on supply chains and business operations, at least partially.

### **III. The Perception of Membership as an Insurance Policy in German Political Discourse**

German foreign policy has long been shaped by two broader processes: the transatlantic context (close ties with Washington, including membership in NATO), and the European context (Germany's role in European integration, often in coordination with its largest and most influential neighbor, France).<sup>16</sup> Additionally, as Europe's economically dominant power, Germany has for many years cultivated relationships with Russia as an energy source. This broader dimension, known as "Ostpolitik" (Eastern Policy), involved pragmatic cooperation between Berlin and Moscow in previous decades on energy projects that, in one way or another, reduced the importance of Ukraine as a transit country for Russian energy.<sup>17</sup> These opposing forces became particularly evident in the political sphere roughly a decade ago.

While the security aspect plays a crucial role in understanding EU membership as a framework for a country's well-being in the context of the Ukraine attack (discussed further in the next chapter), the notion of insurance has previously been used in political discourse to highlight the benefits of EU membership. In 2016, Michael Roth, a member of the German Bundestag, stated: "Europe is not just a playground for detail-obsessed technocrats. Europe is not the madness of uniformity and forced levelling. On the contrary: Europe is our realized dream of diversity, a guarantee for our individual life plans, and our life insurance in turbulent times of crisis! We should keep this in mind much more often when we start doubting the purpose and value of Europe."<sup>18</sup>

<sup>15</sup> Ian Smith, Isobel Koskiw, Ukraine reaches deal with insurers for grain shipments, 2023, <https://www.ft.com/content/1b29860d-763d-4157-a816-4eacb868ef23>, accessed on: 29-01- 2024.

<sup>16</sup> Miloš Petrović, „Political relations between Germany and the United States during the Trump presidency“, *Europe in changes: the old continent at a new crossroads* (editors Katarina Zakić and Birgül Demirtaş), Belgrade, 2020, p. 278.

<sup>17</sup> Andreas Umland, „Germany's Russia Policy in Light of the Ukraine Conflict: Interdependence Theory and Ostpolitik“, *Orbis*, 66, 1/2022, pp. 78–94.

<sup>18</sup> Michael Roth, Gastbeitrag von staatsminister michael roth: europa – unsere lebensversicherung in stürmischen krisenzeiten, 2016, <https://www.treffpunkteuropa.de/gastartikel-von-staatsminister-michael-roth-europa-unsere?lang=fr>, accessed on: 10- 12- 2023

Since the onset of the Ukrainian crisis in 2013, political relations between Russia and the European Union, particularly with Germany as its most influential member, have deteriorated. This decline needs to be examined in the context of each side's capacity for international political influence. On the one hand, Russia portrays itself as a distinct force in international relations, leveraging its "hard power" assets: military and security capabilities, vast energy resources, and shared history, tradition, and cultural proximity with the post-Soviet space. The European Union's power, in contrast, is "soft," resting on its ability "to get others to want what it wants."<sup>19</sup> Neighboring countries seek closer political and economic ties with the Union, which Brussels makes conditional upon reform processes. This applies not only to the enlargement policy, where candidates undertake reforms to meet EU accession criteria, but also to close partners like Norway, with whom the Union collaborates on various political, economic, security, and other issues, even outside of membership. By promoting its values, norms, and standards in its neighborhood, the European Union also strengthens its own power.

The ongoing clash between "hard" and "soft" power is crucial to understanding the European Union's (and particularly Germany's) unique position in the post-2013 geopolitical landscape, culminating in the full-scale Russian invasion of Ukraine in 2022 and the annexation of several eastern territories. A major war rages on the European continent, close to the EU's borders, causing dramatic shifts in German foreign policy (these include halting the Nord Stream 2 pipeline, allocating €100 billion for rearmament, sending military aid to Ukraine, and imposing unprecedented sanctions on Russia).<sup>20</sup> The conflict also coincides with a change in leadership, marking the end of Angela Merkel's long reign and the beginning of Olaf Scholz's term. This presents a delicate moment for Germany as it re-evaluates its relationship with Moscow.

In October 2022, German Foreign Minister Annalena Baerbock declared at the Berlin Forum, "Together we are stronger than this war."<sup>21</sup> She further elaborated in her speech: „Today, in this situation, most people in Europe, in Germany, know what is at stake. In this situation, we need to let our greatest strength prevail: our European cohesion, our solidarity with those who need our support. After all, solidarity is not an end in itself. It is the cornerstone of our joint security. This European solidarity is our *life insurance*“<sup>22</sup>.

<sup>19</sup> Joseph Nye, „Soft Power“, *Foreign Policy* 80, 1990, pp. 153–171.

<sup>20</sup> Miloš Petrović, Maja Kovačević, Ivana Radić Milosavljević, *Srbija i Evropska unija dve decenije nakon Solunskog samita*, Beograd, 2013, p. 196.

<sup>21</sup> „Deutsche Botschaft Tallinn, Zusammen sind wir stärker als dieser Krieg“ – Außenministerin Baerbock beim Berliner Forum Außenpolitik – Auswärtiges Amt, 2023, <https://tallinn.diplo.de/ee-de/themen/politik/baerbock-berliner-forum/2559528>, accessed on: 10. 12. 2023.

<sup>22</sup> • Underlined by the author of this paper.

This statement can be interpreted from several perspectives. Firstly, it emphasizes the significance of the European Union as a protective mechanism in the context of the invasion of Ukraine. It functions as a political community with a security dimension, meaning its borders are subject to defense by all members. This is particularly crucial for eastern member states like Poland, the Baltic countries, and Romania, which directly neighbor a major European war. Membership in the European Union represents their security guarantee that the conflict won't spread beyond their borders. The fact that these countries are also members of NATO provides an additional layer of security in this regard. Within the context of the German minister's statement, EU membership should be interpreted not just in terms of privileges for its citizens, but also with regard to the associated obligations of solidarity.

Life assurance ties the insurance of an individual to the occurrence of a specific event within the agreed-upon policy period. Upon the occurrence of that event, the insurer is obliged to compensate the insured for the incurred loss.<sup>23</sup> Building on this definition, we can equate "insurance" with the mutual defence clause and other membership privileges, while the insurer, or sponsor of the insurance service, is assumed to be the European Union. The EU acts as a guarantor of member states' well-being, while member states have obligations to align themselves with European norms and standards in political, economic, foreign policy, and financial spheres. This analogy can be further extended to resemble an insurance policy. Just as policyholders secure a level of protection by purchasing and paying for insurance, member states contribute to the EU budget to ensure their access to the diverse privileges associated with membership.

German Foreign Minister Annalena Baerbock, echoing her previous statements, emphasized security during a December 2023 visit to Slovenia. Calling for a more efficient EU enlargement policy, she declared, "We need a European Union that serves as an 'anchor of security' for all of us in Europe." She further stressed both countries' commitment to strengthening and modernizing the EU and integrating Western Balkan states. Baerbock stated, "A strong European Union is, just like NATO, an irreplaceable life assurance policy in uncertain times." She reiterated that Western Balkan countries "completely and absolutely" belong in the European Union and their accession serves everyone's security interests.<sup>24</sup>

Considering the above, we can observe that the use of the term "insurance" in the rhetoric of German politicians primarily aligns with moments of crisis. In these situations, the European Union is viewed as a safety net in the face of unforeseen and unfavorable circumstances. Additionally, not only is membership for current member

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<sup>23</sup> Mile Bijelić, *Osiguranje i reosiguranje*, Zagreb, 2002, pp. 292–293.

<sup>24</sup> Tanjug, Berbok: Zemlje Zapadnog Balkana „apsolutno i potpuno“ pripadaju EU, 2022, <https://www.rts.rs/lat/vesti/politika/5322303/berbok-zemlje-zapadnog-balkana-apsolutno-i-potpuno-pripadaju-eu.html>, accessed on: 10-12-2023.

states perceived as advantageous (both in terms of security and other aspects such as individual freedoms and privileges), but the accession of other European states is also seen as enhancing the overall benefits for the entire European space. In this sense, the EU's enlargement policy, of which Serbia is a part, is viewed in a modified context, as evidenced by its expansion to include Eastern European countries such as Moldova, Georgia, and Ukraine. Figuratively, for Germany, EU membership has proven to be an adequate insurance policy, particularly in the current geostrategic climate. Therefore, the accession of new countries is seen as a solution for adequate development, stability, and prosperity for those countries as well.

#### **IV. Theoretical-Conceptual Aspects**

The constructivist approach assumes that the function of theory is not (only) to analyze social processes but also to participate in their creation and dynamics itself.<sup>25</sup> Referring to the research of arguably the most prominent proponent of this approach, Alexander Wendt, Dale Copeland highlights three key distinctions of constructivism compared to other theoretical approaches.<sup>26</sup> Firstly, global political trends and the behavior of international actors are influenced by ideas, norms, and values (not just power and interests, as advocated by realism proponents, *author's comment*). Secondly, this ideational aspect is of essential importance in shaping the behavior and identities of different actors, which are subject to change. Thirdly, the interaction between a set of ideas and various actors leads to changes in social reality, as each side in international relations reacts in some way, thus leaving its mark on them.<sup>27</sup> These aspects are crucial for understanding not only states as primary actors in international relations but also international organizations and the European Union itself as a supranational entity unique in many ways within world politics.

Ian Manners represents one of the most influential researchers in the field of exploring the scope and impact of the European Union. Using the concept of "normative power," Manners explains that the regulatory aspect not only serves as a basis for cohesion within the Union and the functioning of its institutions but also embodies the way in which the EU acts as an influential actor in international relations.<sup>28</sup> In the context of this paper, Ian Manners' ideas complement the constructivist elements explained in the previous section. He argues that beyond simply *what the*

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<sup>25</sup> Videti: Alexander Wendt, „Anarchy is what States Make of it: The Social Construction of Power Politics“, *International Organization* 46, 2/1992, pp. 391–425.

<sup>26</sup> Dale Copeland, „The Constructivist Challenge to Structural Realism“, *International Security* 25, 2/2000, pp. 189–190.

<sup>27</sup> Ibid.

<sup>28</sup> Ian Manners, „Normative Power Europe: A Contradiction in Terms?“ *Journal of Common Market Studies* 40, 2/2002, pp. 252–253.

*EU does*<sup>29</sup> in international relations and how it positions itself on various issues, even more crucial is *what the EU actually is*.<sup>30</sup> He identifies three key characteristics: (1) The EU can be seen as a rule-maker in international relations; (2) It acts to change international norms and (3) The EU should actively spread its norms beyond its borders.<sup>31</sup>

Not only does this approach help showcase the EU's potential to influence the shaping of legal and political systems in neighboring regions like the Western Balkans and Eastern Partnership countries included in its enlargement policy, but it also illuminates the vast internal successes of its unique integration method in strengthening cohesion among member states. Among the most successful aspects of the European Union, we can highlight: the single market- the largest in the world, with its rigorous and far-reaching rules and standards; the largest global economy with a population of around 440 million and an average GDP per capita of €25,000. But there are successes in other domains as well: the Schengen Area, the eurozone, and the development of the EU as a peace project contributing to multi-decade stabilization efforts across a large part of the continent.<sup>32</sup>

An additional benefit of the political and economic integration pursued by the European Union is the security aspect provided by the so-called mutual defence clause. Article 47(7) of the Treaty on European Union stipulates that if a Member State is the victim of armed aggression on its territory, the other Member States *shall have towards it an obligation*<sup>33</sup> of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter.<sup>34</sup> This clause rests on the idea of solidarity among the member states of the Union, where an attack on one of them entails a collective response from the entire EU, which represents a significant deterrent in the context of possible attacks on the most ambitious global organization. Additionally, this provision is complemented by the solidarity clause (Article 222 of the Treaty on the Functioning of the European Union), which also states that Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster (as opposed to natural disasters, author's note).<sup>35</sup>

The security argument can also be interpreted through the lens of neoliberal institutionalism, which views deepening cooperation within the European Union as

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<sup>29</sup> • Underlined by the author of this paper.

<sup>30</sup> • Underlined by the author of this paper.

<sup>31</sup> Ian Manners, *Ibid.*

<sup>32</sup> European Commission, EU position in world trade, 2023, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en), accessed on: 10- 12- 2023.

<sup>33</sup> • Underlined by the author of this paper.

<sup>34</sup> EUR-Lex, Mutual defence clause, 2023, <https://eur-lex.europa.eu/EN/legal-content/glossary/mutual-defence-clause.html#:~:text=The%20Treaty%20of%20Lisbon%20strengthens,the%20Treaty%20on%20European%20Union>), accessed on: 10- 12- 2023.

<sup>35</sup> *Ibid.*

a way to achieve long-term stability on the European continent.<sup>36</sup> By expanding the reach and boundaries of the European Union, including its security guarantees, peace and prosperity can potentially spread to regions of Europe previously deprived of it. Former conflict zones such as the island of Ireland, Cyprus, and the western parts of the former Yugoslavia are now peaceful areas of the continent, suggesting a similar outcome is possible in other regions afflicted by instability. However, the European Union is not the most readily established economic-political environment in the world based solely on spontaneous political agreement and coordination. It is rather the result of years of political-economic and other harmonization and deepening integration across numerous domains. This alignment is not an overnight process; it is comprehensive and incredibly expensive, both economically and politically, as results are not always immediately visible. Joining the European Union not only requires fulfilling the Copenhagen, Madrid, and post-conflict region (for the Western Balkans) criteria, but also relies on the political will of both the aspiring nation's leadership and the leadership within the Union itself (European institutions and all member states). The expansion crisis of the European Union has persisted for at least a decade, and it's uncertain whether this unfavorable trend will be overcome in the near future, as it necessitates a substantial overhaul of decision-making mechanisms and the functioning of European institutions. Expansion crisis of the European Union has persisted for at least a decade and there's no guarantee of overcoming this negative trend in the near future. The European Union enlargement crisis has been ongoing for at least a decade, and it is uncertain whether this unfavorable trend will be overcome in the short term, as it requires serious adjustments to decision-making mechanisms and functioning within European institutions.

However, the fact that the EU's enlargement policy is in crisis (meaning, geographically, the EU has not expanded in a decade) does not imply that the entire system is in crisis, dysfunctional, or lacking internal integration. The current geopolitical challenge lies in the EU's desire to act as a normative power, decisively shaping circumstances and systems of its geographic neighborhood. Yet, in the context of a profound security crisis, this "soft power" approach proves insufficient to quickly change things in these regions. This is further evidenced by Serbia, a leading candidate country, where the level of accession preparedness has not changed since 2016<sup>37</sup> (which is primarily the result of internal circumstances but also reflects the lack of Union's willingness to make the process more credible and dynamic). Additionally, the Union is expected to work simultaneously on correcting its internal functioning

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<sup>36</sup> Mladen Bajagić, „Neoliberalni institucionalizam u međunarodnim odnosima i studijama bezbednosti“, *Srpska politička misao* 39, 1/2013, p. 136.

<sup>37</sup> Strahinja Subotić, Anesa Omeragić, Đorđe Dimitrov, Marko Todorović, „Spremnost i napredak Srbije ka članstvu u EU 2023“, 2023, <https://cep.org.rs/publikacije/spremnost-i-napredak-srbije-ka-clanstvu-u-eu-2023/>, accessed on: 10.-12- 2023.

(e.g., simplifying decision-making based on qualified majority rather than unanimity in domains of national interest) and enhancing its international role. This applies both to neighboring regions with countries aspiring for full membership and to other regions where the EU engages extensively. Implementing reforms that simultaneously improve internal functioning and develop the EU's foreign policy capacities presents a significant challenge. Especially considering that similar attempts in the previous decade were not particularly successful, at least from this external perspective.

However, some authors argue that crises in functioning are actually inherent to the process of European integration.<sup>38</sup> Additionally, geopolitics has always been a significant factor in decision-making and strategic planning, and this is perhaps even more expected during the current European Commission mandate, dubbed "geopolitical."<sup>39</sup> When considering enlargement as a way to enhance the EU's security and foreign policy capabilities in the medium term, it is crucial to understand that all previous accession rounds had, to varying degrees, a security connotation. They contributed to securing European borders militarily, even though the EU itself is not a powerful security actor. In the context of the ongoing war in Ukraine, neighbors like Romania and Poland, despite their concerns, rely on the protective role of EU membership as a deterrent factor against any military interventions. Conversely, the Union, despite its sometimes slow and cumbersome functioning, ensures that its entire economic and political space operates as a cohesive unit, at a safe distance from conflict. The only country to leave the EU, the United Kingdom, faces the reality that, according to a YouGov poll in October 2023, nearly two-thirds of respondents (62%) consider Brexit a failure.<sup>40</sup>

Given the magnitude of the war unfolding in one of the continent's largest nations, this reality cannot be ignored and speaks further to the perception of EU membership as an insurance policy for member states. Even in unimaginable and unpredictable situations (such as potential attacks from the east), member states expect coverage and support from their parent bloc acting as a supranational insurer.

## V. Conclusion

Following the presentation of the geopolitical nature of the risks in Ukraine, this paper analyzes political statements by German officials in which the concept of European integration is linked to the term "insurance." This word is used metaphorically

<sup>38</sup> Frank Schimmelfennig, „European Integration (Theory) in Times of Crisis”, <https://www.eui.eu/Documents/RSCAS/JMF-25-Presentation/Schimmelfennig-European-Integration-in-Crisis-RSC.pdf>, accessed on: 07-12-2023.

<sup>39</sup> Ioannis Armakolas, Srdjan Cvijić, Judy Dempsey and Teresa Reiter, „The geopolitics of EU enlargement and democracy”, The geopolitics of EU enlargement and democracy, The State of the Union Conference, 2021, <https://hdl.handle.net/1814/71531>, accessed on: 07-12-2023.

<sup>40</sup> Shona Murray, „Brits regret Brexit but rejoining the EU is unlikely”, 2023, <https://www.euronews.com/my-europe/2023/09/29/brits-regret-brexit-but-rejoining-the-eu-is-unlikely>, accessed on: 07-12-2023.

to illustrate the exceptional importance and advantage of membership in the European Union, not only in peaceful conditions, but especially in circumstances where a major war rages in the east of the continent. One of the key aspects of this connection is reflected in Article 47 of the Treaty on European Union, which regulates the obligation of other member states to come to the defense of a member attacked. This clause represents a security guarantee that in the event of a spillover conflict, any EU member state, regardless of which country it is, will have the help of other members. This "European solidarity," as the German Foreign Minister stated, represents "life assurance" for member states. Furthermore, it also represents a significant deterrent against potential attacks from any actor, as evidenced by the fact that in the history of the EU, no direct attack has ever been launched by another country on an EU member state.

In this respect, the analogy of EU membership and insurance holds dual significance in the current geopolitical climate. For existing member states, like Germany, who have deeply integrated their political and economic development within the European framework and rely heavily on it, membership is equated with the privileges of well-being and security. They perceive the EU as a safe haven offering protection and prosperity. On the other hand, admitting new countries, currently aspiring to membership, is also seen as beneficial. This expansion is understood as extending the zone of peace and security across a continent already impacted by the war in its eastern region. Therefore, on one hand, the concept of EU enlargement in security, political, and other spheres seems meaningful. This is evident from the long-term evolution of the EU and its emergence as the most relevant actor on the continent. However, the accession of new members also depends on their own capabilities and the EU's capacity to handle numerous, deep, and demanding reforms within a limited timeframe. These reforms include legal harmonization, improved institutional performance, decision-making processes, budget planning, etc. Implementing such transformative changes presents a significant challenge even in peaceful times.

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**Zoran T. Ćirić<sup>1</sup>**

## VAŽNOST KOMUNIKACIJE S KLIJENTIMA U DELATNOSTI OSIGURANJA

### INFORMATIVNI PRILOG

#### Apstrakt

U tradicionalnom poslovanju delatnosti osiguranja klijenti svog osiguravača čuju ili vide tek prilikom kupovine polise ili njene obnove. Ali budući da su drugi sektori klijente stavili u centar i da su se oni sada navikli na taj odnos, takav pristup više nije dovoljan za održavanje poslovne komunikacije. S obzirom na sve zahtevniji i obuhvatniji razvoj poslovanja u finansijskom sektoru, i od osiguravača se očekuje da unaprede svoje veštine komuniciranja. Konstantna razmena informacija s klijentima doprineće, pre svega, da ovi bolje razumeju finansijske usluge u okviru delatnosti osiguranja. Time se utiče na razvijanje njihove svesti o rizicima kojima smo okruženi i potrebi da se tim rizicima upravlja na pravi način. Uostalom, svi predstavnici delatnosti osiguranja će kao glavni ili jedan od glavnih problema za razvoj i unapređenje sektora navesti nedostatak svesti korisnika o značaju osiguranja, kao i to da je zadatak svih učesnika na tržištu da rade na edukaciji klijenata odnosno korisnika usluga.

**Ključne reči:** komunikacija, veštine komunikacije, osiguranje, lojalnost

#### Uvod

Okruženje u kojem živimo i radimo karakterišu brzina i međusobna povezanost, ponajviše zahvaljujući internetu i modernim sredstvima komunikacije. Efikasna komunikacija ključ je svakog uspešnog poslovanja, a ni delatnost osiguranja nije

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<sup>1</sup> Udruženje osiguravača Srbije, stručni saradnik za marketing i odnose s javnošću, zoran.ciric@uos.rs  
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Rad je prihvaćen: 19.02.2024.

izuzetak. Jake komunikacijske veštine od vitalnog su značaja za izgradnju poverenja i negovanje odnosa na relaciji osiguravajuće društvo – klijent. Efikasna komunikacija ima nezamenljivu ulogu u uspostavljanju poverenja. Pružajući informacije na jasan, koncizan i precizan način, klijentima dajemo mogućnost da bolje razumeju za njih složene polise osiguranja, uslove pod kojima su osigurani odnosno uslove pod kojima mogu da naplate štetu. Tačnošću i transparentnošću u poslovanju ulivamo poverenje, negujemo dugotrajne odnose i stvaramo lojalnog kupca. U ovom tekstu, autor će se malo detaljnije baviti osnovama i prednostima efikasne komunikacije u delatnosti osiguranja.

Neizvesnosti i rizici koji ugrožavaju zdravlje, imovinu i život sastavni su deo naše svakodnevice. Rizične događaje nije moguće sprečiti, ali polisom osiguranja možemo da smanjimo gubitke ili, u nekim slučajevima, eliminišemo efekat gubitaka. Međutim, iz ugla pojedinca, odabir osiguranja je komplikovan i težak zadatak. Zbog nedostatka svesti o značaju i prednostima osiguranja, ljudi su izuzetno skeptični i kupovinu polise smatraju nepotrebnim troškom. To posebno važi za nerazvijena tržišta osiguranja, kakvo je i naše.

## I. Odnosi s javnošću

Da bismo uopšte mogli pričati o komunikacionoj strategiji i načinima da se uspostavi i održi odnos s klijentima, moramo se bar kratko osvrnuti na odnose s javnošću, njihovu definiciju i značaj. Šta su to uopšte odnosi s javnošću? Često citirana definicija Instituta za odnose s javnošću Velike Britanije glasi: „Planirani i stalni napor da se uspostavi i održi dobar ugled i međusobno razumevanje između organizacije i njene ciljne javnosti.“<sup>2</sup> Postoji mnogo definicija odnosa s javnošću, ali se sve svode na komunikaciju. To i jeste suština PR-a (odnosa s javnošću). Kada kažemo međusobno razumevanje ili upotrebitimo neki sličan termin, govorimo o posledicama komunikacije, o rezultatima.

Odnosi s javnošću, dakle, omogućavaju jednoj kompaniji da na željeni način kreira i distribuira svoju poruku pripadnicima ciljane javnosti i da utiče na njihove stavove. To je dvosmerni oblik komunikacije, jer odnosi s javnošću omogućavaju i primanje poruke od te iste ciljne javnosti. Osiguranjem povratnih informacija postiže se kontinuirani komunikacijski proces između kompanije i okruženja ili ciljane javnosti. Odnosi s javnošću se zbog toga ne smeju ignorisati, jer kompanija ne može da ne komunicira s javnošću.<sup>3</sup> U cilju postizanja željenih efekata odnosa s javnošću, koriste se mnoga sredstva. Najznačajnije su reklame i saopštenja za medije, organizacijsko (kompanijsko) oglašavanje, publikacije, video i film, specijalni događaji

<sup>2</sup> Anthony Davis, *Sve što treba da znate o odnosima s javnošću*, Velika Britanija, 2003, str. 14.

<sup>3</sup> Goran Pejaković, „Oblici odnosa s javnošću u suvremenom poslovanju“, 2015, <https://hrcak.srce.hr/file/233386> datum pristupa 9.2.2024., str. 128.

i sponzorstva, lobiranje, *fundraising*, sastanci i društvene aktivnosti.<sup>4</sup> Razvoj interneta doprineo je proširenju dijapazona alata (sredstava) za komunikaciju, čime je onlajn alat naročito dobio na značaju. Danas je nezamislivo da vas nema na društvenim mrežama, ukoliko želite da svoj rad i/ili proizvod približite klijentima ili pak da podstaknete komunikaciju s njima. Društvene mreže su postale toliko bitan deo života da možemo slobodno reći da ako vas nema тамо, vi i ne postojite.

## II. Komunikaciona strategija

Komunikaciona strategija usvaja se za jedan određeni period. U tom vremenskom rasponu treba sprovesti marketing odnosno PR aktivnosti (odnosi s javnošću) kojima će se promovisati osiguranje tj. polisa osiguranja i prednosti koje ona ima za građane ili privrednike. Obavezni deo komunikacione strategije jeste medijska strategija u cilju ostvarivanja kontakta s tržištem, to jest sa korisnicima usluga.<sup>5</sup>

Osnovni ciljevi komunikacione strategije trebalo bi da budu:<sup>6</sup>

- promocija osiguranja / konkretnе usluge;
- podizanje nivoa informisanosti o značaju osiguranja – ovo bi moralo da bude deo svake kampanje svakog osiguravajućeg društva, a efekte ima na duže staze;
- povećanje broja korisnika usluga osiguranja.

S tim u vezi, autor ovog teksta smatra da bi trebalo učini sledeće:

- obezbediti kontinuirano informisanje i edukaciju o svim detaljima koji su bitni prilikom donošenja odluke – osigurati se ili ne;
- uspostaviti direktnu komunikaciju čija je glavna poruka da svako mora da vodi računa o sebi, svom zdravlju i imovini;
- stvoriti uzajamno poverenje na relaciji društvo za osiguranje – korisnici usluga;
- jasno, jednostavno i precizno istaći korist posedovanja određene polise osiguranja.

Takva, jasna i kontinuirana komunikacija treba da postane temelj dobrog odnosa i uzajamnog poverenja s korisnicima usluga osiguranja i stvaranja partnerskog odnosa. Sliku i svest o osiguranju (ali i o osiguravajućim društvima) javnost stvara na dva načina: neposredno, u direktnom kontaktu, i posredno, slikom koju npr. kroz medije šaljemo korisnicima usluga.

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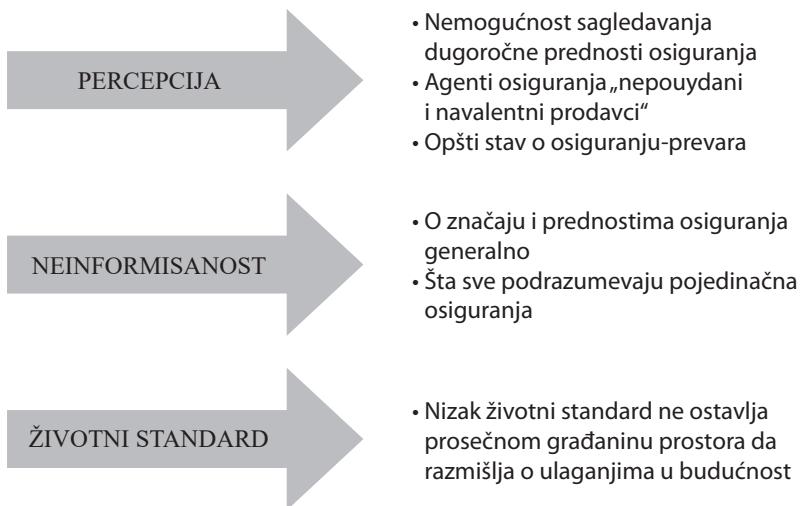
<sup>4</sup> Brkić, Nenad (2003), *Upravljanje marketing komuniciranjem*, treće izdanje, Sarajevo, Ekonomski fakultet u Sarajevu, str. 377.

<sup>5</sup> „Osiguranje nije trošak – komunikaciona strategija”, Udruženje osiguravača Srbije (UOS), 2016, str. 2.

<sup>6</sup> „Osiguranje nije trošak – komunikaciona strategija”, UOS, 2016, str. 2.

### III. Problemi u komunikaciji

## NAJBITNIJI PROBLEMI



Izvor: Autor

Dakle, nedovoljna informisanost, sumnja u prevaru, stav da je osiguranje trošak i da treba osigurati samo ono što se mora, kao i nizak životni standard i slabija kupovna moć, glavni su problemi koji ometaju uspešnu komunikaciju s potencijalnim korisnicima usluga osiguranja. Na poslednja dva pomenuta problema (životni standard i kupovna moć korisnika usluga) osiguravajuća društva ne mogu da utiču. Ali na sve ostale mogu, i to bi trebalo da bude njihov primarni ili jedan od primarnih zadataka.

Druga grupa problema koja može da se pojavi u komunikaciji s korisnicima usluga internog su karaktera. Naime, fokus osiguravajućih društava, menadžmenta pre svega, uglavnom je na statističkim podacima – premiji i profitabilnosti. Rad društva odnosno zaposlenih veoma često ocenjuju podaci o bruto premiji ili zarađenom novcu. Ali to je fragmentaran pristup koji daje kratkoročne efekte i ne uključuje komunikaciju, te samim tim isključuje rezultate na duže staze.

Da li i kako takav pristup može da se promeni? Odgovor je kratak, može. Ali uz uslov da u svakodnevni posao uredimo komunikaciju koja će biti relevantna i korisna, pre svega za kupce.

## **1. Šta promeniti?**

Stručnjaci za komunikaciju u oblasti osiguranja britanskog časopisa *Modern Insurance Magazine*<sup>7</sup> uglavnom savetuju tri strateške promene:

1. prebaciti fokus na kupca / korisnika usluga osiguranja;
2. razumeti njegove potrebe;
3. pripremiti i koristiti različite tehnologije prilagođene svakom kupcu.

Dakle, barijere nisu brojne, ali put do promena nije jednostavan niti se promene mogu sprovesti preko noći. Osnovno pravilo je da se ne zaboravi da sve počinje od kupca polise osiguranja i da se završava s njim, te da za takvu komunikaciju treba imati pravi tim.

U poslednjih nekoliko godina, komunikacija i komunikacijske veštine su generalno evoluirale i dostigle impresivno visok nivo, što važi i za finansijski sektor uopšte i za sektor osiguranja. Delatnost osiguranja spada u sektore koji u velikoj meri zavise od načina na koji se komunicira s klijentima. Stručnjaci za komunikacije slažu se da u osiguranju postoje neke veoma važne komunikacione veštine od kojih zavisi odnos s korisnikom usluga i njegov odnos prema osiguravajućem društvu. Tako npr, Marius Dan Gavriletea sa Univerziteta „Babes-Bolyai“ u članku<sup>8</sup> za *Journal of International Finance and Economic* navodi sledeće veštine:

- verbalne veštine;
- neverbalne veštine;
- veštine pisanja;
- veštine slušanja;
- veštine pravljenja izveštaja.

### **1.1 Fokus na kupca polise**

Brojni su načini da se komunicira s kupcima odnosno korisnicima usluga osiguranja. Od razgovora licem u lice, telefonom i SMS-om, elektronskom poštom ili drugim modernim sredstvima komunikacije do pisanog dokumenta. Uz komunikaciju kao takvu, bitan je i sadržaj, jer samo pravom porukom u pravo vreme kupujete nečiju pažnju i verovatno obezbeđujete novog klijenta ili zadržavate starog.

Stavljanje kupca polise u centar, u praksi bi podrazumevalo i usklađivanje organizacione strukture kompanije u prvom redu s kupcem i njegovim potrebama, a ne samo i isključivo sa uslugom. Time dobijate efikasnu komunikaciju koja će biti

<sup>7</sup> Modern Insurance Magazine, „Effective Communications in the Insurance Market“, <https://moderninsurancemagazine.co.uk/effective-communication-in-the-insurance-market/> pristupljeno 8. 2. 2024.

<sup>8</sup> Marius Dan Gavriletea „Communication in Insurance“ *Journal of International Finance and Economic*, June 2013, DOI: 10.18374/JIFE-13-2.2.

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## **Z. Ćirić: Važnost komunikacije s klijentima u delatnosti osiguranja**

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objedinjena na nivou cele kompanije. Takođe, lakše ćete standardizovati metode komunikacije i obezbediti doslednost na svim nivoima komunikacije s klijentom.

Najveći izazov za sve kompanije, bez obzira na to o kom sektoru govorimo, jeste odabir pravog tona komunikacije, jer „druga strana“ ima različite potrebe koje su promenljivog karaktera i prirode i na to se mora obratiti pažnja prilikom komunikacije i promocije usluga osiguranja.

Generalno, u uspostavljanju valjane komunikacije i prilikom izgradnje međusobnog poverenja, u cilju dobijanja lojalnog klijenta, ove stvari bi, prema autorovom mišljenju, mogle da budu od pomoći:

- Dobar sajt prilagođen kupcu. Korak napred je kalkulator koji će omogućiti kupcu da sam izračuna koliko će ga koštati npr. putno zdravstveno osiguranje, registracija motornog vozila ako kupi vašu polisu AO, osiguranje imovine ili dobrovoljno zdravstveno osiguranje. Sajt mora da bude prilagođen mobilnim uređajima i aplikacijama, zbog njihove sve veće rasprostranjenosti.
- Podsetnik kupcu na obaveze koje ima. Najveće i najuspešnije svetske kompanije upravo to rade – podsećaju svoje kupce da im ističe polisa osiguranja i da treba da je produže. To rade slanjem SMS-a ili jednostavnim pozivom.
- Prilagođavanje jezika koji koristite prilikom slanja poruka. Nezamislivo je slanje iste poruke, istim kanalima i istim jezikom pripadnicima starije generacije, milenijalcima ili nekome ko pripada Z generaciji. Možda vam se učini da su milenijalci ili pripadnici Z generacije trenutno nezainteresovani za većinu poruka koje šaljete. Ali to jednostavno nije tačno. I oni imaju svoje potrebe i interesovanja, ali traže brzu i kratku poruku – taman toliko vremena imaju da joj se posvete. S druge strane, oni su budući kupci osiguranja kao samostalne osobe, roditelji ili kao rukovodioci u kompanijama. Prema jednom istraživanju sajta „Liberty Mutual's Agent for the Future“, već sledeće, 2025. godine, 67% svih zaposlenih trebalo bi da čine pripadnici upravo te generacije.<sup>9</sup> Dakle, slanjem poruke na njima bliskom jeziku, prodajete uslugu i edukujete ih za neka buduća vremena.

### **1.2 Odabratи prave medije za slanje poruka i pojednostaviti ih**

Telefon i papir odavno su prevaziđeni, ali ne i zaboravljeni kao sredstvo komunikacije s klijentima. Današnje moćne vrste alata, kao što su internet (pre svega) i mobilni telefoni, komunikaciju su znatno ubrzali i dali mogućnost odabira u zavisnosti od ciljne grupe. Društveni mediji su još jedan moćan alat za slanje

<sup>9</sup> Agent for the Future, „Attracting and Retaining the Next Generation of Talent“, <https://www.agentforthefuture.com/topics/talent-culture/next-gen-hiring/attracting-retaining-next-generation/> datum pristupa 7. 2. 2024.

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## **Z. Ćirić: Važnost komunikacije s klijentima u delatnosti osiguranja**

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poruka ciljnoj grupi. Platforme kao što su *Facebook*, *X mreža* – nekadašnji *Twitter*, *Linkedin*, *Instagram*, *Tiktok* i ostale, privlače najširu moguću publiku, ali svaka ima svoja pravila. Za starije generacije, strategija komunikacije može uključivati korišćenje brošura, TV i radijskih reklama, štampanih medija i bilborda za promociju usluga. S njima možete kontaktirati i putem telefona, elektronske pošte i tekstualnih poruka. Za mlađe generacije, kanali društvenih mreža i medija najefikasnije su platforme za promociju poruke i vašeg brenda. Korišćenjem društvenih medija, možete se obratiti širokoj populaciji, pogotovo mlađim generacijama.<sup>10</sup>

Prilikom odabira medija za slanje poruka, zadržavanje postojećih i privlačenje novih klijenata, ne zaboravite neku vrstu korisničke podrške. Osiguranje je većini klijenata komplikovano. Bez tog sistema nećete imati uspešnu komunikaciju s korisnicima usluga. Uspešna komunikacija, u ovom slučaju, znači spremnost i sposobnost da se odgovori na sva pitanja i pruže relevantne informacije. Opet, tu je savet da se eliminišu žargonski izrazi iz struke, jer ih niko neće razumeti, još manje se truditi. Koristite jednostavne reči, kratke i precizne rečenice.

### **2. Potrudite se da razumete potrebe kupca/korisnika usluga**

Prikupljanje informacija o klijentima samo je prvi korak u pravcu razumevanja njegovih potreba. Važnije od samog procesa prikupljanja jeste imati uvid u te informacije i unošenje izmena, da biste zaista razumeli tu osobu i njene potrebe, koje su promenljivog karaktera. Koje osiguranje joj je potrebno, koliki budžet ima, da li imate uslugu koja je njoj potrebna ili neku sličnu, da li i koliko osoba razume osiguranje i prednosti koje polisa nosi sa sobom, koje joj je glavno sredstvo komuniciranja – to su pitanja na koja morate imati odgovor. Odgovori na ta pitanja daju vam mogućnost da personalizujete poruke i obezbedite da one budu korisne, razumljive i zanimljive. Održavanje komunikacije koje uključuje poznavanje klijenata ključno je za izgradnju dugotrajne veze.

### **3. Pripremite i koristite različite tehnologije prilagođene svakom kupcu**

Koliko god da je digitalizacija učinila svoje u smislu da je unapredila i ubrzala komunikaciju, u finansijskom sektoru, u osiguranju pogotovo, zadržan je taj lični element tržišta. Tehnologija treba da pomogne da se klijenti osećaju sigurno i da budu zadovoljni i s druge strane da se analiziraju podaci o klijentima i njihovom potrebama. Ovde, opet, treba razgraničiti da li se govori o zadržavanju postojećih ili

<sup>10</sup> Aubrey Moore, „4 communication strategies successful insurance companies use to connect with their target audience“, septembar 2022, <https://www.axiapr.com/blog/4-communication-strategies-successful-insurance-companies-use-to-connect-with-their-target-audience>. datum pristupa 7.2.2024.

privlačenju novih klijenata. Jednostavno, ispravna komunikacija i izgradnja snažnog odnosa s klijentom za posledicu ima lojalnost i rast prihoda.

U svakom slučaju, kupci mogu želeti razgovor putem telefona, elektronske pošte, automatizovanih sistema za čakanje (ChatBot), drugih vrsta tekstualnih poruka ili razgovor licem u lice. Samo jedna metoda nije dovoljna ni da se zadrže postojeći niti da se privuku novi kupci. Dakle, tehnologija koju izaberete treba da podržava višestruke komunikacione kanale. Ovde dolazimo do procesa digitalizacije i (ne) dovoljnog ulaganja, ali o tome u ovom tekstu neće biti reči. Treba podsetiti samo na istraživanje konsultantske kuće „McKinsey & Company“, prema kojem je čak devet od deset osiguravajućih kuća identifikovalo zastareli softver i infrastrukturu kao prepreke za digitalizaciju, ali i bržu komunikaciju s klijentima.<sup>11</sup>

#### **IV. Zaključak**

Nagrada za svaku efikasnu komunikaciju je prednost koju jedna kompanije dobija na tržištu. Pre svega, kupci će razumeti usluge osiguranja, kupovati ih i verovati kompaniji od koje kupuju polise. S vremenom, postaće lojalni kupci. Ali osiguravajuća društva moraju da poboljšaju efikasnost svoje komunikacije i da nagrade lojalan odnos. To je ono što će smanjiti „stopu odliva“, a to je, u krajnjem slučaju, potrebno koliko i novi klijenti.

Osiguranje je izuzetno važna delatnost puna inteligentnih i talentovanih ljudi. Mnogi od njih imaju neverovatne ideje koje bi unele revoluciju u način na koji osiguravajuća društva pomažu ljudima da nauče da upravljaju rizicima kojima smo okruženi. Ali nije važno samo koliko su vaše ideje sjajne, ako ne možete da ih objasnite drugim ljudima i da ih ubedite da će uspeti. Bendžamin Frenklin je prvi počeo da razmišlja o načinima smanjenja rizika od požara, 1735. godine. Osmislio je reforme pod nazivom „On Protection of Towns from Fire“<sup>12</sup> čija se suština svodi na to da je bolje spreciti požar nego ga gasiti. Reforme su jednoobrazno sprovedene, ali ne zato što su građani mislili da je on genije ili zbog reputacije velikog vođe (tada je imao samo 29 godina), već zato što je napisao uverljivo pismo za *Philadelphia Gazette* i obrazložio zašto bi njegove reforme učinile grad sigurnijim.

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<sup>11</sup> Modern Insurance Magazine, „Effective Communications in the Insurance Market“, <https://moderninsurancemagazine.co.uk/effective-communication-in-the-insurance-market/> pristupljeno 8. 2. 2024.

<sup>12</sup> „On Protection of Towns from Fire, 4 February 1735“, *Founders Online*, National Archives, <https://founders.archives.gov/documents/Franklin/01-02-02-0002>. [Original source: *The Papers of Benjamin Franklin*, vol. 2, January 1, 1735, through December 31, 1744, ed. Leonard W. Labaree. New Haven: Yale University Press, 1961, pp. 12–15.] datum pristupa 8.2.2024

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**Zoran T. Ćirić<sup>1</sup>**

## **THE IMPORTANCE OF CUSTOMER COMMUNICATION IN INSURANCE ACTIVITIES**

**INFORMATIVE CONTRIBUTION**

### **Abstract**

In the traditional insurance business, customers usually only hear or see their insurer when they take out a policy or renew an existing one. However, as other industries have put the customer at the center and customers have become accustomed to this type of relationship, this approach is no longer sufficient to maintain business communication. As the financial sector becomes increasingly complex and comprehensive, insurers are also expected to improve their communication skills. Above all, the constant exchange of information with customers will help them to better understand the financial services provided by the insurance industry. This in turn will influence the development of their awareness of the risks that surround us and the need to manage these risks properly. In addition, all insurance industry representatives will cite the lack of customer awareness of the importance of insurance as one of the biggest problems or the major problem for the development and improvement of the sector. They will also emphasize that it is the responsibility of all market participants to work on educating customers and service users.

**Keywords:** *communication, communication skills, insurance, loyalty*

### **Introduction**

The environment in which we live and work is characterized by speed and networking, especially thanks to the Internet and modern means of communication.

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Effective communication is the key to any successful business, and the insurance industry is no exception. Strong communication skills are crucial to building trust and maintaining relationships between the insurance company and the customer. Effective communication plays an irreplaceable role in building trust. By providing information in a clear, concise and accurate manner, we give our customers the opportunity to better understand complex insurance policies, the terms under which they are covered and how they can make a claim. Through accuracy and transparency in business, we build trust, foster long-term relationships and create a loyal customer base. In this article, the author looks at the fundamentals and benefits of effective communication in the insurance industry.

Uncertainties and risks that threaten health, property and life are an integral part of our daily lives. While risky events cannot be prevented, insurance can help us reduce losses or, in some cases, eliminate their effects. However, from an individual's perspective, choosing insurance is a complex and difficult task. Due to the lack of awareness about the importance and benefits of insurance, people are often skeptical and consider taking out a policy as an unnecessary expense. This is especially true in underdeveloped insurance markets such as Serbia.

## I. Public Relations

Before we can even talk about communication strategies and methods for building and maintaining customer relationships, we need to briefly discuss public relations, its definition and its importance. What exactly is public relations? A frequently quoted definition from the Institute of Public Relations in the UK is as follows: „It is the planned and sustained effort to establish and maintain goodwill and mutual understanding between an organization and its publics.”<sup>2</sup> While there are many definitions of public relations, they all boil down to communication. This is the essence of PR (public relations). When we talk about “mutual understanding” or use a similar term, we are referring to the results of communication, the outcomes.

Public relations thus enable a company to formulate its message in the desired way and disseminate it to its target group and influence their opinion. It is a two-way form of communication, as public relations also enable messages to be received from the target audience. Obtaining feedback creates a continuous communication process between the company and its environment or target audience. Therefore, public relations cannot be ignored, because a company must communicate with the public.<sup>3</sup> Many instruments are used to achieve the desired effects of public relations. Among the most important are advertising and press releases, corporate

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<sup>2</sup> Anthony Davis, *Sve što treba da znate o odnosima s javnoću*, Velika Britanija, 2003, p. 14

<sup>3</sup> Goran Pejaković, „Oblici odnosa s javnošću u suvremenom poslovanju”, 2015, <https://hrcak.srce.hr/file/233386> datum pristupa 09.02.2024, p. 128.

advertising, publications, video and film, special events and sponsorship, lobbying, fundraising, meetings and social activities.<sup>4</sup> The development of the internet has helped to expand the range of communication tools and online tools have become particularly important. Today, it is unthinkable not to be present on social media if you want to publicize your work and/or products or encourage communication with customers. Social media platforms have become such an integral part of life that we can freely say that if you are not there, you practically do not exist.

## **II. Communication Strategy**

A communication strategy is set for a specific period of time. During this period, marketing and PR activities are carried out to promote insurance, especially insurance policies, and their benefits to citizens and businesses. A mandatory part of the communication strategy is the media strategy, which aims to engage with the market, i.e., the users of the services.<sup>5</sup>

The main objectives of a communication strategy should be:<sup>6</sup>

- promote insurance/specific services;
- raising awareness of the importance of insurance – this should be part of every insurance company's campaign, and has a long-term impact;
- increase the number of insurance customers.

In this context, the author believes that the following should be done:

- continuous information and education about all the important details when deciding for or against the insurance;
- direct communication with the core message that everyone must take care of themselves, their health and their property;
- build mutual trust between the insurance company and its customers;
- highlight the benefits of a particular insurance policy clearly, simply and precisely.

Such clear and continuous communication should form the basis of a good relationship and mutual trust with insurance customers and foster a partnership. The public shapes its image and perception of insurance (and insurance companies) in two ways: directly through personal contact and indirectly through the image conveyed to customers, e.g., via the media.

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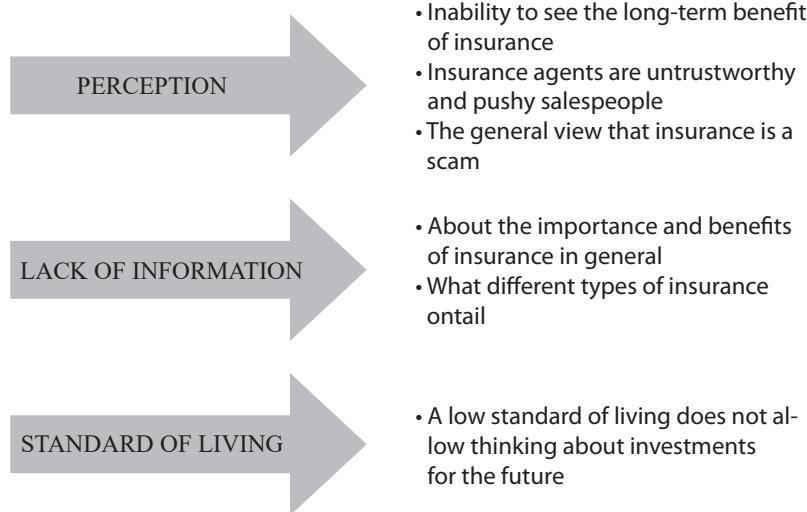
<sup>4</sup> Brkić, N. (2003), *Upravljanje marketing komuniciranjem*, treće izdanje, Sarajevo, Faculty of Economics in Sarajevo, p. 377.

<sup>5</sup> „Osiguranje nije trošak – komunikaciona strategija”, Association of Serbian Insurers (UOS), 2016, p. 2

<sup>6</sup> „Osiguranje nije trošak – komunikaciona strategija”, UOS 2016, p. 2

### **III. Communication Problems**

## **THE MOST IMPORTANT PROBLEMS**



*Source: Author*

Lack of awareness, mistrust of scams and the perception of insurance as a cost that is only required for critical cover, combined with a low standard of living and limited purchasing power, are the biggest barriers to successful communication with potential policyholders. Insurance companies cannot directly influence the last two elements (standard of living and purchasing power), but they can certainly address the first three. This should be a key focus for the industry.

Another internal challenge for customer communication arises from the company's priorities. Insurance companies, especially their management, often focus on statistical data such as premiums and profitability. Employee performance is often evaluated based on these metrics. However, this fragmented approach leads to short-term benefits and neglects the importance of communication in building long-term customer relationships.

Can this approach be changed and how? The answer is simple: yes. But only if you integrate communication, which is primarily relevant and beneficial to customers, into daily operations.

## **1. What Needs to Change?**

Communication experts in the insurance field from the British *Modern Insurance Magazine*<sup>7</sup> recommend three strategic changes:

1. shift the focus to the customer / user of insurance services;
2. understanding customer's needs;
3. develop and utilize diverse technologies tailored to different customers.

While the barriers to effective communication may not be numerous, the path to change is neither simple nor immediate. The key principle to remember is that everything begins and ends with the insurance policyholder. Building a strong communication team focused on customer-centric approaches is crucial for achieving success.

Over the past few years, communication and communication skills have undergone significant advancements, impacting the financial sector, including insurance. The insurance industry heavily relies on effective communication with customers. Communication experts agree that specific crucial communication skills play a vital role in shaping customer relationships and their perception of the insurance company. Marius Dan Gavriletea from the Babes-Bolyai University, in his article<sup>8</sup> for *Journal of International Finance and Economic*, identifies the following key communication skills:

- verbal skills;
- nonverbal skills;
- written skills;
- listen skills;
- reporting building skills.

### **1.1 Policyholder Focus**

There are numerous methods for communicating with insurance policyholders and users of services, ranging from: face-to-face interactions, phone calls and SMS messages, e-mail and other modern communication tools, and written documents. Beyond the communication method itself, the content is also crucial. The right message at the right time can capture someone's attention, potentially leading to acquiring a new customer or retaining an existing one.

Putting the policyholder at the center, in practice, would also entail aligning the company's organizational structure primarily with the customer and their

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<sup>7</sup> Modern Insurance Magazine, „Effective Communications in the Insurance Market”, <https://moderninsurancemagazine.co.uk/effective-communication-in-the-insurance-market/> accessed on: 8. 2. 2024

<sup>8</sup> Marius Dan Gavriletea „Communication in Insurance” *Journal of International Finance and Economic*, June 2013, DOI: 10.18374/JIFE-13-2.2

needs, not just the service itself. This fosters effective communication that is unified throughout the entire company. Additionally, it becomes easier to standardize communication methods and ensure consistency across all levels of customer interaction.

The biggest challenge for all companies, regardless of the sector, is choosing the right communication tone because the "other side" has diverse and evolving needs and characteristics, which require careful consideration when communicating and promoting insurance services.

In the author's opinion, the following elements can be helpful in establishing effective communication, building trust, and acquiring loyal customers:

- A user-friendly website: A step forward is offering calculators that allow customers to independently calculate costs for various insurance types, such as travel health insurance, car registration insurance when purchasing a motor insurance policy, property insurance, or voluntary health insurance. The website should be optimized for mobile devices and applications due to their growing prevalence.
- Customer obligation reminders: Top global companies successfully remind their customers about expiring insurance policies and the need for renewal. This can be done through SMS or simply a phone call.
- Tailoring the language used in communication: Sending the same message, using the same channels, and with the same language to different generations, like senior citizens, millennials, or Gen Z, is ineffective. While it might seem like millennials or Gen Z are currently uninterested in most messages companies send, that is not entirely accurate. They have their own needs and interests, but they prefer concise and quick messages – that is the time they have available to dedicate to it. Additionally, they are the future insurance customers, whether as individuals, parents, or company leaders. According to research by "Liberty Mutual's Agent for the Future," by next year (2025), 67% of the workforce is expected to be comprised of Generation Z individuals.<sup>9</sup> Therefore, communicating with them in a language they understand not only promotes your services but also educates them for the future.

## **1.2 Choosing the Right Media for Sending Messages and Simplifying Them**

The telephone and paper have long been surpassed but not forgotten as means of communication with customers. Today's powerful tools, like the internet (most importantly) and mobile phones, have significantly accelerated communication

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<sup>9</sup> Agent for the Future, „Attracting and Retaining the Next Generation of Talent“, <https://www.agentfort-hefuture.com/topics/talent-culture/next-gen-hiring/attracting-retaining-next-generation/> datum pristupa 7. 2. 2024.

and enabled targeted approaches based on the audience. Social media is another powerful tool for sending messages to specific groups. Platforms like Facebook, X network (formerly Twitter), LinkedIn, Instagram, TikTok, and others attract large audiences, but each has its own rules. For older generations, the communication strategy might include using brochures, TV and radio commercials, print media, and billboards to promote services. You can also contact them via phone, email, and text messages. For younger generations, social media channels and online media platforms are the most effective platforms for promoting your message and brand. Utilizing social media allows you to reach a broad audience, especially younger generations.<sup>10</sup>

When choosing media channels for sending messages with the aim of retaining existing customers and attracting new ones, do not forget to include some form of customer support. For most customers, insurance is a complex subject. Without a support system, you will not achieve successful communication with users of your services. In this case, successful communication means being ready and able to answer all questions and provide relevant information. Once again, it is advisable to eliminate jargon from your vocabulary. No one will understand it, let alone make an effort to decipher those terms. Use simple words, short and concise sentences.

## **2. Make an Effort to Understand the Needs of the Customer/Service User**

Gathering information about customers is only the first step in understanding their needs. More important than gathering information itself is understanding that information and making changes to truly understand that person and their changing needs. What insurance do they need? What is their budget? Do you have the service they need or something similar? Do many people understand the insurance and the benefits the policy brings, and how? What is their main means of communication? These are the questions you need to answer. The answers to these questions give you the opportunity to personalize your messages and ensure they are useful, understandable and engaging. Communication that includes knowing your customers is the key to building a lasting relationship.

## **3. Prepare and Utilize Various Technologies Tailored to Each Customer**

While digitalization has significantly improved and accelerated communication, the financial sector, particularly insurance, still maintains a personal element in the market. Technology should be used to make customers feel secure and satisfied, while also analyzing customer data and their needs. Here, again, it is important

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<sup>10</sup> Aubrey Moore, „4 communication strategies successful insurance companies use to connect with their target audience“, septembar 2022, <https://www.axiapr.com/blog/4-communication-strategies-successful-insurance-companies-use-to-connect-with-their-target-audience>.

to differentiate between whether the focus is on retaining existing customers or attracting new ones. Simply put, effective communication and building a strong relationship with customers lead to loyalty and revenue growth.

In any case, customers may want to interact through phone calls, emails, automated chat systems (Chatbots), other forms of text messages, or face-to-face meetings. A single method is not enough to retain existing customers or attract new ones. Therefore, the technology you choose should support multiple communication channels. This brings us to the process of digitalization and (in)sufficient investment, but that topic will not be covered in this text. It is enough to recall a study by the consulting firm McKinsey & Company, which found that nine out of ten insurance companies identified outdated software and infrastructure as barriers to digitalization and faster communication with customers.<sup>11</sup>

#### **IV. Conclusion**

The reward for every successful communication is a market advantage for the company. Most importantly, customers understand the insurance services, buy them and trust the company they buy policies from. Over time, they become loyal customers. However, insurance companies need to improve the effectiveness of their communications and reward loyal relationships. This will reduce the “churn rate”, which is ultimately just as important as attracting new customers.

The insurance industry is a vibrant sector full of intelligent and talented people. Many of them have incredible ideas that have the potential to revolutionize the way insurance companies help people manage the risks that surround us. However, brilliant ideas are worthless if you can't effectively explain them to others and convince them of their potential success. Benjamin Franklin pioneered thinking about ways to mitigate the risk of fire in 1735. He developed reforms entitled On Protection of Towns from Fire, emphasizing the concept of prevention over cure. These reforms were implemented on a large scale, not because people perceived him as a genius or prominent leader (he was only 29 years old at the time), but because he wrote a persuasive letter to the Philadelphia Gazette explaining why his reforms would make the city safer.

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<sup>11</sup> Modern Insurance Magazine, „Effective Communications in the Insurance Market“, <https://moderninsurancemagazine.co.uk/effective-communication-in-the-insurance-market/> accessed on 8. 2. 2024

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*Translated by: Zorica Simović*

UDK: 336.71:341.645(4-672EU)(44)

**Mr Nikola L. Filipović**

INOSTRANA SUDSKA PRAKSA

**PRESUDA EVROPSKOG SUDA PRAVDE  
U PREDMETU C-911/19  
Fédération bancaire française (FBF)**

v

**Autorité de contrôle prudentiel et de résolution (ACPR)**

**1. Uvod**

Pravno pitanje kojim se Evropski sud pravde bavio u predmet C-911/19 odnosi se na ovlašćenje Evropskog nadzornog tela za bankarstvo – *European Banking Authority* (dalje u tekstu: EBA) da usvoji Smernice o sistemu upravljanja i nadzora nad bankarskim uslugama namenjenim korisnicima. Naime, Udruženje banaka Francuske smatralo je da donošenje takvih smernica predstavlja prekoračenje ovlašćenja EBA kako su ona definisana Uredbom 1093/2010, budući da ni sama uredba kojom se definišu ovlašćenja EBA, ni akti EU u pogledu kojih EBA ima ovlašćenja, nisu u sebi sadržali bilo kakvu referencu na sistem upravljanja i nadzora nad bankarskim uslugama, sa izuzetkom Direktive 2014/17 o potrošačkim kreditima o stambenim nepokretnostima.

**2. EU pravni okvir**

U članu 1(2) Uredbe 1093/2010 стоји sledeće: EBA deluje u okviru ovlašćenja dodeljenih ovom uredbom, a na područjima primene Direktive 2002/87/EZ, Direktive 2008/48/EZ, Direktive 2009/110/EZ, Uredbe (EU) br. 575/2013, Direktive 2013/36/EU, Direktive 2014/49/EU, Direktive 2014/92/EU, Direktive (EU) 2015/2366, u meri u kojoj se ti akti primenjuju na kreditne i finansijske institucije i nadležna tela koja ih nadziru, u okviru relevantnih delova Direktive 2002/65/EZ, uključujući sve direktive, uredbe i odluke koje se temelje na tim aktima, te u okviru bilo kojeg drugog pravno obavezujućeg akta Unije kojim se dodeljuju zadaci koje EBA treba da izvrši.

Član 1(3) Uredbe 1093/2010 predviđa da EBA deluje na području delatnosti kreditnih institucija, finansijskih konglomerata, investicionih društava, institucija za platni promet i institucija za elektronski novac, u vezi s pitanjima koja nisu direktno obuhvaćena zakonodavnim aktima pobrojanim u prethodnom stavu, između ostalog i pitanjima korporativnog upravljanja, revizije i finansijskog izveštavanja, vodeći računa o održivim poslovnim modelima i integraciji ekoloških, socijalnih i upravljačkih faktora, pod uslovom da je delovanje neophodno radi obezbeđivanja efikasne primene tih akata.

Član 1(5) Uredbe 1093/2010 predviđa da su ciljevi EBA zaštita javnog interesa, doprinos kratkoročnoj, srednjeročnoj i dugoročnoj stabilnosti i efektivnosti finansijskog sistema u korist ekonomije Unije, građana i privrednih subjekata. EBA ima zadatak da doprine: poboljšanju funkcionisanja unutrašnjeg tržišta, uključujući naročito pouzdanu, efektivnu i doslednu primenu regulative i nadzora; obezbeđivanje transparentnosti i efikasnosti i urednog funkcionisanja finansijskih tržišta; jačanje međunarodne koordinacije nadzora; sprečavanje regulatorne arbitraže; poboljšanje položaja odnosno zaštite potrošača. [...] U obavljanju zadataka koje ima na osnovu ove uredbe, EBA posebnu pažnju posvećuje svakom sistemskom riziku koji predstavljaju finansijske institucije čija bi propast mogla narušiti delovanje finansijskog sistema ili ekonomiju.

Član 8(1) Uredbe 1093/2010 na kraju predviđa da EBA ima sledeće zadatke: doprinosi definisanju kvalitetnih zajedničkih regulatornih i nadzornih standarda i praksi, a naročito izradom nacrta regulatornih i tehničkih standarda, smernica, preporuka te drugih mera i mišljenja.

Član 16(3) Uredbe 1093/2010 predviđa da nadležna tela i finansijske institucije (kojima su smernice upućene) moraju uložiti napor da se usklade sa smernicama, a svaki nadležni organ dužan je potvrditi da li je usklađen odnosno da li svoje postupanje u nadzoru namerava uskladiti sa smernicom. U slučaju da nadležni organ nije usklađen ili da se ne namerava uskladiti, dužan je da o tome obavesti EBA navodeći svoje razloge.

### **3. Predmet sporu i pravna pitanja**

Na određeni način u pitanju je bio relativno jednostavan spor koji se ticao ovlašćenja za donošenje određenog akta. EBA je 2017. godine usvojila EBA/GL/2015/18 Smernice o sistemu nadzora i upravljanja bankarskim uslugama namenjenim potrošačima. U sklopu svojih obaveza shodno članu 16(3) Uredbe 1093/2010, Francuski nadzorni organ (*Autorité de contrôle prudentiel et de résolution – ACPR*) objavio je da namerava postupati u skladu sa Smernicama, čime su Smernice postale primenljive (obavezujuće) za finansijske ustanove nad kojima ACPR vrši neposredan nadzor. Francusko udruženje banaka osporilo je tu objavu, i pokrenulo postupak pred

nacionalnim sudom, smatrajući da je EBA prekoračila svoja ovlašćenja prilikom usvajanja Smernica.

Međutim kako to često biva, naizgled jednostavno pitanje pokrenulo je čitav niz procesno i materijalno pravnih pitanja, u kom postupku i od strane koga nominalno neobavezujući pravni akti mogu da se osporavaju u sudskom postupku, kao i to da li su Smernice uopšte donete u okviru ovlašćenja koje EBA ima. Pitanja je Francuski sud klasifikovao na sledeći način i uputio Evropskom суду pravde na razmatranje:

- 1) Procesnopravna pitanja: a) Da li Smernice koje usvoji EBA mogu biti osporavane na osnovu člana 263 UFEU u postupku pred Evropskim sudom pravde; b) Da li Udruženje banaka Francuske može osporavati takve smernice u navedenom postupku ima li se u vidu da se akt koji se ne odnosi direktno na Udruženje odnosi na njene članice (aktivna procesna legitimacija Udruženja banaka da pokrene takav postupak); c) Alternativno, ukoliko se Smernice ne mogu osporavati prema postupku predviđenom članom 263 UFEU, ili ako Udruženje banaka nema ovlašćenje da pokrene takav postupak, mogu li Smernice biti osporavane od strane Udruženja banka na temelju člana 267 UFEU;
- 2) Materijalnopravno pitanje: Ukoliko Udruženje banaka ima pravo da pokrene neki od navedenih postupaka, da li su konkretnе EBA smernice donete uz prekoračenje ovlašćenja evropskog regulatora?

### **3.1. Stav Evropskog suda pravde**

U pogledu mogućnosti da se Smernice osporavaju u postupku predviđenom članom 263 UFEU, Sud navodi da je taj član ograničenog domašaja pošto se na temelju njega tužbe za poništaj mogu podnosićti samo protiv akata koji su obavezujući, poput eksplicitno navedenih akata institucija, organa ili agencija Unije, premda nezavisno od njihove forme ili oblika. Stoga je ključno pitanje da li su Smernice kao akt obavezujuće po svojoj pravnoj prirodi.

Sud iz sadržaja samih smernica, odnosno tačke 2, zaključuje da se Smernicama samo iznosi stanovište njihovog donosioca o nadzornim praksama unutar evropskog sistema finansijskog nadzora, odnosno u pogledu toga kako bi pravo Unije trebalo da se primenjuje na određenom području.

Sud zaključuje da su adresati Smernica nadležni organi država članica, i premda član 16(3) Uredbe 1093 predviđa da nadležni organi država članica (i finansijske ustanove) moraju „uložiti napore“ da se usklade sa Smernicama koje izdaje EBA, konkretna obaveza nadležnog organa je da obavesti EBA da li su se ti organi uskladili ili se nameravaju uskladiti sa Smernicama, kao i da o razlozima neusklađenosti obaveste EBA. Dakle, jasno je da nacionalni nadzorni organi nisu

u obavezi da se usklade sa Smernicama, već da obaveste o tome da li se nameravaju uskladiti, i ako ne nameravaju, da obrazlože svoje razloge za neusklađivanje. Slično tome i finansijske ustanove kada su adresati smernica nemaju eksplicitnu obavezu usklađivanja sa Smernicama, već samo obavezu da izveste o tome jesu li usklađene ili nisu, te razloge zbog kojih nisu usklađene.

Iz navedenog Sud zaključuje da Smernice EBA ne mogu biti osporavane na temelju člana 263 UFEU, usled svoje neobavezujuće prirode.

Nakon toga, Sud se upušta u razmatranje mogućnosti da se Smernice EBA osporavaju pred Evropskim sudom u postupku pokrenutom na osnovu člana 267 UFEU, prema kojem je Sud nadležan da ocenjuje valjanost/zakonitost svih akata institucija Unije u prethodnom postupku.

Iako član 263 UFEU isključuje mogućnost da Sud preispituje neobavezujuće pravne akte, Sud svejedno, na osnovu člana 267 UFEU, može ispitati valjanost takvih (neobavezujućih) akata kada odlučuje u prethodnom postupku. Imajući u vidu da se Sud već prethodno izjašnjavao potvrđno o tom pitanju (i to baš u pogledu preispitivanja Smernica EBA), Sud zaključuje da prema pravu Unije postoji mogućnost preispitivanja Smernica u postupku predviđenom članom 267 UFEU.

Sud je dalje razmatrao pitanje da li pravila Unije zahtevaju da podnositelj tužbe za preispitivanje valjanosti/zakonitosti akta Unije pred nacionalnim sudom mora biti lice na čija se prava i obaveze osporavani akt direktno odnosi. U tom pogledu, prema stavu Suda ni TFEU ni pravo EU ne sadrže jasno rešenje, te u odsustvu jasno definisanih uslova u pogledu ovlašćenja na podnošenje takvih tužbi pred nacionalnim sudom, pitanje aktivne procesne legitimacije ostaje da bude uređeno nacionalnim propisima (imajući u vidu da prema stavu Suda članovi 263 i 267 uz dodatak člana 277 UFEU treba da omoguće sveobuhvatni sistem pravnih sredstava i postupaka kojima je cilj da obezbede sudsку kontrolu pravnih akata Unije, te da nacionalni propisi država članica treba da predvide sistem pravnih lekova i postupaka kojim se obezbeđuje poštovanje prava na sudska zaštitu).

U tom smislu Sud zaključuje da pravo Unije ne zahteva kao uslov za podnošenje tužbe da podnositelj tužbe bude lice na koje zakonitost/valjanost akta Unije neposredno utiče, odnosno da se pitanje aktivne procesne legitimacije uređuje nacionalnim propisima uz poštovanje zahteva da takva pravila omoguće sveobuhvatni sistem pravnih sredstava i postupaka kojim se obezbeđuje pravo na sudska zaštitu.

U pogledu same nadležnosti i ovlašćenja za donošenje tih smernica, stav Francuskog udruženja banaka je da Smernice nemaju pravni osnov, pošto regulišu način kreiranja (i distribucije) bankarskih usluga. Jedino Direktiva 2014/17 o potrošačkim kreditima za stambene nekretnine u članu 7 sadrži moguću spojnicu sa materijom koju uređuju Smernice, dok sve ostale direktive koje se pobrajaju u Smernicama kao osnov za njihovo donošenje upućuju isključivo na materiju korporativnog upravljanja a ne upravljanja bankarskim uslugama.

Međutim, Sud je bio suprotnog stava, polazeći od analize odredaba Smernica, te zaključuje da Smernice postavljaju sistem nadzora i upravljanja uslugama kao organizacioni zahtev koji je u vezi sa korporativnim upravljanjem i sistemom internih kontrola u kreditnoj ustanovi, vezujući sadržaj Smernica prvenstveno za odredbe o korporativnom upravljanju iz Direktive 2013/36/EU (član 74). Dalje, Sud smatra da plasiranje neprikladnih finansijskih usluga, poput finansijskih usluga kreiranih bez uzimanja u obzir karakteristika relevantnog (ciljnog) tržišta i interesa potrošača kojima su namenjene, može generisati značajne rizike za finansijsku instituciju, a da se ti rizici ne manifestuju samo kao rizici koji proističu iz ugrožavanja potrošačkih prava, već i kao prudentni rizici koji mogu uticati i na poverenje i stabilnost finansijskog sistema. Drugim rečima, stav suda je da Smernice, premda garantuju viši nivo zaštite potrošača, nisu primarno usmerene na pitanja potrošačkih prava (Smernice ne definišu šta se smatra prikladnom uslugom za pojedinačnog korisnika), već na to da se interesi, karakteristike i odlike korisnika kojima je usluga namenjena uzmu u obzir u procesu upravljanja rizicima i prilikom uspostavljanju sistema korporativnog upravljanja i sistema internih kontrola.

Iz navedenog Sud smatra da usvajanje Smernica spada u delokrug ovlašćenja koje EBA ima na osnovu Uredbe 1093/2010, ne nužno na osnovu veze sa zahtevima iz pojedinih akata EU, već na osnovu opštih ovlašćenja koje EBA ima na osnovu člana 1(2) i 1(3) Uredbe 1093/2010, a koji se tiču korporativnog upravljanja i očuvanja stabilnosti i poverenja u finansijski sistem. Razlozi za to su sledeći: 1) podižu nivo zaštite potrošača; 2) odnose se na opšti okvir preuzimanja (i upravljanja rizicima) kreditnih ustanova; 3) doprinose uspostavljanju i funkcionisanju efikasnih nadzornih praksi.

#### **4. Kratak osvrt na presudu**

Iz ugla osiguranja, ova presuda je interesantna ne toliko iz procesnih aspekata i samih ovlašćenja EBA da doneše takve smernice (integracija bankarskog tržišta EU je daleko više uznapredovala od integracije tržišta osiguranja), već iz aspekta stava suda o vezi između rizika koje distribucija neprikladnih finansijskih usluga (tzv. *mis-selling*) predstavlja i prudentnog nadzora nad finansijskim ustanovama, odnosno da se veliki broj potrošačkih problema može manifestovati na poverenje u finansijski sistem i finansijsku stabilnost, kao i dovođenje u vezu sistema nadzora i upravljanja uslugama sa odredbama regulative korporativnog upravljanja i sistema internih kontrola.

Kako i Direktiva o distribuciji osiguranja članom 25 predviđa uspostavljanje sličnog sistema u osiguravajućim društvima i posrednicima osiguranja (kada se oni smatraju proizvođačima osiguranja), ovaj stav Suda može biti relevantan i za shvatanje mesta sistema nadzora i upravljanja uslugama u sektoru osiguranja.

UDK: 336.71:341.645(4-672EU)(44)

## **NAKNADA ŠTETE ZA IZGUBLJENU ZARADU ZBOG UMANJENJA RADNE SPOSOBNOSTI**

**U slučaju kada oštećeni koji je van radnog odnosa potražuje određeni novčani iznos na ime izgubljene zarade, do čega je došlo usled narušenog zdravlja, mora dokazati iznos zarade koju nije ostvario zbog umanjenja radne sposobnosti, pri čemu se pod zaradom podrazumeva svaka imovinska korist koja se postiže radom u delatnosti koja donosi izvesne prihode.**

*Iz obrazloženja:*

Po članu 40 Zakona o zdravstvenoj zaštiti (*Sl. glasnik RS*, br. 107/05,...113/17), važećem u vreme nastanka štete, pacijent koji zbog stručne greške zdravstvenog radnika odnosno zdravstvenog saradnika u ostvarivanju zdravstvene zaštite pretrpi štetu na svom telu ili se stručnom greškom prouzrokuje pogoršanje njegovog zdravstvenog stanja, ima pravo na naknadu štete prema opštim pravilima o odgovornosti za štetu. Pravo na naknadu štete ne može se unapred isključiti ili ograničiti.

Prema članu 195 Zakona o obligacionim odnosima (ZOO), ko drugome nese telesnu povredu ili mu naruši zdravlje, dužan je naknaditi mu troškove lečenja i druge potrebne troškove s tim u vezi, kao i zaradu izgubljenu zbog nesposobnosti za rad za vreme lečenja. Ako povređeni zbog potpune ili delimične nesposobnosti za rad gubi zaradu, ili su mu potrebe trajno povećane, ili su mogućnosti njegovog daljeg razvijanja i napredovanja uništene ili smanjene, odgovorno lice dužno je plaćati povređenom određenu novčanu rentu, kao naknadu za tu štetu.

Oštećenik ima pravo kako na naknadu obične štete tako i na naknadu izmakle koristi, čija se visina određuje shodno cenama rada u vreme donošenja sudske odluke, izuzev slučaja kad zakon naređuje nešto drugo i kada se pri oceni visine izmakle koristi u obzir uzima dobitak koji se mogao osnovano očekivati prema redovnom toku stvari ili prema posebnim okolnostima čije je ostvarenje sprečeno štetnikovom radnjom ili propuštanjem (član 189 st. 1, 2 i 3 ZOO).

Za ocenu osnovanosti tužbenog zahteva za naknadu materijalne štete neophodno je da tužilac dokaže kako postojanje osnova potraživanja, tako i visinu sume

koju potražuje. U slučaju kada oštećeni koji je van radnog odnosa potražuje određeni novčani iznos na ime izgubljene zarade, do čega je došlo usled narušenog zdravlja, za uspeh u parnici mora da dokaže iznos zarade koju nije ostvario zbog umanjenja radne sposobnosti, pri čemu se pod zaradom podrazumeva svaka imovinska korist koja se postiže radom u delatnosti koja donosi izvesne prihode.

Po oceni Vrhovnog kasacionog suda, pravilno je stanovište nižestepenih sudova da tužilac nema pravo na naknadu štete za izgubljenu zaradu u visini koja je opredeljena u osnovnom tužbenom zahtevu, budući da nije dokazao visinu ove štete na osnovu stvarne zarade koju je ostvarivao pre bolesti. Međutim, kod utvrđenog stanja da zbog greške u lečenju kod tužioca postoji potpuni gubitak profesionalne radne sposobnosti od 100%, da se tužilac pre bolesti bavio građevinskim poslovima i ostvarivao zaradu, pravilno je stanovište prvostepenog suda da je tužilac pretrpeo štetu u visini izgubljene zarade koju je veštak obračunao na osnovu kretanja minimalne cene rada. Šteta koja je nastupila u vreme donošenja prvostepene odluke određuje se u iznosu stvarno pretpljene materijalne štete u tom razdoblju, pa kod stanja utvrđenog veštačenjem da u periodu postojanja zanatsko-fasadarske radnje (od 20. 7. 2009. do 30. 12. 2011. godine) tužilac nije ostvarivao nikakav prihod, pogrešno je stanovište drugostepenog suda da tužilac nema pravo na naknadu štete za izgubljenu zaradu ni u visini minimalne cene rada jer je osnivanjem zanatske radnje bio u mogućnosti da se radno angažuje. Zato je Vrhovni kasacioni sud preinačio drugostepenu presudu i potvrdio prvostepenu presudu u usvajajućem delu zahteva za naknadu štete na ime izgubljene zarade u periodu od 10. 6. 2006. do 31. 1. 2019. godine u visini minimalne cene rada.

*Presuda Vrhovnog kasacionog suda, Rev. 682/21 od 12. X 2022)  
(Izbor sudske prakse br. 7-8/2023, str. 52.)*

## **NAKNADA NEMATERIJALNE ŠTETE ZBOG PRETRPLJENIH DUŠEVNIH BOLOVA USLED NARUŽENOSTI**

**Pravo na naknadu nematerijalne štete zbog pretrpljenih duševnih bolova usled naruženosti oštećeni može ostvarivati od trenutka kada je njegovo stanje postalo trajno, tj. od saznanja da su posledice povređivanja postale trajne i da dalje lečenje ne doprinosi smanjenju trajnih štetnih posledica.**

*Iz obrazloženja:*

Naknada prouzrokovane štete može se zahtevati u okviru subjektivnog roka od tri godine i u okviru objektivnog roka od pet godina. Subjektivni rok od tri

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## **Sudska praksa**

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godine računa se od dana kada je oštećenik doznao za štetu i za lice koje je štetu učinilo, u skladu sa odredbom člana 376 stav 1 ZOO, dok potraživanje zastareva u svakom slučaju za pet godina od kada je šteta nastala, shodno stavu 2 iste odredbe. Pod saznanjem za štetu podrazumeva se i saznanje za njen obim i visinu.

Kada je u pitanju potraživanje naknade prouzrokovane štete za pretrpljene duševne bolove usled naruženosti, relevantan momenat je onaj kada je oštećeni postao svestan da dalje lečenje ne doprinosi smanjenju trajnih štetnih posledica. To je momenat kada je oštećenom saopšteno da su posledice povređivanja postale trajne, bez obzira na to da li je lečenje dalje nastavljeno. Na osnovu nalaza veštaka sudske medicine i neurohirurgije, utvrđeno je da je nakon 12 meseci od povređivanja stanje kod tužioca postalo definitivno i da se od tog trenutka stanje smatra trajnim, odnosno nakon 28. 2. 2014. godine. Tužilac je do tog trenutka završio lečenje i terapiju i konstatovano je njegovo konačno stanje na osnovu nalaza specijaliste klasične i rekonstruktivne hirurgije od 10. 12. 2013. godine. Stoga je pravilan zaključak drugostepenog suda da je tužilac u smislu odredbe člana 361 stav 1 ZOO od tog trenutka imao pravo da zahteva ispunjenje obaveze, odnosno da traži naknadu prouzrokovane štete. Kako je od označenog datuma kada je stanje tužioca postalo trajno pa do podnošenja tužbe protekao subjektivni rok od tri godine, kao i objektivni rok od pet godina, sledi da je pravilan zaključak drugostepenog suda da je potraživanje tužioca zastarelo.

Bez uticaja je revizijski navod tužioca da tužilac i danas trpi duševne bolove zbog naruženosti, izazvane pretrpljenom povredom na radu kod tuženog. Prema stanovištu revidenta, rok zastarelosti je trebalo računati od onog trenutka kada su prestali duševni bolovi izazvani naruženošću, što bi u konkretnom slučaju bilo nakon nalaza veštaka, sačinjenog u ovom postupku dana 16. 9. 2021. godine. Nasuprot revizijskim navodima, tužilac je svoje pravo na naknadu nematerijalne štete zbog pretrpljenih duševnih bolova usled naruženosti mogao ostvarivati od trenutka kada je njegovo stanje postalo trajno, tačnije od saznanja da su posledice povređivanja postale trajne. Okolnost da tužilac i danas trpi duševne bolove zbog naruženosti, usled nastupanja tog deformiteta, nije od uticaja na tužiočevo pravo na naknadu štete. Naknada štete se može ostvariti u zakonom propisanim rokovima, a po proteku tih rokova zastareva. Stoga, protekom tih rokova nije se ugasilo samo pravo već i mogućnost da se to pravo ostvari prinudnim putem. U suprotnom, ne bi postojalo nikakvo vremensko ograničenje u kom bi poverilac mogao ostvarivati svoje pravo da zahteva ispunjenje obaveze. Institut zastarelosti upravo to onemogućava, predviđajući vreme u okviru koga se pravnim putem može zaštititi pravo, kao i od kog trenutka zastarelost počinje da teče.

*Presuda Vrhovnog kasacionog suda, Rev2. 1397/22 od 2. VI 2022)  
(Izbor sudske prakse br. 7-8/2023, str. 55.)*

## **ODGOVORNOST ZA ŠTETU OD OPASNE STVARI I OPASNE DELATNOSTI**

**Za štetu od opasne stvari odgovara njen imalac, a za štetu od opasne delatnosti odgovara lice koje se njome bavi, a imalac odnosno držalač opasne stvari može se oslobođiti odgovornosti za štetu od opasne stvari ako dokaže da šteta potiče od uzroka koji se nalazi van stvari, a čije se dejstvo nije moglo predvideti, izbeći, niti otkloniti.**

*Iz obrazloženja:*

Odredbom člana 172 stav 1 Zakona o obligacionim odnosima, propisano je da pravno lice odgovara za štetu koju njegov organ prouzrokuje trećem licu u vršenju ili u vezi sa vršenjem svojih funkcija. Članom 173 istog zakona propisano je da se za štetu nastalu u vezi s opasnom stvari, odnosno opasnom delatnošću, smatra da potiče od te stvari, odnosno delatnosti, izuzev ako se dokaže da one nisu bile uzrok štete, dok je članom 174 istog zakona predviđeno da za štetu od opasne stvari odgovara njen imalac, a za štetu od opasne delatnosti odgovara lice koje se njome bavi. Prema članu 184 istog zakona, preuzeća i druga pravna lica koja obavljaju komunalnu ili drugu sličnu delatnost od opštег interesa odgovaraju za štetu ako bez opravdanog razloga obustave ili neredovno obavljaju svoju uslugu.

Uslovi za oslobođanje od odgovornosti imaoča opasne stvari propisani su u članu 177 navedenog zakona, tako što se imalac stvari oslobođa odgovornosti ako dokaže da šteta potiče od uzroka koji se nalazio van stvari, a čije se dejstvo nije moglo predvideti, ni izbeći, niti otkloniti (stav 1).

Imajući u vidu navedene zakonske norme, neosnovani su navodi revizije o pogrešnoj primeni materijalnog prava, jer da bi neko bio odgovoran za štetu, između njegove radnje i štete treba da postoji uzročna veza, odnosno šteta treba da bude rezultat ponašanja lica kome se ona pripisuje. Pitanje uzročne veze rešava sud u svakom pojedinačnom slučaju i tako odlučuje o zahtevu za naknadu štete. Kako je pravilo da za štetu od opasne stvari odgovara njen imalac, za štetu od opasne delatnosti odgovara lice koje se njome bavi, te u tom slučaju imalac odnosno držalač opasne stvari može se oslobođiti odgovornosti za štetu od opasne stvari ako je šteta uslovljena određenim okolnostima. U te okolnosti, između ostalog, spada i viša sila, te se držalač opasne stvari oslobođa odgovornosti ako dokaže da šteta potiče od uzroka koji se nalazio van stvari, a čije se dejstvo nije moglo predvideti, izbeći, niti otkloniti. Naime, o šteti nastaloj dejstvom više sile može se govoriti samo ako su se kumulativno stekle tri pravno relevantne činjenice: spoljašnjost uzroka, njegova nepredvidivost i njegova neizbežnost ili neotklonjivost.

Kod utvrđenog stanja da je u konkretnom slučaju do formiranja vodoleža na parcelama tužioca i nastanka štete na zasejanim usevima suncokreta došlo usled ekstremno velike količine padavina, boniteta zemljišta i visokog nivoa Tise i Begeja, pravilan je zaključak drugostepenog suda da ove okolnosti predstavljaju višu silu i da postoji osnov za isključenje odgovornosti tuženog za nastalu štetu u smislu člana 177 stav 1 ZOO, jer je šteta potekla od uzroka čije se dejstvo nije moglo predvideti, izbeći, niti otkloniti, te i ne postoji odgovornost za njen nastanak.

*Presuda Vrhovnog kasacionog suda, Rev. 3060/21 od 20. X 2022)  
(Izbor sudske prakse br. 7-8/2023, str. 56.)*

## **PREKRŠAJ IZ ČLANA 330 STAV 1 TAČKA 23 ZAKONA O BEZBEDNOSTI U SAOBRAĆAJU NA PUTEVIMA**

**Vlasnik odnosno korisnik vozila obavezan je da u roku od osam dana dâ potpune i tačne podatke o identitetu lica koje je u vreme izvršenja prekršaja upravljalo vozilom kojim je prekršaj izvršen.**

*Iz obrazloženja:*

Odredbom člana 330 stav 1 tačka 23 Zakona o bezbednosti u saobraćaju na putevima propisano je da će se propisanom kaznom kazniti za prekršaj vozač ili lice koje postupi suprotno odredbi člana 247 st. 1 i 2 tog zakona.

Članom 247 stav 1 Zakona o bezbednosti u saobraćaju na putevima propisano je da je vlasnik odnosno korisnik vozila obavezan da u roku od osam dana dâ potpune i tačne podatke o identitetu lica kome je omogućeno upravljanje vozilom i dokaz na osnovu kojeg se na nesporan način može utvrditi da je to lice upravljalo vozilom u određeno vreme, a stavom 2 istog člana propisano je da fizičko lice, vlasnik odnosno korisnik vozila ne sme dati vozilo na upravljanje licu koje je pod dejstvom alkohola ili psihoaktivnih supstanci, ili koje je u tolikoj meri umorno, bolesno ili u takvom psihofizičkom stanju da nije sposobno da bezbedno upravlja vozilom, ili nema vozački dozvolu odgovarajuće kategorije.

Imajući u vidu navedeno, prvostepeni prekršajni sud bio je u obavezi da u izreci svoje presude navede da li je okrivljena postupila suprotno odredbi člana 247 stav 1 ili odredbi člana 247 stav 2 Zakona o bezbednosti u saobraćaju na putevima, pa kako to nije učinio, pobijanu presudu doneo je uz bitnu povredu odredaba prekršajnog postupka iz člana 264 stav 1 tačka 14) Zakona o prekršajima, jer je na taj način izreknu učinio nerazumljivom.

Postupajući na taj način, prvostepeni prekršajni sud je učinio bitnu povredu odredaba prekršajnog postupka iz člana 264 stav 1 tačka 14) Zakona o prekršajima, kako se to osnovano ističe u podnetom zahtevu republičkog javnog tužioca. Istu bitnu povredu odredaba prekršajnog postupka učinio je i drugostepeni prekršajni sud, koji je žalbe okriviljene i branioca okriviljene odbio kao neosnovane i potvrdio prvostepenu presudu.

(*Presuda Vrhovnog kasacionog suda, Krzz. Pr. 54/22 od 20. XII 2022)*  
(Izbor sudske prakse br. 7-8/2023, str. 49.)

## **PRAVO OKRIVLJENOG NA ODBRANU**

**U prekršajnom postupku okriviljenom se mora dati mogućnost da se izjasni o činjenicama i dokazima koji ga terete i da iznese sve činjenice i dokaze koji mu idu u korist.**

*Iz obrazloženja:*

Odredbom člana 93 stav 1 Zakona o prekršajima propisano je da se prenošenja odluke okriviljenom mora dati mogućnost da se izjasni o činjenicama i dokazima koji ga terete i da iznese sve činjenice i dokaze koji mu idu u korist, osim u slučajevima predviđenim zakonom.

U konkretnom slučaju, prvostepeni sud nije upoznao okriviljenog A. A. sa iskazima svedoka B. B. i V. V., koji ga terete, niti je njega i njegovog branioca na bilo koji način pozvao da se upoznaju s njihovim iskazima i o njima se izjasne, već je doneo presudu, koju potom drugostepeni sud nije ispitao u delu povrede prava na odbranu iz člana 93 stav 1 Zakona o prekršajima, u smislu člana 272 tog zákona. Ne dajući okriviljenom A. A. mogućnost da se izjasni o dokazima koji ga terete, prvostepeni sud je donošenjem pobijane presude učinio bitnu povredu odredaba prekršajnog postupka iz člana 264 stav 2 tačka 4) u vezi sa članom 93 stav 1 Zakona o prekršajima, koju povredu nije otklonio ni drugostepeni sud.

Iz iznetih razloga, nalazeći da je pobijanim presudama učinjena bitna povreda odredaba prekršajnog postupka, na koju se osnovano ukazuje zahtevom za zaštitu zakonitosti republičkog javnog tužioca, Vrhovni kasacioni sud nalazi da bi pobijane presude trebalo ukinuti i predmet vratiti na ponovno odlučivanje prvostepenom sudu.

Međutim, okriviljeni A. A. je prekršaj za koji je oglašen odgovornim učinio 23. 1. 2020. godine, pa je istekom dana 23. 1. 2022. godine nastupila apsolutna

zastarelost vođenja prekršajnog postupka, u smislu člana 84 stav 7 u vezi sa stavom 1 Zakona o prekršajima.

*Presuda Vrhovnog kasacionog suda, Krzz. Pr. 5/22 od 10. III 2022)  
(Izbor sudske prakse br. 7-8/2023, str. 50.)*

## **NAKNADA NEMATERIJALNE ŠTETE**

**Kada je odlukom Ustavnog suda Srbije utvrđeno da je u izvršnom postupku povređeno pravo na suđenju u razumnom roku zbog njegovog trajanja od 17 godina, tužilac ima pravo na naknadu nematerijalne štete.**

*Iz obrazloženja:*

Žalba tuženika izjavljena protiv presude prvostepenog suda kojom je tuženik Republika Srbija obavezan da tužiocu plati iznos od 800 evra na ime nematerijalne štete zbog povrede prava na suđenje u razumnom roku jeste neosnovana.

Prvostepeni sud je utvrdio da je parnični postupak koji je iniciran tužbom tužioca u toku 1993. godine i okončan presudom 4. V 2004. trajao 11 godina, da je izvršni postupak radi naplate potraživanja trajao 17 godina i nije okončan do dana presuđenja u ovoj pravnoj stvari, pravilan je zaključak da prvostepeni sud nije bio dovoljno aktivan u sprovođenju navedenog izvršenja, a tužilac svojim ponašanjem nije doprineo dužini trajanja postupka, pri čemu je ishod postupka od velikog značaja za tužioca jer se radi o naplati potraživanja iz radnog odnosa, pa je prvostepeni sud pravilno primenio materijalno pravo, i to prvenstveno odredbe čl. 3, 4, 23 i 30 Zaka-na o zaštiti prava na suđenje u razumnom roku, kao i član 200 ZOO, pa je pravilna odluka prvostepenog suda.

*Presuda Višeg suda u Čačku, Gž. 254/20 od 26. X 2020)  
(Izbor sudske prakse br. 7-8/2023, str. 56.)*

*Priredila: Ljiljana J. Lazarević Davidović, dipl. pravnik*

## Odabrani članci

**Emily Douglas: What will happen in the insurance market in 2024? – Šta će se desiti na tržištu osiguranja u 2024. godini?** Ulaskom u 2024. godinu, osiguravajuća društva mogu očekivati mnogo toga u narednim mesecima, gde tehnološke promene, upravljanje talentima, analiza rizika i konkurenčija igraju ključne uloge.

Nedavni izveštaj „Deloitte“-a naglasio je nekoliko razloga za zabrinutost, uključujući porast premija za komercijalne nekretnine, rastuće troškove koji utiču na osiguravajuće kuće, kao i troškove popravke motornih vozila. Insurance Business je obuhvatio neke od najvećih imena i lidera u sektoru koji su izneli svoje prognoze za tržište u 2024. godini.

Kyle Matthews, direktor prodaje i distribucije u „The Hartford“-u, ističe kako tehnologija menja način poslovanja i komunikacije. On vidi tehnologiju kao priliku za promene na bolje u delatnosti osiguranja.

Laura Zoltan, senior potpredsednica za strategiju i distribuciju u „Arch Insurance Group“ Inc., naglašava važnost privlačenja i zadržavanja talenata. Ona ističe individualni razvoj kao ključni faktor za održavanje motivacije zaposlenih.

Krishna Lynch, pomoći potpredsednik za osiguranje od rizika odgovornosti, „Zurich Resilience Solutions“, govori o važnosti analitičke moći veštačke inteligencije za pravilnu procenu rizika u osiguranju, pogotovo u oblastima kao što je sajber osiguranje.

Jenna Kirkpatrick Howard, senior potpredsednica u „Lockton Companies“, ukazuje na izazove sa kojima se suočava tržište osiguranja imovine i odgovornosti, kao i na potrebu za alternativnim rizicima i dobrim planiranjem.

Berri M. Willis, pomoći potpredsednik i direktor za upravljanje u „Burns & Wilcox“, ističe kako tržište donosi prilike i izazove, te kako je važno iskoristiti postojeće snage za ekspanziju i uspeh. Zaključuje da regrutacija talenata, dovođenje više stručnjaka, fokusiranje na različite linije poslovanja, različite niše i različite sektore dovodi do uspeha.

<https://www.insurancebusinessmag.com/us/news/breaking-news/what-will-happen-in-the-insurance-market-in-2024-472765.aspx>  
(Izvor: Insurance Business, januar 2024)

**Frances Stebbing: CRIF calls on insurers to challenge ESG credentials in the supply chain. – CRIF poziva osiguravajuće kompanije da prihvate ESG**

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## Bibliografija

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**standarde u lancu snabdevanja.** CRIF, pružalač informacija o kreditima za potrošače i poslovne subjekte, lansirao je ESG Analytics, alat koji pomaže osiguravajućim kompanijama, kao i drugim finansijskim institucijama, da bolje razumeju koliko su kompanije, klijenti ili dobavljači sa kojima sarađuju u svom delovanju usklađeni s principima ekoloških, društvenih i upravljačkih načela.

Sara Costantini, regionalna direktorka CRIF-a za Veliku Britaniju i Irsku, naglasila je važnost zaštite životne sredine za buduće generacije i istakla ulogu osiguravajućih kuća i finansijskih institucija u tom procesu. CRIF-ov alat ESG Analytics dopunjuje već postojeću ESG uslugu Synesgy, koju koristi više od 600.000 kompanija, uključujući 350 banaka i osiguravajućih društava, u više od 80 zemalja, kako bi se uskladile sa ESG standardima i ciljevima održivosti. Ta inicijativa se, takođe, fokusira na podizanje svesti u osiguranju, pogotovo u vezi s uticajem celokupnih lanaca snabdevanja na ekologiju. ESG Analytics pomaže osiguravačima da brzo i tačno procene ESG kvalifikacije kompanija sa kojima sarađuju ili razmatraju saradnju. Taj alat koristi repozitorijum ESG podataka i više od 130 ključnih indikatora kako bi analizirao oblasti poput emisija gasova sa efektom staklene baštne, upotrebe vode, proizvodnje otpada i generisanje otpada. Usluga omogućava osiguravačima da dobiju ESG ocenu bez potrebe za angažovanjem samih kompanija, pružajući im konkurentnu prednost i pomažući im da prioritetizuju odnose sa održivim kompanijama. Osim toga, alat pomaže u identifikaciji potencijalnih događaja koji bi mogli ugroziti ciljeve i ambicije kompanije u vezi sa ESG, čime doprinosi zaštiti od budućih rizika.

U oblasti osiguranja postoji sve veći pritisak da kompanije razumeju, objave i smanje svoje emisije ugljenika kako bi podržale ciljeve održivosti. Iako su finansirane i osigurane emisije izazovne za merenje, regulatorna tela istražuju potencijalne regulative. Osiguravači imaju ključnu ulogu u prelasku na zelenu ekonomiju, a alat poput ESG Analytics omogućava bolje razumevanje uticaja poslovanja na životnu sredinu. Kroz analizu ključnih ESG indikatora, osiguravači mogu optimizovati politike i portfelje, smanjujući gubitke za kompanije koje su usklađene sa ESG standardima.

Costantini je rekla da je nakon sproveđenja nekoliko konceptualnih dokaza sa vodećim osiguravačima, CRIF pronašao korelaciju između ključnih ESG indikatora i stope gubitaka koja se može koristiti kako bi se optimizovala cena polise i profitabilnost, dok se poboljšava održivost portfelja njihovih klijenata. Dodala je da je CRIF otkrio da što je kompanija više usklađena sa ESG kriterijumima, to je niža ukupna stopa gubitaka za osiguravača, dok su kompanije koje su najmanje usklađene sa ESG principima bile rizičnije, te je stopa gubitaka bila najviša. Stoga je važno da osiguravači prepoznaju te promene i pridruže se inicijativama za održivost.

(Izvor: *Insurance Post*, februar 2024)

**Harry Curtis: AI breakthroughs promise sea change in supply chain insurability.** – Napredak veštačke inteligencije obećava velike promene u osiguranju lanca snabdevanja. Nedavni koraci tehnološkog napretka pokazuju da organizacije sada mogu mnogo brže da razumeju svoje lance snabdevanja nego ranije, rekao je James Crask, šef strateškog konsaltinga za rizik u kompaniji „Marsh“. Crask je, takođe, rekao da tehnološki proboji na polju veštačke inteligencije otvaraju vrata organizacijama da osiguraju veći deo rizika s kojima se suočavaju unutar svojih lanaca snabdevanja. Tradicionalni metod mapiranja uključivao je prilaženje svim dobavljačima i traženje informacija o njihovim dobavljačima, što je dugo trajalo i bilo neefikasno. Međutim, organizacije sada imaju pristup ogromnim bazama podataka i naprednim vrstama alata za analizu, što omogućava brže i dublje razumevanje lanaca snabdevanja i rizika s kojima se suočavaju. Kao rezultat toga, organizacije mogu bolje upravljati rizicima. To može dovesti do prenosa više rizika na osiguravače, što naglašava važnost pouzdanih podataka u upravljanju lancima snabdevanja, objasnio je Crask. On veruje da bi radikalna promena u mapiranju lanca snabdevanja omogućena veštačkom inteligencijom mogla rezultirati prenosom mnogo većeg dela rizika s kojima se organizacije suočavaju unutar svojih lanaca snabdevanja.

Govoreći u kontekstu nedavnog izveštaja Svetskog ekonomskog foruma o globalnom riziku, Crask je rekao da lanci snabdevanja predstavljaju susretanje mnogih vrsta rizika koje su istaknute u tom izveštaju, bili oni geopolitički, ekonomski ili kibernetički. Neproverene informacije i dezinformacije rangirane su kao najveći kratkoročni rizik u izveštaju Svetskog ekonomskog foruma – delom podstaknute dolaskom AI tehnologije. To je posledica težnje organizacija da dobiju pouzdane podatke u svrhu suočavanja s rizicima, poput onih s kojima se suočavaju unutar svojih lanaca snabdevanja. Konsenzus u izveštaju Svetskog ekonomskog foruma je da će stvari dugoročno postati nestabilnije i volatilnije. U tom kontekstu, organizacije će tražiti više pouzdanih izvora informacija, na osnovu kojih će donositi svoje odluke. To je jedan od razloga što se neproverene informacije navode kao jedan od glavnih dugoročnih rizika. Istoriski gledano, organizacije su se zaista borile da shvate rizike koji su skriveni unutar njihovih lanaca snabdevanja. Dostupnost pouzdanih podataka biće apsolutno ključna kako bismo rešili taj problem, zaključio je Crask.

(Izvor: *Insurance Post*, februar 2024)

**Emma Ann Hughes: Admiral partners with Google Cloud for new products.** – „Admiral“ se udružuje sa Google Cloud-om kako bi kreirao nove proizvode. „Admiral“ je postigao sporazum sa Google Cloud-om, koji će tehnološkom gigantu omogućiti da hostuje platforme za upravljanje polisama i naplatu, kao i da koristi generativnu veštačku inteligenciju za stvaranje novih proizvoda i usluga.

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## Bibliografija

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Izvori bliski partnerstvu ekskluzivno su otkrili *Insurance Post*-u da će sporazum između provajdera i *Google Cloud*-a omogućiti „Admiralu“ da ubrza vreme do izlaska novih proizvoda i usluga na tržište primenom aplikacija u oblaku tehnološke kompanije. „Admiral“, koji već pet godina sarađuje sa *Google*-om kako bi se oslobođio svojih zastarelih tehnoloških platformi, sada može koristiti *Google Cloud*-ove analize podataka, kao i usluge veštačke inteligencije i mašinskog učenja ove kompanije.

Prema mišljenju glavnog informacionog direktora „Admirala“ Alana Patefield-Smita, partnerstvo će rezultirati na sledeći način:

- „Admiral“ će koristiti analitiku podataka, mašinsko učenje i generativne AI sposobnosti *Google Cloud*-a kako bi omogućio donošenje odluka zasnovanih na podacima širom organizacije i proizvodnju novih personalizovanih proizvoda.

- Admiral će koristiti centralizovan pregled podataka *Google Cloud*-a kako bi pružio više personalizovanih i besprekornih digitalnih iskustava osiguranicima, uključujući prilagođene ponude i prilagođene usluge.

- *Google Cloud* će biti korišćen kako bi se ojačali digitalni kanali „Admirala“, uključujući web-sajt, mobilnu aplikaciju i kontakt centar kako bi se osiguralo manje naknadnog unosa podataka.

- „Admiral“ će hostovati svoje osnovne platforme za upravljanje polisama i naplatu na *Google Cloud*-u. Provajder je već prebacio 19.000.000 polisa za motorna vozila i domaćinstva tokom poslednjih 18 meseci, a u naredne dve godine na *Google Cloud* će prebaciti putno osiguranje i osiguranje za kućne ljubimce.

- *Google Cloud* će obučavati zaposlene u „Admiralu“ veština računarstva u oblaku i analitici podataka.

Patefield-Smith je rekao da očekuje da će partnerstvo rezultirati time da provajder donosi više personalizovanih proizvoda na tržište, dva do tri puta brže nego što je trenutno stanje, gde je potrebno šest do sedam meseci da se lansira novi proizvod.

Moramo ostati na vrhu, i to je ono čemu smo posvećeni i nadamo se da će ovo partnerstvo doneti sposobnost da ostanemo ispred u sve konkurentnijem okruženju, dodao je Patefield-Smith.

Helen Kelisky, izvršni direktor *Google Cloud*-a, rekla je da su ponosni što podržavaju njegovu kontinuiranu posvećenost pružanju najboljih proizvoda i usluga širom svog portfelja osiguranja. Radujemo se jačanju našeg postojećeg odnosa sa „Admiralom“ kako bismo pospešili strategiju promena i pružili još bolja iskustva svojim klijentima.

(Izvor: *Insurance Post*, februar 2024)

**Roxanne Libatique: Report unveils AI's dual impact on insurance industry.**  
– Izveštaj otkriva dvostruki uticaj veštačke inteligencije na delatnost osiguranja.

Globalno udruženje za pravo osiguranja (GILC) predstavilo je svoj prvi izveštaj o integraciji veštačke inteligencije u delatnosti osiguranja, nudeći sveobuhvatnu analizu iz 18 zemalja. Izveštaj istražuje transformacione efekte veštačke inteligencije, uključujući unapređenja u efikasnosti i inovacijama u različitim operacijama osiguranja, istovremeno ističući povezane izazove poput potencijalne pristrasnosti u algoritmima veštačke inteligencije, zabrinutost za privatnost i povećani rizik od sajber incidenta.

Gillian Davidson, predsednica GILC-a i partnerka u advokatskoj firmi „Sparke Helmore Lawyers“, naglasila je ključnu ulogu veštačke inteligencije u transformisanju pejzaža osiguranja. Veštačka inteligencija je postala neizostavan deo našeg svakodnevnog života i brzo pronalazi put u oblasti osiguranja. Očekuje se da će se ta tendencija nastaviti jer veštačka inteligencija nudi brojne koristi, uključujući bržu obradu zahteva za štetu, unapređeno ocenjivanje rizika, inovativne usluge osiguranja, optimizovane procese administracije i efikasnije četbotove. Davidson je istakla kako analitička moć veštačke inteligencije može pomoći osiguravačima da prodru na tržišta sa složenim profilima rizika, pogotovo tamo gde su istorijski podaci oskudni. Ta analitička prednost je ključna u kreiranju preciznih opcija pokrića, pogotovo u oblastima poput sajber osiguranja.

Evoluirajući regulatorni okvir koji se odnosi na veštačku inteligenciju još je jedna ključna tačka izveštaja, pri čemu delatnost osiguranja pažljivo prati razvojne tokove kao što je budući AI zakon, koji treba da posluži kao regulatorna osnova širom sveta.

Izveštaj je dotakao digitalnu transformaciju unutar modela distribucije osiguranja, tendenciju koja je ubrzala pandemija kovida 19 i koja se karakteriše značajnim prelaskom ka onlajn i digitalnim platformama. Očekuje se da će se taj prelazak nastaviti, što će koristiti tržištima sa tradicionalno niskim stopama penetracije osiguranja.

Usvajanje veštačke inteligencije podrazumeva niz izazova u vezi sa privatnošću podataka. Izveštaj ukazuje na neophodnost za osiguravače da uspostave robustne mehanizme usaglašenosti sa standardima za zaštitu podataka kako bi umanjili rizike povezane sa kršenjem podataka i efikasno upravljali takvim incidentima.

Osiguravajuća rešenja prilagođena rizicima povezanim s veštačkom inteligencijom su još uvek u ranoj fazi razvoja. Međutim, kako tehnologija napreduje i postaje sve prisutnija, a regulatorna tela pojačavaju svoj fokus, možemo očekivati porast rešenja usmerenih na rizike veštačke inteligencije, zaključuje Davidson.

*Report unveils AI's dual impact on insurance industry | Insurance Business America (insurancebusinessmag.com)*

(Izvor: *Insurance Business*, mart 2024)

*Prevela i priredila: Tijana V. Đekić, dipl. filolog*

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#### **1. Osiguranje imovine i osiguranje lica**

##### **1.1. Razlike između osiguranja imovine i osiguranja lica**

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Marjan Ćurković, Vladimir Miletić, *Pravo osiguranja Europske ekonomske zajednice*, Croatia osiguranje d. d., Zagreb, 1993.

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N. Žarković, str. 125.

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N. Žarković (2013), str. 25.

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Primer:

Jasna Pak, „Pravna zaštita korisnika usluga osiguranja“, *Privreda i pravo u tranziciji*, Palić, 2004, str. 35.

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Jelena Kočović, Marija Jovović, „Uticaj liberalizacije i privatizacije na razvoj tržišta osiguranja u Srbiji“, *Tokovi osiguranja*, br. 1/2016, str. 5.

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Primer:

Jasna Pak, str. 57.

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Zakon o obaveznom osiguranju u saobraćaju, *Službeni glasnik RS*, br. 51/09, čl. 15.

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Primer:

čl. 35 st. 5 tač. 8 ili par. 8.

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Zakon o osiguranju, čl. 15.

ZO, čl. 15.

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Primeri:

nemački Trgovački zakonik iz 1897. godine (*Handelsgesetzbuch*), par. 29.

britanski Kompanijski zakon iz 2006. godine (*Companies Act*; dalje u fuznotama: CA), čl. 53.

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Primer:

Christos Gortsos, The Supervision of Financial Conglomerates under European Financial Law (Directive 2002/87/EC), 2010,

<http://fic.wharton.upenn.edu/fic/papers/09/0936.pdf>, pristupljeno: 16. 7. 2016, str. 2

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Primer:

C. Gortsos, The Supervision of Financial Conglomerates under European Financial Law (Directive 2002/87/EC), str. 12.

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Example:

## **I Insurance classification**

### **1. Insurance of property and persons**

#### **1.1. Differences between insurance of property and insurance of persons**

##### **1.1.1. Indemnity principle**

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Nebojša Žarković, *Glossary of Insurance Terms*, Novi Sad, 2013, pp. 100

b) When a book has multiple authors, their first and last names are separated with a comma.

Example:

Marjan Ćurković, Vladimir Miletić, *Pravo osiguranja Europske ekonomske zajednice*, Croatia osiguranje d. d., Zagreb, 1993.

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Example:

N. Žarković, pp. 125

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N. Žarković (2013), pp. 25

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Jasna Pak, „Pravna zaštita korisnika usluga osiguranja“, *Privreda i pravo u tranziciji*, Palić, 2004, str. 35.

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Example:

Vladimir Kovčić, „Stečaj akcionarskog društva za osiguranje“, *Pravo osiguranja u tranziciji* (urednici Predrag Šulejić i Jovan Slavnić), Palić, 2003, str. 56.

d) Repeated citations from the same author should include only the first initial followed by a full stop before the last name of the author and the number of the page.

Example:

Jasna Pak, pp. 57

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Insurance Law – IL, *Official Gazette of the Republic of Serbia*, no.55/04, art.38, par.2

c) Article, paragraph and item of a regulation are referred to as abbreviations art., par., item

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Examples:

Insurance Law, art.15

IL, art.15

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German Commercial Code 1897 (*Handelsgesetzbuch*), par. 29.

British Companies Act 2006 (*Companies Act*; referred in footnotes as: CA), art.53

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Žarković, N., *Glossary of Insurance Terms*, Novi Sad, 2013, pp. 100

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