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Dr Marija Karanikić Mirić[1]

FORMA UGOVORA O OSIGURANJU

ORIGINALNI NAUČNI RAD

Apstrakt

U srpskom pozitivnom pravu ugovor o osiguranju je formalan pravni posao: da bi bio punovažan, potrebno je da bude zaključen u formi propisanoj zakonom. Tu postoje malobrojni izuzeci. U ovom radu najpre su izložena opšta pitanja o formi ugovora: šta je to forma, šta su formalni ugovori, koji su pojavni oblici forme, šta je to obavezna ili konstututivna forma ugovora i koje su pravne posledice njenog nepoštovanja, šta je to paralelizam formi, koja je svrha forme u savremenom društvu. Drugi deo rada posvećen je zakonskoj formi ugovora o osiguranju u pravu Republike Srbije: najpre se razmatra osnovni slučaj zakonom propisane konstitutivne forme ugovora o osiguranju, a potom posebna zakonska mogućnost da strane ugovore realnu formu tog ugovora.

Ključne reči: ugovor o osiguranju, konstitutivna forma, pismena forma, realna forma.

I UOPŠTENO O FORMI UGOVORA

1. Šta je to forma ugovora?

Forma pravnog posla je **oblik** u kom se izjavljuje pravno relevantna volja; to je unapred određen, spoljašnji odnosno vidljiv način izražavanja sadržine volje učesnika u pravnom prometu, sredstvo kojim se materijalizuje sadržina volje subjekta koji preduzima pravni posao.

[1] Redovna profesorka Pravnog fakulteta Univerziteta u Beogradu.
Prvi deo ovog teksta („Uopšteno o formi ugovora") pripremila sam oslanjajući se u velikoj meri na svoje ranije istraživanje za knjigu: Marija Karanikić Mirić, *Obligaciono pravo*, Službeni glasnik, Beograd, 2024.
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Forma pravnog posla **uvek postoji**. Svaki ugovor po prirodi stvari mora imati nekakvu formu. Drugo je pitanje da li je forma ugovora unapred zadata, odnosno da li postoji zahtev da se volja izjavi odnosno saopšti u tačno određenoj formi da bi mogla da proizvede nameravano pravno dejstvo.

Kad preduzimaju pravne poslove, učesnici u pravnom prometu slobodno biraju formu u kojoj će izjaviti svoju volju. To proizlazi iz **načela autonomije volje**: pravni subjekti su u principu slobodni, u granicama prinudnih propisa, javnog poretka i dobrih običaja, da svoje odnose urede po svojoj volji, što obuhvata i njihovu slobodu da odaberu oblik ispoljavanja te svoje volje.

Kad forma ugovora nije ni propisana ni posebno ugovorena, svaka ugovorna strana može da izjavi volju u formi koju sama odabere. Tako se pismena ponuda može usmeno prihvatiti, i obratno, na usmenu ponudu može se pristati pismenim putem. Ponuda učinjena mejlom može se prihvatiti usmeno, u telefonskom razgovoru, ili pak pismom, koje će biti poslato redovnom poštom ili po kuriru.

2. Formalni i neformalni ugovori

Ugovor je **formalan** ako ima propisanu ili ugovorenu konstitutivnu formu, to jest ako se za njegovo punovažno zaključenje zahteva da saglasnost volja ugovornih strana bude izražena u određenoj formi.[2] Taj zahtev može biti postavljen opštom normom (zakonom) ili pojedinačnom normom (sporazumom ugovornih strana). U našem pravu, zakonsku konstitutivnu formu imaju, na primer, prodaja, razmena i poklon nepokretnosti, prodaja s obročnim otplatama cene, ugovori o građenju, kreditu, licenci, trgovinskom zastupanju, angažovanju ugostiteljskih kapaciteta (alotmanu). U formalne ugovore se kod nas ubraja i **ugovor o osiguranju**.

Ako pak nema nikakvih, ni opštih ni pojedinačnih pravila o obaveznoj formi ugovora, za taj ugovor se kaže da je **neformalan**. Važno je znati da neformalan ugovor nije ugovor bez forme: ugovor mora imati formu i kad je neformalan. Kad se kaže da je neki ugovor neformalan, to ne znači da on nema nikakvu formu, nego da svaka strana slobodno bira formu u kojoj će izjaviti svoju volju. Neformalni ugovori se u pravnoj literaturi često označavaju kao konsensualni, a izrazi konsensualan i neformalan upotrebljavaju se kao sinonimi:[3] za neformalne ugovore se obično kaže da se zaključuju konsensualno, to jest prostom saglasnošću izjavljenih volja (*solo*

[2] Izuzetno, zahtev forme se može odnositi na izjavu volje jedne ugovorne strane, dok druga strana zadržava slobodu da volju izjavi u formi po svom izboru. Takav ugovor je **jednostrano formalan**, a kao primer se može navesti jemstvo. Ugovor o jemstvu obavezuje jemca samo ako je izjavu o jemčenju učinio pismeno; poverilac može s tim da se saglasi u bilo kojoj formi. Član 998 Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ,* br. 29/1978, 39/1985, 45/1989 i 57/1989, *Službeni list SRJ,* br. 31/1993, *Službeni list SCG,* br. 1/2003 i *Službeni glasnik RS,* br. 18/2020.

[3] Videti umesto mnogih: Slobodan Perović, *Obligaciono pravo*, Službeni list SFRJ, Beograd, 1990, 182, 195.

consensu), a pod načelom konsensualizma misli se na načelno garantovanu slobodu ugovornika da izaberu formu ugovora u koji stupaju.[4]

3. Koji su pojavni oblici forme?

Našu pravnu misao druge polovine XX veka obeležila je podela formi na usmenu i pismenu formu, realnu formu te formu javne isprave. Pod formom javne isprave misli se na pismenu formu u čijem je sačinjavanju na neki način učestvovao organ javne vlasti.[5]

Međutim, usled razvoja novih tehnologija i uvođenja javnog beležništva u naš pravni sistem, u XXI veku ponuđena je drugačija klasifikacija formi pravnih poslova:[6] (a) elektronska forma je izdvojena kao posebna kategorija; (b) umesto forme javne isprave usvojena je šira kategorija kvalifikovane pismene forma, koja obuhvata formu javne isprave, ali i druge slučajeve kad se uz sadržinu posla i svojeručan potpis na ispravi zahtevaju i neke dopunske formalnosti. Drugim rečima, učestvovanje nosioca javnih ovlašćenja u sastavljanju isprave o pravnom poslu svrstano je među načine na koje obična pismena forma može da se dopuni, odnosno posebno kvalifikuje. Takva forma je ujedno najstroža i najpouzdanija.[7]

Da sumiramo: Po načinu izražavanja volje forma se u našem savremenom pravu može podeliti na **usmenu**, **pismenu**, **realnu** i **elektronsku**; pismena forma se deli na običnu (svojeručno potpisana isprava) i kvalifikovanu; a kvalifikovana pismena forma dalje se razvrstava na javno overenu (legalizovanu) ispravu, javno potvrđenu (solemnizovanu) ispravu i javno sastavljenu ispravu.[8]

a) Usmena forma

Usmena forma pravnog posla je ispoljavanje sopstvene pravno relevantne volje **govorenjem**, to jest kazivanjem njenog sadržaja. Usmena komunikacija

[4] Pojedini autori smatraju da konsensualni ugovori nisu suprotnost formalnim nego realnim ugovorima. To se temelji na njihovom prethodnom stavu da predaja stvari kod realnih ugovora nije forma ili oblik izjavljivanja volje nego obavezan dodatak usmeno postignutoj saglasnosti. Tako: Jakov Radišić, *Obligaciono pravo. Opšti deo*, sedmo izdanje, Nomos, Beograd, 2004, 123–124.

[5] S. Perović (1990), 342; Živomir Đorđević, Vladan Stanković, *Obligaciono pravo*, Naučna knjiga, Beograd, 1987, 246.

[6] Pierre Engel, *Traité des obligations en droit suisse*, Stämpfli, Berne, 1997, 248 (qualifizierte Schriftform, forme écrite qualifiée). Kod nas: Dejan Đurđević, *Javnobeležnička delatnost*, Dosije, Beograd, 2014, 25–27.

[7] Tako je smatrao i Bogišić: Što se pred javnom vlašću uglavi, najtvrđe je i najbistrije. Član 1023 Opšteg imovinskog zakonika za Knjaževinu Crnu Goru (OIZ) iz 1888.

[8] D. Đurđević, 23–27. Izložena podela je izvršena po pojavnom obliku, to jest po izgledu forme. Iz nje se ne može videti da li je određena forma propisana ili ugovorena i koji je njen pravni značaj, odnosno koje bi bile pravne posledice njenog nepoštovanja. Na primer, pismena forma nekog ugovora može biti zakonska ili ugovorena, a po svom pravnom značaju mogla bi biti uslov punovažnosti tog ugovora ili prost dokaz o njegovom usmenom zaključenju.

podrazumeva dve strane: produktivnu (govorenje) i receptivnu (slušanje i razumevanje). Za razliku od pisanja i čitanja, koji se mogu vremenski razdvojiti, govorenje i slušanje se po prirodi stvari odvijaju istovremeno: slušanje ne može da se odgodi. Da bi slušalac mogao da čuje to što je izgovoreno, učesnici u usmenoj komunikaciji moraju se naći na istom mestu u isto vreme. Tome se upodobljava telefonski razgovor.

Pravni posao je preduzet **u usmenom obliku** kad pravni subjekt izgovori sadržinu svoje volje zarad postizanja nekog pravnog dejstva. Kad je saopštena u usmenoj formi, volja se materijalizuje trenutno, saznatljiva je onima koji su prisutni, ali ne ostavlja trajni zapis, koji bi omogućio reprodukciju onoga što je izgovoreno. Stoga je osnovni nedostatak usmene forme to što se teško dokazuje postojanje i sadržina izjave, to jest da je nešto rečeno i šta je tačno rečeno. Taj nedostatak se tradicionalno prevazilazi obezbeđivanjem svedoka.

Usmena forma dvostranog pravnog posla podrazumeva da je zajednička volja ugovornih strana govorno uobličena, to jest da je sadržaj njihove saglasnosti izražen usmenim kazivanjem. Usmena forma ugovora je **načelno dopuštena**, osim kad je drugačije propisano ili kad se ugovorne strane unapred sporazumeju da će njihov ugovor biti punovažan samo ako bude bio zaključen u nekoj drugoj formi. Savremeni zakonodavac nikad ne propisuje obaveznu usmenu formu ugovora. Ugovor može usmeno da se zaključi uvek kad nije ni propisana ni ugovorena neka druga forma.

Treba napomenuti da izrazi **usmeno i neformalno nisu sinonimi**. Usmeno zaključeni ugovori mogu da budu strogo formalni. Kao primer za to najlakše je navesti verbalne kontrakte rimskog prava: *dotis dictio* (jednostrano formalno obećanje miraza), *iusiurandum liberti* (zakletva oslobođenika), *praediatura* (procesno jemstvo koje je kasnije menjalo svrhu) i *stipulatio* (apstraktan jednostrano-obavezujući pravni posao kojim su se preuzimale raznovrsne imovinske obaveze).[9]

b) Realna forma

Realna forma pravnog posla jeste izražavanje pravno relevantne volje **činom predaje stvari**. Predaja stvari je poseban oblik materijalizacije volje subjekta da izazove određeno pravno dejstvo. Ugovori koji se zaključuju u realnoj formi nazivaju se realnim ugovorima. Da bi realan ugovor bio formalan neophodno je da realna forma bude propisana ili ugovorena kao uslov za njegovu punovažnost.

Za zaključenje konsensualnog ugovora dovoljno je da ugovorne strane postignu saglasnost o sadržini svog ugovora, to jest da formiraju zajedničku volju o njegovom pravnom dejstvu. Saglasnost volja može biti izražena usmeno, pismeno ili elektronski, a ako je zajedničkom voljom ugovornika predviđena predaja određene stvari, ta predaja može samo da bude čin ispunjenja obaveze iz konsensualnog ugovora.

[9] Miroslav Milošević, *Rimsko pravo*, Nomos, Beograd, 2005, 320; Paul du Plessis, *Borkowski's Textbook on Roman Law*, O.U.P., Oxford, 2005, 290; Martin Hogg, *Promises and Contract Law*, C.U.P., Cambridge, 2011, 110.

Nasuprot tome, realan ugovor se ne smatra zaključenim sve dok jedna ugovorna strana ne preda drugoj strani stvar na koju se taj ugovor odnosi. Predaja stvari je po svom pravnom dejstvu **akt zaključenja realnog ugovora**.

Naravno, ugovorne strane moraju biti saglasne o tome šta predaja stvari znači u pravnom smislu. Stoga ni realnog ugovora ne može biti ako ne postoji zajednička volja ugovornih strana da stupe u odnos određene sadržine. Međutim, one tu svoju saglasnost moraju da izraze predajom i prijemom stvari na koju se ugovor odnosi. Jedan ugovornik predaje stvar a drugi ugovornik tu stvar prima, sve u nameri zaključenja, i u tom času i tim činom biva zaključen realan ugovor.

c) Pismena forma

Pismena forma obezbeđuje trajnu materijalizaciju sadržine pravnog posla. U najširem smislu to je potpisani tekst izjave na ispravi. Pismena forma pravnog posla sastoji se iz najmanje dva elementa. To su: (a) **tekst izjave volje** pravnog subjekta koji preduzima pravni posao, napisan elektronskim ili mehaničkim uređajem za pisanje ili rukom i (b) **svojeručni potpis tog subjekta**. Tekst izjave i svojeručni potpis uvek se nalaze na nekom telesnom predmetu, najčešće na hartiji, koji se naziva ispravom i predstavlja trajni zapis sadržine pravnog posla. Ugovornik koji ne zna da piše staviće na ispravu rukoznak overen od dva svedoka ili od suda odnosno drugog nosioca javnih ovlašćenja. Pismena forma pravnog posla omogućava odloženi neposredni uvid u sadržinu izjave nečije pravno relevantne volje. Za razliku od usmene forme, kod koje se ne mogu razdvojiti govorenje i slušanje, pismena forma omogućava odloženo čitanje napisanog, to jest razdvajanje produktivne i receptivne faze u verbalnoj komunikaciji.

Postoji oboriva zakonska pretpostavka potpunosti pismene isprave o pravnom poslu. Kad je ugovor zaključen u posebnoj formi, na osnovu zakona ili po volji strana, uzima se da među stranama važi samo ono što stoji u toj ispravi. Ipak, punovažne su i (a) istovremene usmene pogodbe o sporednim tačkama o kojima u formalnom ugovoru ništa nije rečeno, ako nisu u suprotnosti s njegovom sadržinom ili protivne cilju propisane forme, i (b) istovremene usmene pogodbe kojima se smanjuju ili olakšavaju obaveze jedne ili obe strane ako je posebna forma propisana samo u interesu ugovornika.

d) Vrste pismene forme

Postoje dve vrste pismene forme pravnog posla: **obična i kvalifikovana**.

Obična pismena forma je svojeručno potpisana isprava na kojoj je elektronskim ili mehaničkim uređajem za pisanje ili rukom napisana sadržina pravnog posla. Elementi obične pismene forme ugovora jesu tekst ugovora, to jest pismeni izraz sadržine ugovora o kojoj su strane saglasne, i njihovi svojeručni potpisi. Tekst ugovora može da napiše, otkuca ili odštampa jedna od ugovornih strana ili neko treće lice. Običaj je da se isprava o pravnom poslu datira.

Zakonom je izričito propisano da je zahtev pismene forme ispunjen kad strane razmene pisma, ali i onda kad se sporazumeju nekim sredstvom koje omogućava da se sa izvesnošću utvrde sadržina i davalac izjave. Kao primer za to sredstvo naš zakonodavac navodi teleprinter, što je bilo u skladu s vremenom kad je ZOO usvojen. Teleprinteri su električne pisaće mašine koje su mogle međusobno da komuniciraju putem zatvorene i kontrolisane teleks mreže, nalik fiksnoj telefoniji. Kao što je poznato, oni se više ne koriste. U današnje vreme trajni elektronski zapis ugovora koji je usmeno zaključen može da se obezbedi razmenom elektronske pošte, odnosno da se sačuva na raznim nosačima, kao što su DVD, CD-ROM, memorijska kartica i hard-disk računara. Taj zapis je prost dokaz o usmeno zaključenom ugovoru. Na primer, garantni list je isprava o garanciji, a garancija je izjava volje kojom proizvođač jemči odnosno obećava ispravno funkcionisanje stvari u toku određenog vremena, počev od njene predaje kupcu. Trgovac je dužan da potrošaču preda garantni list u pismenoj ili elektronskoj formi ili na drugom trajnom nosaču zapisa, kao prost dokaz o garanciji. Propuštanje da se taj dokaz obezbedi prekršajno se kažnjava, ali sama izjava o garanciji neće zbog toga biti ništava; ona obavezuje trgovca i kad je usmeno data.

Kad je pismena forma ugovora propisana zakonom, trajni elektronski zapis teksta ugovora može da zameni propisanu pismenu formu samo ako taj zapis omogućava da se sa izvesnošću utvrdi identitet ugovornih strana. Svojeručni potpis kao element pismene forme osigurava da je ugovor zaključilo lice koje je kao ugovornik označeno na ispravi o ugovoru. Običnu pismenu formu stoga može da zameni samo ono sredstvo koje pruža iste garantije, to jest obavlja funkciju autentifikacije. Na primer, elektronska forma je savremeno sredstvo koje može zameniti običnu pismenu formu ugovora. Ona u sebi mora da sadrži odgovarajuće elektronske potpise ugovornih strana, koji predstavljaju adekvatan supstitut za njihove svojeručne potpise.

Nije retkost da se zakonom propiše da je trgovac dužan da potrošača o nečemu obavesti u predugovornoj fazi ili tokom trajanja ugovornog odnosa. Zakonodavac obično zahteva da trgovac pruži određena **obaveštenja na trajnom nosaču zapisa** i propisuje građanskopravne i kaznenopravne sankcije za trgovca koji tu dužnost ne obavi na propisani način. Trajni nosač zapisa definiše se kao svaki instrument koji omogućava da se podaci pohrane da bi kasnije moglo da im se pristupi, odnosno da bi mogli da se reprodukuju u neizmenjenom obliku, kao što su papir, elektronska pošta, CD-ROM, DVD, memorijska kartica i hard-disk računara.[10]

Trajni nosač zapisa nije forma pravnog posla nego telesni predmet na kom se može zapisati sadržina pravnog posla ili neko obaveštenje ili obična beleška, i to (a) ispisivanjem na hartiji ili drugom materijalu, kao što su drvo i glina, s kog se tekst može neposredno pročitati, ili (b) utiskivanjem na predmetima kao što su bušena kartica, CD-ROM i DVD, s kojih se tekst čita mehaničko-računarski i ne može

[10] Čl. 5, st. 1, t. 44 Zakona o zaštiti potrošača – ZZP, *Službeni glasnik RS*, br. 88/2021.

se menjati, ili pak (c) kao elektronski dokument, recimo, na memorijskoj kartici, s koje se čita pomoću računara i podleže promenama. Zapis je, dakle, neko pismeno ili elektronski dokument, a nosač zapisa je medij koji omogućava čuvanje, čitanje i reprodukciju onoga što je zapisano. Tako je, na primer, pre zaključenja ugovora o osiguranju i tokom trajanja ugovornog odnosa osiguravač dužan da ugovarača osiguranja obavesti o mnogo čemu, u pismenoj formi ili na drugom trajnom nosaču podataka, što omogućava da se podaci čuvaju, da im se pristupi i da se reprodukuju u neizmenjenom obliku.[11] Takođe, trgovac je dužan da na trajnom nosaču zapisa obavesti potrošača da može i elektronskim putem da ostvari svoje pravo na odustanak od ugovora zaključenog na daljinu ili van poslovnih prostorija trgovca.[12]

Ipak, treba primetiti da se u tim slučajevima ne radi o zakonskoj formi ugovora nego o **zakonskoj formi dugovanih obaveštenja**. Jedan ugovornik je dužan da pre zaključenja ugovora, u vreme zaključenja ili tokom trajanja ugovornog odnosa obavesti drugu stranu o nečemu i da to učini na način koji omogućava da se dati podaci sačuvaju, da im se ponovo pristupi i da se štampaju odnosno da se na drugi način reprodukuju dok god je to potrebno s obzirom na svrhu i prirodu ugovora. **Teret dokazivanja** da je obaveštenje učinjeno u propisanoj formi snosi ono lice čija je to obaveza. Obaveštenje se može učiniti, na primer, na hartiji bez svojeručnog potpisa, koja se šalje poštom ili predaje adresatu na ruke, a u nekim slučajevima ono se i ističe u prostorijama trgovca, tako da potencijalni saugovornik može da ga pročita i ponese sa sobom. Takođe, obaveštenje može da se učini u obliku elektronskog dokumenta bez elektronskog potpisa, koji se šalje elektronskom poštom, predaje adresatu na memorijskoj kartici, a u nekim slučajevima se postavlja onlajn, tako da ga drugi mogu snimiti ili odštampati.

Kvalifikovana pismena forma podrazumeva sve što i obična pismena forma, a to znači sadržinu pravnog posla i svojeručne potpise lica koja preduzimaju posao na telesnom predmetu (ispravi), ali traži još nešto, čime se ova forma dodatno kvalifikuje i što je čini strožom od obične pismene forme. Ta dopuna se naziva **dodatnim formalnostima**. Na primer, ponekad se zahteva da lice koje preduzima određeni pravni posao svojeručno ispiše tekst pravnog posla na ispravi (olografski testament) ili da u prisustvu svedoka prizna ispravu za svoj pravni posao (alografski testament). Dodatna formalnost se nekad sastoji u tome što nosilac javnih ovlašćenja participira u zaključenju ugovora tako što overava (legalizuje) potpise ugovornih strana, ili potvrđuje (solemnizuje) njihovu privatnu ispravu o pravnom poslu, ili pak za ugovornike sačinjava javnu ispravu u odgovarajućem postupku. Na primer, pre nego što je kod nas uvedeno javno beležništvo, ugovori na osnovu kojih se može preneti pravo svojine na nepokretnosti, kao što su prodaja, poklon i razmena,

[11] Čl. 82–84 Zakona o osiguranju – ZO, *Službeni glasnik RS*, br. 139/2014 i 44/2021.
[12] Čl. 27 ZZP.

zaključivani su u formi javno overene (legalizovane) isprave. Potpisi strana na tim ugovorima morali su biti overeni kod suda. Ugovor o doživotnom izdržavanju i ugovor o ustupanju i raspodeli imovine za života zaključivani su u formi javno potvrđene (solemnizovane) isprave.

U našem pozitivnom pravu, najvažnije su kvalifikovane pismene forme za koje dodatnu formalnost predstavlja **učešće javnog beležnika**.[13] Tu spadaju javno overena isprava, javno potvrđena isprava i javno sastavljena isprava.

Forma **javnobeležnički overene** isprave je kvalifikovana pismena forma koja obuhvata (a) običnu pismenu formu i (b) klauzulu o overi potpisa (legalizacionu klauzulu). Overavanjem potpisa javni beležnik potvrđuje da je podnosilac isprave, čiji je identitet prethodno utvrdio, u njegovom prisustvu svojeručno potpisao podnetu ispravu, odnosno da je potpis koji se već nalazi na podnetoj ispravi priznao za svoj. Javni beležnik nije odgovoran za sadržinu podnete isprave, niti je dužan da utvrđuje ima li podnosilac pravo da potpiše tu ispravu. Iz toga proizlazi da je samo **legalizaciona klauzula** javna isprava, to jest da samo ona ima punu dokaznu snagu. Što se svega ostalog tiče, javno overena isprava nije ništa drugo do privatna (nejavna) isprava, koja podleže oceni po slobodnom sudijskom uverenju.[14]

Forma **javnobeležnički potvrđene** privatne (nejavne) isprave jeste kvalifikovana pismena forma koja obuhvata (a) običnu pismenu formu i (b) solemnizacionu klauzulu (klauzulu o potvrđivanju). Javno potvrđivanje se vrši stavljanjem solemnizacione klauzule na ispravu o pravnom poslu. Tom klauzulom javni beležnik potvrđuje da je ugovornim stranama u njegovom prisustvu pročitana isprava, da su strane izjavile da ta isprava verno i potpuno odgovara njihovoj volji i da su je svojeručno potpisale. Prilikom potvrđivanja isprave o pravnom poslu, javni beležnik je dužan da licima koja preduzimaju pravni posao objasni smisao tog posla, da im ukaže na njegove posledice, da ispita da li je pravni posao dozvoljen, odnosno da nije u suprotnosti s prinudnim propisima, javnim poretkom i dobrim običajima. Osim toga, javni beležnik je dužan da ispita imaju li strane pravnu i poslovnu sposobnost koja se traži za preduzimanje pravnog posla i jesu li ovlašćene da preduzmu taj posao, te da proveri da li je zastupnik ili punomoćnik ugovorne strane poslovno sposoban i ovlašćen da izjavi volju u njeno ime. Zbog svega toga **celovita javno potvrđena isprava**, a ne samo njena solemnizaciona klauzula, ima svojstvo javne isprave i punu dokaznu snagu.[15]

[13] D. Đurđević, 25–27.

[14] Zakonsku formu javno overene isprave kod nas danas imaju, na primer, nasledna izjava, ugovor o osnivanju privrednog društva i ugovor o prenosu udela u društvu s ograničenom odgovornošću. Povrh toga, svaki pravni posao može se sačiniti u formi javnobeležnički overene isprave, osim kad je zakonom propisano da se takvi poslovi zaključuju u strožoj formi, kao što su javno potvrđena ili javno sastavljena isprava.

[15] Zakonsku formu javno potvrđene (solemnizovane) isprave kod nas danas imaju, na primer: (a) ugovori na osnovu kojih se stiče pravo svojine na nepokretnostima, kao što su prodaja, razmena i poklon;

Forma **javno sastavljene** isprave najstroža je kvalifikovana pismena forma pravnog posla, koja sadrži najveći broj dodatnih, kvalifikujućih formalnosti. U sastavljanju javne isprave učestvuje državni organ ili drugi nosilac javnih ovlašćenja, a kad ispravu sačinjava javni beležnik, onda se forma javno sastavljene isprave naziva još i javnobeležnički zapis. Takvu ispravu sastavlja javni beležnik u posebnom vanparničnom postupku, po kazivanju lica koje preduzima određeni pravni posao, a kad se radi o ugovoru, po kazivanju ugovornih strana. Poput solemnizovane isprave, **ceo javnobeležnički zapis ima svojstvo javne isprave** – čitava isprava, a ne samo neki njen deo. Kad sastavlja ispravu o ugovoru, javni beležnik je dužan da utvrdi identitet ugovornih strana, da strane upozna sa sadržinom ugovora koji zaključuju te da ih pouči o njegovim pravnim posledicama. Javnobeležnički zapis ima istu dokaznu snagu kao da je sačinjen u sudu ili pred drugim državnim organom. Povrh toga, pod uslovima koji su određeni zakonom, javnobeležnički zapis može imati snagu izvršne isprave. U osnovnim crtama, javnobeležnički zapis je izvršna isprava ako je u njemu utvrđena određena obaveza na činidbu o kojoj se strane mogu sporazumeti i ako sadrži izričitu izjavu dužnika da se na osnovu te isprave može neposredno sprovesti prinudno izvršenje.[16]

e) Elektronska forma

Razvoj digitalnih tehnologija omogućio je da se u savremenom pravnom prometu sadržina ugovora iskaže u obliku elektronskog dokumenta. Od kada znamo za pismo, sadržina ugovora se može zapisati na hartiji ili na nekom drugom telesnom predmetu. Povrh toga, danas se sadržina ugovora može zabeležiti i u obliku digitalnog zapisa, koji je pogodan za elektronsko čuvanje, obradu i prenošenje.

Digitalni zapis sadržine pravnog posla predstavlja elektronski dokument, koji ima svoj (a) unutrašnji prikaz, to jest tehničko-programsku stranu koju čita mašina i koja u principu nije od interesa za ugovornike, a ima i (b) spoljašnji, vizuelni prikaz sadržine ugovora, za čije nam je čitanje neophodan računar.

(b) ugovor o hipoteci i založna izjava (ako ne sadrže izričitu izjavu obavezanog lica da se na osnovu njih može po dospelosti obaveze neposredno sprovesti prinudno izvršenje); (c) ugovor kojim se zasnivaju stvarne ili lične službenosti; (d) ugovor kojim supružnici odnosno budući supružnici uređuju svoje imovinske odnose na postojećoj ili budućoj imovini (bračni ugovor). I drugi ugovori se mogu sačiniti u formi javnobeležnički potvrđene isprave, ako se strane tako sporazumeju, izuzev ugovora koji se po zakonu zaključuju u strožoj formi javno sastavljene isprave.

[16] Čl. 85 Zakona o javnom beležništvu – ZJB, *Službeni glasnik RS*, br. 31/2011, 85/2012, 19/2013, 55/2014 (drugi zakon), 93/2014 (drugi zakon), 121/2014, 6/2015 i 106/2015. Takođe, na osnovu javnobeležničkog zapisa može neposredno da se izvrši upis u javni registar, ako zapis sadrži izjavu kojom dužnik na to izričito pristaje. Zakonsku formu javnobeležničkog zapisa kod nas imaju ugovori o raspolaganju nepokretnostima poslovno nesposobnih lica; sporazum o zakonskom izdržavanju; ugovor o hipoteci i založna izjava (ako sadrže izričitu izjavu obavezanog lica da se na osnovu njih može po dospelosti obaveze neposredno sprovesti prinudno izvršenje, bilo sudskim bilo vansudskim putem). Povrh toga, ugovornici mogu da se sporazumeju o tome da će njihov ugovor proizvoditi pravno dejstvo samo ako bude bio zaključen u formi javnobeležničkog zapisa.

Setimo se da pismena forma ugovora podrazumeva ispravu o pravnom poslu, na kojoj se nalaze tekst sadržine ugovora i svojeručni potpisi ugovornih strana. Pismena forma ugovora, dakle, nije puki ispis njegove sadržine na telesnom predmetu, nego je još neophodno da se ugovornici svojeručno potpišu na tu ispravu, tako da se identifikuju i priznaju tekst ugovora kao svoj. Isto se može kazati za ugovore zaključene u elektronskoj formi.

Elektronska forma ugovora obuhvata (a) elektronski dokument, to jest digitalni zapis sadržine ugovora, i (b) elektronske potpise ugovornika, koji se tako identifikuju i prihvataju tekst ugovora kao svoj. Elektronski potpis, kao i svojeručni potpis, mora biti potpis fizičkog lica. Kad ugovor zaključuje pravno lice, koristi se elektronski potpis onog fizičkog lica koje je ovlašćeno da zastupa to pravno lice pri zaključenju ugovora.

Postoje tri vrste elektronskog potpisa: običan, napredni i kvalifikovani.

Običan elektronski potpis je skup podataka u elektronskom obliku koji su pridruženi i logički povezani s drugim (potpisanim) elektronskim podacima, tako da se elektronskim potpisom potvrđuje integritet tih elektronskih podataka i identitet potpisnika. To je, dakle, skup elektronskih podataka koji zajedno potvrđuje sadržinu elektronskog dokumenta i identitet lica koje je potpisalo taj dokument. **Napredni elektronski potpis** je kredibilniji od običnog, jer pouzdanije potvrđuje integritet potpisanih podataka i identitet potpisnika. Potpisnik je jedini koji kontroliše upotrebu svog naprednog elektronskog potpisa. Svaka naknadna izmena potpisanih podataka može da se utvrdi, a potpisani podaci se ne mogu krišom menjati. Napredni elektronski potpis, dakle, omogućava da se pouzdanije identifikuje potpisnik i detektuju naknadne izmene potpisanog dokumenta. Napredni potpis se ne može kopirati s elektronskog dokumenta da bi se ponovo koristio; potpisani dokument ne može da se izmeni a da o tome ne ostane elektronski trag. **Kvalifikovani elektronski potpis** je posebna vrsta naprednog elektronskog potpisa, opremljen kvalifikovanim sertifikatom koji izdaje nadležno sertifikaciono telo.[17] Kvalifikovani elektronski potpis je po zakonu izjednačen sa svojeručnim potpisom. To je najpouzdaniji elektronski potpis: s njim je najsigurnije da elektronski podaci nisu menjani nakon što su potpisani, te da je dokument potpisalo lice čiji je to potpis, to jest upravo onaj ko je ovlašćen da se stavljanjem tog potpisa identifikuje i prizna elektronski dokument kao svoj.

ZOO ne pominje elektronsku formu ugovora, ali predviđa da je zahtev pismene forme ispunjen ako se strane sporazumeju nekim drugim sredstvom koje omogućava da se sa izvesnošću utvrde sadržina i davalac izjave. Odskora je propisano da kvalifikovani elektronski potpis ima isto pravno dejstvo kao i svojeručni potpis.

[17] Za sada postoje sertifikaciona tela Pošte Srbije, Privredne komore Srbije, Ministarstva unutrašnjih poslova, Ministarstva odbrane i druga.

Osim toga, kvalifikovani elektronski potpis može da zameni overu (legalizaciju) svojeručnog potpisa, ako je to propisano posebnim zakonom.[18]

Ugovornim stranama, dakle, kod nas na raspolaganju stoje sledeće opcije. Prvo, **kad zakonom nije propisana forma**, strane mogu zaključiti ugovor u elektronskoj formi, koristeći običan, napredni ili kvalifikovani elektronski potpis. Čak, ugovor mogu zaključiti i prostom razmenom elektronske pošte. Takođe, slobodne su da u elektronskoj formi obezbede prost dokaz o usmeno zaključenom ugovoru. Drugo, **kad je zakonom propisano da se ugovor zaključuje u pismenoj formi**, ugovorne strane mogu zameniti propisanu formu samo onom elektronskom formom koja je snabdevena njihovim kvalifikovanim elektronskim potpisima jer su samo takvi elektronski potpisi po zakonu izjednačeni sa svojeručnim potpisima. Ni običan ni napredni elektronski potpis nisu dovoljni da bi se njihovim stavljanjem na elektronski dokument mogao ispuniti zahtev zakonodavca da određeni ugovor bude zaključen u pismenoj formi. Treće, **kad je zakonom određeno da se ugovor sačinjava u formi javno overene isprave** (legalizacija potpisa), propisanu formu može zameniti elektronska forma koja sadrži kvalifikovane elektronske potpise ugovornika samo ako je takva zamena posebno dopuštena zakonom. I četvrto, kad je zakonom propisano da se ugovor zaključuje u formi **solemnizovane isprave ili javnobeležničkog zapisa**, propisana forma se ne može zameniti elektronskom formom, čak ni onom koja sadrži kvalifikovane elektronske potpise.

Poslednje pitanje koje treba pomenuti zbog potpunog uvida u ovaj relativno nov pravni režim tiče se odnosa originala i kopije elektronskog dokumenta. Naime, elektronski dokument može biti izvorno elektronski ili pak može nastati digitalizacijom (na primer, skeniranjem) isprave koja izvorno nije elektronska. Takođe, elektronski dokument štampanjem može da dobije fizički oblik, a može se i umnožavati elektronskim putem. U tom obilju situacija treba videti šta se smatra originalom, a šta su kopije te šta je potrebno da bi se neka kopija po svome dejstvu ili značaju izjednačila s originalom.

(a) Elektronski dokument koji je izvorno nastao u elektronskom obliku smatra se originalom. (b) Originalom se smatra i svaki drugi elektronski dokument koji ima istovetan digitalni zapis. (c) Štampanjem spoljne forme elektronskog dokumenta, to jest njegovog vizuelnog prikaza, može da se izradi kopija tog dokumenta na hartiji. Takva kopija može se overiti kod javnog beležnika. Overavanjem kopije javni beležnik potvrđuje da je kopija isprave istovetna s kopiranom ispravom. Javni beležnik može potvrditi da je odštampani primerak podudaran sa izvornim elektronskim dokumentom ako je štampanje tog primerka obavljeno pod njegovim nadzorom. Pre nego što overi štampani primerak elektronskog dokumenta, javni beležnik je dužan da

[18] Čl. 50 Zakona o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju, *Službeni glasnik RS*, br. 94/2017 i 52/2021.

ispita da li je upotrebljen kvalifikovani elektronski potpis. U klauzuli o overavanju mora da naznači da je reč o odštampanom primerku elektronskog dokumenta. (d) Elektronski dokument može nastati digitalizacijom izvornog dokumenta čija forma nije elektronska, recimo, skeniranjem stranica papira na kojima je ispisan tekst ugovora. Takav elektronski dokument smatra se kopijom izvornog dokumenta koji nije elektronski. Overavanjem te kopije javni beležnik potvrđuje da je elektronska kopija isprave istovetna s kopiranom ispravom. Potrebno je da se podneta isprava digitalizuje pred javnim beležnikom. On potom unosi svoj kvalifikovani elektronski pečat u digitalizovanu kopiju kojim potvrđuje njenu istovetnost s izvornom ispravom koja nije elektronska.[19]

4. Čemu služi forma?

U modernom pravu, osnovni princip je sloboda izbora forme sopstvenih izjava volje. Učesnici u pravnom prometu slobodno biraju oblik u kom će saopštiti svoju volju. Pravni poslovi načelno proizvode nameravana pravna dejstva bez obzira na formu u kojoj su preduzeti. Načelo autonomije volje prožima sve građanske kodifikacije od XIX veka do danas. Iz njega proizlazi sloboda ugovaranja, koja podrazumeva i slobodan izbor forme ugovora i drugih pravnih poslova. Taj **princip slobodnog izbora forme** pravnog posla danas se naziva konsensualizam i razume se kao suprotnost načelnom formalizmu starih prava. Konsensualizam proizlazi iz slobode ugovaranja i znači da svi načini na koje se može izraziti pravno relevantna volja jednako vrede. Slobodan izbor oblika u kom će se izjaviti volja odgovara praktičnim potrebama ubrzanog i omasovljenog prometa robe i usluga.

Kad nema forme, nema ni posla. Pravno relevantna volja mora da se izrazi, manifestuje, učini saznatljivom drugima da bi mogla da proizvede pravno dejstvo. Pravni posao nije skrivena, nesaopštena, unutrašnja volja nego je to izjavljena volja. Ta neophodnost da se volja iskaže, da se materijalizuje, znači da svaki pravni posao po prirodi stvari mora imati nekakvu formu. Forma je nužnost, jer volja mora da se ispolji, da zadobije oblik, da bi mogla pravno da deluje. Pod svrhom forme se stoga ne misli na funkciju forme kao takve, nego na funkciju određene forme koja je obavezna za neki pravni posao. Pitanje nije zašto ugovor ima formu, nego zašto je zakonom ograničen slobodan izbor forme, to jest čemu služi forma koja je za određene ugovore propisana kao obavezna.

[19] Na margini: elektronski potpis može imati samo fizičko lice, dok elektronski pečat može da ima i pravno lice odnosno organ pravnog lica. Kao i potpis, elektronski pečat može biti običan, napredan i kvalifikovan. Kad organ javne vlasti donosi akt u obliku elektronskog dokumenta, onda kvalifikovani elektronski pečat tog organa, ili kvalifikovani elektronski potpis ovlašćenog lica u tom organu, zamenjuju pečat organa i svojeručni potpis ovlašćenog lica. Za kvalifikovani elektronski pečat važi zakonska pretpostavka očuvanosti integriteta i tačnosti porekla podataka za koje je vezan.

U francuskoj teoriji je rečeno da konsensualizam odgovara jakim, zrelim i poštenim ugovornicima. S jedne strane, konsensualizam je jednostavan, ubrzava promet, pogoduje ekonomiji. S druge strane, on otvara mogućnost olakog i nepromišljenog obvezivanja, ostavlja treća lica bez pouzdanog svedočanstva o postojanju i sadržini tuđih ugovora, a sami ugovornici lakše dospevaju u nesaglasje oko toga jesu li obavezani ugovorom ili pak nisu.[20]

To znači da obavezna forma ima i neke manjkavosti. Ona usporava promet, stvara dodatne troškove za ugovorne strane, a ponekad ih i navodi na pogrešan zaključak da im puko poštovanje određene forme garantuje punovažnost preduzetog posla. Ova poslednja manjkavost naročito pogađa formu javne overe potpisa. Zahtev forme može i da pogoduje nesavesnoj strani koja, pozivajući se na manjkavosti u formi ugovora, zapravo želi da izigra obavezu koju je na sebe prihvatila.[21]

Koja je svrha forme pravnih poslova u savremenom pravu? Jasno je da danas forma nema sakralnu ulogu, više se ne smatra da obaveze nastaju iz obreda ili verbalne formule. Formalizam načelno ne odgovara uslovima slobodne trgovine. Zadata forma pravnog posla usporava pravni promet i stvara troškove. Međutim, u nekim oblastima poslovanja, kao što su **bankarstvo i osiguranje**, forma pravnih poslova je i dalje veoma važna. Koja je današnja funkcija forme, čemu ona služi?

Prvo, forme koje obezbeđuju trajni zapis sadržine ugovora omogućavaju da ugovorne strane i treća zainteresovana lica kasnije ostvare uvid u postignutu saglasnost, to jest da se uvere da je ugovor zaključen i na šta se odnosi, što je osobito važno kod trajnih ugovornih odnosa i kad se na osnovu ugovora prenosi svojina ili neko drugo stvarno pravo. Forma ugovora ima **dokaznu funkciju**, na primer u slučaju spora o postojanju ili sadržini ugovora, ili kad strane treba da obaveste treća lica o svom ugovornom odnosu, odnosno kad jedna od njih treba da pokaže osnov svog sticanja i tako dalje.

Privatna isprava o ugovoru koja je sačinjena u običnoj pismenoj formi ili u elektronskoj formi služi kao običan dokaz o zaključenju i sadržini ugovora i podleže slobodnoj sudijskoj oceni. Nasuprot tome, javne isprave o pravnim poslovima, to jest kvalifikovane pismene forme u čijem sačinjavanju učestvuje nosilac javnih ovlašćenja (pre svega javni beležnik), imaju punu dokaznu snagu, to jest dokazuju istinitost onoga što je u njima potvrđeno ili određeno. Međutim, tu postoji gradacija. (a) Kad je ugovor zaključen u formi javno overene isprave, svojstvo javne isprave ima samo legalizaciona klauzula: u slučaju spora o tome ko je potpisao određenu ispravu, sud je dužan da uzme da je ispravu potpisalo ono lice koje je označeno kao potpisnik u klauzuli o overi potpisa. Što se svega ostalog tiče, javno overena isprava nije ništa drugo do privatna isprava, koja podleže oceni po slobodnom sudijskom uverenju.

[20] Phillippe Malaurie, Laurent Aynes, Phillippe Stoffel-Munck, *Droit des obligations*, L.G.D.J., Paris, 2017, 305–306.

[21] Hugh Beale *et al*., *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford, 2019, 396.

(b) Kad je pak ugovor zaključen u formi solemnizovane isprave ili javnobeležničkog zapisa, svojstvo javne isprave i punu dokaznu snagu ima celovita isprava o pravnom poslu, a ne samo neki njen deo.

Drugo, određene forme ugovora obezbeđuju da ugovornici budu bolje informisani o sadržini, značaju i pravnim posledicama ugovora u koji stupaju, što strane štiti od lakomislenog i prenagljenog obvezivanja i pristajanja na rizike koje ne razumeju. Takvu **zaštitnu funkciju** imaju pre svega forme koje podrazumevaju da nosilac javnih ovlašćenja koji učestvuje u sačinjavanju isprave o pravnom poslu upozori ugovornike na nešto ili da odbije da sačini ispravu o ništavom poslu. Na primer, javni beležnik je po zakonu dužan da upozori strane da su njihove izjave nejasne, nerazumljive ili dvosmislene, ili da odbije da sačini ispravu o pravnom poslu ako utvrdi da volja ugovornika nije ozbiljna i slobodna, ili da je ugovor koji strane žele da zaključe suprotan imperativnim propisima, javnom poretku ili dobrim običajima. Povrh toga, javni beležnik sastavlja zapis po kazivanju ugovornih strana i pri tome im pomaže da njihova saglasna volja bude jasno izražena i pravno dopuštena.

Treće, neke forme pružaju garancije da je određeni posao preduzelo baš ono lice koje je kao takvo označeno na ispravi o pravom poslu i da tekst isprave odgovara sadržini izjavljene volje. To se naziva **autentifikacionom funkcijom forme** i naročito je izraženo kod javnobeležničkih formi, jer javni beležnik utvrđuje identitet ugovornih strana, njihovih zastupnika i drugih učesnika u postupku i tim radnjama koje je dužan da preduzme on svodi na minimum mogućnost falsifikovanja i naknadnog manipulisanja tekstom isprave.[22]

Konačno, nesporno je da strogi formalizam usporava pravni promet. Zahtev forme nalaže da strane zastanu i ispune sve što je potrebno da volju izraze baš u onom obliku koji se od njih traži. To im stvara dodatne troškove, oduzima vreme i generalno poskupljuje transakciju. Međutim, upravo najstrože forme (one koje obezbeđuju da isprava o pravnom poslu ima dejstvo izvršne isprave) u krajnjem ishodu mogu da ubrzaju pravni promet, to jest da osetno **skrate vreme koje je potrebno za naplatu** ugovornih potraživanja.

5. Kada je forma obavezna?

Bitna forma ugovora može biti propisana zakonom ili ugovorena između strana. Ako je forma po zakonu bitna, strane mogu sporazumom samo da je **pooštre**; ne mogu sporazumno da olakšaju ili isključe zakonsku formu: forma koja je propisana kao uslov za punovažnost ugovora može da se zameni strožom formom, to jest formom koja sadrži sve što i propisana forma i tome dodaje još neku formalnost. Zakonom se može predvideti i **konkurencija bitnih formi**, to jest propisati više formi od kojih je jedna dovoljna za punovažno zaključenje ugovora.

[22] D. Đurđević, 28–30.

Kad je forma **ugovorena**, a ne propisana, izvršenje ugovora bez poštovanja te forme treba razumeti kao odustanak ugovornih strana od sporazuma o formi koji su ranije zaključile.[23] Kad je pak konstitutivna forma ugovora **propisana**, a ne ugovorena, ugovor ne proizvodi nameravano pravno dejstvo ako nije zaključen u toj formi. Apsolutna ništavost je građanskopravna sankcija za nepoštovanje konstitutivne forme. Međutim, za razliku od ugovora koji su ništavi zbog nekog drugog uzroka, ugovor koji je ništav zbog nedostatka propisane forme može da se osnaži izvršenjem.[24]

Do osnaženja (konvalidacije) izvršenjem dolazi po izuzetku, kad se kumulativno steknu zakonom predviđeni uslovi. (a) Prvi uslov je da je za zaključenje ugovora **propisana pismena forma**.[25] (b) Drugi uslov je da su strane **izvršile svoje ugovorne obaveze** u celini ili u pretežnom delu. (c) I treće, ugovor se ne može osnažiti izvršenjem ako bi to bilo u suprotnosti sa **svrhom forme**, odnosno ako bi se takvim osnaženjem očigledno osujetio cilj zbog kog je forma propisana.

Na primer, nije dopušteno da se izvršenjem osnaži ugovor kome nedostaje forma propisana u cilju zaštite javnog interesa, ali je dopušteno takvo osnaženje kad je ugovor izvršen, a forma koja nije poštovana pri njegovom zaključenju trebalo je da upozori strane na složenost pravnog posla i da umanji opasnost od spora o njegovom postojanju i sadržini. Izvršenjem se, recimo, može osnažiti ugovor o građenju ili ugovor o deobi, ali nije dopušteno da se na taj način osnaži ugovor na osnovu kog se stiče pravo svojine na nepokretnosti. Ugovor o osiguranju treba svrstati među ugovore koji mogu da se osnaže izvršenjem.

6. Šta je to paralelizam formi?

Paralelizam formi je izraz kojim se označava **vezanost formi dva pravna posla**. On se ne pretpostavlja na osnovu same činjenice što su neki poslovi povezani, nego se mora posebno propisati ili predvideti ugovorom, u opštim granicama slobode ugovaranja. Ako paralelizam formi nije posebno predviđen, forma jednog posla traži se samo za taj posao, a ne i za druge poslove koji nastaju u vezi s njim. Na primer, zakonom je određeno da sporazum o ugovornoj kazni mora biti u zakonskoj formi ugovora iz kog potiče obezbeđena obaveza; ponuda i prihvat moraju se učiniti u formi koja je propisana za ugovor; pristanak na ustupanje ugovora je punovažan

[23] Recimo, ako su se strane sporazumele da pooštre zakonsku pismenu formu ugovora tako što će svoje potpise overiti kod javnog beležnika, ali potom taj ugovor zaključe u običnoj zakonom propisanoj pismenoj formi, treba uzeti da su prećutno odustale od ugovorenog pooštrenja.

[24] Čl. 73 ZOO.

[25] Kao što je rečeno, pismena forma može da bude obična ili kvalifikovana. Ugovor kome nedostaje forma može da se osnaži ispunjenjem samo ako je to u skladu s ciljem propisane forme. Ispunjenjem po pravilu mogu da se osnaže samo oni ugovori za koje je propisana obična pismena forma. To je zato što konvalidacija ispunjenjem po pravilu nije u skladu s ciljevima zbog kojih se propisuju kvalifikovane pismene forme.

samo ako je dat u formi koja je zakonom propisana za ustupljeni ugovor; predugovor proizvodi pravno dejstvo samo ako se zaključi u formi koja je zakonom propisana kao uslov za punovažnost glavnog ugovora;[26] ugovor za koji je propisana forma javnobeležničkog zapisa može sporazumno da se raskine, izmeni ili dopuni jedino u istoj toj formi.[27]

Forma koja je zakonom propisana za neki ugovor načelno se traži i za punomoćje i za saglasnost trećeg lica za zaključenje tog ugovora. Međutim, kad je za ugovor propisana forma javno potvrđene isprave ili javnobeležničkog zapisa, dovoljno je da potpis vlastodavca na punomoćju odnosno potpis trećeg lica na dozvoli ili odobrenju za zaključenje ugovora bude overen (legalizovan).[28]

II. POSEBNO O FORMI UGOVORA O OSIGURANJU U SISTEMU ZOO

1. Delatnost osiguranja i pravni poslovi osiguravača

Delatnost osiguranja je **poslovna delatnost osiguravača**, koja se ubraja u posebno regulisane, specijalizovane poslovne delatnosti, poput bankarske delatnosti i delatnosti davalaca lizinga. Nadzor nad obavljanjem delatnosti osiguranja vrši Narodna banka Srbije.[29]

Delatnost osiguranja je, dakle, posebno uređena privredna delatnost ili, kako se to moderno kaže, *industrija*, koja ima svoje regule, unutrašnju logiku i ekonomske zakonitosti. Osnovna svrha te delatnosti jeste zaštita od rizika kojima je izložena osigurana imovina ili osigurano lice. Zaštita se pruža posteriorno, to jest kad se realizuje osigurani rizik, i to tako što se obezbeđuje naknada pretrpljene štete ili isplata određene sume. Povrh toga, delatnost osiguranja može imati i dopunsku, sasvim ograničenu, preventivnu funkciju: poslovna delatnost osiguravača obuhvata i preduzimanje pojedinih mera zarad sprečavanja i otklanjanja opasnosti koje ugrožavaju osiguranu imovinu ili osigurana lica. Međutim, ustanova osiguranja je **prevashodno reaktivna**: osnovna funkcija osiguranja jeste reparacija, to jest da se poprave, otklone ili makar umanje posledice osiguranog slučaja koji se već ostvario u imovinskoj ili u ličnoj sferi osiguranika.[30]

Umesto da sam snosi vlastite rizike, osiguranik se plaćanjem premije priključuje **zajednici rizika** i tako socijalizuje sopstveni osigurani rizik, to jest deli ga s drugim

[26] Čl. 271 i 38, čl. 145, st. 3 i čl. 45, st. 2 ZOO.
[27] Čl. 82, st. 3 ZJB.
[28] Čl. 90, st. 2 i čl. 29, st. 2 ZOO.
[29] Čl. 13 ZO.
[30] Videti: Nataša Petrović Tomić, *Pravo osiguranja: Sistem*, Službeni glasnik, Beograd, 2019, 43–44 i *passim*. (o raznolikim aspektima delatnosti osiguranja); Predrag Šulejić, *Pravo osiguranja*, Pravni fakultet Univerziteta u Beogradu (PFBG) i Dosije, Beograd, 1997, 26–28 (o preventivnoj funkciji osiguranja).

članovima te zajednice, pristajući na to da i oni s njim podele svoje osigurane rizike. Svi članovi zajednice izloženi su istoj opasnosti i, znajući da će ta opasnost stvarno pogoditi samo neke od njih, oni odlučuju da dele rizik tako što plaćaju premije iz kojih će moći da se isplati naknada ili osigurana suma onima čiji se rizik ostvari.[31]

Ustanova osiguranja ima antičko poreklo.[32] Međutim, današnji imenovani ugovor o osiguranju jeste moderan pravni posao, koji je udaljen i mnogo složeniji od svojih istorijskih korena. Poznavanje istorije osiguranja nije neophodno za razumevanje savremenog instituta. Ipak, duga istorija osiguranja svedoči o postojanju drevne potrebe da se socijalizuje rizik od štete, odnosno da se podeli rizik od imovinskih gubitaka. Tom riziku je izložen svaki učesnik u pravnom prometu.

U obavljanju svoje poslovne delatnosti osiguravači zaključuju odnosno preduzimaju **raznovrsne pravne poslove**, među kojima su najvažniji ugovori o osiguranju, ali su važni i poslovi reosiguranja, te poslovi posredovanja i zastupanja u osiguranju.

Šire posmatrano, pravni poslovi koje preduzimaju osiguravači mogu biti (a) jednostrani (kao što su opšti uslovi poslovanja ili ponuda za zaključenje ugovora o osiguranju) ili pak (b) dvostrani (na primer, ugovor o osiguranju). (c) Osim toga, pojedini autori naglašavaju da postoje i zajednički poslovi. Za nastanak zajedničkog pravnog posla potrebno je da volju izjave dva ili više lica, ali ne uzajamno (svako spram ostalih) nego zajedno (na istoj strani).[33] U delatnosti osiguranja to bi, recimo, bile odluke kolektivnog organa nekog društva za osiguranje.

2. Ugovor o osiguranju: pojam i pravne osobine

Ugovor o osiguranju je, dakle, jedan od brojnih pravnih poslova koje osiguravači zaključuju odnosno preduzimaju u obavljanju svoje poslovne delatnosti.[34]

Po svojim pravnim osobinama, ugovor o osiguranju spada u imenovane, dvostranoobavezne (sinalagmatične), teretne, trajne i aleatorne[35] dvostrane pravne poslove obvezivanja.[36]

[31] N. Petrović Tomić, 72 i dalje.

[32] P. Šulejić (1997), 32 i dalje.

[33] Vladimir V. Vodinelić, *Građansko pravo. Uvod u građansko pravo i Opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Beograd, 2017, 450.

[34] O ugovoru o osiguranju vid: N. Petrović Tomić, 283 i dalje; P. Šulejić (1997), 161 i dalje; Mirko Vasiljević, *Trgovinsko pravo*, PFBG, Beograd, 2012, 178 i dalje; Ivica Jankovec, *Privredno pravo*, Službeni list, Beograd, 1999, 563 i dalje.

[35] Aleatornost je pravna osobina ugovora o osiguranju, a ne osiguravačeve poslovne delatnosti; poslovna delatnost osiguravača nije za njega aleatorna. Tako: M. Vasiljević, 179; P. Šulejić (1997), 165 (svaki pojedinačni ugovor o osiguranju jeste aleatoran: ne može se poništavati zbog prekomernog oštećenja, osiguranik ne može tražiti vraćanje premija ako ne nastupi osigurani slučaj; međutim, osiguravač zaključuje veliki broj ugovora, čime eliminiše svoj ekonomski rizik i stoga se može kazati da poslovna delatnost osiguravača nije preterano rizična).

[36] O ovim i još nekim podelama ugovora videti: M. Karanikić Mirić, 173 i dalje.

Kada se ugovor o osiguranju svrsta u pravne poslove obvezivanja, to znači da se njegova svrha ostvaruje izvršenjem uzajamnih obaveza koje su iz tog ugovora nastale.[37] Zato se ugovor o osiguranju najbolje definiše preko obaveza koje iz njega nastaju. Tim ugovorom se jedna strana (ugovarač osiguranja) obavezuje da plati određeni novčani iznos na ime premije osiguranja i, eventualno, da ispuni i neke druge obaveze (kao što je preduzimanje ugovorom predviđenih mera prevencije), a druga ugovorna strana (osiguravač) zauzvrat se obavezuje da, ako se ostvari osigurani slučaj, osiguraniku ili nekom trećem licu (a) isplati naknadu štete kod imovinskih osiguranja, (b) isplati ugovorenu svotu (osiguranu sumu) kod ličnih osiguranja ili pak (c) da učini nešto drugo (recimo, da štetu koja je pokrivena osiguranjem naknadi u naturi ili da brani osiguranika od neosnovanih odštetnih zahteva – kod osiguranja od odgovornosti).

Ugovor o osiguranju se po pravilu sklapa adhezionom tehnikom, to jest po načinu svog zaključenja svrstava se u ugovore po pristupu. Osnovno obeležje ugovora po pristupu je to što jedna strana (a) unapred priprema sadržinu budućeg ugovora i (b) isključuje mogućnost pregovora o toj sadržini. Kod ugovora o osiguranju taj položaj ima osiguravač. Strana koja pristupa ugovoru ne učestvuje u oblikovanju njegove sadržine, nego u svemu pristaje na tuđu zamisao. Njena sloboda ugovaranja svodi se na slobodu da zaključi ili da ne zaključi ugovor. U toj poziciji nalazi se ugovarač osiguranja.

Za ugovor o osiguranju kaže se da je to ugovor međusobnog poverenja (*uberrimae fidei*). To znači da on nalaže ugovornim stranama da se jedna prema drugoj ophode u skladu s najvišim standardom savesnosti i poštenja, naročito u domenu uzajamnog obaveštavanja o okolnostima koje su bitne za njihov ugovorni odnos.[38]

Ugovor o osiguranju se ne može svrstati među ugovore koji se zaključuju s obzirom na ličnost (*intuitu personae*). Prvo, ličnost osiguravača nije presudna, on posluje po zakonu i opštim uslovima, a kada se ostvari osigurani slučaj, osiguraniku nije naročito važno da mu baš osiguravač isplati naknadu odnosno osiguranu svotu: njemu je samo važno da taj iznos dobije. Drugo, ugovor o osiguranju obično nije vezan ni za ličnost ugovarača osiguranja. Međutim, ličnost osiguranika može da bude važna za procenu nekih rizika i samo u tom ograničenom smislu može se kazati da se ugovor o osiguranju zaključuje s obzirom na ličnost. Osiguravaču je načelno svejedno ko će mu platiti premiju, ali mu nije svejedno – kad osigurava rizike koji ugrožavaju ličnu sferu osiguranika – ko je taj osiguranik, šta radi, kako živi, kakvog je zdravstvenog stanja itd.[39]

[37] Nasuprot tome stoje pravni poslovi raspolaganja, kao što su otpuštanje duga, novacija ili ustupanje potraživanja, iz kojih ne nastaju nikakve obaveze i koji ostvaruju svoju svrhu neposredno, samom činjenicom svog zaključenja.

[38] P. Šulejić (1997), 170.

[39] Štaviše, nekad se osigurani rizik nalazi u samoj ličnosti osiguranika: od njegove pažnje odnosno od kvaliteta njegovog postupanja zavisi da li će ostvariti osigurani slučaj. To je tipično za osiguranje od odgovornosti.

Naposletku, osim toga što je imenovan, dvostranoobavezan, teretan, aleatoran i trajan, što spada u poslove obvezivanja i što se redovno zaključuje adhezionom tehnikom, ugovor o osiguranju je kod nas načelno formalan. Opšta pitanja o formi ugovora izložena su u prvom delu ovog rada, a nastavak rada posvećen je formi ugovora o osiguranju.

3. Forma ugovora o osiguranju u sistemu ZOO

a) Pravni značaj polise osiguranja ili druge isprave o ugovoru

U našem pozitivnom pravu, ugovori se u načelu zaključuju u slobodnoj formi: kad forma nekog ugovora nije ni propisana ni posebno ugovorena, svaka strana može da izjavi volju za zaključenje tog ugovora u formi koju sama odabere.[40]

Međutim, ZOO sadrži posebno pravilo o formi ugovora o osiguranju, koje je zajedničko za osiguranje imovine i osiguranje lica. Po tom pravilu, ugovor o osiguranju ima konstitutivnu pismenu formu: smatra se zaključenim kad strane potpišu polisu osiguranja ili listu pokrića.[41] Dakle, da bi se ugovor o osiguranju zaključio u skladu s odredbama ZOO, neophodno je da se sačini odgovarajuća pismena isprava o tom ugovoru (polisa osiguranja ili list pokrića), koja po svom pravnom značaju nije prost dokaz da je ugovor zaključen, nego zakonski uslov za njegovo punovažno zaključenje.[42]

Treba napomenuti da su neka osiguranja izričito isključena iz tog režima: pravila ZOO o ugovoru o osiguranju ne primenjuju se na plovidbeno osiguranje, reosiguranje i osiguranje potraživanja.[43] Pobrojana osiguranja nisu izuzeta iz čitavog ZOO, nego samo iz onih njegovih odredaba kojima se posebno uređuje osiguranje. Drugim rečima, na izuzete ugovore primenjuju se opšte odredbe ZOO o ugovorima (što obuhvata i pravilo o slobodnom izboru forme), a ne primenjuju se posebne odredbe tog zakona o ugovoru o osiguranju, uključujući i posebno pravilo o konstitutivnoj formi.

U našem pravu danas je nesporno da je ugovor o osiguranju redovno formalan. Međutim, nije uvek bilo tako:[44] (a) Posle Drugog svetskog rata, pod uticajem

[40] O tome je više rečeno u prvom delu ovog članka.

[41] Čl. 901, st. 1 ZOO. Naravno, ispravu o ugovoru strane mogu da potpišu lično ili preko svog zastupnika.

[42] Rečima suda: Po opštem pravilu, zaključenje ugovora ne podleže nikakvoj formi (član 67 stav 1 ZOO); dovoljna je usmena saglasnost volja ugovarača. Međutim, u članu 901 stav 1 ZOO propisano je da je ugovor o osiguranju zaključen kad ugovorač osiguranja i osiguravač potpišu odgovarajući pismeni dokument. Ugovor o osiguranju stoga mora da bude zaključen u pismenoj formi, a ako nema tu formu, onda nema ni pravno dejstvo (član 70 stav 1 ZOO) i ne uživa sudsku zaštitu. Rešenje Višeg privrednog suda, Pž. 8934/97 od 28. januara 1998, ParagrafLex. Takođe: Ugovor o osiguranju zaključen je kad strane potpišu polisu, pa ugovarač osiguranja koji je potpisanu polisu vratio osiguravaču nije tim svojim gestom mogao konkludentno da odbije ponudu za zaključenje (pošto je ugovor već zaključen), niti je na taj način mogao da raskine ugovor. Presuda Privrednog apelacionog suda, Pž. 4358/2011(2) od 5. januara 2012, ParagrafLex.

[43] Čl. 899 ZOO.

[44] O toj istoriji sve prema: P. Šulejić (1997), 165 i dalje.

nekih predratnih pravnih pravila, sudovi su isprva smatrali da se ugovor o osiguranju obavezno zaključuje u pismenoj formi. (b) Kasnije su se priklonili drukčijem shvatanju pravne teorije i praksi koja se razvila u opštim uslovima mnogih osiguravača, a naime, da je ugovor o osiguranju zaključen čim strane postignu saglasnost o njegovoj sadržini, dok polisa osiguranja ili druga isprava o ugovoru služe samo kao prost dokaz o zaključenju tog ugovora i nisu uslov za njegovu punovažnost.[45] (c) Novija sudska praksa je potom kodifikovana: od 1967. godine zakonom je propisana obaveza osiguravača da izda polisu osiguranja ili drugu ispravu o zaključenom ugovoru.[46] To znači da je polisa osiguranja ili druga pismena isprava o ugovoru služila samo kao prost dokaz o tome da je ugovor zaključen, dok se taj ugovor mogao zaključiti u bilo kojoj formi, što znači i usmeno. (d) Uprkos tome što je ugovor o osiguranju zakonom netom određen kao neformalan, Konstantinović je već 1969. godine u Skici predložio da polisa osiguranja ne bude puki dokaz o zaključenju ugovora, nego njegova obavezna forma.[47] (e) Jugoslovenski zakonodavac je prihvatio taj predlog 1978. godine: u sistemu ZOO opšte pravilo je da ugovor o osiguranju nije zaključen dok strane ne potpišu polisu osiguranja ili listu pokrića.[48]

b) Polisa kao zakonska konstitutivna forma ugovora o osiguranju

Da bi se osiguranje imovine ili osiguranje lica ugovorilo u skladu s odredbama ZOO, neophodno je da ugovorne strane potpišu polisu osiguranja.[49] Uza sve kritike koje se mogu uputiti tom zakonskom rešenju, i uz moguća drukčija tumačenja postojeće zakonske odredbe, pravni značaj polise nije sporan za naše sudove: polisa se kod nas razume kao **konstitutivna forma ugovora o osiguranju**.[50]

Propisana pismena forma ugovora o osiguranju obično se postiže upotrebom obrasca ili formulara osiguravača, na kojem piše da je reč o polisi. Međutim, trebalo

[45] Kada se kaže da je polisa **prost dokaz**, to znači (a) da polisa nije uslov za punovažno zaključenje ugovora i (b) da se postojanje i sadržina ugovora mogu dokazivati i drugim sredstvima, a ne samo polisom.

[46] Čl. 64, st. 2 Osnovnog zakona o osiguranju i osiguravajućim organizacijama, *Službeni list SFRJ*, br. 7/1967.

[47] Čl. 879, st. 1 Skice. Vid: Mihailo Konstantinović, *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Službeni list SRJ, Beograd, 1996, 292.

[48] Postoje i neki izuzeci od tog pravila. O njima će tek biti reči.

[49] Čl. 901, st. 1 ZOO.

[50] N. Petrović Tomić, 317. Iz sudske prakse: Potpisivanjem polise osiguranja zaključuje se taj ugovor i nastaje obaveza plaćanja premije. Rešenje Privrednog apelacionog suda, Pž. 12837/2010 od 1. septembra 2011, ParagrafLex. Takođe: Potpisivanjem polise za ugovoreni višegodišnji period osiguranja konstituisan je pravno valjan ugovorni odnos za ceo period osiguranja. Nije relevantno to što je osiguranik docnije odbio da potpiše posebnu polisu za kraći period u okviru ugovorenog roka trajanja osiguranja. Rešenje Vrhovnog suda Srbije, Prev. 323/2007 od 13. septembra 2007, ParagrafLex. Čak: To što je osiguranik prihvatio da s osiguravačem zaključi ugovor o kasko kombinovanom osiguranju motornog vozila ne znači da je taj ugovor zaključen sve dok obe strane ne potpišu polisu osiguranja, tim pre što je i posebnim uslovima osiguravača propisano da se ugovor zaključuje potpisivanjem polise. Presuda Privrednog apelacionog suda, Pž. 11031/2010 od 20. jula 2011.

bi uzeti da je zakonski zahtev forme zadovoljen uvek kada je u nameri zaključenja, na bilo kom trajnom materijalu, zabeležena obavezna sadržina ugovora o osiguranju i svojeručni potpisi ugovornih strana. To pismeno može biti naslovljeno kao polisa, ili nenaslovljeno, ili čak može da bude pogrešno naslovljeno (*falsa nominatio non nocet*), ali svakako mora sadržati minimalne elemente polise iz člana 902 ZOO.[51]

Polisa osiguranja je isprava o ugovoru koja se sačinjava u **običnoj pismenoj formi**.[52] Minimalna sadržina polise osiguranja propisana je zakonom:[53] u polisi se moraju navesti ugovorne strane, osigurana stvar odnosno osigurano lice, rizik koji je obuhvaćen osiguranjem, trajanje osiguranja i period pokrića, svota osiguranja ili da je osiguranje neograničeno; premija[54] ili doprinos (kod osiguranja na uzajamnoj osnovi) i datum izdavanja polise. Tekst polise osiguranja može da napiše, otkuca ili odštampa jedna od ugovornih strana ili treće lice, ali je redovno sačinjava sam osiguravač. U svakom slučaju, ugovor o osiguranju smatra se zaključenim tek kad polisu potpišu obe ugovorne strane.[55]

Zakonom je propisano da opšti uslovi pod kojima se zaključuje ugovor obavezuju stranu koja im pristupa samo ako su joj bili poznati ili morali biti poznati u času zaključenja.[56] To pravilo je dodatno pooštreno kod ugovora o osiguranju: ne samo što ugovarač osiguranja mora da bude obavešten o uslovima osiguranja, nego to mora i da bude konstatovano na polisi. Naime, polisa osiguranja mora sadržati konstataciju da je osiguravač ispunio dve zakonske obaveze: (a) da upozori ugovarača osiguranja da su uslovi osiguranja sastavni deo ugovora i (b) da preda ugovaraču osiguranja tekst tih uslova, ako nisu štampani na samoj polisi. To se odnosi kako na opšte tako i na posebne uslove osiguranja po kojima posluje konkretan osiguravač. U slučaju neslaganja neke odredbe uslova osiguranja i neke odredbe polise, po zakonu je merodavna polisa, a ako se ne slažu neka štampana i neka rukopisna odredba polise (kad takva uopšte postoji) – merodavna je rukopisna odredba.[57]

Opšti i posebni uslovi osiguranja se, dakle, integrišu odnosno inkorporiraju u ugovor konstatacijom na polisi da je ugovarač osiguranja o tome obavešten i da

[51] Potonje izdavanje polise na odgovarajućem obrascu osiguravača tada bi imalo pravni značaj prostog dokaza o ugovoru koji je već zaključen. Suprotno: poslednja odluka suda u prethodnoj fusnoti.

[52] O običnoj pismenoj formi više je rečeno u prvom delu ovog članka.

[53] Čl. 902, st. 1 ZOO.

[54] Iz sudske prakse: Premija je cena osiguranja i stoga predstavlja bitan element ugovora o osiguranju. Ako se premija ne može precizno odrediti prema podacima koji su navedeni u polisi, ugovor o osiguranju je nevažeći. Nije dovoljno da se umesto iznosa premije u polisi samo navede „važeća tarifa". Presuda Višeg privrednog suda u Beogradu, Pž. broj 1976/01 od 20. juna 2001, ParagrafLex.

[55] Stoga je u našem pravu načelno merodavna polisa kad se njena sadržina razlikuje od ponude osiguranja ili od onoga što su strane utanačile tokom pregovora. Drukčije je kad je ugovor o osiguranju neformalan. P. Šulejić (1997), 195 i dalje. Vid. Čl. 71 ZOO.

[56] Čl. 142, st. 3 ZOO.

[57] Čl. 902, st. 3–5 ZOO.

mu je predat tekst tih uslova, ako taj tekst nije odštampan na samoj polisi. Drugim rečima, ugovor o osiguranju obuhvata polisu osiguranja i inkorporirane opšte i posebne uslove osiguranja koji su na snazi u času zaključenja tog ugovora, pod uslovom da je osiguravač upozorio drugu stranu da su ti uslovi sastavni deo ugovora, da mu je predao njihov tekst (ako nisu štampani na polisi) i da je sve to potvrdio u polisi.

Zakonom je propisana minimalna sadržina polise, to jest elementi koje polisa mora da sadrži. Međutim, strane su slobodne da u polisu unesu i druge elemente, to jest da polisom ugovore i nešto što zakonodavac od njih ne traži. Recimo, polisa može da sadrži sporazum o mesnoj nadležnosti suda.[58] Osim toga što mogu da potpišu isto pismeno, ugovorne strane mogu i **da razmene polise**, to jest da svaka strana dobije polisu koju je potpisao drugi ugovornik. Ta mogućnost je izričito predviđena zakonom.[59] Počiva na ideji da strana koja drži ispravu koju je potpisao drugi ugovornik može uvek da doda svoj potpis i tako je učini kompletnom.

Povrh toga, zakonom je posebno dopušteno da se zakonska konstitutivna pismena forma zameni drugim sredstvom koje omogućava da se sa izvesnošću utvrde sadržina i davalac izjave.[60] To znači da se i pismena forma polise osiguranja može zameniti elektronskom formom koja je snabdevena **kvalifikovanim elektronskim potpisima** ugovornih strana, jer su samo takvi elektronski potpisi po zakonu izjednačeni sa svojeručnim potpisima:[61] ni običan ni napredni elektronski potpis nisu dovoljni da bi se njihovim stavljanjem na elektronski dokument mogao ispuniti zahtev zakonodavca da polisa osiguranja bude sačinjena u pismenoj formi.[62]

Izuzetno, fizičko lice koje se kvalifikuje kao **korisnik finansijskih usluga** (što obuhvata i osiguranje) može da zaključi ugovor na daljinu u vrednosti do 600.000 dinara bez upotrebe svog kvalifikovanog elektronskog potpisa, ako je autentifikaciona funkcija zakonske forme tog ugovora obezbeđena na neki drugi, zakonom propisan način (korišćenjem najmanje dva elementa za potvrđivanje korisničkog identiteta ili korišćenjem neke od šema elektronske identifikacije visokog nivoa pouzdanosti).[63] To je posebno zakonsko pravilo kojim se štite potrošači koji ugovaraju finansijske usluge korišćenjem sredstava komunikacije na daljinu. Ono dopušta da se autentifikaciona funkcija svojeručnog potpisa ili kvalifikovanog elektronskog potpisa potrošača (a ne pružaoca finansijske usluge) ostvari upotrebom **nekog drugog oblika elektronske**

[58] Rešenje Višeg suda u Čačku, Gž. 1594/2021 od 10. marta 2022, ParagrafLex.
[59] Čl. 72, st. 4 ZOO.
[60] *Ibidem*.
[61] Čl. 50 Zakona o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju, *Službeni glasnik RS*, br. 94/2017 i 52/2021 i čl. 3, st. 2 Zakona o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu – ZZKFUD, *Službeni glasnik RS*, br. 44/2018.
[62] O elektronskoj formi više je rečeno u prvom delu ovog članka. Tamo su razjašnjena i obaveštenja koja su ugovorne strane po zakonu dužne da jedna drugoj daju na trajnom nosaču zapisa.
[63] Čl. 3, st. 3 ZZKFUD.

identifikacije, kojim se obezbeđuje visoko poverenje u identitet potrošača i praktično onemogućava zloupotreba odnosno neistinito predstavljanje.

Polisa osiguranja se može **privremeno zameniti listom pokrića** u koju se unose bitni sastojci ugovora o osiguranju. Ta mogućnost je predviđena samim zakonom.[64] List pokrića se takođe izdaje u pismenoj ili u odgovarajućoj elektronskoj formi, sadrži samo najosnovnije podatke o ugovorenom osiguranju i obično se izdaje kad je osiguraniku ili ugovaraču osiguranja hitno potrebna isprava o zaključenom poslu, kod transportnih osiguranja ili kad se osigurava veliki objekat koji je potrebno prethodno pregledati.[65] Ugovorne obaveze između strana nastaju čim obe potpišu list pokrića – ugovarač ili osiguranik zaštićen je od rizika, dok osiguravač stiče pravo na premiju.

List pokrića ima svedenu sadržinu i kasnije mora biti zamenjen polisom koja sadrži sve zakonom propisane elemente. Čim se izda list pokrića, nastaje i zakonska obaveza da se umesto njega sačini polisa osiguranja, u razumnom roku, odnosno u roku koji je propisan uslovima osiguranja ili uobičajen za određenu vrstu osiguranja. Ako je izdat list pokrića, **ugovor se smatra zaključenim**. Polisa osiguranja koja se sačini kasnije ne može imati pravni značaj konstitutivne forme ugovora o osiguranju, već može samo da bude dokaz o njegovom postojanju i sadržini.

Prema opštim pravilima ugovornog prava, osiguravač u svojim uslovima osiguranja može da postavi stroži zahtev forme ili da proširi obaveznu sadržinu polise, na šta ugovarač osiguranja pristaje tako što pristupa zaključenju ugovora po strožim pravilima. Ugovorne strane ne mogu da olakšaju ili isključe zakonsku formu polise osiguranja, ali mogu tu **formu sporazumno da pooštre**. Umesto obične pismene forme koja je propisana zakonom (stavljanje svojeručnog potpisa na polisu), strane mogu da se sporazumeju, recimo, da njihovi potpisi moraju biti overeni kod javnog beležnika da bi se smatralo da je ugovor zaključen. Takođe, strane mogu da **prošire minimalnu sadržinu polise**, to jest da zaključenje ugovora sporazumno uslove navođenjem dodatnih elemenata, koji se po zakonu inače ne moraju navoditi u polisi.[66]

Ugovor o osiguranju koji nije zaključen u propisanoj konstitutivnoj formi podleže **konvalidaciji ispunjenjem**.[67] Do konvalidacije izvršenjem dolazi po izuzetku, kad se kumulativno steknu zakonom predviđeni uslovi o kojima je ranije bilo reči. Prvi uslov je da je za zaključenje ugovora propisana obična (a ne kvalifikovana) pismena forma.[68] To je zato što konvalidacija ispunjenjem po pravilu nije u skladu

[64] Čl. 902, st. 2 ZOO.

[65] P. Šulejić (1997), 197.

[66] Minimalna sadržina polise propisana je u čl. 902, st. 1 i 4 ZOO.

[67] Čl. 73 ZOO.

[68] Rešenje Višeg trgovinskog suda, Pž. 5798/2008(2) od 10. februara 2009, ParagrafLex (odredba člana 73 ZOO ne može se primeniti ako je, pored pismene forme, za neki ugovor propisana i overa potpisa ugovarača ili saglasnost trećeg lica za zaključenje).

s ciljevima zbog kojih se propisuju kvalifikovane pismene forme. Drugi uslov je da su strane izvršile svoje ugovorne obaveze u celini ili u pretežnom delu. I treće, ugovor se ne može osnažiti izvršenjem ako bi to bilo u suprotnosti sa svrhom forme, odnosno ako bi se takvim osnaženjem očigledno osujetio cilj zbog kog je forma propisana. Pravne posledice osnaženja izvršenjem ogledaju se u tome što se od strane koja je pretežno izvršila ugovornu obavezu može zahtevati da je izvrši u celini i u tome što nijedna strana ne može zahtevati vraćanje onoga što je izvršila po osnovu ugovora koji je bio ništav zbog nedostatka forme, ali se u međuvremenu osnažio izvršenjem.

Naposletku, u posebnim slučajevima, kada polisa predstavlja prost dokaz o ugovoru, nema smisla razmatrati mogućnost da se ugovor o osiguranju osnaži ispunjenjem (kako je predviđeno u članu 73 ZOO): ako je polisa puki dokaz o ugovoru koji se smatra zaključenim čim strane postignu saglasnost o njegovim bitnim elementima, onda taj ugovor ne može biti ništav zbog nedostatka forme, pa se neće ni postaviti pitanje njegove konvalidacije ispunjenjem.

U uporednom pravu preteže shvatanje o neformalnom karakteru osiguranja,[69] što znači da polisa redovno ima karakter prostog dokaza o postojanju i sadržini ugovora. Tako je i kod nas bilo u poratnom periodu – do usvajanja ZOO. Naša savremena pravna teorija zalaže se za povratak na to rešenje, to jest za napuštanje bitne zakonske forme ugovora o osiguranju.[70] Međutim, dok se ta izmena ne sprovede, čini se da treba prihvatiti da je intencija domaćeg zakonodavca bila da u sistemu ZOO ugovor o osiguranju ima konstitutivnu običnu pismenu formu te da je njegova minimalna sadržina ono što je navedeno kao sadržina polise u članu 902 ZOO. (a) To znači da se ugovor smatra zaključenim kad obe strane potpišu polisu osiguranja. (b) Povrh toga, ugovor o osiguranju treba smatrati zaključenim i kada ugovorne strane u običnoj pismenoj formi postignu saglasnost o minimalnoj sadržini koja je propisana za polisu i obe se svojeručno potpišu, ali to ne bude na formularu koji se inače koristi za izdavanje polise osiguranja.[71] (c) Konačno, ugovor o osiguranju treba smatrati zaključenim i kad je sačinjen u elektronskoj formi koja sadrži kvalifikovane elektronske potpise oba ugovornika. I tada je njegova minimalna sadržina ona koja je u zakonu propisana za polisu.

c) Polisa kao prost dokaz o zaključenom ugovoru

Već je rečeno da se pravila ZOO o ugovoru o osiguranju ne primenjuju na plovidbeno osiguranje, osiguranje potraživanja i reosiguranje, što znači da se na te ugovore ne primenjuje ni odredba ZOO o formalnom karakteru osiguranja. Osiguravač je i tada dužan da izda polisu osiguranja, ali ta polisa nije uslov za nastanak ugovora, nego prost dokaz o ugovoru koji je zaključen u nekom drugom obliku.[72]

[69] N. Petrović Tomić, 295; P. Šulejić (1997), 166 i dalje.
[70] N. Petrović Tomić, 296.
[71] To bi bilo zaključenje ugovora o osiguranju po opštim pravilima za (formalne) ugovore. Vid. *Ibid*., 322.
[72] Polisa se ovde razmatra samo iz aspekta forme ugovora o osiguranju. Osim toga što može da bude konstitutivna forma ugovora ili pak dokazno sredstvo, polisa može da služi i kao sredstvo legitimacije,

Povrh toga, i u sistemu ZOO postoje izuzetni **slučajevi zaključenja ugovora bez polise**, u kojima polisa ne može imati pravni značaj konstitutivne forme, već samo može da služi kao dokaz o postojanju i sadržini ugovora. Osiguravač je i u tim situacijama dužan da izda polisu osiguranja, ali polisa tada ne predstavlja bitnu formu ugovora o osiguranju, nego **prost dokaz o činjenici njegovog zaključenja**.

1) Realna forma ugovora o osiguranju

Obično se kaže da je kapara jedini realan ugovor u našem ZOO.[73] Međutim, ZOO posebno predviđa i jednu mogućnost da se realna forma ugovori umesto zakonske pismene forme. Naime, u svojim opštim uslovima poslovanja (uslovi osiguranja) osiguravač može da predvidi slučajeve u kojima ugovorni odnos iz osiguranja nastaje samim plaćanjem premije.[74] To se naziva **osiguranjem bez polise**.[75]

U takvim slučajevima ugovor o osiguranju ima **ugovorenu konstitutivnu realnu formu**. Ta forma je (a) ugovorena, zato što za konkretan ugovor nije propisana zakonom nego je predviđena uslovima osiguravača koje je prihvatio njegov saugovornik; (b) konstitutivna je, zato što predstavlja jedan od alternativno postavljenih uslova punovažnog zaključenja (ugovor mora biti zaključen u zakonskoj pismenoj ili u ugovorenoj realnoj formi, da bi proizvodio pravna dejstva); (c) realna je, zato što se ugovor zaključuje plaćanjem polise osiguranja – predaja određene novčane sume predstavlja čin zaključenja ugovora.

Realna forma ugovora o osiguranju ugovara se tako što je osiguravač predvidi u svojim uslovima, a druga strana to prihvati kad plati premiju u nameri da pristupi ugovoru pod uslovima tog osiguravača. Da ta mogućnost nije posebno propisana zakonom, ugovornim stranama ne bi bilo dopušteno da odstupe od zakonom propisane konstitutivne pismene forme ugovora o osiguranju.

Osiguravač u svojim uslovima može da predvidi da se ugovor smatra zaključenim kad druga strana plati premiju u celosti ili pak kad je plaćen jedan njen deo: ne postoji zakonska smetnja da se uslovima osiguranja predvidi, recimo, da se premija plaća u obrocima a da se ugovor zaključuje plaćanjem prve rate.

(kvalifikovana) isprava o dugu ili hartija od vrednosti, što nije predmet ovog rada. O tim drugim funkcijama polise rečeno je više u: P. Šulejić (1997), 191 i dalje.

[73] ČI, 79, st. 1 ZOO. Takođe, zaloga, ostava i zajam se, prema klasičnom shvatanju, svrstavaju u realne ugovore. To jesu bili realni ugovori u našem predratnom pravu, ali ih ZOO danas određuje kao konsensualne. Predaja stvari nije čin njihovog zaključenja, nego čin ispunjenja ugovorne obaveze koja je iz njih već nastala.

[74] ČI. 903 ZOO.

[75] Kao primer se obično navodi dobrovoljno osiguranje putnika u javnom saobraćaju od posledica nesrećnog slučaja, koje se zaključuje kupovinom karte za prevoz. N. Petrović Tomić, 302; M. Vasiljević, 182; Predrag Šulejić, „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995, 1477.

Kad je uslovima osiguranja predviđeno da se ugovor zaključuje plaćanjem premije, ugovor o osiguranju **nije neformalan**:[76] ne zaključuje se u slobodnoj formi, već ima ugovorenu konstitutivnu realnu formu. Osiguravač je i tada dužan da ugovaraču osiguranja izda polisu na njegov zahtev. Međutim, polisa tada nema pravni značaj konstitutivne forme ugovora o osiguranju, nego služi kao prost dokaz o postojanju i sadržini ugovora koji je zaključen u realnoj formi.

Kako se taj slučaj razlikuje od konvalidacije izvršenjem? (a) Kada se ugovor o osiguranju zaključi u realnoj formi, onda glavna ugovorna obaveza osiguravača nastaje čim ugovarač osiguranja plati premiju. Ta obaveza je utuživa. To je zato što se ugovor zaključuje činom plaćanja premije. (b) Nasuprot tome, do konvalidacije izvršenjem dolazi tek kad je ugovor kojem nedostaje bitna zakonska forma izvršen u celosti ili u pretežnom delu. To znači da ugovorne obaveze ne nastaju dok nisu pretežno već izvršene. Kada je ugovor izvršen, dolazi go konvalidacije i nijedna strana ne može zahtevati vraćanje onoga što je već dala. Međutim, dok ne dođe do konvalidacije, ne može se zahtevati od ugovarača osiguranja da plati premiju, niti se može tražiti od osiguravača da isplati naknadu odnosno osiguranu sumu ili učini nešto drugo što je određeno ugovorom ako se ostvari osigurani slučaj. Te obaveze nisu utužive dok ne dođe do konvalidacije, a kada dođe do konvalidacije, to jest kad su ih strane već izvršile od svoje volje, u celini ili u pretežnom delu, nijedna strana nema pravo na povraćaj datog.[77]

Osim opisanog slučaja **osiguranja bez polise**, koji se u zakonu izričito tako naziva (član 903 ZOO), postoje u sistemu ZOO i druge situacije u kojima polisa ne može biti ništa drugo do dokaz da je ugovor već zaključen na neki drugi način – a ne obostranim potpisivanjem polise.

2) Jednostrano pismen ugovor o osiguranju

Kod nas je zakonom izričito propisano da pismena ponuda učinjena osiguravaču za zaključenje ugovora o osiguranju vezuje ponudioca, ako on nije odredio kraći rok, za vreme od osam dana od dana kad je ponuda prispela osiguravaču, a ako je potreban lekarski pregled, onda za vreme od trideset dana. Ako osiguravač u tom roku ne odbije ponudu koja ne odstupa od uslova pod kojima on vrši predloženo osiguranje, smatraće se da je ponudu prihvatio i da je ugovor zaključen. U tom slučaju ugovor se smatra zaključenim kad je ponuda prispela osiguravaču.[78]

[76] Suprotno: Ivica Jankovec, „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ur. Borislav Blagojević, Vrleta Krulj), Savremena administracija, Beograd, 1983, 1938.

[77] Jankovec drukčije razume ovu stvar. Po njemu, plaćanjem premije osiguranja u skladu s članom 903 ZOO zapravo dolazi do konvalidacije izvršenjem koja je na opšti način uređena u članu 73 ZOO. Jankovec smatra da je već plaćanjem premije ugovor pretežno izvršen, jer izvršenje glavne obaveze osiguravača ionako zavisi od toga hoće li se ostvariti osigurani slučaj. Stoga treba zanemariti pitanje da li je osiguravač izvršio svoju obavezu, kad se procenjuje da li su ispunjeni uslovi za konvalidaciju ugovora njegovim pretežnim ili potpunim izvršenjem. I. Jankovec (1983), 1938.

[78] Čl. 901, st. 2–4 ZOO.

Ugovor o osiguranju i tada ima zakonom propisanu formu koja je uslov za njegovu punovažnost.[79] Reč je o **jednostrano pismenom formalnom ugovoru**.[80] Ugovor, dakle, ni tada nije neformalan, nego je jednostrano pismen: ponuda osiguranika mora da bude u pismenoj ili odgovarajućoj elektronskoj formi. Posebnim zakonskim pravilom je, naime, predviđeno da ugovor o osiguranju proizvodi pravno dejstvo samo ako je ugovarač osiguranja učinio ponudu u pismenoj formi, dok osiguravač tu ponudu prihvata ćutanjem.

Sadržina ugovora određena je ponudom ugovarača osiguranja, koja u svemu mora da bude u skladu s uslovima osiguranja i mora da bude sačinjena u pismenoj formi. Opšta pravila dopuštaju da se pismena forma te ponude zameni elektronskom formom koja sadrži kvalifikovani elektronski potpis. Protekom roka u kojem je ponudilac bio vezan ponudom, pismena ponuda koja nije odbijena konvertuje se u pismeni ugovor o osiguranju – smatra se da je osiguravač svojim ćutanjem iskazao prihvatanje pismene ponude a da je ugovor te sadržine zaključen kad je ponuda prispela osiguravaču. Osiguravač je i u tom slučaju dužan da izda polisu osiguranja, ali ta polisa može samo da ima pravni značaj prostog dokaza o ugovoru koji je već zaključen; ona nikako ne može biti njegova konstitutivna forma.

U pravnom smislu ćutanje znači uzdržavanje od svake reakcije, izostanak i govora i delanja, potpuno pasivno držanje. Ponuda po prirodi stvari ne može da se učini ćutanjem, jer njome ponudilac mora da predloži sadržinu budućeg ugovora. To važi bez izuzetka. Kada je o prihvatu reč, osnovno pravilo je da ćutanje ponuđenog ne znači prihvatanje ponude. Međutim, postoje i neki izuzeci od tog pravila:

Prvo, učesnici u pravnom prometu mogu da se sporazumeju da će u njihovom budućem poslovnom odnosu ćutanje ponuđenog imati značenje prihvatanja ponude koja mu je učinjena. Naravno, to se ne može ugovoriti kad je forma pravnog posla imperativno propisana zakonom, kao što je propisana za osiguranje u sistemu ZOO.

Drugo, ćutanje može da znači prihvatanje ako to u određenom kontekstu nalažu poslovni običaji. To nije primenjivo na ugovore koji su po zakonu formalni.

Treće, ZOO uređuje dve situacije u kojima se po izuzetku ćutanje ponuđenog uzima kao prihvatanje:[81] Kad ponuđeni stoji u stalnoj poslovnoj vezi s ponudiocem u pogledu isporuke određene robe, smatra se da je prihvatio ponudu koja se odnosi na takvu robu, ako je nije odmah ili u ostavljenom roku odbio. Takođe, kad ponuđeni stoji u stalnoj poslovnoj vezi s ponudiocem u pogledu vršenja naloga

[79] Suprotno (da je taj ugovor neformalan): M. Vasiljević, 182.

[80] Već je pomenuto da ugovor o jemstvu obavezuje jemca samo ako je izjavu o jemčenju učinio pismeno. Čl. 998 ZOO. Poverilac može s tim da se saglasi u bilo kojoj formi, što znači da je za zakonodavca ugovor o jemstvu jednostrano formalan (jednostrano pismen).

[81] Čl. 42, st. 3 i 4 ZOO.

za obavljanje određenih poslova, smatra se da je prihvatio nalog koji se odnosi na te poslove, ako ga nije odmah ili u ostavljenom roku odbio.[82] To nije primenjivo na osiguranje.

Četvrto, zakonom može posebno da se propiše da ćutanje ponuđenog znači da on prihvata ponudu za zaključenje određenog imenovanog ugovora. Upravo to je naš zakonodavac učinio kod ugovora o osiguranju: **ćutanje osiguravača na pismenu ponudu** koja mu je učinjena u roku za prihvatanje i u skladu s uslovima osiguranja uzima se kao prihvatanje po izričitoj zakonskoj odredbi. U tom slučaju se ne traži da je između strana postojao bilo kakav trajni poslovni odnos, nego (a) da je ponuda učinjena pismeno, (b) da ju je učinio ugovarač osiguranja, (c) da je ponuda sasvim u skladu s opštim uslovima, (d) da je ćutanje trajalo 8 dana, odnosno 30 dana ako je potreban lekarski pregled.

3) Odstupanje od zakonske forme u nesumnjivom interesu osiguranika

Dispozitivnost zakonskih odredaba spada u osnovna načela našeg ZOO:[83] strane mogu svoj obligacioni odnos da urede drukčije nego što je tim zakonom određeno, osim ako iz pojedine odredbe zakona ili iz njenog smisla ne proizlazi drugačije. Međutim, pravila ZOO o ugovoru o osiguranju **načelno su imperativna**:[84] strane mogu da odstupe od tih pravila samo kada za to imaju izričito zakonsko ovlašćenje[85] ili pak kad je konkretno odstupanje u nesumnjivom interesu osiguranika a nije izričito zabranjeno.[86]

U domaćoj pravnoj teoriji iznet je stav da i od zakonske forme ugovora o osiguranju može da se odstupi pozivanjem na član 900 stav 2 ZOO, to jest kad to

[82] Međutim, ako ne postoji trajni poslovni odnos između te dvojice, onda se ćutanje nalogoprimca koji je primio određeni nalog ne kvalifikuje kao prihvatanje tog naloga, već kao nesavesno postupanje u predugovornoj fazi, odnosno kao osnov predugovorne odgovornosti za tako pričinjenu štetu. Čl. 750 ZOO.

[83] Čl. 20 ZOO.

[84] Čl. 900 ZOO.

[85] Izričito ovlašćenje da se ugovori drugačije nego što je propisano sadržano je u nekoliko članova ZOO: čl. 930, čl. 931, st. 1, čl. 936, st. 1, čl. 937, st. 1. Te zakonske odredbe su dispozitivne po izuzetku.

[86] (a) Recimo, osiguravač po zakonu može da zahteva poništenje ugovora ako je ugovarač osiguranja namerno učinio netačnu prijavu ili namerno prećutao neku okolnost takve prirode da osiguravač ne bi zaključio ugovor da je znao za pravo stanje stvari (čl. 908, st. 1 ZOO). Međutim, umesto toga se može ugovoriti da osiguravač ima pravo da zahteva povećanje premije. (b) Ako je ugovoreno da se premija plaća prilikom zaključenja ugovora, obaveza osiguravača da isplati naknadu ili svotu određenu ugovorom po zakonu dospeva narednog dana od dana uplate premije (čl. 913, st. 1 ZOO). Međutim, umesto toga se može ugovoriti da obaveza osiguravača dospeva ranije i da on snosi rizik čim pregleda stvar, a ne tek narednog dana od dana uplate premije. (c) Ako je povećanje rizika toliko da osiguravač ne bi zaključio ugovor da je takvo stanje postojalo u času njegovog zaključenja, on po zakonu može da raskine ugovor (član 914 stav 3 ZOO). Međutim, umesto toga se može ugovoriti da osiguravač ima pravo da zahteva povećanje premije. Videti te i druge primere u: Predrag Šulejić, „Član 900. Odstupanje od odredaba ove glave", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995, 1469.

odstupanje nesumnjivo nalažu interesi osiguranika. Kao primer naveden je slučaj kad ovaj treba što pre da dobije pokriće od rizika kojem je izložen.[87]

Međutim, osiguranik gotovo uvek ima očigledan interes da što pre dobije pokriće. Taj njegov interes štiti se pravilima o zaključenju ugovora ćutanjem osiguravača ili plaćanjem premije. Osim toga, ugovor o osiguranju koji je ništav zbog nedostatka forme može da se osnaži izvršenjem. Takođe, zakonom je izričito dopušteno da se pismena forma zameni samo onom formom koja omogućava da se sa izvesnošću utvrde sadržina i davalac izjave.[88] Polisa osiguranja se po tome može sačiniti i u elektronskoj formi koja sadrži kvalifikovane elektronske potpise ugovornih strana. Mimo navedenih situacija, naši sudovi zahtevaju da se ugovor o osiguranju zaključi svojeručnim potpisivanjem polise (lično ili preko zastupnika), ako se na taj ugovor primenjuju pravila ZOO. Konačno, stroga pravila ZOO o formi ugovora o osiguranju nisu propisana samo zarad zaštite interesa ugovarača osiguranja ili osiguranika, nego i u interesu osiguravača, da njegova obaveza ne nastane pre nego što je određeno koji su rizici pokriveni osiguranjem, u formi koja smanjuje šanse da to bude predmet sporenja. Zbog svega toga se čini da je mogućnost da se od zakonske forme ugovora o osiguranju odstupi na osnovu odredbe člana 900 stav 2 ZOO (u nesumnjivom interesu osiguranika) u našoj teoriji razmatrana samo kao jedan od potencijalnih odgovora na strogi formalizam našeg zakonskog rešenja, a ne *de lege lata* – kao postojeća zakonom predviđena opcija.[89]

Literatura

- Beale, H. *et al., Cases*, *Materials and Text on Contract Law*, Hart Publishing, Oxford, 2019.
- du Plessis, P., *Borkowski's Textbook on Roman Law*, O.U.P., Oxford, 2005.
- Đorđević, Ž., Stanković, V., *Obligaciono pravo*, Naučna knjiga, Beograd, 1987.
- Đurđević, D., *Javnobeležnička delatnost*, Dosije, Beograd, 2014.
- Engel, P., *Traité des obligations en droit suisse*, Stämpfli, Berne, 1997.
- Hogg, M., *Promises and Contract Law*, C.U.P., Cambridge, 2011.
- Jankovec, I., „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ur. Borislav Blagojević, Vrleta Krulj), Savremena administracija, Beograd, 1983.
- Jankovec, I., *Privredno pravo*, Službeni list, Beograd, 1999.

[87] P. Šulejić (1997), 168 (voz kreće odmah po utovaru pošiljke; osiguranik nema vremena da ode da potpiše polisu; svoju volju da osigura pošiljku saopštava slanjem telegrama osiguravaču).

[88] Čl. 72, st. 4 ZOO.

[89] Šulejić razmatra tu mogućnost samo u udžbeniku (P. Šulejić (1997), 168, a ne i u komentaru (Predrag Šulejić, „Član 901. Kad je ugovor zaključen", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995, 1471–1472.

- Karanikić Mirić, M., *Obligaciono pravo*, Službeni glasnik, Beograd, 2024.
- Konstantinović, M., *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Službeni list SRJ, Beograd, 1996.
- Malaurie, P., Laurent Aynes, Phillippe Stoffel-Munck, *Droit des obligations*, L.G.D.J., Paris, 2017.
- Milošević, m., *Rimsko pravo*, Nomos, Beograd, 2005.
- Perović, S., *Obligaciono pravo*, Službeni list SFRJ, Beograd, 1990.
- Petrović Tomić, N., *Pravo osiguranja: Sistem*, Službeni glasnik, Beograd, 2019.
- Radišić, J., *Obligaciono pravo. Opšti deo*, sedmo izdanje, Nomos, Beograd, 2004.
- Vasiljević, M., *Trgovinsko pravo*, PFBG, Beograd, 2012.
- Vodinelić, V., *Građansko pravo. Uvod u građansko pravo i Opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Beograd, 2017.
- Šulejić, P.,„Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995.
- Šulejić, P., *Pravo osiguranja*, Pravni fakultet Univerziteta u Beogradu (PFBG) i Dosije, Beograd, 1997.
- Šulejić, P.,„Član 900. Odstupanje od odredaba ove glave", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995.
- Šulejić, P.,„Član 901. Kad je ugovor zaključen", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995.

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FORM OF INSURANCE CONTRACT

ORIGINAL SCIENTIFIC PAPER

Abstract

In Serbian positive law, an insurance contract is a formal legal transaction: for it to be valid, it must be concluded in the form prescribed by law. There are a few exceptions to this rule. This paper first addresses general issues related to the contract form, including the concept of form, the nature of formal contracts, the various manifestations of form, the concept of mandatory or constitutive form, and what are the legal consequences of non-compliance with it, what is the principle of form parallelism, and what is the purpose of form in modern society. The second part of the paper focuses on the legal form of the insurance contract under the law of the Republic of Serbia. It first examines the fundamental case of the legally prescribed constitutive form of the insurance contract, followed by an examination of a specific legal provision that allows the contracting parties to agree upon a real form for the contract.

Keywords: insurance contract, constitutive form, written form, real form.

I GENERAL ASPECTS OF CONTRACT FORM

1. What is the form of a contract?

The form of a legal transaction refers to the manner in which a legally relevant intention is expressed. It is a pre-determined, external, and visible way of expressing

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the content of the intention of the parties engaged in legal transactions, a means by which the intent of the party engaging in the legal transaction is materialized.

The form of a legal transaction always exists. Every contract, by its nature, must have some form. The question is whether the form of the contract is predetermined, or whether there is a requirement for the will to be expressed in a specific form in order for it to produce the intended legal effect.

When engaging in legal transactions, the parties are generally free to choose the form in which they will express their will. This stems from **the principle of autonomy of will**: legal entities are generally free, within the limits of mandatory regulations, public order, and good customs, to regulate their relations according to their own preferences, which includes the freedom to choose the manner of expressing that will.

When the form of a contract is neither prescribed nor specifically agreed upon, each contracting party may express its will in any form it chooses. Thus, a written offer can be accepted orally, and vice versa, an oral offer can be accepted in writing. An offer made via email can be accepted orally, during a telephone conversation, or in writing, by regular mail or courier.

2. Formal and Informal Contracts

A contract is considered **formal** if it has a prescribed or agreed-upon constitutive form, meaning that for its valid conclusion, the mutual assent of the contracting parties must be expressed in a specific form.[2] This requirement may be established by a general norm (law) or by a particular norm (agreement between the contracting parties). In our legal system, for example, the legal constitutive form is required for contracts such as the sale, exchange, and donation of real estate, sale with instalment payments, construction, loan agreements, license agreements, commercial agency agreements, and hospitality allotment contracts. **The insurance contract** is also considered a formal contract under our law.

If neither general nor specific legal provisions prescribe a mandatory form, the contract is considered **informal**. It is important to understand that an informal contract is not a contract without form: a contract must have a form, even if it is informal. When it is said that a contract is informal, it does not mean that it lacks any form, but that each party is free to choose the form in which it will express its will.

[2] Exceptionally, the requirement of form may apply only to one party's declaration of intent, while the other party remains free to express its intent in any form of their choosing. Such a contract is **unilaterally formal**. A typical example is a contract of suretyship (guarantee), where the surety is bound only if the declaration of suretyship is made in writing, while the creditor may consent in any form. This requirement is stipulated in Article 998 of the Law of Obligations (ZOO), *Službeni glasnik SFRJ,* No. 29/1978, 39/1985, 45/1989, and 57/1989; *Službeni glasnik SRJ,* No. 31/1993; *Službeni glasnik SCG,* No. 1/2003; and *Službeni glasnik RS,* No. 18/2020.

Informal contracts are often referred to in legal literature as consensual contracts, and the terms consensual and informal are often used synonymously.[3] Informal contracts are generally said to be concluded consensually, i.e. through the mere agreement of the declared wills (*solo consensu*), and the principle of consensualism refers to the fundamentally guaranteed freedom of the contracting parties to choose the form of the contract they enter into.[4]

3. What are the types of form?

The legal thought in our country during the second half of the 20th century was marked by the division of forms into oral and written forms, as well as real form and the form of a public document. The form of a public document refers to a written form in which a public authority has, in some way, participated in its creation.[5]

However, with the development of new technologies and the introduction of public notary services into our legal system, a different classification of legal transaction forms was proposed in the 21st century:[6] (a) electronic form has been singled out as a separate category; (b) instead of the form of a public document, a broader category of qualified written form has been adopted, which encompasses the form of a public document, but also other cases where, in addition to the content of the transaction and the handwritten signature, additional formalities are required. In other words, the participation of public authority holders in drafting the legal document about a legal transaction is classified among the ways in which a standard written form can be supplemented or specially qualified. This form is also the most stringent and reliable.[7]

To summarize: In terms of the manner of expressing will, the form in our contemporary law can be divided into **oral, written, real**, and **electronic**; the written form is further divided into regular (handwritten signed document) and qualified; and the qualified written form is further categorized into publicly notarized

[3] Slobodan Perović, *Obligaciono pravo,* Službeni list SFRJ, Belgrade, 1990, 182, 195.

[4] Some authors believe that consensual contracts are not the opposite of formal contracts, but rather of real contracts. This perspective is based on their prior assertion that the delivery of an object in real contracts is not a form or mode of expressing intent, but rather a mandatory supplement to the orally achieved agreement. Jakov Radišić, *Obligaciono pravo. Opšti deo,* 7th edition, Nomos, Belgrade, 2004, 123–124.

[5] S. Perović (1990), 342; Živomir Đorđević, Vladan Stanković, *Law of Obligations*, Naučna knjiga, Belgrade 1987, 246.

[6] Pierre Engel, *Traité des obligations en droit suisse*, Stämpfli, Berne 1997, p. 248 (qualifizierte Schriftform, forme écrite qualifiée). In our case: Dejan Đurđević, *Javnobeležnička delatnost*, Dosije, Belgrade 2014, 25–27.

[7] Bogišić held that: What is established before public authority is the strictest and clearest. Article 1023 of the General Property Code for the Principality of Montenegro (OIZ) of 1888.

(legalized) documents, publicly certified (solemnized) documents, and publicly drafted documents.[8]

3.1. Oral Form

The oral form of a legal transaction is the expression of one's own legally relevant will through **speech**, i.e. stating its content. Oral communication involves two parties: the productive (speaking) and the receptive (listening and understanding). Unlike writing and reading, which can be separated over time, speaking and listening naturally occur simultaneously: listening cannot be postponed. In order for the listener to hear what is being said, the participants in the oral communication must be in the same place at the same time. This is analogous to a telephone conversation.

A legal transaction is made **in oral form** when a legal entity verbally expresses the content of its will to achieve a legal effect. When expressed in oral form, the will materializes immediately and is perceivable to those present, but it does not leave a permanent record that would allow for the reproduction of what was said. Therefore, the primary drawback of the oral form is the difficulty in proving the existence and content of the statement, i.e. what was said and exactly what was conveyed. This drawback is traditionally overcome by securing witnesses.

The oral form of a bilateral legal transaction implies that the mutual will of the contracting parties is verbally articulated, meaning that the content of their agreement is expressed through oral statements. The oral form of a contract **is generally allowed**, unless otherwise prescribed or when the contracting parties agree in advance that their contract will only be valid if concluded in another form. Contemporary lawmakers never prescribe the mandatory oral form of a contract. A contract can be concluded orally whenever no other form is prescribed or agreed upon.

It should be noted that the terms **oral and informal are not synonymous**. Contracts concluded orally can still be strictly formal. An example of this is verbal contracts from Roman law, such as *dotis dictio* (a unilateral formal promise of a dowry), *iusiurandum liberti* (an oath of a freedman), *praediatura* (a procedural suretyship that later changed its purpose), and *stipulatio* (an abstract unilateral binding legal transaction through which various property obligations were assumed).[9]

[8] D. Đurđević, 23–27. This classification is based on the form's appearance, meaning the visible characteristics of the form. It does not reveal whether a specific form is prescribed by law or agreed upon and what its legal significance is, or what the legal consequences of its non-compliance might be. For instance, the written form of a contract can be statutory or contractual, and in terms of its legal significance, it could be a condition for the validity of that contract or merely proof of its oral conclusion.

[9] See: Miroslav Milošević, *Rimsko pravo*, Nomos, Belgrade 2005, 320; Paul du Plessis, *Borkowski's Textbook on Roman Law*, O.U.P., Oxford, 2005, 290; Martin Hogg, *Promises and Contract Law*, C.U.P., Cambridge, 2011, 110.

3.2. Real Form

The real form of a legal transaction is the expression of a legally relevant will through **the act of delivering an object**. The delivery of an object is a special form of materializing the will of the party to cause a specific legal effect. Contracts concluded in real form are called real contracts. For a real contract to be considered formal, it is necessary for the real form to be prescribed or agreed upon as a condition for its validity.

To conclude a consensual contract, it is sufficient for the contracting parties to reach an agreement on the content of their contract, that is, to form a mutual will regarding its legal effect. The mutual will can be expressed orally, in writing, or electronically, and if the contracting parties agree to the delivery of a specific object, that delivery can only be an act of fulfilling an obligation from the consensual contract.

In contrast, a real contract is not considered concluded until one contracting party delivers the object to the other party that the contract concerns. The delivery of the object is, in terms of its legal effect, **the act of concluding a real contract**.

Of course, the contracting parties must agree on what the delivery of the object means in legal terms. Therefore, a real contract cannot exist unless there is a mutual agreement between the contracting parties to enter into a relationship of a specific content. However, they must express this agreement through the delivery and acceptance of the object to which the contract pertains. One party delivers the object, and the other party accepts it, all with the intention of concluding the contract, and at that moment, with that act, the real contract is concluded.

3.3. Written Form

The written form ensures the permanent materialization of the content of a legal transaction. In the broadest sense, it is a signed text of a declaration on a document. The written form of a legal transaction consists of at least two elements: (a) **the text of the declaration of intent** by the legal entity engaging in the legal transaction, written either electronically or mechanically, or by hand, and (b) **the handwritten signature of that entity.** The text of the declaration and the handwritten signature are always placed on a physical medium, most often paper, which is called the document and serves as a permanent record of the content of the legal transaction. A contracting party who cannot write will affix a handmark on the document (a signature by mark), certified by two witnesses or by a court or other public authority. The written form of a legal transaction allows for delayed direct insight into the content of someone's legally relevant will. Unlike the oral form, where speaking and listening cannot be separated, the written form enables delayed reading of what has been written, i.e. the separation of the productive and receptive phases in verbal communication.

There is a rebuttable legal presumption of the completeness of a written document regarding a legal transaction. When a contract is concluded in a specific form, either by law or by the will of the parties, it is presumed that only what is written in that document applies between the parties. However, valid are also (a) simultaneous oral agreements regarding secondary matters not mentioned in the formal contract, provided they do not contradict its content or undermine the purpose of the prescribed form, and (b) simultaneous oral agreements that reduce or ease the obligations of one or both parties, if the special form is prescribed solely for the benefit of the contracting parties.

3.4. Types of Written Form

There are two types of written forms for legal transactions: standard and qualified.

The standard written form is a document that is signed by hand, on which the content of the legal transaction is written either by electronic or mechanical means, or by hand. The elements of the standard written form of a contract are the text of the contract, i.e. the written expression of the content of the contract that the parties have agreed upon, and their handwritten signatures. The text of the contract may be written, typed, or printed by one of the contracting parties or by a third party. It is customary for the legal document to be dated.

The law explicitly stipulates that the requirement for a written form is fulfilled when the parties exchange letters, or when they agree upon any means that allows the content and the author of the statement to be determined with certainty. For instance, the legislator mentioned teletypes, which were in use when the Law of Obligations (ZOO) was adopted. Teletypes are electric typewriters that could communicate via a closed, controlled teleprinter network, similar to landline telephony. As is well known, they are no longer in use. Nowadays, a permanent electronic record of a contract concluded orally can be ensured through the exchange of emails, or it can be stored on various media such as DVDs, CD-ROMs, memory cards, and computer hard drives. Such a record serves as simple proof of an orally concluded contract. For example, a warranty card is a document of guarantee, and the guarantee is a declaration of will in which the manufacturer guarantees or promises the proper functioning of a product for a specific period, starting from the moment the product is handed over to the buyer. The merchant is obliged to provide the consumer with the warranty card in written or electronic form, or on another permanent data storage medium, as simple proof of the warranty. Failure to provide such proof is subject to a misdemeanour penalty, but the declaration of warranty itself will not be invalidated due to this; it still obligates the merchant even when given orally.

When the written form of a contract is prescribed by law, a permanent electronic record of the text of the contract can replace the prescribed written form only

if this record allows the identity of the contracting parties to be determined with certainty. The handwritten signature, as an element of the written form, ensures that the contract was concluded by the person identified as a contracting party in the contract document. Therefore, the standard written form can only be replaced by a means that provides the same guarantees, i.e. performs the function of authentication. For example, the electronic form is a modern means that can replace the standard written form of a contract. It must contain the appropriate electronic signatures of the contracting parties, which serve as an adequate substitute for their handwritten signatures.

It is not uncommon for the law to prescribe that a merchant is obliged to inform the consumer about certain matters during the pre-contractual phase or during the contractual relationship. The legislator usually requires that the merchant provides **certain notifications on a permanent data storage medium** and prescribes civil and criminal penalties for the merchant who fails to fulfil this obligation in the prescribed manner. A permanent data storage medium is defined as any instrument that allows data to be stored for later access or reproduction in an unchanged form, such as paper, email, CD-ROM, DVD, memory card, and hard disk drives.[10]

A permanent data storage medium is not a form of a legal transaction, but a physical object on which the content of a legal transaction, notification, or a simple note can be recorded. This can be done by (a) writing on paper or another material such as wood or clay, from which the text can be read directly, (b) embossing on objects such as punched cards, CD-ROMs, and DVDs, from which the text is read mechanically by a computer and cannot be changed, or (c) as an electronic document, for example, on a memory card, from which it can be read using a computer and is subject to changes.

A record is, therefore, a written or electronic document, while the data storage medium is the medium that allows the storage, reading, and reproduction of what has been recorded. For example, before concluding an insurance contract and throughout the duration of the contractual relationship, the insurer is obliged to notify the policyholder about many matters, in writing or on another permanent data storage medium, that ensures the data can be stored, accessed, and reproduced unchanged.[11] Also, a merchant is obligated to notify the consumer on a permanent data storage medium that they can exercise their right to withdraw from a contract concluded remotely or outside the business premises of the merchant, by electronic means.[12]

However, it should be noted that in these cases, we are not talking about a legal form of the contract but rather **the legal form of required notifications**.

[10] Article 5 paragraph 1 point 44 of the Zakon o zaštiti potrošača - ZZP (Consumer Protection Act), *Službeni glasnik RS,* No. 88/2021.

[11] Articles 82–84 of the Zakon o osiguranju – ZO (Law on Insurance), *Službeni glasnik RS,* No. 139/2014 and 44/2021.

[12] Article 27 of the ZZP.

One contracting party is obliged to notify the other party about something before, at the time of, or throughout the duration of the contractual relationship, and to do so in a way that allows the provided data to be stored, accessed again, and printed, or otherwise reproduced, as long as necessary, given the purpose and nature of the contract. **The burden of proving** that the notification was made in the prescribed form falls on the party who is obligated to provide the notification.

The notification can be made, for example, on paper without a handwritten signature, which is sent by mail or handed over to the recipient in person, and in some cases, it may be posted in the merchant's premises so that a potential co-contractor can read it and take it with them. Additionally, the notification can be made in the form of an electronic document without an electronic signature, which is sent by email, handed to the recipient on a memory card, or in some cases posted online, so that others can save or print it.

A qualified written form includes everything that the standard written form entails, meaning the content of the legal transaction and the handwritten signatures of the parties involved on a physical object (document), but it requires something more, which further qualifies this form and makes it stricter than the standard written form. This supplement is called **additional formalities**. For example, sometimes it is required that the person undertaking a specific legal transaction writes the text of the legal transaction by hand on the document (holographic will) or acknowledges the document in the presence of witnesses as their legal transaction (allographic will). The additional formality sometimes consists of a public authority participating in the conclusion of the contract by certifying (legalizing) the signatures of the contracting parties, or confirming (solemnizing) their private document of the legal transaction, or preparing a public document in the appropriate procedure for the contracting parties. For example, before public notaries were introduced in our legal system, contracts that could transfer property rights to real estate, such as sale, gift, and exchange, were concluded in the form of a publicly certified (legalized) document. The signatures of the parties on these contracts had to be certified by a court. Contracts for lifelong support and contracts for the transfer and division of property during the lifetime were concluded in the form of a publicly confirmed (solemnized) document.

In our positive law, the most important qualified written forms are those in which the additional formality involves **the participation of a public notary**.[13] This includes publicly certified documents, publicly confirmed documents, and publicly drafted documents.

The form of a **publicly notarized document** is a qualified written form that includes (a) the standard written form and (b) a signature authentication clause

[13] D. Đurđević, 25–27.

(legalization clause). By certifying the signature, the notary public confirms that the submitter of the document, whose identity has been previously verified, has signed the document in their presence, or that they have already acknowledged the signature on the document as their own. The notary public is not responsible for the content of the submitted document nor are they obliged to determine whether the submitter has the right to sign the document. Thus, only **the legalization clause** makes the document a public document, meaning that only it has full probative force. As for everything else, a publicly notarized document is nothing more than a private (non-public) document, which is subject to evaluation by the free judicial discretion.[14]

The form of a **publicly confirmed** private (non-public) document is a qualified written form that includes (a) the standard written form and (b) a solemnization clause (confirmation clause). Public confirmation is done by placing a solemnization clause on the document of the legal transaction. With this clause, the notary public confirms that the document was read to the parties in their presence, that the parties declared that the document faithfully and completely reflects their will, and that they have signed it by hand.

When confirming a document of a legal transaction, the notary public is obliged to explain the meaning of the transaction to the parties, to point out its consequences, to verify whether the legal transaction is permissible, i.e. not contrary to mandatory regulations, public order, or good customs. Furthermore, the notary public must verify whether the parties have the legal and business capacity required to undertake the legal transaction, and whether they are authorized to undertake it, as well as check if the representative or attorney of the contracting party is legally capable and authorized to declare the will on their behalf. For all these reasons, a **complete publicly confirmed document**, not just its solemnization clause, has the status of a public document and full probative force.[15]

The form of a **publicly drawn up** document is the strictest qualified written form of a legal transaction, which includes the greatest number of additional qualifying formalities. A public authority or another holder of public powers participates

[14] Currently, in our law, public forms of notarized documents include, for example, declarations of inheritance, contracts for the establishment of a company, and contracts for the transfer of shares in a limited liability company. Moreover, any legal transaction can be made in the form of a notarized document, except when the law stipulates that such transactions must be concluded in a stricter form, such as a publicly confirmed or publicly composed document.

[15] Currently, in our law, publicly confirmed (solemnized) documents include, for example: (a) contracts based on which ownership rights to real estate are acquired, such as sale, exchange, and donation; (b) mortgage agreements and pledges (if they do not contain an explicit statement by the obligated party that direct enforcement can be carried out upon the due date of the obligation); (c) contracts establishing real or personal servitudes; (d) contracts by which spouses or future spouses arrange their property relations concerning existing or future property (marriage contracts). Other contracts can also be made in the form of notarized documents if the parties so agree, except for contracts that must be concluded in a stricter form of a publicly composed document as prescribed by law.

in the drafting of the public document, and when it is drawn up by a notary public, it is also referred to as a notarial record. Such a document is prepared by the notary public in a special non-contentious procedure, based on the statement of the person undertaking the legal transaction, and when it concerns a contract, on the statement of the contracting parties. Like a solemnized document, **the entire notarial record has the status of a public document** – the entire document, not just some part of it. When drafting a contract document, the notary public is required to verify the identity of the contracting parties, inform the parties about the content of the contract they are entering into, and educate them about its legal consequences. The notarial record has the same evidentiary value as if it were drawn up in court or before another state authority. Moreover, under conditions defined by law, a notarial record may have the power of an enforceable document. In general, a notarial record is an enforceable document if it establishes a specific obligation to perform an act that the parties can agree upon and contains an explicit statement by the debtor that, based on this document, enforcement can be directly carried out.[16]

3.5. Electronic Form

The development of digital technologies has made it possible for the content of contracts in modern legal transactions to be expressed in the form of an electronic document. Since the emergence of writing, the content of a contract could be recorded on paper or some other physical medium. In addition, today the content of a contract can also be recorded as a digital file, which is suitable for electronic storage, processing, and transmission.

A digital record of the content of a legal transaction represents an electronic document that has (a) an internal representation, i.e. the technical-programming aspect that is machine-readable and generally not of interest to the contracting parties, and (b) an external, visual representation of the content of the contract, for which we need a computer to read it.

It is important to recall that the written form of a contract implies a document regarding the legal transaction, which contains the text of the contract and the handwritten signatures of the contracting parties. Therefore, the written form of a contract is not just the printed content on a physical medium; it also requires

[16] Article 85 of the Zakon o javnom beležništvu - ZJB (Public Notaries Act), *Službeni glasnik RS,* No. 31/2011, 85/2012, 19/2013, 55/2014 (other law), 93/2014 (other law), 121/2014, 6/2015, and 106/2015. Additionally, based on a notarial record, immediate registration in the public register can be executed if the record contains a statement in which the debtor explicitly agrees to it. The legal form of a notarial record in our jurisdiction includes contracts regarding the disposal of real estate by legally incompetent persons; agreements on statutory maintenance; mortgage contracts and pledge statements (if they contain an explicit statement by the obligated party that enforcement can be carried out directly upon the due date of the obligation, either judicially or extrajudicially). Moreover, the contracting parties can agree that their contract will produce legal effects only if it is concluded in the form of a notarial record.

the contracting parties to hand-sign the document, thus identifying themselves and recognizing the text of the contract as their own. The same can be said for contracts concluded in electronic form.

The electronic form of a contract includes (a) the electronic document, i.e. the digital record of the contract's content, and (b) the electronic signatures of the contracting parties, which identify them and accept the text of the contract as their own. An electronic signature, like a handwritten signature, must be made by a natural person. When a legal entity concludes a contract, the electronic signature of the individual authorized to represent that legal entity in concluding the contract is used.

There are three types of electronic signatures: standard, advanced, and qualified.

A standard electronic signature is a set of data in electronic form that is attached and logically linked to other (signed) electronic data, so that the electronic signature confirms the integrity of the electronic data and the identity of the signatory. Thus, it is a set of electronic data that together confirms the content of the electronic document and the identity of the person who signed the document. **An advanced electronic signature** is more reliable than the standard one because it more reliably confirms the integrity of the signed data and the identity of the signatory. The signatory is the only one who controls the use of their advanced electronic signature. Any subsequent modification of the signed data can be detected, and the signed data cannot be secretly altered. Therefore, an advanced electronic signature allows for a more reliable identification of the signatory and the detection of any subsequent changes to the signed document. The advanced signature cannot be copied from the electronic document to be reused; the signed document cannot be modified without leaving an electronic trace.

A qualified electronic signature is a special type of advanced electronic signature, equipped with a qualified certificate issued by an accredited certification authority.[17] A qualified electronic signature is legally equated with a handwritten signature. It is the most reliable electronic signature: it ensures that the electronic data have not been changed after being signed, and that the document was signed by the person whose signature it is, namely, the one authorized to use that signature to identify themselves and recognize the electronic document as their own.

The Law of Obligations (ZOO) does not mention the electronic form of a contract directly, but it does provide that the requirement for a written form is met if the parties agree on another medium that allows the content and the declarant to be determined with certainty. Recently, it has been stipulated that a qualified

[17] Currently, certification authorities include the Serbian Post, the Chamber of Commerce of Serbia, the Ministry of Internal Affairs, the Ministry of Defence, and others.

electronic signature has the same legal effect as a handwritten signature. Furthermore, a qualified electronic signature can replace the certification (legalization) of a handwritten signature if specifically prescribed by law.[18]

Thus, the following options are available to the parties in our legal system. First, **when the law does not prescribe a specific form**, the parties can conclude the contract in electronic form using a standard, advanced, or qualified electronic signature. In fact, the contract can even be concluded through a simple exchange of emails. The parties are also free to ensure simple proof of an orally concluded contract in electronic form. Second, **when the law prescribes that a contract must be concluded in writing**, the parties can replace the prescribed form only with an electronic form that is equipped with their qualified electronic signatures, because only such signatures are legally equated with handwritten signatures. Neither the standard nor the advanced electronic signature is sufficient to meet the legal requirement that a specific contract be concluded in written form. Third, **when the law specifies that a contract must be in the form of a publicly certified document** (legalization of signatures), the prescribed form can be replaced by an electronic form containing qualified electronic signatures of the parties only if such a replacement is specifically allowed by law. Fourth, when the law requires that a contract be concluded in the form of a solemnized document or a public notarial record, the prescribed form cannot be replaced by an electronic form, even one containing qualified electronic signatures.

The final issue to mention, for a complete understanding of this relatively new legal framework, concerns the relationship between the original and copies of an electronic document. An electronic document can either be originally created in electronic form or it can result from the digitization (e.g. scanning) of a document that was not originally electronic. Furthermore, an electronic document can be printed into a physical form or duplicated electronically. In all these scenarios, it is necessary to determine what is considered the original and what is considered a copy, as well as what is required for a copy to be legally or functionally equivalent to an original.

(a) An electronic document that was originally created in electronic form is considered the original. (b) Any other electronic document that has the identical digital record is also considered the original. (c) By printing the external form of the electronic document, i.e. its visual representation, a copy of the document can be made on paper. This copy can be certified by a notary public. By certifying the copy, the notary public confirms that the copy of the document is identical to the original document. The notary public can certify that the printed copy matches the original electronic document if the printing of that copy was done under their supervision.

[18] Article 50 of the Zakon o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju, (Law on Electronic Documents, Electronic Identification and Trust Services in Electronic Business) *Službeni glasnik RS*, No. 94/2017 and 52/2021.

Before certifying the printed copy of the electronic document, the notary public must verify that a qualified electronic signature was used. The certification clause must specify that it is a printed copy of the electronic document. (d) An electronic document can also be created by digitizing an original non-electronic document, for example, by scanning pages of paper on which the contract text is written. Such an electronic document is considered a copy of the original non-electronic document. The notary public can certify this copy by confirming that the electronic copy is identical to the original document. It is required that the original document be digitized in the presence of the notary public. The notary public then adds their qualified electronic seal to the digitized copy, confirming its identity with the original non-electronic document.[19]

4. What is the purpose of form?

In modern law, the basic principle is the freedom to choose the form of one's own declarations of will. Participants in legal transactions are free to choose the form in which they will express their will. Legal acts generally produce the intended legal effects regardless of the form in which they are made. The principle of autonomy of will has permeated all civil codifications from the 19th century to the present. It implies the freedom to contract, which also includes the free choice of the form of contracts and other legal transactions. This **principle of the free choice of form** in legal transactions is now referred to as consensualism and is understood as a contrast to the formalism that characterized ancient legal systems. Consensualism stems from the freedom to contract and signifies that all ways in which legally relevant will can be expressed are equally valid. The free choice of form in which one's will is expressed aligns with the practical needs of rapid and widespread trade in goods and services.

Without form, there is no transaction. The legally relevant will must be expressed, manifested, and made perceivable to others in order to produce legal effect. A legal transaction is not a hidden, unspoken, internal will, but a declared will. This necessity to express will, to materialize it, means that every legal transaction, by its nature, must have some form. Form is a necessity because the will must be manifested, must take shape, in order to have legal effect. Therefore, the purpose of form is not to refer to the function of the form in general, but rather the function

[19] In the margin: An electronic signature can only be held by a natural person, whereas an electronic seal can be held by a legal entity or an authorized body within a legal entity. Similar to a signature, an electronic seal can be standard, advanced, or qualified. When a public authority issues an act in the form of an electronic document, the qualified electronic seal of that authority or the qualified electronic signature of an authorized person within that authority replaces the institution's seal and the handwritten signature of the authorized person. A qualified electronic seal carries a legal presumption of data integrity and the authenticity of its origin.

of a specific form that is mandatory for a particular legal transaction. The question is not why a contract has a form, but rather why the free choice of form is restricted by law and what purpose the form, which is mandatory for certain contracts, serves.

French theory has stated that consensualism is suitable for strong, mature, and honest contracting parties. On one hand, consensualism is simple, speeds up transactions, and benefits the economy. On the other hand, it opens the possibility for hasty and thoughtless commitments, leaves third parties without reliable proof of the existence and content of others' contracts, and makes it easier for contracting parties to disagree on whether they are actually bound by a contract or not.[20]

This means that mandatory form has some drawbacks. It slows down transactions, creates additional costs for the contracting parties, and sometimes leads them to the mistaken conclusion that mere compliance with a prescribed form guarantees the validity of the undertaken legal act. This last drawback particularly affects the form of public signature certification. The requirement for form can also benefit an unscrupulous party who, by pointing out formal deficiencies in the contract, actually wants to circumvent the obligation they had willingly accepted.[21]

What is the purpose of form in legal transactions under modern law? It is clear that today form does not have a sacred role; it is no longer believed that obligations arise from rituals or verbal formulas. Formalism, in principle, does not meet the conditions of free trade. The prescribed form of a legal transaction slows down legal traffic and creates costs. However, in certain areas of business, such as **banking and insurance**, the form of legal transactions is still very important. So, what is the current function of form, and what purpose does it serve?

First, forms that ensure a permanent record of the content of a contract allow the contracting parties and third interested third parties to later review the agreement and verify that the contract was concluded and what it pertains to. This is particularly important in long-term contractual relationships and when ownership, or other real rights are transferred based on a contract. Thus, the form of a contract serves a **proof function**, for example, in the case of a dispute about the existence or content of a contract, or when the parties need to inform third parties about their contractual relationship, or when one of them needs to show the basis of their acquisition, and so on.

A private document regarding a contract, created in a simple written form or in electronic form, serves as standard evidence of the conclusion and content of the contract and is subject to the judge's discretion. In contrast, public documents regarding legal transactions, i.e. qualified written forms in which a public authority

[20] Phillippe Malaurie, Laurent Aynes, Phillippe Stoffel-Munck, *Droit des obligations*, L.G.D.J., Paris, 2017, 305–306.

[21] Hugh Beale *et al., Cases, Materials and Text on Contract Law,* Hart Publishing, Oxford, 2019, 396.

(primarily a notary public) participates, have full probative value, meaning that they prove the truthfulness of what is confirmed or determined within them. However, there is a gradual scale in this regard. (a) When a contract is concluded in the form of a publicly certified document, only the legalization clause has the characteristic of a public document. In the case of a dispute about who signed a particular document, the court must assume that the document was signed by the person identified as the signatory in the certification clause. As for everything else, the publicly certified document is nothing more than a private document subject to free judicial evaluation. (b) When a contract is concluded in the form of a solemnized document or a notarial record, the entire document about the legal transaction has the characteristic of a public document and full probative value — not just some part of it.

Second, certain forms of contracts ensure that the contracting parties are better informed about the content, significance, and legal consequences of the contract they are entering into, protecting them from rash and hasty commitments, or accepting risks they do not understand. This **protective function** is especially important for forms that require the involvement of a public authority, such as a notary public, in drafting the legal document to warn the parties about certain aspects or refuse to draft a document for an invalid transaction. For example, the notary public is obliged by law to warn the parties if their declarations are unclear, incomprehensible, or ambiguous, or to refuse to draw up a document for a void transaction. The notary public must decline to create a document if they find that the will of the parties is not serious or free, or if the contract they wish to conclude is contrary to mandatory regulations, public order, or good morals. Furthermore, the notary public drafts the document based on the statements of the contracting parties, and helps ensure that their mutual will is clearly expressed and legally valid.

Third, some forms provide guarantees that the legal transaction was undertaken by the person identified in the legal document, and that the text of the document reflects the content of the expressed will. This is known as the **authentication function of the form**, and it is particularly emphasized in notarial forms. The notary public verifies the identity of the contracting parties, their representatives, and other participants in the procedure, minimizing the possibility of forgery and subsequent manipulation of the document's content.[22]

Finally, it is undeniable that strict formalism slows down legal transactions. The requirement of form mandates that the parties pause and fulfil everything necessary to express their will in the exact form requested. This creates additional costs, consumes time, and generally increases the expense of the transaction. However, the strictest forms — those ensuring that a legal document has the effect of an executive instrument — can, in the long run, speed up legal transactions by **effectively shortening the time needed for the enforcement** of contractual claims.

[22] D. Đurđević, 28–30.

5. When is Form Mandatory?

The essential form of a contract may be prescribed by law or agreed upon by the parties. If the form is legally required, the parties may only make it **more stringent** by mutual agreement; they cannot make the legal form easier or exclude it through mutual agreement. The form prescribed as a condition for the validity of a contract may be replaced by a more stringent form, that is, a form that includes everything prescribed by the legal form, with the addition of further formalities. The law may also provide for **competition among essential forms**, meaning that it may prescribe multiple forms, meaning that one form is sufficient for the valid conclusion of the contract.

When the form is **agreed upon**, but not prescribed by law, the execution of the contract without complying with this form should be understood as a waiver by the contracting parties of the agreement about the form that they had previously concluded.[23] However, when a constitutive form of the contract is prescribed by law, and not agreed upon by the parties, the contract does not produce the intended legal effect if it is not concluded in that form. Absolute nullity is the civil law sanction for non-compliance with the constitutive form.

Nevertheless, unlike contracts that are null due to other reasons, a contract that is null due to the lack of the prescribed form can be validated through execution.[24]

The process of validation (convalidation) through execution occurs by exception, when the cumulative conditions prescribed by law are met. (a) The first condition is that a **written form is prescribed** for the conclusion of the contract.[25] (b) The second condition is that the parties **have executed their contractual obligations** in full or in substantial part. (c) Third, a contract cannot be validated through execution if such execution would contradict the **purpose of the form**, or if validation in such a way would obviously undermine the goal for which the form was prescribed.

For example, it is not permitted to validate a contract by execution if it lacks the form prescribed for the protection of public interest. However, such validation is allowed when the contract has been executed, and the form that was not complied with at the time of conclusion was intended to warn the parties about the complexity of the legal transaction and to reduce the risk of disputes regarding its existence and content. Execution, for instance, can validate a construction contract or a contract

[23] For example, if the parties agreed to tighten the statutory written form by notarizing their signatures but later conclude the contract in the standard legally prescribed written form, it should be considered that they have implicitly waived the agreed-upon stricter form.

[24] Aticle 73 of the ZOO.

[25] As mentioned earlier, a written form may be simple or qualified. A contract lacking the required form may be validated through performance only if this aligns with the purpose of the prescribed form. Typically, only contracts requiring a simple written form can be validated through performance, as validation by performance is generally incompatible with the objectives of qualified written forms.

for partition, but it is not permitted to validate in this way a contract on the basis of which a property right is acquired on immovable property. Insurance contracts should be classified among those contracts that can be validated by execution.

6. What is Parallelism of Forms?

The term parallelism of forms refers to the **interconnection between the forms of two legal transactions**. It is not presumed merely because certain transactions are related; rather, it must be specifically prescribed or provided by law or agreed upon in a contract, within the general limits of the freedom to contract. If parallelism of forms is not specifically foreseen, the form required for one transaction applies only to that transaction, and not to other transactions that arise in connection with it. For example, the law stipulates that an agreement on a contractual penalty must be in the legal form of the contract from which the secured obligation originates; offers and acceptances must be made in the form prescribed for the contract; consent to the assignment of a contract is valid only if given in the form prescribed by law for the assigned contract; a preliminary agreement produces legal effects only if concluded in the form prescribed by law as a condition for the validity of the main contract;[26] a contract for which a notarial form is prescribed can only be terminated, amended, or supplemented by mutual agreement in the same form.[27]

The form prescribed by law for a particular contract is generally required also for the power of attorney and the consent of a third party to conclude that contract. However, when the form for a contract requires a public notarized document or notarial record, it is sufficient for the signature of the principal on the power of attorney, or the signature of the third party on the consent or approval for the conclusion of the contract to be notarized (legalized).[28]

II SPECIFICITIES OF THE INSURANCE CONTRACT FORM IN THE SYSTEM OF THE LAW OF OBLIGATIONS

1. Insurance Activity and Legal Transactions of the Insurer

The insurance activity is the **business activity of the insurer**, classified as a specially regulated, specialized business activity, similar to banking or leasing activities. The National Bank of Serbia supervises the performance of insurance activities.[29]

[26] Articles 271 and 38, Article 145(3), and Article 45(2) of the ZOO.
[27] Article 82(3) of the ZJB.
[28] Article 90(2) and Article 29(2) of the ZOO.
[29] Article 13 of the ZO, *Službeni glasnik RS,* No. 139/2014 and 44/2021.

Thus, the insurance activity is a specially regulated economic activity, or as it is often referred to in modern terms, an *industry*, which has its own rules, internal logic, and economic laws. The primary purpose of this activity is to provide protection against the risks to which insured property or insured persons is exposed. Protection is provided retroactively, meaning when the insured risk materializes, by providing compensation for the damage incurred or paying a predetermined sum. Moreover, the insurance activity may have a supplementary, quite limited preventive function: the business activity of the insurer also includes taking specific measures to prevent or eliminate risks threatening the insured property or persons. However, the insurance institution is **primarily reactive**: the main function of insurance is reparation, meaning the repair, removal, or at least reduction of the consequences of an insured event that has already occurred, either in the property or personal sphere of the insured party.[30]

Instead of bearing their own risks, the insured person, by paying the premium, joins a **risk community**, thereby socializing their own insured risk, i.e. sharing it with other members of the community and agreeing that they, too, will share their insured risks with them. All members of the community are exposed to the same danger, and knowing that the danger will actually affect only some of them, they decide to share the risk by paying premiums from which compensation or the insured sum will be paid to those whose risks materialize.[31]

The institution of insurance has ancient origins.[32] However, the modern insurance contract is a contemporary legal transaction, which is much more complex and distant from its historical roots. Knowledge of the history of insurance is not necessary to comprehend the modern institution. Nevertheless, the long history of insurance attests to the existence of an ancient need to socialize the risk of damage, i.e. to share the risk of property loss. Every participant in legal transactions is exposed to this risk.

In performing its business activity, insurers conclude or undertake **various legal transactions**, among which the most important are insurance contracts, but reinsurance transactions, as well as brokerage and agency activities in insurance, are also significant.

Broadly speaking, the legal transactions undertaken by insurers can be (a) unilateral (such as general business conditions or an offer to conclude an insurance contract) or (b) bilateral (for example, an insurance contract). (c) In addition, some authors emphasize the existence of joint transactions. For a joint legal transaction

[30] See: Nataša Petrović Tomić, *Pravo osiguranja: Sistem*, Službeni glasnik RS, Belgrade 2019, 43–44 and *passim*. (on various aspects of insurance activity); Predrag Šulejić, *Pravo osiguranja*, Faculty of Law, University of Belgrade (PFBG) and Dosije, Belgrade 1997, 26–28 (on the preventive function of insurance).

[31] N. Petrović Tomić, 72 *et seq*.

[32] P. Šulejić (1997), 32 *et seq*.

to arise, the will must be expressed by two or more persons, but not mutually (each with respect to the others), but jointly (on the same side).[33] In the insurance industry, this could, for example, refer to decisions made by the collective body within an insurance company.

2. The Insurance Contract: Definition and Legal Characteristics

The insurance contract is one of the numerous legal transactions that insurers conclude or undertake in the course of their business activities.[34]

In terms of its legal characteristics, the insurance contract falls under the category of nominate, bilateral (synallagmatic), onerous, long-term, and aleatory[35] bilateral legal binding transactions.[36]

When the insurance contract is categorized as a binding legal transaction, it means that its purpose is achieved by the fulfilment of mutual obligations that arise from the contract.[37] Therefore, the insurance contract is best defined by the obligations that emerge from it. In this contract, one party (the policyholder) undertakes to pay a specified monetary amount as the insurance premium and, potentially, to fulfil other obligations (such as taking the preventive measures stipulated by the contract), while the other party (the insurer) commits, in return, to compensate for the damage in case the insured event occurs. This compensation may involve (a) paying the damages in property insurance, (b) paying the agreed sum (insured amount) in personal insurance, or (c) taking another action (for instance, compensating for the insured damage in kind or defending the insured from unjustified claims – in liability insurance).

Insurance contracts are typically concluded using an adhesion technique, meaning they belong to the category of contracts of adhesion. The fundamental characteristic of contracts of adhesion is that one party (a) prepares the content of the future contract in advance, and (b) excludes the possibility of negotiating that

[33] Vladimir V. Vodinelić, *Građansko pravo. Uvod u građansko pravo i Opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Belgrade 2017, 450

[34] For more on the insurance contract, see: N. Petrović Tomić, Ivica Jankovec, *Privredno pravo*, Službeni glasnik RS, Belgrade, 1999, 563 et seq.

[35] Aleatoricism is a legal characteristic of the insurance contract itself, not of the insurer's business activity; the insurer's business activity is not aleatory. See: M. Vasiljević (2012), 179; P. Šulejić (1997), 165 (each individual insurance contract is aleatory: it cannot be annulled due to excessive damage, and the policyholder cannot demand a refund of premiums if the insured event does not occur. However, the insurer concludes a large number of contracts, thereby eliminating its economic risk, so it can be said that the insurer's business activity is not excessively risky).

[36] For these and other classifications of contracts, see: M. Karanikić Mirić (2024), 173 *et seq*.

[37] In contrast, dispositional legal transactions—such as debt forgiveness, novation, or assignment of claims—do not create obligations but achieve their purpose immediately upon conclusion.

content. In the case of insurance contracts, the insurer occupies this position. The party adhering to the contract does not participate in the formation of its content but agrees to the terms set by the other party. Their freedom of negotiation is limited to the decision of whether to conclude or not to conclude the contract. This position is held by the policyholder.

The insurance contract is considered to be a contract of mutual trust (*uberrimae fidei*). This means that it obliges the contracting parties to act toward each other in accordance with the highest standards of good faith and fairness, particularly regarding the mutual duty of informing each other about circumstances that are significant to their contractual relationship.[38]

The insurance contract cannot be classified as a contract concluded based on identity (*intuitu personae*). First, the identity of the insurer is not crucial, as they operate according to the law and the general terms, and when the insured event occurs, it is not of particular importance to the policyholder whether the specific insurer pays the compensation or the insured sum; what matters is that the amount is paid. Second, the insurance contract is usually not tied to the identity of the policyholder either. However, the identity of the insured party may be relevant when assessing certain risks, and in this limited sense, it can be said that the insurance contract is concluded with regard to *intuitu personae*. In general, the insurer does not care who pays the premium. However, when covering risks that affect an individual's personal sphere, the insurer does pay close attention to who the insured is, what they do, how they live, and their overall health status, etc.[39] Finally, in addition to being nominate, bilateral, onerous, aleatory, and long-term, as part of binding transactions and typically concluded by adhesion, the insurance contract is, in our system, fundamentally formal. General questions regarding the form of contracts were addressed in the first part of this paper, and the remainder of the paper is dedicated to the form of the insurance contract.

3. The Form of the Insurance Contract in the ZOO System

3.1. Legal Significance of the Insurance Policy or Other Document Concerning the Contract

Under our positive law, contracts are generally concluded in a free form: when the form of a contract is neither prescribed nor specifically agreed upon, each party may declare its will to conclude the contract in the form it chooses.[40]

However, the Law of Obligations (ZOO) contains a specific rule regarding the form of the insurance contract, which applies to both property insurance and personal

[38] P. Šulejić (1997), 170.

[39] In some cases, the insured risk is directly tied to the insured person's characteristics—whether the insured event occurs depends on their attentiveness or behaviour. This is typical for liability insurance.

[40] A more detailed discussion on this can be found in the first part of this article.

insurance. According to this rule, the insurance contract requires a constitutive written form: it is considered concluded when the parties sign the insurance policy or cover note.[41] Therefore, for the insurance contract to be concluded in accordance with the provisions of the ZOO, it is necessary to create an appropriate written document for the contract (the insurance policy or cover note), which, in terms of its legal significance, is not merely evidence that the contract has been concluded, but a legal condition for its valid conclusion.[42]

It should be noted that some types of insurance are explicitly excluded from this regime: the ZOO rules concerning the insurance contract do not apply to marine insurance, reinsurance, and insurance of receivables.[43] These types of insurance are not excluded from the entire ZOO but only from those provisions of the ZOO that specifically regulate insurance. In other words, for the excluded contracts, the general provisions of the ZOO regarding contracts apply (including the rule regarding the free choice of form), but the specific provisions of the ZOO regarding the insurance contract, including the special rule on constitutive form, do not apply.

In our law, it is now undisputed that the insurance contract is regularly formal. However, this was not always the case[44]: (a) After World War II, under the influence of some pre-war legal rules, courts initially considered that the insurance contract had to be concluded in writing. (b) Later, they adopted a different view, in line with the legal theory and practice developed under the general conditions of many insurers, which held that an insurance contract was concluded as soon as the parties reached an agreement on its content, with the insurance policy or another document serving only as proof of the contract's conclusion and not a condition for its validity.[45] (c) The more recent judicial practice was codified: since 1967, the law has required insurers to issue an insurance policy or another document confirming

[41] Article 901, paragraph 1 of the ZOO. Naturally, the document may be signed by the parties personally or through their representatives.

[42] As stated by the court: "As a general rule, the conclusion of a contract does not require any specific form (Article 67, paragraph 1 of the ZOO); oral consent of the contracting parties suffices. However, Article 901, paragraph 1 of the ZOO prescribes that an insurance contract is concluded when the policyholder and the insurer sign the corresponding written document. Therefore, the insurance contract must be concluded in written form, and if it does not meet this requirement, it has no legal effect (Article 70, paragraph 1 of the ZOO) and does not enjoy judicial protection." Decision of the Higher Commercial Court, Pž. 8934/97 of January 28, 1998, ParagrafLex. Also: "An insurance contract is concluded when the parties sign the policy, so a policyholder who returned the signed policy to the insurer could not, by that act, implicitly reject the offer to conclude the contract (since the contract had already been concluded), nor could they terminate the contract in that way." Judgment of the Commercial Appellate Court, Pž. 4358/2011(2) of January 5, 2012, ParagrafLex.

[43] Article 899 of the ZOO.

[44] For more on this history, see: P. Šulejić, 165 *et seq*.

[45] When it is said that a policy is **mere proof**, this means (a) that the policy is not a requirement for the valid conclusion of the contract and (b) that the existence and content of the contract can be proven by other means, not just the policy.

the concluded contract.[46] This means that the insurance policy or another written document concerning the contract served only as mere proof that the contract had been concluded, while the contract itself could be concluded in any form, including orally. (d) Despite the fact that the insurance contract was newly defined by law as informal, Konstantinović proposed in 1969 in his Draft that the insurance policy should not merely be proof of the contract's conclusion but its mandatory form.[47] (e) The Yugoslav legislator accepted this proposal in 1978: under the ZOO system, the general rule is that the insurance contract is not concluded until the parties sign the insurance policy or the cover note.[48]

3.2. The Policy as the Legal Constitutive Form of the Insurance Contract

In order for property insurance or personal insurance to be concluded in accordance with the provisions of the ZOO, it is necessary for the contracting parties to sign the insurance policy.[49] Despite all the criticisms that may be directed at this legal solution and possible alternative interpretations of the existing legal provision, the legal significance of the policy is undisputed for our courts: the policy is understood in our jurisdiction as the **constitutive form of the insurance contract**.[50]

The prescribed written form of the insurance contract is typically achieved by using the insurer's form or template, which explicitly states it is stated that it is an insurance policy. However, the legal requirement for form should be considered met whenever the essential content of the insurance contract is recorded on any durable medium with the handwritten signatures of the contracting parties. This document may be titled as a policy, or left untitled, or even incorrectly titled (*falsa nominatio non nocet*), but it must certainly contain the minimum elements of the policy as prescribed in Article 902 of the ZOO.[51]

[46] Article 64, paragraph 2 of the Basic Law on Insurance and Insurance Organizations, *Službeni glasnik SFRJ,* No. 7/1967.

[47] Article 879, paragraph 1 of the Draft. See: Mihailo Konstantinović, *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Službeni glasnik SFRJ, Belgrade 1996, 292.

[48] There are some exceptions to this rule, which will be discussed later.

[49] Article 901, Paragraph 1 of the ZOO.

[50] N. Petrović Tomić, 317. From judicial practice: By signing the insurance policy, the contract is concluded, and the obligation to pay the premium arises. Decision of the Commercial Appellate Court, Pž. 12837/2010 of September 1, 2011, ParagrafLex. Also: By signing a policy for a multi-year insurance period, a legally valid contractual relationship is constituted for the entire insurance period. It is irrelevant that the insured later refused to sign a separate policy for a shorter period within the agreed duration of the insurance. Decision of the Supreme Court of Serbia, Prev. 323/2007 of September 13, 2007, ParagrafLex. Even: The fact that the insured agreed to conclude a contract with the insurer for combined casco motor vehicle insurance does not mean that the contract is concluded until both parties sign the insurance policy, especially since the insurer's special conditions prescribe that the contract is concluded by signing the policy. Judgment of the Commercial Appellate Court, Pž. 11031/2010 of July 20, 2011.

[51] The subsequent issuance of a policy on the insurer's standard form would then have the legal significance of mere proof of a contract that has already been concluded. Conversely, the last court ruling cited in the previous footnote takes a different stance.

The insurance policy is a document concerning the contract that is created in a **standard written form**[52]. The minimum content of the insurance policy is prescribed by law:[53] the policy must include the contracting parties, the insured object or insured person, the risk covered by the insurance, the duration of the insurance and coverage period, the insured sum or indication that the insurance is unlimited; the premium[54] or contribution (in the case of mutual insurance), and the date of issuance of the policy. The text of the insurance policy may be written, typed, or printed by one of the contracting parties or a third party, but it is usually drafted by the insurer itself. In any case, the insurance contract is considered concluded only when the policy is signed by both contracting parties.[55]

The law prescribes that the general terms under which the contract is concluded bind the party agreeing to them only if they were known to the party or should have been known at the time of conclusion.[56] This rule is further tightened for insurance contracts: not only must the policyholder be informed of the insurance terms, but this must also be stated in the policy. Specifically, the insurance policy must contain a statement confirming that the insurer has fulfilled two legal obligations: (a) to inform the policyholder that the insurance terms are an integral part of the contract, and (b) to provide the policyholder with the text of those terms, unless they are printed directly on the policy itself. This applies to both the general and specific insurance terms under which the specific insurer operates. In the case of a discrepancy between any provision of the insurance terms and any provision of the policy, the policy prevails according to the law. If there is a discrepancy between printed and handwritten provisions of the policy (if such exist), the handwritten provision prevails.[57]

Therefore, the general and special insurance terms are integrated or incorporated into the contract by a statement on the insurance policy confirming that the policyholder has been informed about them and that the text of these terms has been provided to them, if they are not printed on the policy itself. In other words, the insurance contract encompasses the insurance policy and the incorporated general and special terms of insurance that are valid at the time of conclusion, provided that the insurer has informed the other party that these terms are an integral part

[52] More on standard written form is discussed in the first part of this article.

[53] Article 902, Paragraph 1 of the ZOO.

[54] From case law: The premium is the price of insurance and therefore constitutes an essential element of the insurance contract. If the premium cannot be precisely determined based on the information stated in the policy, the insurance contract is invalid. It is not sufficient for the policy to merely state "applicable tariff" instead of specifying the premium amount. Judgment of the Higher Commercial Court in Belgrade, Pž. No. 1976/01 of June 20, 2001, ParagrafLex.

[55] Therefore, in our legal system, the policy is generally authoritative when its content differs from the insurance offer or from what the parties agreed upon during negotiations. The situation is different when the insurance contract is informal. P. Šulejić (1997), 195 *et seq*. See Article 71 ZOO.

[56] Article 142, Paragraph 3 of the ZOO.

[57] Article 902, Paragraphs 3–5 of the ZOO.

of the contract, delivered their text (if not printed on the policy), and confirmed all of this in the policy.

The law prescribes the minimum content of the insurance policy, i.e. the elements the policy must contain. However, the parties are free to include other elements in the policy, that is, they can agree on matters that the legislator does not require. For example, the policy may contain an agreement on the local jurisdiction of the court.[58] In addition to signing the same document, the contracting parties may also **exchange policies**, meaning that each party may receive the policy signed by the other contracting party. This possibility is explicitly provided by law.[59] It is based on the idea that the party holding the document signed by the other contracting party can always add their own signature, thus making it complete.

Moreover, the law specifically permits the replacement of the legally required written form with another method that ensures the content and the issuer of the declaration can be clearly identified[60]. This means that the written form of the insurance policy can be replaced by an electronic form equipped with **qualified electronic signatures** from the contracting parties, as only such electronic signatures are legally equated with handwritten signatures.[61] Neither a standard nor an advanced electronic signature is sufficient to meet the legal requirement for the policy to be in written form.[62]

Exceptionally, an individual classified qualifies as a consumer of financial services (which includes insurance) may conclude a distance contract valued up to 600,000 dinars without using their qualified electronic signature, provided that the authentication function required by the law for that contract is secured in another legally prescribed manner (using at least two elements to confirm the user's identity or by using an electronic identification scheme with a high level of reliability).[63] This is a special legal rule aimed at protecting consumers who enter into financial service contracts using remote communication means. It allows for the authentication function of the handwritten signature or qualified electronic signature of the consumer (not the service provider) to be realized by using some **other form of electronic identification** that ensures a high level of trust in the consumer's identity, thereby effectively preventing abuse or false representation.

[58] Decision of the Higher Court in Čačak, Gž. 1594/2021 of March 10, 2022, ParagrafLex.

[59] Article 72, Paragraph 4 of the ZOO.

[60] *Ibidem*.

[61] Zakon o elektronskom dokumentu, elektronskoj identifikaciji i uslugama od poverenja u elektronskom poslovanju (Article 50 of the Law on Electronic Documents, Electronic Identification, and Trust Services in Electronic Business), *Službeni glasnik RS,* No. 94/2017 and 52/2021, and Article 3, Paragraph 2 of the Zakon o zaštiti korisnika finansijskih usluga kod ugovaranja na daljinu - ZZKFUD (Law on Consumer Protection in Distance Financial Services Contracts - ZZKFUD), *Službeni glasnik RS,* No. 44/2018.

[62] More on the electronic form is discussed in the first part of this article, where the legal obligations for the contracting parties to provide certain notifications on a durable medium are also explained.

[63] Article 3, Paragraph 3 of the ZZKFUD.

The insurance policy can be **temporarily replaced by a cover note**, which includes the essential components of the insurance contract. This possibility is also provided by law.[64] The cover note is issued either in writing or in an appropriate electronic form, containing only the most basic data about the agreed insurance. It is usually issued when the policyholder or the insurance contractor urgently requires proof of the concluded transaction, in cases like transport insurance, or when insuring a large property that requires prior inspection.[65] The contractual obligations between the parties arise as soon as both sign the cover note — the policyholder or insured is protected against risk, while the insurer acquires the right to the premium.

The cover note has a limited content and must later be replaced by an insurance policy containing all legally prescribed elements. Once the cover note is issued, a legal obligation arises to replace it with an insurance policy within a reasonable period, or within the period prescribed by the insurance terms or customary for that type of insurance. If a cover note is issued, **the contract is considered concluded**. The insurance policy issued later cannot have the legal significance of the constitutive form of the insurance contract; it can only serve as proof of the contract's existence and content.

According to general contract law, the insurer may set stricter requirements for the form or extend the mandatory content of the policy, to which the policyholder agrees by entering into the contract under stricter rules. The contracting parties cannot relax or exclude the legal form of the insurance policy, but they may **mutually agree to make the form stricter**. For instance, instead of the standard written form required by law (handwritten signature on the policy), the parties can agree that their signatures must be notarized for the contract to be considered concluded. Furthermore, the parties may expand the **minimum content of the policy**, meaning they can condition the conclusion of the contract on the inclusion of additional elements that are not legally required to be included in the policy.[66]

An insurance contract that has not been concluded in the prescribed constitutive form is subject to **validation by performance.**[67] The validation by performance occurs as an exception when the cumulative conditions foreseen by law are met, as discussed earlier. The first condition is that the contract's conclusion is prescribed by the ordinary (not qualified) written form.[68] This is because validation by performance is generally inconsistent with the objectives for which qualified written forms are required. The second condition is that the parties have performed their contractual

[64] Article 902, Paragraph 2 of the ZOO.
[65] P. Šulejić (1997), 197.
[66] The minimum content of the policy is prescribed in Article 902, Paragraphs 1 and 4 of the ZOO.
[67] Article 73 of the ZOO.
[68] Decision of the Higher Commercial Court, Pž. 5798/2008(2) of February 10, 2009, ParagrafLex (the provision of Article 73 ZOO cannot be applied if, in addition to the written form, the contract also requires notarization of signatures or the consent of a third party for its conclusion).

obligations either in full or in substantial part. Third, the contract cannot be validated by performance if such validation would contradict the purpose of the form, or if it would clearly defeat the goal for which the form was prescribed. The legal consequences of validating a contract through performance are that the party that has mostly performed their contractual obligation can be required to complete it, and neither party can demand the return of what has been performed under a contract that was invalid due to lack of form, but has since been validated by performance.

Finally, in special cases, when the insurance policy merely serves as proof of the contract, there is no point in considering the possibility of validating the insurance contract by performance (as envisaged in Article 73 of the ZOO). If the insurance policy is merely proof of the contract that is considered concluded as soon as the parties agree on its essential elements, then this contract cannot be null and void due to lack of form, and the question of validation through performance will not arise.

In comparative law, there is a prevailing view regarding the informal nature of insurance,[69] meaning that the policy usually serves as mere proof of the existence and content of the contract. This was the case in our country after the war, until the adoption of the ZOO. Our contemporary legal theory advocates returning to this solution, i.e. abandoning the mandatory legal form for the insurance contract.[70] However, until such a change is implemented, it seems that the domestic legislator's intention was for the insurance contract to have a constitutive standard written form within the framework of the ZOO, and its minimum content should be that prescribed for the policy in Article 902 of the ZOO.

(a) This means that the contract is considered concluded when both parties sign the insurance policy. (b) Furthermore, the insurance contract should be considered concluded when the contracting parties reach an agreement in standard written form on the minimum content prescribed for the policy and both parties sign it by hand, even if it is not on the standard form typically used to issue an insurance policy.[71] (c) Finally, the insurance contract should be considered concluded when it is made in electronic form containing qualified electronic signatures from both parties. In such a case, its minimum content is that which is prescribed by law for the policy.

3.3. The Insurance Policy as Mere Proof of a Concluded Contract

It has already been stated that the provisions of the ZOO regarding insurance contracts do not apply to marine insurance, insurance of claims, and reinsurance, which means that the ZOO provision regarding the formal nature of insurance does not apply to these contracts either. In these cases, the insurer is still obliged to issue

[69] N. Petrović Tomić, 295; P. Šulejić (1997), 166 *et seq*.

[70] N. Petrović Tomić, 296.

[71] This would constitute the conclusion of an insurance contract according to the general rules for (formal) contracts. See: N. Petrović Tomić, 322.

an insurance policy, but that policy is not a condition for the creation of the contract; instead, it serves as mere proof of a contract concluded in some other form.[72]

Moreover, even within the framework of the ZOO, there are exceptional **cases in which a contract is concluded without a policy**, where the policy cannot have the legal significance of a constitutive form, but only serves as proof of the existence and content of the contract. The insurer is still obligated to issue an insurance policy in these cases, but the policy does not represent an essential form of the insurance contract; rather, it serves **merely as proof of the fact that the contract has been concluded**.

3.3.1. Real Form of the Insurance Contract

It is commonly said that the earnest money (deposit) is the only real contract in our ZOO.[73] However, the ZOO specifically provides for a possibility where a real form of the contract can be agreed upon instead of the legally prescribed written form. Specifically, in its general terms of business (insurance terms), the insurer can specify cases where the contractual relationship from the insurance arises solely through the payment of the premium.[74] This is referred to as **insurance without a policy**.[75]

In such cases, the insurance contract has a **contractually agreed constitutive real form**. This form is (a) agreed upon, because it is not prescribed by law for a specific contract but is provided in the insurer's terms, which the other party accepts; (b) constitutive, because it represents one of the alternatively set conditions for the valid conclusion of the contract (the contract must be concluded either in the legally required written form or in the agreed-upon real form to produce legal effects); (c) real, because the contract is concluded by paying the insurance premium—the payment of a certain sum of money constitutes the act of concluding the contract.

The real form of the insurance contract is agreed upon when the insurer provides it in their terms, and the other party accepts it by paying the premium with the intention of entering into a contract under the insurer's terms. If this possibility

[72] The policy is considered here only from the perspective of the form of an insurance contract. In addition to serving as the constitutive form of a contract or as evidence, an insurance policy can also function as an identification document, a (qualified) debt instrument, or a security, which is beyond the scope of this paper. More on these other functions of the policy can be found in: P. Šulejić (1997), 191 *et seq*.

[73] Article 79, paragraph 1, ZOO. Additionally, pledge, deposit, and loan, according to classical understanding, are classified as real contracts. While these were real contracts in pre-war law, the ZOO now defines them as consensual contracts. The delivery of an item is not an act of concluding the contract but an act of fulfilling a contractual obligation that has already arisen from it.

[74] Article 903, ZOO.

[75] A common example is voluntary passenger accident insurance in public transport, which is concluded upon purchasing a transport ticket. N. Petrović Tomić, 302; M. Vasiljević, 182; Predrag Šulejić, "Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ed. Slobodan Perović), Savremena administracija, Belgrade, 1995.

were not specifically prescribed by law, the parties would not be allowed to deviate from the legally prescribed constitutive written form of the insurance contract.

The insurer, in their terms, may stipulate that the contract is considered concluded when the other party pays the full premium or when part of it is paid. There is no legal obstacle to the insurer's terms providing, for example, that the premium is paid in instalments and that the contract is concluded by paying the first instalment.

When the insurance terms provide that the contract is concluded by paying the premium, the insurance contract is **not informal**:[76] it is not concluded in a free form, but rather in the agreed-upon constitutive real form. Even in this case, the insurer is still required to issue a policy upon request of the policyholder. However, the policy in this case does not have the legal significance of a constitutive form of the insurance contract, but rather serves only as mere proof of the existence and content of the contract concluded in the real form.

How does this case differ from validation by performance? (a) When the insurance contract is concluded in real form, the main contractual obligation of the insurer arises as soon as the policyholder pays the premium. This obligation is enforceable. This is because the contract is concluded by the act of paying the premium. (b) In contrast, validation by performance occurs only when a contract lacking the essential legal form is performed in full or to a substantial extent. This means that contractual obligations do not arise until they have been predominantly performed. Once the contract is performed, validation occurs, and neither party can demand the return of what they have already provided. However, until validation occurs, the policyholder cannot be required to pay the premium, nor can the insurer be required to pay the compensation or the insured sum, or do anything else specified in the contract if the insured event occurs. These obligations are not enforceable until validation occurs. Once validation has taken place, that is, when the parties have voluntarily performed their obligations in full or to a substantial extent—neither party has the right to claim restitution of what has already been given.[77]

In addition to the described case of **insurance without a policy**, which is explicitly named as such in the law (Article 903 of the ZOO), there are other situations in the ZOO framework where the policy cannot be anything other than proof that the contract has already been concluded in some other manner—not by the mutual signing of the policy.

[76] Ivica Jankovec, „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (eds. Borislav Blagojević, Vrleta Krulj), Savremena administracija, Belgrade, 1983, 1938.

[77] Jankovec interprets this differently. According to him, paying the insurance premium under Article 903 of the ZOO actually constitutes validation by performance, as generally regulated in Article 73 of the ZOO. He argues that by paying the premium, the contract is already predominantly performed, since the insurer's main obligation depends on whether the insured event occurs. Therefore, he suggests that the insurer's performance should not be considered when assessing whether the conditions for contract validation by performance have been met. I. Jankovec (1983), 1938.

3.3.2. Unilateral Written Insurance Contract

It is explicitly stipulated by law in our system that a written offer made to the insurer for the conclusion of an insurance contract binds the offeror for a period of eight days from the day the offer is received by the insurer, unless a shorter period has been specified. If a medical examination is required, this period extends to thirty days. If the insurer does not reject the offer within that period, and the offer does not deviate from the terms under which the insurer provides the proposed insurance, the offer is considered accepted and the contract is concluded. In this case, the contract is considered concluded when the offer is received by the insurer.[78]

The insurance contract still retains the legally prescribed form required for its validity[79]. It is a **unilateral written formal contract.**[80] Thus, even in this case, the contract is not informal, but unilateral and written: the offer made by the policyholder must be in writing or an appropriate electronic form. A special legal rule stipulates that an insurance contract produces legal effects only if the policyholder has made the offer in writing, with the insurer accepting the offer by silence.

The content of the contract is determined by the offer made by the policyholder, which must fully comply with the insurer's terms and must be made in written form. General rules allow the written form of the offer to be replaced by an electronic form containing a qualified electronic signature. Once the period during which the offeror is bound by the offer expires, the written offer that is not rejected converts into a written insurance contract – it is considered that the insurer, by remaining silent, has accepted the offer, and the contract with that content is concluded when the offer is received by the insurer. In this case, the insurer is also obligated to issue the insurance policy, but the policy can only serve as mere proof of the contract that has already been concluded; it cannot be the constitutive form of the contract.

In legal terms, silence means refraining from any reaction, the absence of both speech and action, a completely passive stance. By its nature, an offer cannot be made by silence, as the offeror must propose the content of the future contract. This rule applies without exception. When it comes to acceptance, the basic rule is that silence does not mean acceptance of the offer. However, there are some exceptions to this rule:

First, participants in legal transactions can agree that in their future business relationship, the silence of the offeree will be understood as acceptance of the offer made to them. Of course, this cannot be agreed upon when the form of the legal transaction is imperatively prescribed by law, as is the case with insurance in the ZOO system. Second, silence may be deemed acceptance if it is required by

[78] Article 901, paragraphs 2–4, of the ZOO.

[79] In contrast (that the contract is informal): M. Vasiljević, 182.

[80] It has already been mentioned that a guarantee contract binds the guarantor only if the statement of guarantee has been made in writing. [Article 998, ZOO.] The creditor may agree to this in any form, which means that for the legislator, a guarantee contract is unilaterally formal (unilateral written).

business customs in a particular context. This is not applicable to contracts that are legally formal. Third, the ZOO regulates two situations in which, by exception, the silence of the offeree is taken as acceptance:[81] If the offeree has an ongoing business relationship with the offeror regarding the delivery of specific goods, it is considered that the offeree has accepted an offer relating to such goods if they do not reject it immediately or within the prescribed time. Similarly, if the offeree has an ongoing business relationship with the offeror regarding the performance of certain tasks, it is considered that they have accepted an offer relating to those tasks if they do not reject it immediately or within the prescribed time.[82] This does not apply to insurance. Fourth, the law may specifically stipulate that silence from the offeree means acceptance of the offer to conclude a specific nominated contract. This is precisely what the legislator has done for insurance contracts: **the insurer's silence on a written offer** made to them within the acceptance period and in accordance with the terms of insurance is deemed as acceptance, as explicitly provided by law. In this case, there is no requirement for an ongoing business relationship between the parties, but rather that (a) the offer was made in writing, (b) it was made by the insurance proposer, (c) it fully complied with the general terms, and (d) the silence lasted for eight days, or thirty days if a medical examination is required.

3.3.3. Deviation from the Legal Form in the Undeniable Interest of the Insured

The dispositive nature of legal provisions is one of the fundamental principles of our ZOO:[83] the parties can arrange their contractual relationship differently than prescribed by the law, unless a specific provision of the law or its purpose dictates otherwise. However, the rules of the ZOO regarding insurance contracts are **generally imperative**:[84] the parties can only deviate from these rules when they have explicit legal authorization[85] or when such a deviation is in the undeniable interest of the insured and is not explicitly prohibited.[86]

[81] Article 42, paragraphs 3 and 4, ZOO.

[82] However, if there is no permanent business relationship between the two parties, then the silence of the commission recipient who has received a certain commission is not qualified as acceptance of that commission but as careless conduct in the pre-contractual phase, thus serving as the basis for pre-contractual liability for the damage caused. Article 750, ZOO.

[83] Article 20 ZOO.

[84] Article 900 ZOO.

[85] Explicit authorization to contract differently than prescribed is contained in several articles of the ZOO: Article 930, Article 931, paragraph 1, Article 936, paragraph 1, Article 937, paragraph 1. These legal provisions are dispositive (non-mandatory) by exception.

[86] (a) For example, the insurer may request the annulment of the contract if the policyholder has intentionally made an inaccurate declaration or intentionally concealed a circumstance of such nature that the insurer would not have concluded the contract had they known the true state of affairs (Article 908, paragraph 1, ZOO). However, it can instead be agreed that the insurer has the right to demand an increase in the premium.

In domestic legal theory, the position has been presented that deviation from the legal form of an insurance contract can be justified by referring to Article 900, paragraph 2 of the ZOO, i.e. when such deviation is undoubtedly required by the interests of the insured. An example often cited is the case when the insured needs to immediately obtain coverage for a risk they are exposed to.[87]

However, the insured almost always has an obvious interest in obtaining coverage as soon as possible. This interest is protected by the rules regarding the conclusion of the contract by the silence of the insurer or by the payment of the premium. Additionally, an insurance contract that is null and void due to a lack of form can be validated through performance. Also, the law explicitly allows for the written form to be replaced by any form that ensures the content and the party making the statement can be clearly determined.[88] The insurance policy can, therefore, be made in an electronic form that contains qualified electronic signatures of the contracting parties. Outside of these situations, our courts require that the insurance contract be concluded by the handwritten signing of the policy (either in person or through a representative), if the rules of the ZOO apply to that contract.

Finally, the strict rules of the ZOO regarding the form of the insurance contract are not only prescribed for the protection of the interests of the insurance proposer or the insured but also in the interest of the insurer, so that their obligation does not arise before it is determined which risks are covered by the insurance, in a form that reduces the likelihood of disputes. Because of all of this, the possibility of deviating from the legal form of the insurance contract based on the provision of Article 900, paragraph 2 of the ZOO (in the undeniable interest of the insured) seems to be considered in our legal theory merely as one of the potential responses to the strict formalism of our legal solution, rather than as a *de lege lata*—an existing legally provided option.[89]

(b) If it is agreed that the premium is to be paid at the conclusion of the contract, the insurer's obligation to pay compensation or the amount specified in the contract arises by law the next day after the premium payment (Article 913, paragraph 1, ZOO). However, it can be agreed instead that the insurer's obligation becomes due earlier and that they bear the risk as soon as they inspect the item, not just the next day after the premium payment.
(c) If the increase in risk is such that the insurer would not have concluded the contract had such a state existed at the time of its conclusion, they may, by law, terminate the contract (Article 914, paragraph 3, ZOO). However, it can instead be agreed that the insurer has the right to demand an increase in the premium. For further examples, see: Predrag Šulejić, "Article 900. Deviation from the Provisions of this Chapter," in: Slobodan Perović (ed.), Commentary on the Law of Obligations, Savremena administracija, Belgrade 1995, 1469.

87 P. Šulejić (1997), 168 (the train departs immediately upon loading the shipment; the insured does not have time to go and sign the policy; their intention to insure the shipment is communicated by sending a telegram to the insurer).

88 Article 72, paragraph 4, ZOO.

89 Predrag Šulejić, „Član 901. Kad je ugovor zaključen", Komentar Zakona o obligacionim odnosima (ed. Slobodan Perović), Savremena administracija, Belgrade, 1995, 1471–1472

Literature

- Beale, H. *et al., Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford, 2019.
- du Plessis, P., *Borkowski's Textbook on Roman Law*, O.U.P., Oxford, 2005.
- Đorđević, Ž., Stanković, V., *Obligaciono pravo*, Naučna knjiga, Belgrade, 1987.
- Đurđević, D., *Javnobeležnička delatnost*, Dosije, Belgrade, 2014.
- Engel, P., *Traité des obligations en droit suisse*, Stämpfli, Berne, 1997.
- Hogg, M., *Promises and Contract Law*, C.U.P., Cambridge, 2011.
- Jankovec, I., „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ur. Borislav Blagojević, Vrleta Krulj), Savremena administracija, Belgrade, 1983.
- Jankovec, I., *Privredno pravo*, Službeni list, Belgrade, 1999.
- Karanikić Mirić, M., *Obligaciono pravo*, Službeni glasnik, Belgrade, 2024.
- Konstantinović, M., *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Službeni list SRJ, Belgrade, 1996.
- Malaurie, P., Laurent Aynes, Phillippe Stoffel-Munck, *Droit des obligations*, L.G.D.J., Paris, 2017.
- Milošević, m., *Rimsko pravo*, Nomos, Belgrade, 2005.
- Perović, S., *Obligaciono pravo*, Službeni list SFRJ, Belgrade, 1990.
- Petrović Tomić, N., *Pravo osiguranja: Sistem*, Službeni glasnik, Belgrade, 2019.
- Radišić, J., *Obligaciono pravo. Opšti deo*, sedmo izdanje, Nomos, Belgrade, 2004.
- Vasiljević, M., *Trgovinsko pravo*, PFBG, Belgrade, 2012.
- Vodinelić, V., *Građansko pravo. Uvod u građansko pravo i Opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Belgrade, 2017.
- Šulejić, P., „Član 903. Osiguranje bez polise", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Beograd, 1995.
- Šulejić, P., *Pravo osiguranja*, Pravni fakultet Univerziteta u Beogradu (PFBG) i Dosije, Belgrade, 1997.
- Šulejić, P., „Član 900. Odstupanje od odredaba ove glave", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Belgrade, 1995.
- Šulejić, P., „Član 901. Kad je ugovor zaključen", *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović), Savremena administracija, Belgrade, 1995.

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POSLOVANJE OSIGURAVAJUĆIH DRUŠTAVA U DIGITALNOM OKRUŽENJU – ŠTA NAM DONOSI DORA?

PREGLEDNI RAD

Sažetak

Poslovanje osiguravajućih društava u digitalnom okruženju omogućava niz prednosti poput ubrzanja prometa, lakše dostupnosti usluga osiguranja i smanjenja troškova. Međutim, taj vid poslovanja, osim pomenutih prednosti, sa sobom nosi i brojne rizike, kao što su IKT (informaciono-komunikacione tehnologije) rizici i sajber napadi. Kako bi se prevazišle razlike u regulisanju upravljanja ovim rizicima među državama članicama EU, doneta je Uredba o digitalnoj operativnoj otpornosti (DORA).

U radu autorka nastoji da ukaže na izazove poslovanja osiguravajućih društava u digitalnom okruženju, trenutnu regulativu u pogledu upravljanja IKT rizicima, kao i izazove sa kojima će se države i osiguravajuća društva susresti prilikom primene odredaba DORA-e. Treba imati u vidu da se na taj način unapređuje zaštita korisnika usluga osiguranja, što je glavni cilj regulative EU u poslovanju osiguravajućih društava (Solventnost II).

Ključne reči: DORA, digitalno okruženje, digitalna operativna efikasnost, IKT rizik, sajber incidenti.

I Uvod

Istorijski gledano, finansijski sektor je bio veoma proaktivan u korišćenju informacionih tehnologija za uspostavljanje novih poslovnih modela i optimizaciju

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unutrašnjih procesa. Proces digitalne transformacije znatno se ubrzao poslednjih godina i postao je ključan za opstanak društava koja posluju na finansijskom tržištu iz više razloga. Najpre, očekivanja korisnika usluga postala su takva da se sve više ceni dostupnost fleksibilnih usluga koje su prilagođene ličnim potrebama i odmah dostupne bilo gde i u bilo koje vreme. Pored toga, ekonomsko okruženje uticalo je na finansijske institucije da prilagode svoje poslovne modele, lansiraju nove usluge u potrazi za alternativnim izvorima prihoda i poboljšanjem efikasnosti unutrašnjih procesa, kako bi smanjile troškove. Na taj način omogućava se umnožavanje kapaciteta sistema, a troškovi se smanjuju.

Kao rezultat te transformacije, osiguravajuća društva, budući da su deo finansijskog sektora, postaju potpuno zavisna od svoje tehnologije, koja više nije samo instrument za lakše i brže poslovanje, već i diferencijalni i konkurentski faktor. S druge strane, osim brojnih prednosti, visok stepen digitalizacije povećava rizik od sajber incidenata. Dodatno i drugi faktori doprinose tom rastućem riziku, poput složenosti tehnološkog okruženja većine finansijskih institucija, koje im otežava da održavaju adekvatno kontrolno okruženje i čini ih ranjivijim.

Važno je napomenuti sledeće: kako bi sprovela te procese digitalne transformacije i imala pristup tehnološkim inovacijama koje najbolje mogu doprineti njihovom poslovanju, osiguravajuća društva dopunjuju svoje kapacitete pribavljanjem eksternih usluga i kupovinom proizvoda trećih strana. Zato je otpornost i sajber bezbednost tih trećih strana, pogotovo provajdera, postala značajna koliko i otpornost samih društava, jer incidenti koji ih pogađaju mogu uticati na ceo sektor.[2]

Iako neka istraživanja govore da je finansijski sektor jedan od sektora koji je najbolje opremljen za prevazilaženje sajber i IKT rizika, delimično zbog visokog nivoa regulacije i nadzora, otpornost na pomenute rizike među učesnicima u ovom sektoru je neujednačena. Finansijski sektor je bio glavna meta internet napada, usled čega su regulatori i nadzorni organi prepoznali potrebu za ublažavanjem i upravljanjem IKT rizicima i rade na poboljšanju otpornosti i stabilnosti celokupnog finansijskog sistema.[3] Međutim, mere bezbednosti i kontrole koje su primenjene u kompanijama, pogotovo manjim, neretko su nedovoljne za upravljanje novim sajber i IKT rizicima, čija je ekspanzija nastala tokom pandemije virusa kovid 19. U tom periodu ubrzan je proces automatizacije i digitalizacije na tržištu osiguranja.[4] Zbog toga nije iznenađujuće što su se među institucijama koje su zabeležile najveći porast broja sajber napada, između ostalih, naročito izdvojila i osiguravajuća društva (koja pripadaju

[2] Silvia Senabre, Iván Soto, José Munera, „Strengthening the Cyber Resilience of the Financial Sector - Developments and Trends", *Financial Stability Review*, 2021, 89-90.

[3] Philipp S. Krüger, Jan-Philipp Brauchle, *The European Union, Cybersecurity, and the Financial Sector: A Primer*, Cyber Policy Initiative Working Paper Series – „Cybersecurity and the Financial System", Carnegie Endowment for International Peace , Washington, 2021, 6.

[4] Jelena Ž. Kočović *et al.*, „Pravci razvoja tržišta osiguranja", *Tokovi osiguranja*, 3/2024, 540.

sektoru gde je koncentrisan veliki broj malih institucija).[5] Specifična priroda sajber pretnji koje su obično prekogranične i nisu ograničene na pojedinačne jurisdikcije, dovodi do internacionalizacije kako napada tako i odgovora i njihovog međunarodnog uticaja (direktnog i indirektnog uticaja kroz „efekat zaraze"). Evropska unija, u tom smislu, postaje sve aktivnija u donošenju pravne regulative u tom pogledu, radi stvaranja digitalne operativne efikasnosti kompanija.[6] Među najznačajnijim izdvaja se Direktiva NIS 2,[7] a zatim i Uredba o digitalnoj operativnoj efikasnosti (DORA),[8] koja predstavlja *lex specialis* i koju će od 2025. godine morati da implementiraju društva koja posluju u finansijskom sektoru.

II Pojam digitalne operativne efikasnosti

Digitalna operativna efikasnost predstavlja sposobnost društva da izgradi, održi i preispituje svoju operativnu celovitost i pouzdanost, tako da upotrebom IKT usluga obezbedi sigurnost mrežnih i informacionih sistema kojima se služi i putem kojih se omogućava kontinuirano pružanje finansijskih usluga i njihov kvalitet. Važnost digitalne otpornosti je prirodan rezultat napretka digitalizacije i dva povezana izazova, sajber i IKT rizika.[9] Predložena regulativa EU zahtevaće od osiguravajućih društava da uspostave interne okvire upravljanja i kontrole sposobne da obezbede efikasno i mudro upravljanje IKT rizicima. Iako će ta obaveza biti delegirana posebnoj funkciji u okviru osiguravajućeg društva, uprava će biti odgovorna za sve propuste, imajući u vidu njenu obavezu da odobri i nadgleda upravljanje ovim rizicima.[10] DORA ima za cilj da uvede harmonizovan i sveobuhvatan okvir za digitalnu operativnu otpornost evropskih finansijskih institucija, jasno navodeći eksplicitne zahteve za rešavanje i ublažavanje IKT i sajber rizika. To je direktan odgovor na zajednički savet Evropskih nadzornih agencija (European Supervisory Authorities – ESA). ESA su

[5] S. Senabre, I. Soto, J. Munera, 90.

[6] Paweł Pelc, „The Role of Cybersecurity in the Public Sphere – The European Dimension. Financial Institutions", in: *The Role of Cybersecurity in the Public Sphere – The European Dimension* (eds. K. C. Jentkiewicz, I. Hoffman), Maribor, 2022, 60.

[7] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148, *Official Journal of the European Union L333/80* - NIS 2 Directive.

[8] Regulation (EU) 2022/2554 of the European Parliament And of The Council Of 14 December 2022 on Digital Operational Resilience For The Financial Sector And Amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011, *Official Journal of the European Union L333/1* – DORA.

[9] Jose Ramon Martínez Resano, „Digital Resilience and Financial Stability - The Quest For Policy Tools in The Financial Sector", *Revista de Estabilidad Financiera*, 2022, 65.

[10] Pierpaolo Marano, Michele Siri, „Regulating Insurtech in The European Union", *Journal of Financial Transformation,* 2021, 173.

identifikovale četiri oblasti delovanja na koje se treba usredsrediti u regulatornom razvoju u bliskoj budućnosti: prvo, zahtevi za IKT bezbednost i upravljanje rizicima; drugo, sektorski zahtevi za izveštavanje o sajber incidentima; treće, direktni nadzor i supervizija pružalaca usluga trećih strana; i četvrto, okvir za testiranje sajber otpornosti. DORA reguliše sva ta pitanja i pruža potencijalne odgovore i rešenja za trenutne pravne praznine.[11]

III Poslovanje osiguravajućih društava u digitalnom okruženju

Tehnološki napredak i razvoj digitalnih tehnologija omogućava osiguravajućim društvima da poboljšaju svoje poslovanje, ali i da unaprede korisničko iskustvo. Digitalizacija omogućava najpre analizu velike količine podataka koja postaje ključna za donošenje informisanih odluka u delatnosti osiguranja. Na taj način, analizom istorijskih podataka, osiguravajuća društva mogu preciznije proceniti rizike i prilagoditi polise, čime se omogućava personalizacija ponude korisnicima. Na osnovu podataka o ponašanju korisnika, moguće je kreirati prilagođene polise osiguranja koje se zasnivaju na potrebama konkretnog korisnika. Sledeća značajna prednost je optimizacija procesa obrade šteta, jer se automatizacijom analize podataka ubrzavaju procesi obrade šteta i na taj način smanjuje vreme potrebno za rešavanje zahteva. Osim navedenog, korišćenje veštačke inteligencije i digitalnih platformi omogućava automatsku obradu zahteva smanjujući potrebu za ljudskom intervencijom. Algoritmi veštačke inteligencije mogu analizirati obrasce ponašanja i identifikovati sumnjive aktivnosti, smanjujući rizik od prevara. I kao najvažnije, imajući u vidu da je poverenje korisnika usluga osiguranja stavljeno u centar svih aktivnosti osiguravajućih društava, na taj način omogućava se poboljšanje podrške korisnicima usluga. Međutim, kao što donosi mnoge prednosti, digitalizacija takođe stavlja osiguravajuća društva pred velike izazove. Imajući u vidu da obrađuju velike količine osetljivih podataka, uključujući lične i finansijske podatke svojih korisnika, zaštita ovih podataka od sajber napada postaje ključni prioritet. Primeri incidenata pokazuju koliko su osiguravajuća društva ranjiva na sajber pretnje, što može dovesti do gubitka poverenja korisnika i značajnih finansijskih gubitaka. Stoga, danas upravljanje IKT rizicima i sajber bezbednost predstavljaju jednu od značajnih obaveza i ciljeva u poslovanju. Tokom procesa prilagođavanja promenama u poslovanju zahtevaće se usaglašavanje s brojnom i često promenljivom regulativom, ulaganje u modernu IT infrastrukturu i njeno održavanje, kontinuirano investiranje u nadogradnju sistema i obuku zaposlenih. Prilagođavanje digitalnoj transformaciji zahteva promenu poslovne kulture, a uspostavljanje inovativnog i fleksibilnog radnog okruženja ključno je za uspeh digitalne transformacije.

[11] P. S. Krüger, J.P. Brauchle, 4.

IV Upravljanje IKT rizicima u osiguravajućim društvima

Brzina kojom se IT okruženje menja i razvija svakodnevno izlaže tržište osiguranja i njegovo okruženje novim rizicima. Pravovremene mere kontrole rizika moraju se kontinuirano evaluirati kako bi se osiguralo da budu i dalje efikasne u identifikaciji i upravljanju rizicima s kojima se ova društva susreću.[12] Direktiva Solventnost II[13] stupila je na snagu 2016. godine kako bi harmonizovala regulativu osiguranja u EU. Međutim, ona ne reguliše eksplicitno IKT rizike i sajber bezbednost, već ih implicitno obrađuje kao deo operativnih rizika. Član 41 Direktive Solventnost II zahteva od osiguravajućih društava da uspostave efikasan sistem upravljanja koji omogućava upravljanje poslovima pažnjom dobrog stručnjaka. Ta društva treba da preduzmu razumne korake kako bi osigurala kontinuitet u obavljanju svojih aktivnosti, uključujući razvoj planova za vanredne situacije. Društva za osiguranje „moraju primeniti odgovarajuće i proporcionalne sisteme, resurse i procedure". U skladu sa članom 44, kao deo sistema upravljanja, moraju „imati uspostavljen efikasan sistem za upravljanje rizicima... kako bi identifikovale, merile, nadzirale, upravljale i izveštavale, na kontinuiranoj osnovi, o rizicima, pojedinačno i na agregiranom nivou, kojima su izložene ili bi mogle biti izložene, kao i o njihovim međuzavisnostima". Na taj način Direktiva uređuje upravljanje svim rizicima kojima je društvo izloženo, bez eksplicitne analize IKT rizika. S obzirom da evropska regulativa koja se odnosi na osiguravajuća društva ne obrađuje specifično pravilno upravljanje IKT i sajber rizicima, regulativa zemalja članica često se znatno razlikuje. Dok neke zemlje, kao što je npr. Nemačka, imaju specifične zahteve za IKT sigurnost i upravljanje u sektoru osiguranja,[14] druge zemlje nemaju nikakvu regulativu u pogledu ovog pitanja. To pokazuje snažnu potrebu za harmonizacijom evropske regulative u pogledu pitanja upravljanja i prevazilaženja ovih rizika.[15]

Evropska nadzorna tela (ESA), kao što smo pomenuli, zaključuju da trenutni fragmentiran regulatorni i nadzorni pejzaž može dovesti do nekonzistentnih praksi širom Evrope i ugroziti ravnopravno poslovanje. Stoga je predlog da se u odgovarajućim podsektorima utvrde opšti zahtevi za upravljanje IKT rizicima i omogući sajber bezbednost, kako bi se stvorili uslovi za sigurno pružanje usluga. Takva harmonizacija pomogla bi u promovisanju veće IKT sigurnosti i sajber bezbednosti. U skladu s tim Evropsko nadzorno telo za osiguranje i penzijske fondove (EIOPA) objavilo je Smernice

[12] Simon Grima, Pierpaolo Marano, „Designing a Model for Testing the Effectiveness of a Regulation: The Case of DORA for Insurance Undertakings", *Risks*, 9/2021, 2.

[13] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), *Official Journal of the European Union L335/1* - Solventnost II.

[14] Federal Financial Supervisory Authority (Bafin), „Supervisory Requirements for IT in Insurance Undertakings", 2022.

[15] P. S. Krüger, J.P. Brauchle, 16-17.

o sigurnosti i upravljanju na području informacionih i komunikacionih tehnologija (EIOPA Smernice).[16] EIOPA Smernice pokrivaju oblasti upravljanja IKT rizicima, strategiju IKT-a, politiku i mere informacione sigurnosti, sigurnost IKT operacija i upravljanje IKT operacijama, upravljanje promenama IKT-a, planove odgovora i oporavka itd. One su izrađene na osnovu Smernica Evropskog bankarskog nadzornog tela (EBA)[17] kako bi se osigurala doslednost među podsektorima. Te smernice predviđaju obavezu uprave društva da omogući da se pomoću sistema upravljanja odnosno funkcije upravljanja rizicima i sistema internih kontrola na odgovarajući način upravlja IKT i sigurnosnim rizicima. Osim toga, društvo mora voditi računa da broj članova i njihove veštine (*fit and proper*) budu prikladni za pružanje podrške operativnim potrebama na području IKT-a, postupcima upravljanja rizicima IKT-a i sigurnosnim rizicima na kontinuiranoj osnovi, kako bi se obezbedilo sprovođenje strategije IKT-a.[18] I ovde se primenjuje načelo proporcionalnosti, tačnije pravo društava da EIOPA Smernice primenjuju na način u skladu s prirodom, obimom i složenošću rizika kojima su izložena. Osiguravajuća društva treba da uspostave programe osposobljavanja za informacionu sigurnost za sve zaposlene, uključujući članove uprave, kako bi se obezbedilo da budu osposobljeni za izvršavanje svojih dužnosti i odgovornosti. Osim toga, treba da organizuju i sprovedu periodične programe za podizanje svesti o sigurnosti, o tome kako postupati s rizicima povezanim s informacionom sigurnosti.[19]

V DORA u osiguravajućim društvima

Kao što smo prethodno pomenuli, pandemija izazvana globalnim širenjem kovida 19 i njen efekat na poslovanje društava bili su katalizatori za ubrzanje digitalizacije.[20] Suočavajući se s regulatornom fragmentacijom koja je nastala, EU je odlučila da predstavi DORA-u. DORA je usklađeni pristup EU da zameni ono što se naziva „nekoordinisanim nacionalnim inicijativama".[21] Uredba postavlja jedinstvene zahteve u vezi sa bezbednošću mrežnih i informacionih sistema koji podržavaju poslovne procese finansijskih entiteta, neophodne za postizanje visokog zajedničkog

[16] European Insurance and Occupational Pensions Authority (EIOPA), Smernice o sigurnosti i upravljanju u području informacijskih i komunikacijskih tehnologija, EIOPA-BoS-20/600 – EIOPA Smernice.

[17] *Smernice EBA-e o upravljanju rizicima IKT-a i sigurnosnim rizicima*, EBA/GL/2019/04, https://www.eba.europa.eu/sites/default/files/document_library/Publications/Guidelines/2020/GLs%20on%20ICT%20and%20security%20risk%20management/Updated%20Translations/880816/Final%20draft%20Guidelines%20on%20ICT%20and%20security%20risk%20management_COR_HR.pdf, 10.07.2024.

[18] EIOPA Smernice, Smernica 2.

[19] EIOPA Smernice, Smernica 13.

[20] Za više o uticaju pandemje virusa kovid 19 na poslovanje sektora osiguranja u Republici Srbiji v: Marko R. Risimović, Zlata I. Đurić, Nađa M. Đurić, „Poslovanje sektora osiguranja u Republici Srbiji u uslovima pandemije kovida 19", *Tokovi osiguranja*, 1/2022, 111-129.

[21] Stavros Kourmpetis, „Management of ICT Third Party Risk Under the Digital Operational Resilience Act", *Digitalisation, Sustainability, and the Banking and Capital Markets Union*, Palgrave Macmillan, 2023, 220.

nivoa digitalne operativne otpornosti.[22] Predlogom DORA, Evropska komisija je direktno odgovorila na preporuke ESA i prepoznajući rizike koji mogu proizaći iz nedostatka detaljnih i sveobuhvatnih pravila u ovoj oblasti predlaže da DORA ima veoma široku primenu i da pokrije gotovo sve finansijske institucije iz sva tri podsektora.[23] Radi postizanja digitalne operativne otpornosti, predlaže se da društva uspostave i održavaju otporne IKT sisteme i alat koji minimizira uticaj IKT rizika; da kontinuirano identifikuju sve izvore IKT rizika; da uspostave zaštitne, preventivne i detektivne mere; da uspostave posvećene i sveobuhvatne politike za ostvarivanje kontinuiteta poslovanja i planove za vanredne situacije i oporavak kao integralni deo operativne politike kontinuiteta poslovanja. Regulativa sama po sebi ne nameće specifičnu standardizaciju, već se oslanja na evropske i međunarodno priznate tehničke standarde ili najbolje prakse u industriji.

1. Ciljevi i značaj DORA-e

U EU, DORA omogućava harmonizaciju u regulisanju digitalne operativne otpornosti.[24] Glavni cilj je otpornost finansijskog sektora, među ostalim i u operativnom smislu, kako bi se osigurala njegova tehnološka sigurnost i dobro funkcionisanje, brz oporavak od povreda i incidenata na području IKT-a, a time obezbedilo delotvorno i neometano pružanje finansijskih usluga u celoj EU, uz očuvanje poverenja potrošača u tržište.

Na taj način omogućava se konsolidacija i unapređenje zahteva u pogledu IKT rizika koji je do sada bio obuhvaćen operativnim rizikom u različitim pravnim aktima Unije (pa tako i Direktivom Solventnost II u osiguravajućim društvima). Iako su tim aktima obuhvaćene glavne kategorije finansijskih rizika (npr. kreditni rizik, tržišni rizik, rizik likvidnosti, rizik ponašanja na tržištu), njima u vreme donošenja nisu sveobuhvatno obrađene sve komponente operativne otpornosti. Odredbe koje se odnose na operativne rizike često su se zasnivale na tradicionalnom kvantitativnom pristupu upravljanju rizikom, te nisu bila obuhvaćena kvalitativna pravila za zaštitu, otkrivanje, ograničenje, oporavak, izveštavanje i digitalno testiranje u slučaju IKT napada. Konsolidovanjem i ažuriranjem različitih pravila o IKT rizicima, sve odredbe koje se odnose na digitalne rizike u finansijskom sektoru na ovaj način su dosledno objedinjene u jedinstveni zakonodavni akt. Na taj način DORA omogućava popunjavanje pravnih praznina i uklanjanje nedoslednosti u nekim prethodnim pravnim aktima, između ostalog u vezi s terminologijom koja se u njima upotrebljava. Ona izričito definiše IKT rizik, upravljanje IKT rizicima, izveštavanje o incidentima, testiranje

[22] Luís Barroso,„Fintechs: Concept, Level Playing Field and the Supervisory Approach", *Fintech Regulation and the Licensing Principle*, 2023, 43.
[23] P S. Krüger, J. P. Brauchle, 22
[24] J. R. Martínez Resano, 77.

operativne otpornosti i praćenje IKT rizika povezanog s trećim stranama. Na taj način podiže se i svest o IKT rizicima i ukazuje se na činjenicu da IKT incidenti i neadekvatna operativna otpornost mogu ugroziti stabilnost finansijskih subjekata.[25]

Donošenjem jedinstvenog zakonodavnog akta u pogledu digitalne operativne efikasnosti omogućava se da finansijski subjekti slede isti pristup i ista pravila u upravljanju IKT rizicima. Predložene odredbe imaće značajan uticaj na mere sajber bezbednosti koje preduzimaju osiguravajuća društva, takođe kroz uvođenje zahteva za sprovođenje penetracionih testova koji će uticati na njihov rad.[26] Prilikom primene tih pravila, osiguravajuća društva treba da uzmu u obzir veličinu i ukupni profil rizičnosti, te prirodu, opseg i složenost svojih usluga, aktivnosti i poslovanja (načelo proporcionalnosti). Doslednost će doprineti povećanju poverenja u rad osiguravajućih društava, kao i ceo finansijski sektor. Osim toga, omogućava se očuvanje stabilnosti, što je naročito značajno u periodu kada se poslovanje u velikoj meri oslanjanja na sisteme, platforme i infrastrukture IKT-a, što podrazumeva povećani digitalni rizik. Poštovanjem osnovne „digitalne higijene" trebalo bi izbeći nastajanje velikih troškova za privredu, smanjenjem učinka i troškova poremećaja u radu IKT-a na najmanju moguću meru.[27]

2. Uticaj na rad osiguravajućih društava

Osiguravajuća društva, kao i ostatak finansijskog sektora, biće u obavezi da primene te odredbe, što će zahtevati usklađivanje na svim nivoima društva. Osim što je neophodno da na nivou samog društva preduzmu sve mere za prevazilaženje IKT rizika (upravljanje rizikom, izveštavanje o incidentima, testiranje digitalne operativne otpornosti, razmena informacija), naročito značajno je što Uredba uspostavlja i zahteve koji se odnose na ugovorne aranžmane sklopljene s trećim licima koja pružaju IKT usluge, kao i pravila za saradnju između nadležnih tela i nadzor i izveštavanje koji sprovode. U skladu sa odredbama DORA-e, osiguravajuća društva koja nisu mikropreduzeća biće dužna da uspostave nezavisnu kontrolnu funkciju za upravljanje IKT rizicima i obezbede nadzor nad sprovođenjem ove funkcije, koja će biti odvojena od ostalih kontrolnih funkcija i funkcije unutrašnje revizije u skladu s modelom „tri linije odbrane" ili internim modelom upravljanja rizicima i kontrole nad njima.[28] Nezavisnost te kontrolne funkcije je značajna kako bi se izbegli sukobi interesa. Na taj način se jasno ukazuje na to da su, u današnjem digitalnom poslovanju, IKT rizici jedni od primarnih rizika kojima su društva izložena. Sam termin kontrolna funkcija ukazuje na značaj i odgovornost koju neka funkcija nosi. Međutim, bez obzira na

[25] DORA, recital 12.
[26] P. Pelc, 63.
[27] DORA, recital 13.
[28] DORA., čl. 6, st. 4.

obavezu uspostavljanja posebne funkcije za upravljanje IKT rizicima, odgovornost za sve dužnosti u vezi sa upravljanjem njima snosi uprava društva.[29]

Osim navedenog, osiguravajuća društva će, u skladu s principom proporcionalnosti, morati da uspostave funkciju za praćenje ugovornih aranžmana sklopljenih s pružaocima IKT usluga ili da imenuju člana višeg rukovodstva za takav nadzor. Kako bi se redovno evaluirala i pratila sposobnost da usluge pruža bez negativnih učinaka na digitalnu operativnu otpornost osiguravajućeg društva, trebalo bi uskladiti nekoliko ključnih ugovornih elemenata s pružaocima IKT usluga. Takvim usklađivanjem potrebno je da se obuhvate minimalna područja koja su ključna kako bi se društvu omogućilo potpuno praćenje rizika kojima bi moglo biti izloženo od treće strane koja društvu pruža IKT usluge. To je značajno radi očuvanja digitalne otpornosti društva koja je direktno zavisna od stabilnosti, funkcionalnosti, dostupnosti i sigurnosti IKT usluga koje prima.[30]

Potrebno je preduzeti odgovarajuće mere za upravljanje krizama i za sprovođenje strategije za IKT incidente. Od osiguravajućih društava očekuje se implementacija sveobuhvatnog okvira za upravljanje IKT rizicima kao deo celokupnog sistema upravljanja rizicima, uključujući strategije, politike, smernice, procedure, protokole i aplikacije neophodne za sveobuhvatnu i adekvatnu zaštitu svih informacionih i IKT resursa od štetnih uticaja svake vrste.[31] Kako bi bila u mogućnosti da prevaziđu te rizike, društva će morati da uspostave interne procese za otkrivanje, upravljanje i obaveštavanje o incidentima vezanim za IKT,[32] kao i programe za pregled sopstvene digitalne operativne stabilnosti. Na taj način biće u mogućnosti da procene spremnost, identifikuju slabosti, nedostatke ili praznine u digitalnoj operativnoj stabilnosti i implementiraju korektivne mere u ranim fazama.[33] Uredba predviđa punu odgovornost samog društva za pravilno postupanje sa incidentima i posledicama koje usled njega nastanu, bez obzira na pružanje relevantnih povratnih informacija ili opštih smernica od strane nadzornih organa kao meru nakon prijave incidenta.[34] Stoga, osiguravajuća društva biće u obavezi da uspostave mere procene rizika i bezbednosti, kao i da usvoje strategija za upravljanje IKT rizicima kako bi bila u mogućnosti da odgovore na izazove digitalnog okruženja u kome danas posluju.[35]

[29] P. Marano, M. Siri, 173.
[30] DORA, recital 68.
[31] DORA, čl. 6.
[32] DORA, čl. 17.
[33] DORA, čl. 24.
[34] DORA, čl. 22.
[35] Thorsten Ammann, Imran Syed, Vinny Sanchez, „Exploring Operational Resilience in Financial Services – the Effects of DORA on Risk and Regulation in Top 3 Financial Markets", *Computer Law Review International*, 2/2023, 44.

a) Upravljanje IKT rizicima

U savremenom digitalnom okruženju upravljanje IKT rizicima od strane osiguravajućih društava postalo je ključno kako bi društva ostala konkurenta i očuvala poverenje korisnika usluga osiguranja. U skladu sa odredbama Uredbe, upravljanje IKT rizicima sprovodi se kroz nekoliko međusobno povezanih faza: utvrđivanje rizika, zaštitu i sprečavanje, otkrivanje, odgovor i oporavak, učenje i razvoj i komunikaciju.

Da bi se uspešno upravljalo tim rizicima, neophodno je da društvo najpre utvrdi, klasifikuje, dokumentuje i vodi evidencije o svim poslovnim funkcijama koje se oslanjaju i koriste IKT-om. Osim toga, da sprovodi procenu rizika i utvrđuje konkretne izvore IKT rizika, procenjuje eventualne pretnje i ranjivosti i preispituje scenarije rizika. Imajući u vidu da Uredba posebnu pažnju posvećuje rizicima koji dolaze od strane trećih lica koja društvu pružaju IKT usluge, potrebno je utvrditi, dokumentovati i voditi evidencije za sve procese koji zavise od tih lica. U okviru te prve faze neophodno je najmanje jednom godišnje sprovoditi procenu rizika za sve zastarele IKT sisteme.[36]

Kada završe prvu fazu i utvrde rizike, od društava se očekuje da preduzmu sve mere prevencije od IKT rizika. Tokom te faze društvo treba da prati i kontroliše sigurnost i funkcioniranje IKT sistema i uticaj IKT rizika na taj sistem, da uspostavi politiku informacione sigurnosti, razvije pouzdanu strukturu za upravljanje mrežom i infrastrukturom. Takođe, radi sprečavanja nastanka IKT rizika, društva sprovode upravljačke, logičke i fizičke kontrole pristupa IKT imovini, mehanizme autentifikacije, dokumentovane politike, postupke i kontrole za upravljanje promenama IKT-a.[37]

U okviru treće faze koju Uredba naziva „otkrivanje" neophodno je da društvo uspostavi mehanizme za brzo otkrivanje neobičnih aktivnosti, da odredi pragove za upozorenja i kriterijume za aktiviranje i pokretanje procesa odgovora na IKT incidente, što uključuje i mehanizme za automatsko upozoravanje u slučaju izbijanja IKT incidenata.[38] Kada je ova faza završena, potrebno je da društvo bude u mogućnosti da odgovori na IKT incident i oporavi se od njega. Od posebnog značaja će biti obaveza uspostavljanja sveobuhvatne politike kontinuiteta poslovanja na području IKT-a, kao i uvođenje funkcije za upravljanje krizama koju moraju uspostaviti društva koja nisu mikropreduzeća i obaveza da nadzornom telu na zahtev dostave procenu godišnjih troškova i gubitaka koji su prouzrokovani IKT incidentima.[39]

Nakon što IKT incidenti izazovu poremećaje u poslovanju osiguravajućeg društva, važno je da se prikupe sve informacije i izvrši analiza slabostī društva, internet pretnji , IKT incidenata i napada, kao i kakav je njihov uticaj na digitalnu operativnu efikasnost društva. Osiguravajuća društva koja nisu mikropoduzeća na zahtev

[36] DORA, čl. 8.
[37] DORA, čl. 9.
[38] DORA, čl. 10.
[39] DORA, čl. 11.

obaveštavaju nadzorni organ o promenama koje su sprovedene u toku preispitivanja nakon IKT incidenata. Utvrđuje se da li je društvo postupalo u skladu s uspostavljenim postupcima, kao i da li su preduzete mere bile delotvorne. Neophodno je da društvo mapira razvoj IKT rizika, analizira učestalost, vrste, razmere i obrasce incidenata i napada, da sprovede edukaciju i osposobljavanje osoblja putem programa za podizanje svesti o sigurnosti na području IKT-a i digitalnoj operativnoj otpornosti, kao i da prati tehnološka dostignuća kako bi bolje razumelo na koji način ta dostignuća mogu uticati na zahteve u pogledu sigurnosti IKT-a i digitalnu operativnu otpornost.

Kao poslednja faza za upravljanje rizicima javlja se komunikacija koja se ostvaruje izradom planova komunikacije i objavom barem značajnih IKT incidenata ili ranjivosti klijentima, partnerskim finansijskim subjektima i javnosti, zavisno od slučaja. Komunikacione politike se razlikuju u zavisnosti od toga da li se radi o internim politikama ili je u pitanju komunikacija sa spoljnim partnerima, klijentima itd. Iz navedenog vidimo da DORA predviđa jedan sveobuhvatan sistem za upravljanje IKT rizicima, koji od društava zahteva kako uspostavljanje takvog sistema, tako i praćenje i analizu da li su konkretne mere i politike bile delotvorne. Ukoliko se ispostavi suprotno, od društva se očekuje da kontinuirano unapređuje sistem za upravljanje IKT rizicima. Imajući u vidu da se radi o rizicima koji se svakodnevno razvijaju, jedino takav pristup može obezbediti delotvorno upravljanje i prevazilaženje izazova koje digitalno poslovanje donosi osiguravajućim društvima i celom finansijskom sektoru.

b) Upravljanje, klasifikacija i izveštavanje u vezi sa IKT incidentima

DORA propisuje proces upravljanja, klasifikacije IKT incidenata i sajber pretnji, *izveštavanje* o značajnim IKT incidentima i *dobrovoljno obaveštavanje* o ozbiljnim sajber pretnjama.

U okviru procesa upravljanja IKT incidentima, osiguravajuća društva će morati da uspostave proces kojim će evidentirati, pratiti i preduzimati mere za sve IKT incidente i ozbiljne sajber pretnje i dokumentovati njihove uzroke. To obuhvata uspostavljanje sistema za rano upozoravanje, klasifikaciju i kategorisanje IKT incidenata prema ozbiljnosti, zahvaćenosti ključnih usluga, aktivaciju uloga, odgovornosti i planova za unutrašnju i spoljnu komunikaciju, rešavanje prigovora korisnika, izveštavanje višeg rukovodstva barem o značajnim IKT incidentima i uspostavljanje načina odgovora na IKT incidente.[40]

Za klasifikaciju IKT incidenata i sajber pretnji (broj, učinak, trajanje, raširenost, gubitak podataka, ključnost, ekonomski učinak), pripremljen je zajednički nacrt Regulatornih tehničkih standarda (RTS) u kojem su bliže opisani kriterijumi za klasifikaciju IKT incidenata i sajber pretnji, procenu relevantnosti njihovog značaja i ozbiljnosti.[41]

[40] DORA, čl. 17.

[41] Draft Regulatory Technical Standards to Further Harmonise ICT Risk Management Tools, Methods, Processes and Policies as Mandated Under Articles 15 and 16(3) of Regulation (EU) 2022/2554, JC 2023 86, 2024, https://www.esma.europa.eu/sites/default/files/2024-01/JC_2023_86_-_Final_report_on_draft_RTS_on_ICT_Risk_Management_Framework_and_on_simplified_ICT_Risk_Management_Framework.pdf, 25. 7. 2024.

Kada je u pitanju izveštavanje o IKT incidentima, DORA pravi razliku između *obaveznog izveštavanja* o značajnim IKT incidentima i *dobrovoljnog obaveštavanja* o ozbiljnim sajber pretnjama, ako društvo smatra da je pretnja relevantna za finansijski sektor. U proces izveštavanja i dobrovoljnog obaveštavanja uključeni su i korisnici usluga koje će osiguravajuće društvo obavezno izveštavati kada je incident takav da utiče na njihove finansijske interese. To je u skladu sa glavnim ciljem koji je postavljen pred osiguravajuća društva, a to je zaštita korisnika usluga osiguranja. Za dugoročno poslovanje tih društava vrlo je značajno da održe dobru poslovnu reputaciju i poverenje korisnika usluga, što je moguće jedino ukoliko ih obaveštavaju o svim pitanjima značajnim za zaštitu njihovih interesa. U slučaju ozbiljne sajber pretnje, važno je da društvo obavesti i klijente, koji bi mogli biti pogođeni, i da ih pouči o odgovarajućim zaštitnim merama čije bi preduzimanje mogli razmotriti.

Izveštavanje koje osiguravajuće društvo sprovodi u odnosu na nadzorni organ se sastoji se od :

- *početnog obaveštenja;*
- *prelaznog izveštaja* (čim se status izvornog incidenta znatno promeni ili se postupanje u vezi sa značajnim IKT incidentom promeni na osnovu novih dostupnih informacija);
- *ažurirana obaveštenja* (prema potrebi, svaki put kad se pojave relevantne novosti o statusu, kao i na izričit zahtev nadzornog organa);
- *završnog izveštaja*.

Nadzorno telo je u obavezi da obavesti EIOPA-u koja procenjuje značaj IKT incidenta i u zavisnosti od sopstvene procene dalje izveštava nadležne regulatore odnosno tela država članica radi preduzimanja mera u cilju očuvanja stabilnosti finansijskog sektora.[42] Za potrebe izveštavanja ESA je izradila zajednički nacrt RTS-ova kojima će detaljnije odrediti sadržaj i rokove izveštavanja i obaveštavanja, kao i standardne šablone, obrasce i postupke za izveštavanje o značajnim IKT incidentima i obaveštavanje o ozbiljnim sajber pretnjama.[43] Osim toga, DORA obavezuje ESA-u da do 17. 1. 2025. izrade zajednički izveštaj u kom će proceniti mogućnost centralizacije izveštavanja o značajnim incidentima kroz uvođenje jedinstvenog centra za izveštavanje o značajnim IKT incidentima.[44]

[42] DORA, čl. 19.

[43] Draft Regulatory Technical Standards on the Content of the Notification and Reports for Major Incidents and Significant Cyber Threats And Determining the Time Limits for Reporting Major Incidents and Draft Implementing Technical Standards on the Standard Forms, Templates and Procedures for Financial Entities to Report a Major Incident and to Notify a Significant Cyber Threat, https://www.esma.europa.eu/sites/default/files/2024-07/JC_2024-33_-_Final_report_on_the_draft_RTS_and_ITS_on_incident_reporting.pdf, 20. 7. 2024.

[44] DORA, čl. 20.

Obaveštenje pruža veću šansu za bolje razumevanje i identifikaciju izvora incidenta, analizu potencijalnih posledica i traženje pomoći. Brzo obaveštavanje o incidentu može takođe pomoći drugim institucijama da se bolje pripreme za slične napade.[45] Na taj način omogućilo bi se brzo reagovanje u slučaju IKT incidenta, na nivou cele EU, i značajno bi se olakšalo upravljanje IKT incidentima, što bi bilo od ogromnog značaja imajući u vidu da su ovakvi incidenti sve češći, kao i da mogu značajno poremetiti funkcionisanje celog finansijskog sektora.

v) Testiranje digitalne operativne otpornosti

U skladu sa odredbama Uredbe, sastavni deo okvira za upravljanje IKT rizicima, incidentima i pretnjama jeste izrada programa testiranja digitalne operativne otpornosti. To obuhvata procenu i skeniranje ranjivosti, mrežne sigurnosti, fizičke sigurnosti, testiranje kompatibilnosti, performansi, integralno testiranje itd. Sprovođenje testiranja može sprovesti nezavisni spoljni ili unutrašnji izvršilac testiranja. Ako se testiranje sprovodi interno, mora se obezbediti nezavisnost, s ciljem izbegavanja sukoba interesa u fazama osmišljavanja i sprovođenja testiranja. Neophodno je da osiguravajuća društva najmanje jednom godišnje sprovedu test IKT sistema i aplikacija kojima se podupiru ključne ili važne funkcije.[46] Osim toga, društva koja nisu mikropreduzeća biće dužna da svake tri godine (učestalost se može smanjiti, ali i povećati u zavisnosti od zahteva nadzornog organa) sprovedu napredna testiranja IKT sistema, alata i procesa na temelju TLPT-a (Threat-Led Penetration Testing).[47] Osiguravajuće društvo mora da proceni koje ključne i važne funkcije će biti obuhvaćene tim testiranjem (funkcije čiji bi poremećaj bitno narušio finansijske rezultate ili sposobnost kontinuiranog ispunjavanja uslova i obaveza društva), a rezultate ove procene potvrđuje nadzorni organ, dok će se sažetak rezultata testiranja dostavljati i određenom jedinstvenom telu javne vlasti koje određuju države članice. Za potrebe sprovođenja naprednog testiranja na osnovu TLPT-a moći će da se angažuju samo odgovarajuća lica unutar ili van društva koja ispunjavaju posebne zahteve i kriterijume koje je propisala DORA, ali i zahteve, standarde i kriterijume povezane s ovim testiranjem koje će izraditi ESA. Na taj način DORA propisuje *fit and proper* uslove koje mora ispunjavati izvršilac koji obavlja testiranje.

[45] Dirk Clausmeier, „Regulation of the European Parliament and the Council on Digital Operational Resilience for the Financial Sector (DORA)", *International Cybersecurity Law Review,* 4/2023, 85.

[46] DORA, čl. 24.

[47] DORA, čl. 26; Ovo testiranje omogućava da se utvrdi kako trenutne pretnje mogu uticati na kritične poslovne funkcije. TLPT je mehanizam za verifikaciju stvarne otpornosti društva koji je ključan za funkcionisanje celog finansijskog sektora.

g) Upravljanje IKT rizikom povezanim s trećim stranama, aranžmani za razmenu informacija i nadzorni organi

DORA poseban fokus stavlja na upravljanje IKT rizikom povezanim s trećim licima, što ne predstavlja potpunu novinu za osiguravajuća društva imajući u vidu da su i do sada imala mogućnost „izdvajanja" (outsourcing) ključnih odnosno važnih poslovnih funkcija. DORA opširno i detaljno reguliše ključna načela dobrog poslovnog upravljanja IKT rizikom povezanog s trećim licima, kao i nadzorni okvir za treća lica koja pružaju IKT usluge. Imajući u vidi da se nove odredbe o digitalnoj operativnoj efikasnosti odnose i na ta lica, ona su barem indirektno pogođena istim regulatornim zahtevima kao i sama osiguravajuća društva. Kao posledica toga, od njih će se zahtevati da ponovo prilagode svoje standardne ugovorne uslove i usluge u skladu sa zahtevima koje postavlja DORA ukoliko žele da zadrže ili čak prošire svoju bazu klijenata.[48]

DORA uređuje razmenu informacija među finansijskim subjektima koje se odnose na sajber pretnje, uključujući pokazatelje ugroženosti, taktike, tehnike i postupke, sigurnosna upozorenja i konfiguracioni alat. Osiguravajuća društva biće u obavezi da obaveštavaju nadzorni organ o učestvovanju u takvim aranžmanima za razmenu informacija.

Uredba navodi spisak nadzornih tela za sve subjekte u finansijskom sektoru i uređuje njihovu međusobnu saradnju, saradnju sa glavnim nadzornim telom i telom osnovanim u skladu sa NIS 2 Direktivom. Takođe, uspostavlja mehanizme za razmenu primera iz prakse koji su se pokazali delotvornim i propisuje ovlašćenja za nadzor, istrage i sankcije potrebne za izvršavanje propisanih zadataka, ovlašćenja izricanja administrativnih kazni i korektivnih mera i objavu administrativnih kazni. Osim navedenog, reguliše dužnost obaveštavanja Komisije, ESMA-e, EBA-e i EIOPA-e o zakonima i propisima kojima se omogućava primena novih odredaba digitalne operativne efikasnosti, čuvanja poslovnih tajni i zaštiti podataka.

Interesantno je da DORA, iako predviđa različite nadzorne i istražne mere, kao i mogućnost izricanja sankcija od stane nadzornog organa kako bi se prisilili adresati novih odredaba da se pridržavaju pravnog i regulatornog okvira, ne pruža eksplicitne novčane kazne ili druge krivične sankcije za nepoštovanje zahteva osim za treća lica koja pružaju IKT usluge.[49] U tom pogledu, regulacija se razlikuje od Opšte uredbe o zaštiti podataka (GDPR)[50] i NIS-2 Direktive.[51] Umesto toga, prema članu 50 DORA-e, članicama EU ostavljeno je da odrede administrativne kazne

[48] T. Ammann, I. Syed, V. Sanchez, 44.

[49] DORA, čl. 35.

[50] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *Official Journal of the European Union L 119/1* – GDPR.

[51] Gde su propisane novčane kazne do najvećeg iznosa od 20.000.000 € ili 4 % ukupnog godišnjeg prihoda u prethodnoj finansijskoj godini.

i krivične sankcije za nepoštovanje odredaba u svojim nacionalnim zakonima. Za sada je nejasno kako će članice EU sprovesti te odredbe, ali na ovaj način može doći do nekonzistentnog tretmana.[52]

DORA donosi niz izazova za poslovanje osiguravajućih društava, ali osiguravajuća društva koja budu uspela da se izbore sa ovim izazovima biće dobro pozicionirana za kontinuirani napredak u sve digitalnijem finansijskom i poslovnom okruženju.[53]

VI Zaključak

Poslovanje osiguravajućih društava u digitalnom okruženju predstavlja dinamičan i sveobuhvatan proces transformacije koji obuhvata tehnološke inovacije, promene u poslovnim modelima i prilagođavanje novim očekivanjima klijenata. Digitalizacija osiguravajućim društvima omogućava povećanje efikasnosti, smanjenje troškova, te poboljšanje korisničkog iskustva kroz brže i personalizovanije usluge. Međutim, imajući u vidu da takvo poslovanje sa sobom nosi i niz rizika, a da je potrebno prevazići fragmentaciju tržišta koja nastaje usled različitih zakonodavnih rešenja zemalja članica, na nivou EU doneta je DORA. Uopšteno gledano, DORA predstavlja značajan korak napred u poboljšanju digitalne operativne otpornosti osiguravajućih društava, kao i ostalih finansijskih institucija u EU. Međutim, ona pred ta društva postavlja i značajne izazove, uključujući potrebu za proširenjem sposobnosti njihove operativne otpornosti, uspostavljanjem posebne kontrolne funkcije za upravljanje IKT rizicima, unapređenjem sposobnosti izveštavanja o incidentima i razvojem sofisticiranijih metoda testiranja i analize scenarija. Osim toga, kompanije će morati značajno da ulažu u edukaciju osoblja, unapređenje komunikacije sa partnerima, klijentima, nadzornim telom.

Da bi uspešno primenila novu regulativu, osiguravajuća društva treba da preduzmu niz koraka. Najpre je potrebno da investiraju u IT infrastrukturu jer samo kontinuirana ulaganja u modernu i sigurnu IT infrastrukturu mogu obezbediti uspešnu digitalnu transformaciju. Osim toga neophodno je da izvrše obuke zaposlenih kako bi omogućili bolje razumevanje i primenu sigurnosnih mera i procedura. Dodatno im primenu može olakšati saradnja i angažovanje eksternih stručnjaka, što će olakšati i identifikaciju i otklanjanje slabosti u sigurnosnim sistemima. Redovno testiranje otpornosti i simulacije incidenta omogućavaju bolje pripreme za realne pretnje.

Osiguravajuća društva koja uspešno integrišu digitalne tehnologije u svoje poslovanje imaju potencijal da značajno unaprede svoju konkurentnost na tržištu, te da pruže kvalitetnije i efikasnije usluge svojim klijentima. Digitalno okruženje ne

[52] T. Ammann, I. Syed, V. Sanchez, 45.

[53] Pavel Gusiv, *Development of a Compliance Gap Analysis Method For The Digital Operational Resilience Act (DORA)*, master rad, Lapland University of Applied Scciences, 2023, 29.

samo da transformiše način na koji posluju već i otvara nove prilike za inovacije i rast u delatnosti osiguranja. U tom aspektu, postojanje detaljne regulative za obezbeđivanje digitalne operativne otpornosti biće im od posebnog značaja.

Literatura

- Ammann, T., Syed, I., Sanchez, V., „Exploring Operational Resilience in Financial Services – the Effects of DORA on Risk and Regulation in Top 3 Financial Markets", *Computer Law Review International*, 2/2023, 43-48.
- Barroso, L., „Fintechs: Concept, Level Playing Field and the Supervisory Approach", *Fintech Regulation and the Licensing Principle*, 2023, 25-44.
- Clausmeier, D., „Regulation of the European Parliament and the Council on Digital Operational Resilience for the Financial Sector (DORA)", *International Cybersecurity Law Review,* 4/2023, 79-90.
- Draft Regulatory Technical Standards on the Content of the Notification and Reports for Major Incidents and Significant Cyber Threats and Determining the Time Limits for Reporting Major Incidents and Draft Implementing Technical Standards on the Standard Forms, Templates and Procedures for Financial Entities to Report a Major Incident and to Notify a Significant Cyber Threat, https://www.esma.europa.eu/sites/default/files/2024-07/JC_2024-33_ _Final_report_on_the_draft_RTS_and_ITS_on_incident_reporting.pdf, 20.07.2024.
- Draft Regulatory Technical Standards to Further Harmonise ICT Risk Management Tools, Methods, Processes and Policies as Mandated Under Articles 15 And 16(3) of Regulation (EU) 2022/2554, JC 2023 86, 2024, https://www.esma.europa.eu/sites/default/files/2024-01/JC_2023_86_-_Final_report_on_draft_RTS_on_ICT_Risk_Management_Framework_and_on_simplified_ICT_Risk_Management_Framework.pdf, 25.07.2024.
- European Insurance and Occupational Pensions Authority (EIOPA), *Smernice o sigurnosti i upravljanju u području informacijskih i komunikacijskih tehnologija,* EIOPA-BoS-20/600.
- Federal Financial Supervisory Authority (Bafin), „Supervisory Requirements for IT in Insurance Undertakings", 2022.
- Grima, S., Marano, P., „Designing a Model for Testing the Effectiveness of a Regulation: The Case of DORA for Insurance Undertakings", *Risks*, 9/2021, 206-217.
- Gusiv, P., Development of a Compliance Gap Analysis Method For the Digital Operational Resilience Act (DORA), master rad, Lapland University of Applied Scciences, 2023.

- Kourmpetis, S., „Management of ICT Third Party Risk Under the Digital Operational Resilience Act", *Digitalisation, Sustainability, and the Banking and Capital Markets Union*, Palgrave Macmillan, 2023, 211-226.
- Krüger, P. S., Brauchle, J.P., *The European Union, Cybersecurity, and the Financial Sector: A Primer*, Cyber Policy Initiative Working Paper Series – „Cybersecurity and the Financial System", Carnegie Endowment for International Peace , 2021.
- Kočević, J. et al., „Pravci razvoja tržišta osiguranja", *Tokovi osiguranja*, 3/2024, 536-548.
- Marano, P., Siri, M., „Regulating Insurtech in The European Union", *Journal of Financial Transformation,* 2021, 166-177.
- Martínez Resano, J. R., „Digital Resilience and Financial Stability – the Quest for Policy Tools in the Financial Sector", *Revista de Estabilidad Financiera*, 2022, 59-88.
- Pelc, P., „The Role of Cybersecurity in the Public Sphere - the European Dimension. Financial Institutions", in: *The Role of Cybersecurity in the Public Sphere – The European Dimension* (eds. K. C. Jentkiewicz, I. Hoffman), Maribor, 2022, 59-69.
- Risimović, M. Đurić, Z., Đurić, N. „Poslovanje sektora osiguranja u Republici Srbiji u uslovima pandemije kovida 19", *Tokovi osiguranja*, 1/2022, 111-148.
- Senabre, S., Soto, I. Munera, J., „Strengthening the Cyber Resilience of the Financial Sector - Developments and Trends", Financial Stability Review, 2021, 86-102.

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INSURANCE COMPANIES BUSINESS IN A DIGITAL ENVIRONMENT – WHAT DOES DORA BRING?

REVIEW PAPER

Abstract

The operation of insurance companies offers a range of advantages in a digital environment, such as accelerated transactions, easier access to insurance services, and cost reduction. However, they also carry the risk of ICT (Information and Communication Technology) risks and cyber attacks. In order to overcome the discrepancies in the national legislations of EU member states and the fragmentation of the financial market, the Digital Operational Resilience Act, known as DORA, was adopted.

In this paper, the author aims to highlight the challenges that insurance companies face in a digital environment, the current regulation regarding ICT risk management, and the difficulties that both states and insurers may expect during the implementation of DORA's provisions. It should be noted that this approach also enables the protection of insurance customers, which is the main goal of EU insurance regulation (Solvency II).

Keywords: DORA, digital environment, digital operational resilience, ICT risk, cyber incidents, EIOPA.

I Introduction

Historically, the financial sector has been highly proactive in utilizing information technologies to develop new business models and optimize internal

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processes. In recent years, the digital transformation process has accelerated significantly, becoming crucial for the survival of companies operating in the financial market for many reasons. Firstly, customer expectations have evolved, with increasing demand for flexible, personalized services that are instantly accessible anytime and anywhere. Additionally, the economic environment has impacted financial institutions, prompting them to adapt their business models, introduce new services in search of alternative revenue streams, and improve internal efficiency to reduce costs. This approach enhances system capacity while reducing costs.

As a result of this transformation, insurance companies, being part of the financial sector, have become entirely dependent on their technology, which is no longer merely a tool for streamlining operations, but also a key differentiating and competitive factor. On the other hand, despite numerous advantages, the high degree of digitalization increases the risk of cyber incidents. Various other factors contribute to this growing risk, including the complexity of the technological environment of most financial institutions, which makes it challenging for them to maintain an effective control framework and increases their vulnerability.

It is important to note the following: to implement these digital transformation processes and gain access to technological innovations that best support their operations, insurance companies often rely on external service providers and third-party products. Consequently, the resilience and cybersecurity of these third parties, particularly service providers, have become just as critical as the resilience of the insurance companies themselves, as incidents affecting these providers can impact the entire sector.[2]

Although some research suggests that the financial sector is among the best-equipped industries for managing cyber and ICT risks, partly due to stringent regulation and oversight, cyber resilience among market participants remains inconsistent. The financial sector has been a primary target for cyberattacks, prompting regulators and supervisory authorities to recognize the need for mitigating and managing ICT risks while working to enhance the overall resilience and stability of the financial system.[3] However, the security measures and controls implemented within companies, especially smaller ones, are often insufficient for managing the new cyber and ICT risks that have emerged during the COVID-19 pandemic. Therefore, it is not surprising that insurance companies, which are part of a sector with a high concentration of small institutions, have recorded the most significant increase in cyberattacks.[4] The specific nature of cyber threats, typically cross-border

[2] S. Senabre, I. Soto, J. Munera, „Strengthening the Cyber Resilience of the Financial Sector - Developments and Trends", *Financial Stability Review*, 2021, 89-90.

[3] P. S. Krüger, J.P. Brauchle, *The European Union, Cybersecurity, and the Financial Sector: A Primer*, Cyber Policy Initiative Working Paper Series – „Cybersecurity and the Financial System", Carnegie Endowment for International Peace, 2021, 6.

[4] S. Senabre, I. Soto, J. Munera, 90.

and not confined to specific jurisdictions, has led to the internationalization of both cyberattacks and response measures, as well as their global impact (both direct and indirect through the "contagion effect"). In this context, the European Union has become increasingly active in developing legal regulations aimed at creating digital operational resilience for companies.[5] Among the most significant regulatory measures is the NIS 2 Directive,[6] followed by the Digital Operational Resilience Act (DORA),[7] which serves as a *lex specialis* and will become mandatory for all financial sector entities starting in 2025.

II Concept of Digital Operational Resilience

Digital operational resilience refers to a company's ability to build, maintain, and reassess its operational integrity and reliability, ensuring the security of the networks and information systems it uses through the application of ICT services, thereby enabling the continuous provision and quality of financial services. The importance of digital resilience is a natural outcome of advancements in digitalization and two interconnected challenges, cyber and ICT risks.[8] The proposed EU regulation will require insurance companies to establish internal governance and control frameworks capable of ensuring effective and prudent management of ICT risks. Although this obligation will be delegated to a specific function within the insurance company, the management will remain responsible for any shortcomings, given its duty to approve and oversee the management of these risks.[9] DORA aims to introduce a harmonized and comprehensive framework for the digital operational resilience of European financial institutions, explicitly outlining requirements for addressing and mitigating ICT and cyber risks. This is a direct response to the joint recommendations of the European Supervisory Authorities (ESA). The ESA has identified four areas of focus for regulatory development in the near future: first, requirements for ICT security and risk management; second, sector-specific requirements for reporting

[5] P. Pelc, „The Role of Cybersecurity in the Public Sphere – The European Dimension. Financial Institutions", in: *The Role of Cybersecurity in the Public Sphere – The European Dimension* (eds. K. C. Jentkiewicz, I. Hoffman), Maribor, 2022, 60.

[6] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive).

[7] Regulation (EU) 2022/2554 of the European Parliament And of The Council Of 14 December 2022 on Digital Operational Resilience For The Financial Sector And Amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011, *Official Journal of the European Union L333/1* - DORA.

[8] J. R. Martínez Resano, „Digital Resilience and Financial Stability - The Quest For Policy Tools in The Financial Sector", *Revista de Estabilidad Financiera*, 2022, 65.

[9] P. Marano, M. Siri, „Regulating Insurtech in The European Union", *Journal of Financial Transformation,* 2021, 173.

cyber incidents; third, direct oversight and supervision of third-party service providers; and fourth, a framework for testing cyber resilience. DORA regulates all these issues and provides potential responses and solutions to current legal gaps.[10]

III The Operation of Insurance Companies in the Digital Environment

Technological advancements and the development of digital technologies enable insurance companies to improve their operations and enhance customer experience. Digitalization primarily allows for the analysis of vast amounts of data, which becomes crucial for making informed decisions in the insurance sector. By analyzing historical data, insurance companies can assess risks more accurately and tailor policies, thus facilitating the personalization of offerings to customers. Based on user behavior data, it is possible to create customized insurance policies that are tailored to the specific needs of individual clients. Another significant advantage is the optimization of the claims processing procedure, as automating data analysis speeds up the claims processing and reduces the time required to resolve requests. Additionally, the use of AI and digital platforms enables automated processing of claims, decreasing the need for human intervention. AI algorithms can analyze behavioral patterns and identify suspicious activities, thereby reducing the risk of fraud. Most importantly, considering that customer trust in insurance services is central to all activities of insurance companies, this approach facilitates an improvement in customer support. However, while digitalization brings many advantages, it also presents substantial challenges for insurance companies. Given that they handle large volumes of sensitive data, including personal and financial information of their clients, protecting this data from cyberattacks has become a critical priority. Incidents highlight how vulnerable insurance companies are to cyber threats, which can lead to a loss of customer trust and significant financial losses. Therefore, managing ICT risks and cybersecurity represent one of the key responsibilities and objectives in business today. During the process of adapting to changes in business, compliance with numerous and often changing regulations will be required, along with investments in modern IT infrastructure and its maintenance, continuous investment in system upgrades, and employee training. Adjusting to digital transformation necessitates a change in corporate culture, and establishing an innovative and flexible work environment is crucial for the success of digital transformation.

IV Managing ICT Risks in Insurance Companies

The speed at which the IT environment is changing and evolving daily exposes the insurance market and its environment to new risks. Timely risk control

[10] P. S. Krüger, J.P. Brauchle, 4.

measures must be continuously evaluated to ensure they remain effective in identifying and managing the risks these companies face.[11] The Solvency II Directive[12] came into force in 2016 to harmonize insurance regulation within the EU. However, it does not explicitly regulate ICT risks and cybersecurity, but addresses them implicitly as part of operational risks. Article 41 of the Solvency II Directive requires insurance companies to establish an effective management system that allows for the prudent management of business operations. These companies must take reasonable steps to ensure continuity in their activities, including developing contingency plans. Insurance firms „must implement appropriate and proportional systems, resources, and procedures". In accordance with Article 44, as part of the management system, they shall „have in place an effective risk-management system... to identify, measure, monitor, manage, and report, on a continuous basis the risks, at an individual and at an aggregated level, to which they are or could be exposed, and their interdependencies". In this way, the Directive governs the management of all risks to which a company is exposed, without explicitly analyzing ICT risks. Given that European regulations concerning insurance undertakings do not specifically address proper management of ICT and cyber risks, the regulations of member states often differ significantly. While some countries, such as Germany, have specific requirements for ICT security and management in the insurance sector,[13] other countries don't have any regulation on this matter. This points out a strong need for harmonization of European regulations regarding the management and overcoming of these risks.[14]

European supervisory authorities (ESA), as previously mentioned, conclude that the current fragmented regulatory and supervisory landscape can lead to inconsistent practices across Europe and jeopardize fair competition. Therefore, it is proposed that general requirements for managing ICT risks and ensuring cybersecurity should be established in relevant subsectors to create conditions for the secure provision of services. Such harmonization would help promote greater ICT security and cybersecurity. In this regard, the European Insurance and Occupational Pensions Authority (EIOPA) has published Guidelines on Security and Management in the field of Information and Communication Technologies (EIOPA Guidelines).[15] The EIOPA Guidelines cover areas such as ICT risk management, ICT strategy, information security

[11] S. Grima, P. Marano, „Designing a Model for Testing the Effectiveness of a Regulation: The Case of DORA for Insurance Undertakings", *Risks*, 2021, 2.

[12] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Official Journal of the European Union – Solvency II.

[13] Federal Financial Supervisory Authority (Bafin), „Supervisory Requirements for IT in Insurance Undertakings", 2022.

[14] P. S. Krüger, J.P. Brauchle, 16-17.

[15] European Insurance and Occupational Pensions Authority (EIOPA), *Guidelines on Security and Management in the field of Information and Communication Technologies*, EIOPA-BoS-20/600 – EIOPA Guidelines.

policies and measures, ICT operational security, ICT operations management, change management in ICT, response and recovery plans, etc. They were developed based on the Guidelines of the European Banking Authority (EBA)[16] to ensure consistency among subsectors. These guidelines require the management of the company to ensure that ICT and security risks are appropriately managed through risk management systems and internal control systems. Additionally, the company must ensure that the number of members and their skills (*fit and proper*) are adequate to support the operational needs in the area of ICT, ICT risk management, and security risks on a continuous basis, to ensure the implementation of the ICT strategy.[17] The principle of proportionality also applies here, i.e. the right of companies to apply the EIOPA Guidelines in a manner consistent with the nature, scope, and complexity of the risks to which they are exposed. Insurance undertakings should establish information security training programs for all employees, including board members, to ensure they are equipped to carry out their duties and responsibilities. Furthermore, they should organize and implement periodic security awareness programs on how to handle information security-related risks.[18]

V DORA in Insurance Companies

As previously mentioned, the COVID-19 pandemic and its impact on business operations accelerated digitalization. Facing regulatory fragmentation, the EU decided to introduce DORA. DORA represents a harmonized EU approach to replace what has been termed "uncoordinated national initiatives".[19] The regulation establishes unified requirements regarding the security of network and information systems that support the business processes of financial entities, essential for achieving a high common level of digital operational resilience.[20] With the DORA proposal, the European Commission directly responded to the ESA's recommendations. Recognizing the risks arising from the lack of detailed and comprehensive regulations in this area, the proposal suggests that DORA should have a broad scope, covering almost all financial institutions across all three subsectors.[21] To achieve digital operational

[16] EBA Guidelines on ICT Risk Management and Security Risks, EBA/GL/2019/04 https://www.eba.europa.eu/sites/default/files/document_library/Publications/Guidelines/2020/GLs%20on%20ICT%20and%20security%20risk%20management/Updated%20Translations/880816/Final%20draft%20Guidelines%20on%20ICT%20and%20security%20risk%20management_COR_HR.pdf, 10.07.2024.

[17] EIOPA Guidelines, Guideline 2.

[18] EIOPA Guidelines, Guideline 13.

[19] S. Kourmpetis, „Management of ICT Third Party Risk Under the Digital Operational Resilience Act", *Digitalisation, Sustainability, and the Banking and Capital Markets Union*, Macmillan, 2023, p. 220.

[20] L. Barroso, „Fintechs: Concept, Level Playing Field and the Supervisory Approach", *Fintech Regulation and the Licensing Principle*, 2023, 43.

[21] P. S. Krüger, J. P. Brauchle, p. 22.

resilience, companies are expected to establish and maintain robust ICT systems and tools that minimize the impact of ICT risks; continuously identify all sources of ICT risks; implement protective, preventive, and detective measures; and establish dedicated and comprehensive policies for business continuity, including contingency and recovery plans as an integral part of operational continuity policies. The regulation itself does not impose specific standardization but relies on European and internationally recognized technical standards and best industry practices.

1. Objectives and Importance of DORA

In the EU, DORA enables the harmonization of regulations concerning digital operational resilience.[22] The main goal is to ensure the resilience of the financial sector, particularly in operational terms, to guarantee its technological security, efficient functioning, and rapid recovery from ICT-related breaches and incidents. This ensures the effective and uninterrupted provision of financial services across the EU while maintaining consumer confidence in the market.

This approach enables the consolidation and enhancement of requirements related to ICT risk, which had previously been classified under operational risk in various EU legal acts (including the Solvency II Directive for insurance companies). While these legal frameworks addressed key categories of financial risks (such as credit risk, market risk, liquidity risk, and market conduct risk), they did not comprehensively cover all components of operational resilience at the time of their adoption. Provisions related to operational risks were often based on a traditional quantitative risk management approach, lacking qualitative rules for protection, detection, mitigation, recovery, reporting, and digital testing in case of ICT attacks. By consolidating and updating various rules on ICT risks, all provisions related to digital risks in the financial sector are consistently integrated into a single legislative act. In this way, DORA helps fill legal gaps and eliminate inconsistencies in previous legal acts, including issues related to terminology. It explicitly defines ICT risk, ICT risk management, incident reporting, operational resilience testing, and the monitoring of ICT risks associated with third parties. As a result, it raises awareness of ICT risks and highlights the fact that ICT incidents and inadequate operational resilience can jeopardize the stability of financial entities.[23]

By adopting a unified legislative act regarding digital operational efficiency, financial entities can follow the same approach and rules in managing ICT risks. The proposed provisions will have a significant impact on the cybersecurity measures taken by insurance undertakings, including the introduction of requirements for

[22] J. R. Martínez Resano, 77.
[23] DORA, recital 12.

conducting penetration tests, which will affect their operations.[24] In applying these rules, insurance undertakings should consider their size and overall risk profile, as well as the nature, scope, and complexity of their services, activities, and operations (principle of proportionality). Consistency will contribute to increasing trust in the operations of insurance undertakings and the entire financial sector. Furthermore, it helps preserve stability, which is particularly important at a time when business heavily relies on ICT systems, platforms, and infrastructure, leading to increased digital risk. Adhering to basic "digital hygiene" should help avoid significant costs for the economy by minimizing the impact and costs associated with disruptions in ICT operations.[25]

2. Impact on the Operations of Insurance Companies

Insurance companies, like the rest of the financial sector, will be obliged to implement these provisions, which will require compliance at all levels of the undertaking. In addition to taking all necessary measures at the organizational level to address ICT risks (risk management, incident reporting, testing digital operational resilience, and information sharing), it is particularly significant that the Regulation establishes requirements concerning contractual arrangements with third parties providing ICT services, as well as rules for cooperation between competent authorities and oversight and reporting they carry out. According to the provisions of DORA, insurance companies that are not micro-enterprises will be obliged to establish an independent control function for managing ICT risks and ensure oversight of the implementation of this function, which must be separate from other control functions and internal audit functions in accordance with the "three lines of defense" model or an internal risk management and control model.[26] The independence of this control function is crucial to avoid conflicts of interest. This clearly indicates that, in today's digital business environment, ICT risks are among the primary risks that companies face. The very term control function points out the significance and responsibility that such a function carries. However, regardless of the obligation to establish a dedicated function for managing ICT risks, the responsibility for all duties related to managing these risks rests with the company's management.[27]

In addition to the above, insurance companies will, in accordance with the principle of proportionality, need to establish a function for monitoring contractual arrangements made with ICT service providers or appoint a senior management member for such oversight. In order to regularly evaluate and monitor the ability

[24] P. Pelc, 63.
[25] DORA, recital 13.
[26] DORA, Article 6, Paragraph 4.
[27] P. Marano, M. Siri, 173.

to provide services without negative effects on the digital operational resilience of the insurance company, several key contractual elements should be aligned with ICT service providers. Such alignment needs to cover the minimum areas that are crucial to enable the company to fully monitor the risks it may be exposed to from third parties providing ICT services. This is significant for maintaining the digital resilience of the company, which is directly dependent on the stability, functionality, availability, and security of the ICT services it receives.[28]

It is necessary to take appropriate measures for crisis management and for implementing a strategy for ICT incidents. Insurance companies are expected to implement a comprehensive framework for managing ICT risks as part of the overall risk management system, including strategies, policies, guidelines, procedures, protocols, and applications necessary for comprehensive and adequate protection of all information and ICT resources from harmful impacts of any kind.[29] To be able to overcome these risks, companies will need to establish internal processes for detecting, managing, and reporting ICT-related incidents,[30] as well as programs for reviewing their own digital operational stability. In this way, they will be able to assess readiness, identify weaknesses, deficiencies, or gaps in digital operational stability, and apply corrective measures at early stages.[31] The regulation provides for the full responsibility of the company itself for properly handling incidents and the consequences arising from them, regardless of the provision of relevant feedback or general guidance from supervisory authorities as a measure following the reporting of an incident.[32] Therefore, insurance companies will be obliged to establish measures for risk and security assessment, as well as to adopt strategies for managing ICT risks to be able to respond to the challenges of the digital environment in which they operate today.[33]

2.1. Management of ICT Risks

In the modern digital environment, the management of ICT risks by insurance companies has become crucial for remaining competitive and maintaining the trust of insurance customers. In accordance with the provisions of the Regulation, ICT risk management is carried out through several interconnected phases: risk identification, protection and prevention, detection, response and recovery, learning and development, and communication.

[28] DORA, recital 68.
[29] DORA, Article 6.
[30] DORA, Article 17.
[31] DORA, Article 24.
[32] DORA, Article 22.
[33] T. Ammann, I. Syed, V. Sanchez, „Exploring Operational Resilience in Financial Services – the Effects of DORA on Risk and Regulation in Top 3 Financial Markets", *Computer Law Review International*, 2/2023, 44.

To successfully manage these risks, it is essential for the company to first identify, classify, document, and keep records of all business functions that rely on and utilize ICT. Additionally, it must conduct a risk assessment and identify specific sources of ICT risks, evaluate potential threats and vulnerabilities, and review risk scenarios. Given that the Regulation pays particular attention to risks arising from third parties providing ICT services to the company, it is necessary to identify, document, and maintain records for all processes dependent on these entities. As part of this first phase, it is required to conduct a risk assessment for all obsolete ICT systems at least once a year.[34]

Once the first phase is completed and risks are identified, companies are expected to take all preventive measures against ICT risks. During this phase, the company should monitor and control the security and functioning of ICT systems and the impact of ICT risks on these systems, establish an information security policy, and develop a reliable structure for managing networks and infrastructure. Furthermore, to prevent the occurrence of ICT risks, companies implement management, logical, and physical access controls for ICT assets, authentication mechanisms, documented policies, procedures, and controls for managing ICT changes.[35]

In the third phase, referred to as "detection" by the Regulation, the company must establish mechanisms for the rapid detection of unusual activities, set thresholds for alerts, and criteria for activating and initiating the response process to ICT incidents, including mechanisms for automatic alerting in case of ICT incident outbreaks.[36] Once this phase is completed, the company must be capable of responding to ICT incidents and recovering from them. A significant obligation will be the establishment of a comprehensive business continuity policy in the field of ICT, as well as the introduction of a crisis management function that must be established by companies that are not microenterprises, along with the obligation to provide the supervisory authority, upon request, with an assessment of the annual costs and losses caused by ICT incidents.[37]

After ICT incidents disrupt the operations of an insurance company, it is crucial to gather all information and analyze the company's weaknesses, internet threats, ICT incidents, and attacks, as well as their impact on the company's digital operational efficiency. Insurance companies that are not microenterprises are required to inform the supervisory authority about the changes implemented during the review following ICT incidents. It is determined whether the company acted in accordance with established procedures and whether the measures taken were effective. The company must map the development of ICT risks, analyze the frequency,

[34] DORA, Article 8.
[35] DORA, Article 9.
[36] DORA, Article 10.
[37] DORA, Article 11.

types, scale, and patterns of incidents and attacks, conduct training and awareness programs for staff on ICT security and digital operational resilience, and monitor technological advancements to better understand how these advancements may affect ICT security requirements and digital operational resilience.

The final phase of risk management involves communication, which is achieved by creating communication plans and publicly disclosing at least significant ICT incidents or vulnerabilities to clients, partner financial entities, and the public, depending on the case. Communication policies vary depending on whether they pertain to internal policies or communication with external partners, clients, etc. From this, we see that DORA provides for a comprehensive system for managing ICT risks, which requires companies not only to establish such a system but also to monitor and analyze whether specific measures and policies have been effective. If the opposite is found to be true, the company is expected to continuously improve its ICT risk management system. Given that these risks are constantly evolving, only such an approach can ensure effective management and overcoming the challenges that digital business presents to insurance companies and the entire financial sector.

2.2. Management, Classification, and Reporting of ICT Incidents

DORA stipulates the process for managing and classifying ICT incidents and cyber threats, reporting significant ICT incidents, and *voluntarily notifying* about serious cyber threats.

As part of the ICT incident management process, insurance companies will need to establish a procedure for recording, monitoring, and taking action on all ICT incidents and serious cyber threats while documenting their causes. This includes setting up an early warning system, classifying and categorizing ICT incidents based on severity and impact on critical services, activating roles, responsibilities, and plans for internal and external communication, handling customer complaints, reporting at least significant ICT incidents to senior management, and establishing response mechanisms for ICT incidents.[38]

For the classification of ICT incidents and cyber threats (such as number, impact, duration, spread, data loss, criticality, and economic effect), a draft Regulatory Technical Standards (RTS) has been prepared, which outlines specific criteria for classifying ICT incidents and cyber threats, as well as assessing their significance and severity.[39]

[38] DORA, Article 17.

[39] Draft Regulatory Technical Standards to Further Harmonise ICT Risk Management Tools, Methods, Processes and Policies as Mandated Under Articles 15 and 16(3) of Regulation (EU) 2022/2554, JC 2023 86, 2024, https://www.esma.europa.eu/sites/default/files/2024-01/JC_2023_86_-_Final_report_on_draft_RTS_on_ICT_Risk_Management_Framework_and_on_simplified_ICT_Risk_Management_Framework.pdf, 25.7.2024.

When it comes to ICT incident reporting, DORA distinguishes between *reporting* of significant ICT incidents and *voluntary notification* of serious cyber threats if the company considers the threat relevant to the financial sector. The reporting and voluntary notification process also involves service users, as insurance companies are required to inform them when an incident affects their financial interests. This aligns with the primary objective set for insurance companies—to protect insurance consumers. For the long-term operations of these companies, it is crucial to maintain a strong business reputation and customer trust, which can only be achieved by keeping them informed about all matters relevant to protecting their interests.

In the case of a serious cyber threat, it is important for the company to notify clients who may be affected and to educate them about appropriate protective measures they may consider implementing.

The reporting that an insurance company conducts in relation to the supervisory authority consists of:

- *an initial notification*;
- *an interimediate repor*t (as soon as the status of the original incident significantly changes or actions related to a significant ICT incident are modified based on newly available information);
- *updated notifications* (as needed, whenever relevant updates on the status arise, as well as upon the explicit request of the supervisory authority);
- *a final report*.

The supervisory authority is obliged to notify EIOPA, which assesses the significance of the ICT incident and, based on its own assessment, further informs the relevant regulators or authorities of the member states to take measures aimed at maintaining the stability of the financial sector.[40] For reporting purposes, the ESA has prepared a joint draft of RTSs that will further define the content and deadlines for reporting and notifications, as well as standard templates, forms, and procedures for reporting significant ICT incidents and notifying about serious cyber threats.[41] Additionally, DORA mandates that the ESA prepare a joint report by January 17, 2025, assessing the feasibility of centralizing reporting on significant incidents by introducing a unified reporting center for major ICT incidents.[42]

[40] DORA, Article 19.

[41] Draft Regulatory Technical Standards on the Content of the Notification and Reports for Major Incidents and Significant Cyber Threats And Determining the Time Limits for Reporting Major Incidents and Draft Implementing Technical Standards on the Standard Forms, Templates and Procedures for Financial Entities to Report a Major Incident and to Notify a Significant Cyber Threat, https://www.esma.europa.eu/sites/default/files/2024-07/JC_2024-33_-_Final_report_on_the_draft_RTS_and_ITS_on_incident_reporting.pdf, 20. 7. 2024.

[42] DORA, Article 20.

Notification increases the likelihood of better understanding and identifying the source of the incident, analyzing potential consequences, and seeking assistance. Rapid incident notification can also help other institutions better prepare for similar attacks.[43] This would enable a swift response to ICT incidents across the EU and significantly facilitate ICT incident management, which is of great importance given the increasing frequency of such incidents and their potential to severely disrupt the functioning of the entire financial sector.

2.3. Testing Digital Operational Resilience

In accordance with the provisions of the Regulation, an essential part of the framework for managing ICT risks, incidents, and threats is the development of a digital operational resilience testing program. This encompasses vulnerability assessment and scanning, network security testing, physical security evaluation, compatibility and performance testing, as well as integrated testing. Testing can be conducted by an independent parties external or internal testing. If conducted internally, independence must be ensured to avoid conflicts of interest during the design and execution phases of the testing. Insurance companies are required to conduct ICT system and application testing that support critical or important functions at least once a year.[44] Additionally, companies that are not microenterprises will be obligated to perform advanced ICT system, tool, and process testing based on TLPT (Threat-Led Penetration Testing) every three years (the frequency may be adjusted, either decreased or increased, depending on supervisory authority requirements).[45] Insurance companies must assess which critical and important functions will be included by this testing (functions whose disruption would significantly affect financial results or the company's ability to continuously meet its obligations); the results of this assessment must be confirmed by the supervisory authority, while a summary of the test results will be submitted to a designated central public authority determined by the member states. For conducting advanced testing based on TLPT, only qualified individuals, either within or outside the company, who meet specific requirements and criteria established by DORA may be engaged. Additionally, ESA will define further requirements, standards, and criteria related to TLPT. In this way, DORA prescribes *fit and proper* conditions that the testing executor must fulfill.

[43] D. Clausmeier, „Regulation of the European Parliament and the Council on Digital Operational Resilience for the Financial Sector (DORA)", *International Cybersecurity Law Review,* 4/2023, 85.
[44] DORA, Article 24.
[45] DORA, Article 26.

2.4. Management of ICT Risk Related to Third Parties, Information-Sharing Arrangements, and Supervisory Authorities

DORA puts special focus on managing ICT risk associated with third parties. This is not an entirely new requirement for insurance companies, as they have already had the ability to "outsource" key or important business functions. However, DORA extensively and thoroughly regulates the core principles of effective business management of ICT risks linked to third parties, as well as the supervisory framework for third-party ICT service providers. Since the new provisions on digital operational resilience also apply to these entities, they are at least indirectly affected by the same regulatory requirements as insurance companies. As a result, third-party ICT service providers will be required to adjust their standard contractual terms and services in line with DORA's requirements if they wish to maintain or expand their client base.[46]

DORA regulates the exchange of information among financial entities related to cyber threats, including indicators of compromise, tactics, techniques, and procedures, security alerts, and configuration tools. Insurance companies will be required to notify the supervisory authority about their participation in such information exchange arrangements.

The regulation lists the supervisory bodies for all entities in the financial sector and governs their mutual cooperation, cooperation with the main supervisory body, and the body established under the NIS 2 Directive. It also establishes mechanisms for sharing effective best practice examples and specifies the powers for supervision, investigations, and sanctions necessary to carry out the prescribed tasks, including the authority to impose administrative fines and corrective measures and to publish administrative penalties. In addition, it regulates the obligation to notify the Commission, ESMA, EBA, and EIOPA about laws and regulations that facilitate the implementation of new provisions on digital operational efficiency, the safeguarding of business secrets, and data protection.

Interestingly, while DORA provides for various supervisory and investigative measures, as well as the possibility of imposing sanctions by the supervisory authority to compel the addressees of the new provisions to comply with the legal and regulatory framework, it does not specify explicit monetary fines or other criminal penalties for non-compliance, except for third parties providing ICT services.[47] In this regard, the regulation differs from the General Data Protection Regulation (GDPR)[48]

[46] T. Ammann, I. Syed, V. Sanchez, 44.

[47] DORA, Article 35.

[48] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *Official Journal of the European Union L 119/1* – GDPR.

and the NIS-2 Directive.[49] Instead, according to Article 50 of DORA, EU member states are left to determine administrative fines and criminal sanctions for non-compliance with provisions in their national laws. It is currently unclear how EU member states will enforce these provisions, but this approach may lead to inconsistent treatment.[50]

DORA presents a series of challenges for the operations of insurance companies, but those that manage to tackle these challenges will be well-positioned for continuous advancement in an increasingly digital financial and business environment.[51]

VI Conclusion

The operation of insurance companies in a digital environment represents a dynamic and comprehensive process of transformation, encompassing technological innovations, changes in business models, and adaptation to new customer expectations. Digitalization enables insurance companies to enhance efficiency, reduce costs, and improve the customer experience through faster and more personalized services. However, given that such operations involve various risks and that overcoming market fragmentation resulting from differing legislative solutions among member states is necessary, the EU has adopted the Digital Operational Resilience Act (DORA). Generally speaking, DORA represents a significant step forward in improving the digital operational resilience of insurance companies, as well as other financial institutions within the EU. However, it also presents substantial challenges for these companies, including enhancing their operational resilience capabilities, establishing a dedicated control function for managing ICT risks, improving incident reporting capabilities, and developing more sophisticated testing and scenario analysis methods. Additionally, companies will need to make significant investments in staff training, enhancing communication with partners, clients, and supervisory bodies.

To successfully implement the new regulation, insurance companies must take a series of steps. First, they need to invest in IT infrastructure, as only continuous investments in modern and secure IT infrastructure can ensure a successful digital transformation. Furthermore, it is necessary to conduct employee training to enable a better understanding and application of security measures and procedures. Additionally, the implementation of the regulation can be facilitated by collaborating with and engaging external experts, which will also help identify and eliminate vulnerabilities in security systems. Regular resilience testing and incident simulations will enable better preparedness for real threats.

[49] Where monetary fines are prescribed up to a maximum of €20,000,000 or 4% of total annual revenue in the previous financial year.

[50] T. Ammann, I. Syed, V. Sanchez, 45.

[51] P. Gusiv, Development of a Compliance Gap Analysis Method For The Digital Operational Resilience Act (DORA), master rad, Lapland University of Applied Sciences, 2023, 29.

Insurance companies that successfully integrate digital technologies into their operations have the potential to significantly enhance their competitiveness in the market, providing higher quality and more efficient services to their clients. The digital environment not only transforms the way they operate but also opens up new opportunities for innovation and growth within the insurance industry. In this regard, the existence of detailed regulation for ensuring digital operational resilience will be of particular importance to them.

Literature

- Ammann, T., Syed, I., Sanchez, V., „Exploring Operational Resilience in Financial Services – the Effects of DORA on Risk and Regulation in Top 3 Financial Markets", *Computer Law Review International*, 2/2023, 43-48.
- Barroso, L., „Fintechs: Concept, Level Playing Field and the Supervisory Approach", *Fintech Regulation and the Licensing Principle*, 2023, 25-44.
- Clausmeier, D.,„Regulation of the European Parliament and the Council on Digital Operational Resilience for the Financial Sector (DORA)", *International Cybersecurity Law Review,* 4/2023, 79-90.
- Draft Regulatory Technical Standards on the Content of the Notification and Reports for Major Incidents and Significant Cyber Threats and Determining the Time Limits for Reporting Major Incidents and Draft Implementing Technical Standards on the Standard Forms, Templates and Procedures for Financial Entities to Report a Major Incident and to Notify a Significant Cyber Threat, https://www.esma.europa.eu/sites/default/files/2024-07/JC_2024-33_ _Final_report_on_the_draft_RTS_and_ITS_on_incident_reporting.pdf, accessed: 20.07.2024.
- Draft Regulatory Technical Standards to Further Harmonise ICT Risk Management Tools, Methods, Processes and Policies as Mandated Under Articles 15 And 16(3) of Regulation (EU) 2022/2554, JC 2023 86, 2024, https://www.esma.europa.eu/sites/default/files/2024-01/JC_2023_86_-_Final_report_on_draft_RTS_on_ICT_Risk_Management_Framework_and_on_simplified_ICT_Risk_Management_Framework.pdf, accessed: 25.07.2024.
- European Insurance and Occupational Pensions Authority (EIOPA), *Smernice o sigurnosti i upravljanju u području informacijskih i komunikacijskih tehnologija,* EIOPA-BoS-20/600 – EIOPA Smernice.
- Federal Financial Supervisory Authority (Bafin), „Supervisory Requirements for IT in Insurance Undertakings", 2022.
- Grima, S., Marano, P., „Designing a Model for Testing the Effectiveness of a Regulation: The Case of DORA for Insurance Undertakings", *Risks*, 2021, 1-12.

- Gusiv, P., Development of a Compliance Gap Analysis Method For the Digital Operational Resilience Act (DORA), master rad, Lapland University of Applied Sciences, 2023.
- Kourmpetis, S., „Management of ICT Third Party Risk Under the Digital Operational Resilience Act", *Digitalisation, Sustainability, and the Banking and Capital Markets Union*, Palgrave Macmillan, 2023.
- Krüger, P. S., Brauchle, J.P., *The European Union, Cybersecurity, and the Financial Sector: A Primer*, Cyber Policy Initiative Working Paper Series – „Cybersecurity and the Financial System", Carnegie Endowment for International Peace , 2021.
- Marano, P., Siri, M., „Regulating Insurtech in The European Union", *Journal of Financial Transformation,* 2021, 166-177.
- Martínez Resano, J. R., „Digital Resilience and Financial Stability – the Quest for Policy Tools in the Financial Sector", *Revista de Estabilidad Financiera*, 2022, 59-88.
- Pelc, P., „The Role of Cybersecurity in the Public Sphere - the European Dimension. Financial Institutions", in: *The Role of Cybersecurity in the Public Sphere – The European Dimension* (eds. K. C. Jentkiewicz, I. Hoffman), Maribor, 2022, 59-69.
- Senabre, S., Soto, I. Munera, J., „Strengthening the Cyber Resilience of the Financial Sector - Developments and Trends", Financial Stability Review, 2021, 86-102.
- *Smernice EBA-e o upravljanju rizicima IKT-a i sigurnosnim rizicima*, EBA/GL/2019/04, https://www.eba.europa.eu/sites/default/files/document_library/Publications/Guidelines/2020/GLs%20on%20ICT%20and%20security%20risk%20management/Updated%20Translations/880816/Final%20draft%20Guidelines%20on%20ICT%20and%20security%20risk%20management_COR_HR.pdf, accessed: 10.07.2024.

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RAZVOJ DISTRIBUCIJE OSIGURANJA U BIH: *DE LEGE FERENDA*

STRUČNI RAD

Sažetak

Autori u radu predstavljaju pravni okvir i analiziraju regulatorne odredbe o distribuciji osiguranja u Bosni i Hercegovini. U radu se preispituju odredbe zakona koje reguliraju distribuciju osiguranja, odnosno, konkretnije, pokušava se dati odgovor na pitanje da li je zakonska regulativa u ovom kontekstu zastarjela i da li je neophodno pristupiti izmjenama? Oslanjajući se na rezultat uporednopravne analize zakonodavstva Evropske unije u tom kontekstu, autori zagovaraju stajalište da je pravni okvir distribucije osiguranja de lege ferenda potrebno mijenjati i uskladiti sa Direktivom o distribuciji osiguranja. Izmjene treba da idu u cilju efikasnog funkcionisanja tržišta osiguranja i jačanja zaštite potrošača.

Ključne riječi: *distribucija osiguranja, posredovanje u osiguranju, proizvodi osiguranja, direktiva Evropske unije o distribuciji osiguranja.*

I Uvod

Distribuciju osiguranja potrebno je razlikovati od obavljanja djelatnosti osiguranja.[2] Djelatnost osiguranja je regulisana Zakonom o osiguranju Federacije Bosne i Hercegovine[3] i čine je poslovi osiguranja, poslovi reosiguranja i poslovi neposredno

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[2] Vidi više kod: Nataša Petrović Tomić, *Osnovi prava osiguranja,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2021, 113 i dalje.

[3] *Službene novine Federacije BiH*, broj 23/17, u daljem tekstu: ZOS FBiH

povezano za poslovima osiguranja. Pod poslovima osiguranja podrazumijeva se zaključivanje ugovora o osiguranju i izvršavanje obaveza iz tako zaključenog ugovora. Uz prednje navedene radnje, poslovi osiguranja obuhvataju i poduzimanje mjera za sprečavanje i suzbijanje rizika koji ugrožavaju osiguranu imovinu i lica. Nasuprot tome, poslovi reosiguranja predstavljaju zaključivanje i izvršavanje ugovora o reosiguranju osiguranog viška rizika jednog društva za osiguranje kod drugog društva za reosiguranje. Pored poslova osiguranja i reosiguranja, djelatnost osiguranja čine i poslovi koji su neposredno povezani sa poslovima osiguranja. Tradicionalno te poslove čine utvrđivanje rizika i šteta i njihovu procjenu, posredovanje radi prodaje kao i prodaja ostataka osiguranih oštećenih stvari i pružanje drugih intelektualnih i tehničkih usluga u vezi sa poslovima osiguranja. Posljednji poslovi koji se odnose na posredovanje radi prodaje predstavljaju distribuciju osiguranja, koja je, kako će se vidjeti poslije, regulisana posebnim zakonom. Zakon o društvima za osiguranje Republike Srpske[4] preciznije daje definiciju djelatnosti osiguranja[5] navodeći izričito da je to djelatnost zaključivanja i izvršavanja ugovora o osiguranju i reosiguranju, te djelatnost posrednika i zastupnika u osiguranju.

Za funkcionisanje osiguranja od životne važnosti je djelatnost posredovanja i zastupanja.[6] U našem pozitivnopravnom okviru nema izravne definicije distribucije osiguranja, međutim ona se može izvući posredno. Distributivni sistem usluga osiguranja predstavlja posredovanje u privatnom osiguranje, koje se obavlja putem zastupnika i brokera u osiguranju.

II Regulatorni okvir distribucije osiguranja u Bosni i Hercegovini

Generalno, svi pravni izvori koji se odnose na osiguranje mogu se klasificirati u dvije grupe. Jednu čine statusni, a drugu materijalno-pravni izvori. Statusni izvori prava osiguranja su oni kojima se reguliraju pravni položaj, status društava za osiguranje, nadzor osiguranja i slično. Materijalno-pravni izvori su oni koji normiraju obvezno-pravne odnose u oblasti prava osiguranja, bilo na temelju zakona ili ugovora.

Regulatorni okvir distribucije osiguranja u Bosni i Hercegovini (u daljem tekstu: BiH) čini šest propisa. To su:

a) Zakon o obligacionim odnosima FBiH,[7]
b) ZOS FBiH,

[4] *Službeni glasnik Republike Srpske*, br. 17/05, 01/06, 64/06 I 74/10, u daljem tekstu: ZDO RS.
[5] Čl. 2. stav 1. ZDO RS.
[6] Marijan Ćurković, „Posredovanje i zastupanje u osiguranju", *Zbornik sa 7. savjetovanja o obradi i likvidaciji međunarodnih automobilskih šteta (Hrvatski ured za osiguranje, Ante Lui),* Lovran, 1999, 33.
[7] *Sl. list SFRJ*, br. 29/1978, 39/1985, 45/1989 - odluka USJ i 57/1989, *Sl. list RBiH*, br. 2/1992, 13/1993 i 13/1994 i *Sl. novine FBiH*, br. 29/2003 i 42/2011; u daljem tekstu: ZOO FBiH.

c) Zakon o obligacionim odnosima Republike Srpske,[8]
d) ZDO RS,
e) Zakon o posredovanju u privatnom osiguranju[9] i
f) Zakon o zastupanju u osiguranju i posredovanju u osiguranju i reosiguranju.[10]

Kao što je navedeno u uvodu, ZOS FBiH u općim odredbama i ZDO RS u uvodnim odredbama određuju šta se to podrazumijeva pod djelatnošću osiguranja, pri čemu oba zakona navode da posredovanje radi prodaje potpada u širem smislu pod djelatnost osiguranja. Ova dva zakona predstavljaju *lex generalis*, dok ZPPO FBiH i ZZOPOR RS predstavljaju *lex specialis* u odnosu na ovu materiju. ZOO FBiH i ZOO RS sadrže značajnu odredbu koja reguliše ovlaštenja zastupnika osiguranja,[11] ali ova dva zakona predstavljaju i materijalno pravni izvor u odnosu na ugovor o posredovanju i ugovor o trgovačkom zastupanju, koje odredbe se primjenjuju na zastupnika u osiguranju i brokera u osiguranju, u dijelu koji nije uređen ZPPO FBiH i ZZOPOR RS.[12]

1. Federacija Bosne i Hercegovine

Temeljni zakon o osiguranju u FBiH je ZOS FBiH, kojim se uređuje osnivanje, poslovanje, nadzor i prestanak društava za osiguranje i reosiguranje osnovanih u FBiH, kao i podružnica društava za osiguranje i reosiguranje koja nemaju sjedište u FBiH.[13] Zakon je donesen 2017. godine, podijeljen je na 15 glava sa ukupno 230 članova, pa možemo reći da se radi o prilično obimnom zakonu.

Kao što je navedeno u uvodu rada, poslovi osiguranja, poslovi reosiguranja i poslovi neposredno povezani za poslovima osiguranja čine djelatnost osiguranja. Poslovi neposredno povezani za poslovima osiguranja su posredovanje radi prodaje, što je uređeno u ZPPO FBiH, kao *lex specialis*. Zakon je donesen 2005. godine, a mijenjan je dva puta, 2010 i 2016. godine. Podijeljen je na šest dijelova: I opće odredbe, II zastupnik u osiguranju, III broker u osiguranju, IV nadzor nad posrednicima u osiguranju, V kaznene odredbe i VI prijelazne i završne odredbe. Radi se o relativno malom zakonu, koji ukupno ima 19 članova. ZPPO FBiH normira posredovanje u privatnom osiguranju, uslove za obavljanje tih poslova kao i nadzor nad njihovim

[8] *Sl. list SFRJ*, br. 29/1978, 39/1985, 45/1989 - odluka USJ i 57/1989 i *Sl. glasnik RS*, br. 17/1993, 3/1996, 37/2001 - dr. zakon, 39/2003 i 74/2004; u daljem tekstu: ZOO RS.
[9] *Službene novine Federacije BiH*, br. 22/05, 8/10 I 30/16, u daljem tekstu: ZPPO FBiH.
[10] *Službeni glasnik Republike Srpske*, br. 47/17, u daljem tekstu: ZZOPOR RS.
[11] Čl. 906. ZOO FBiH i ZOO RS.
[12] Miroslav Džidić, Marijan Ćurković, *Pravo osiguranja,* Pravni fakultet Sveučilišta u Mostaru, Mostar, 2017, 115.
[13] Čl. 1. ZOS FBiH.

obavljanjem u FBiH.[14] Shodno zakonskoj regulativi, postoje dvije vrste posredovanja u osiguranju, i to: zastupnik u osiguranju i broker u osiguranju.

Da bi društvo za osiguranje u FBiH moglo da obavlja djelatnost neposrednog osiguranja ili djelatnost reosiguranja preko posrednika u osiguranju, oni moraju biti registrovani u skladu sa ovim zakonom i upisani u poseban registar koji vodi Agencija za nadzor osiguranja FBiH (u daljem tekstu: Agencija za nadzor FBiH). Bitno je naglasiti da takva registracija vrijedi na teritoriji cijele Bosne i Hercegovine. Ukoliko je posrednik u osiguranju registrovan u FBiH, on može pružati svoje usluge i u Republici Srpskoj (u daljem tekstu: RS), ali isključivo putem organizacione jedinice RS, što se detaljnije uređuje zakonom. Vrijedi i *vice versa* kada se radi o posredniku u osiguranju koji je registrovan u RS, a prvi put ima namjeru da obavlja poslove u FBiH preko organizacione jedinice, s tim što o tome pismeno obavještava Agenciju na nadzor RS.[15]

U djelatnosti osiguranja veoma su značajne uloge zastupnika i posrednika.[16]

Zastupnik u osiguranju je jedna od dvije vrste posrednika u osiguranju. ZPPO FBiH mu posvećuje svega dva člana, jedan koji se odnosi na opće odredbe i drugi koji detaljnije propisuje registrovanje zastupnika.[17] Poslove zastupanja u osiguranju mogu obavljati pravna ili fizička lica koja se bave profesionalnom djelatnošću. Izuzetno, ove poslove mogu obavljati i banke[18] i javna preduzeća – poštanski operateri, naravno uz uslov posjedovanja dozvole i upisa lica u registre Agencije za nadzor FBiH. Zastupnik djeluje u ime i/ili za račun jednog ili više društava, što znači da se radi o licu koje je vezano za osiguravača. Da bi zastupnik u osiguranju mogao da obavlja poslove zastupanja u osiguranju, on mora zaključiti pismeni ugovor sa društvom za osiguranje, a društvo je u obavezi da ga dostavi Agenciji za nadzor FBiH. Jednaka obaveza obavještavanja Agencije za nadzor FBiH od strane društva postoji i u slučaju raskida ugovora o zastupanju, bez obzira koji je razlog raskida uz objavljivanje takvog obavještenja u dnevnim novinama većeg tiraža u mjestu poslovanja zastupnika u osiguranju i internet stranici društva.[19] Zastupnik u osiguranju samostalno obavlja djelatnost a njegovi poslovi obuhvataju sljedeće poslove: pokretanje, predlaganje i izvršavanje pripremnih radnji do zaključenja ugovora o osiguranju, zaključenje ugovora o osiguranju, pomaganje u primjeni ili izvršenju ugovora o osiguranju, naročito u slučaju eventualnog odštetnog zahtjeva i pružanje savjetodavnih usluga.

Da bi zastupnik u osiguranju mogao otpočeti obavljanje profesionalne djelatnosti moraju se ispuniti određeni uslovi, koji su različiti u zavisnosti od toga da li se radi o zastupniku fizičkom ili pravnom licu i registrovati se kod Agencije za nadzor

[14] Čl. 1. ZPPO FBiH.
[15] Čl. 5. ZPPO FBiH.
[16] Vidi više kod: Dragan Mrkšić, Zdravko Petrović, Katarina Ivančević, *Pravo osiguranja, II izmjenjeno i dopunjeno izdanje,* Fakultet za poslovno pravo, Beograd, 2005, 90 i dalje.
[17] Čl. 6. i 7. ZPPO FBiH.
[18] Osim u osiguranju od odgovornosti za motorna vozila.
[19] Ova obaveza postoji i u slučaju isteka ugovora o zastupanju.

FBiH. Kada je u pitanju registar za zastupnika fizičko lice, on je podijeljen na dva podregistra, podregistar sa imenima zastupnika registrovanih u FBiH i podregistar sa imenima zastupnika koji su registrovani u RS i pružaju usluge u FBiH. Prvi podregistar broji ukupno 1149 zastupnika u osiguranju a drugi 5. Agencija vodi i podregistar javnih preduzeća – poštanskih operatera i banaka zastupnika u osiguranju koji ima ukupno 13 upisanih zastupnika.[20] Registar društava za zastupanje u osiguranju ima dva podregistra glavnog registra. U podregistru društava za zastupanje u osiguranju u FBiH je upisano 41 društvo, a u podregistru podružnica društava za zastupanje u osiguranju iz RS je upisano 5 podružnica. Društvo za zastupanje u osiguranju može biti osnovano u obliku dioničkog društva ili društva sa ograničenom odgovornošću u skladu sa zakonom kojim se uređuje položaj privrednih društava Da bi Agencija za nadzor FBiH donijela rješenje o upisu u registar u roku od 30 dana od dana podnošenja zahtjeva, zastupnik u osiguranju mora podniijeti zahtjev za upis i dostaviti dokumentaciju propisanu zakonom.[21] Zastupnici imaju obavezu plaćanja godišnje naknadu za nadzor nad poslovanjem i takse za registrovanje u skladu sa propisima Agencije. Godišnja naknada za društva za zastupanje u osiguranju, banke, javna preduzeća – poštanski operateri, podružnice društava plaćaju godišnju naknadu u iznosu od 0,5% od ostvarene provizije u prethodnoj godini za tekuću godinu, ali ne manje od 1.000,00 KM, dok fizička lica plaćaju isti procenat, ali je minimalni iznos smanjen na 500,00 KM.[22]

Interesantno je da zakon ne spominje izričito pravo na proviziju kada su u pitanju zastupnici u osiguranju, ali ZOO koji regulira ugovor o trgovačkom zastupanju (što je po svojoj prirodi ugovor koji zaključuje zastupnik i društvo) kao jedno od osnovnih prava zastupnika predviđa naknadu (proviziju).[23] Zastupnik ima pravo na proviziju kada je ugovor zaključen njegovim posredovanjem, kada je zaključio direktno ugovore (ako je za to bio ovlašten), kao i u slučaju da je društvo zaključilo ugovore o osiguranju sa klijentima koje je zastupnik pronašao.[24] Zastupnik stiče pravo na naknadu kada ugovor bude izvršen.[25] On ima pravo na proviziju i kada ugovor ne bude izvršen ukoliko je za neizvršenje krivo društvo za osiguranje.[26] Pitanje provizije je pitanje koje se najčešće reguliše ugovorom o zastupanju sa društvom za osiguranje, uz brojna druga pitanja, poput ovlaštenja zastupnika.[27] Kada je u pitanju visina provizije, ona se određuje ugovorom. Ukoliko to nije slučaj, zastupnik ne bi trebao

[20] Registar zastupnika u osiguranju, Internet stranica Agencije za nadzor FBiH, https://nados.ba/bs/zastupnici/ 16.7.2024.
[21] Vidi čl. 7. ZPPO FBiH.
[22] Odluka o naknadama, *Službene novine FBiH,* br. 2/18 (dalje: Odluka o naknadama FBiH).
[23] M. Džidić, M. Ćurković, 126-127.
[24] Čl. 804. ZOO.
[25] Odnosno kada bude plaćena premija od strane ugovaratelja.
[26] Čl. 805. ZOO
[27] N. Petrović Tomić, 122.

ostati bez naknade, nego ima pravo na uobičajenu naknadu.[28] Konačno, ukoliko je zastupnik imao ovlaštenje za naplatu premije i izvršio je, pripada mu posebna naknada u tom slučaju.[29] Kada su u pitanju troškovi koje je zastupnik imao u okviru redovnog obavljanja svoje djelatnosti, on nema pravo na njihovu naknadu, ali ostaje da se to pitanje može drugačije urediti ugovorom između zastupnika i društva. Ukoliko je zastupnik imao posebne troškove koji su koristili društvu, zastupnik će imati pravo na njihovu naknadu.[30]

Na ovom mjestu čini se uputnim spomenuti i odredbe ZOO koje se odnose na ugovor o osiguranju, a regulišu zastupanje u osiguranju. Naime, osiguravač može ovlastiti nekoga da ga zastupa sa ili bez ograničenja njegovih ovlaštenja. U slučaju da zastupnik osiguranja djeluje bez ograničenja ovlaštenja, onda on može u ime i za račun osiguravača da zaključuje ugovore o osiguranju, ugovara njegove izmjene ili produženje važenja. Također, u ovom slučaju zastupnik osiguranja može izdavati polise osiguranja, naplaćivati premije i primati izjave koje se odnose na osiguravača. Ukoliko postoje ograničenja njegovih ovlaštenja, a to nije bilo poznato ugovaraču osiguranja, smatra se da ta ograničenja nisu ni postojala.[31]

Druga vrsta posrednika u osiguranju je *broker u osiguranju*. Zakon mu posvećuje član više u odnosu na zastupnika u osiguranju (čl. 8 – 10), kojim su uređene opće odredbe, registrovanje i obaveze brokera. Poslove brokera u osiguranju mogu obavljati pravna i fizička lica koja samostalno obavljaju djelatnosti. Za razliku od zastupnika u osiguranju, koji radi za društvo za osiguranje, isključivi profesionalni cilj brokera u osiguranje jeste da radi u ime osiguranika, što znači da je u potpunosti nezavisan od društva za osiguranje. Poslovi brokera obuhvataju sljedeće poslove: dovođenje u vezu lica koja traže osiguranje ili reosiguranje i društva za osiguranje ili reosiguranje, obavljanje pripremnih radova za zaključenje ugovora o osiguranju ili reosiguranju i pomaganje prilikom obrade i izvršenja ugovora, naročito u slučaju odštetnih zahtjeva.[32]

Za razliku od zastupnika u osiguranju, gdje zakon ništa ne govori o proviziji koja im pripada (iako to čini ZOO kako je naprijed navedeno), kod brokera u osiguranju je izričito normirano da prima proviziju od društva i djeluje uz potpunu slobodu u pogledu izbora društva za osiguranje.[33] To se čini odmah nakon definisanja brokera prije uslova za dobijanje dozvole za obavljanje djelatnosti.

Da bi broker otpočeo sa obavljanjem djelatnosti, mora da ispuni određene uslove koji su različiti u zavisnosti od toga da li se radi o fizičkom ili pravnom licu.

[28] Čl. 806. st. 1. ZOO.
[29] Čl. 807. ZOO.
[30] Čl. 808. ZOO.
[31] Čl. 906. ZOO.
[32] Ovo samo ukoliko je ugovoreno.
[33] Čl. 8. st. 2. ZPPO FBiH.

Broker u osiguranju (fizičko i pravno lice) se mora registrovati u posebnom registru kod Agencije za nadzor FBiH. Registar fizičkih lica brokera je podijeljen na dva podregistra, jedan je podregistar sa imenima brokera u osiguranju koji su registrovani u FBiH, a drugi podregistar sa imenima brokera u osiguranju koji su registrovani u RS i pružaju usluge u FBiH preko organizacione jedinice u FBiH. U prvom podregistru je upisano 13 brokera, a u drugom ukupno 5.[34] Registar za brokere pravna lica je podijeljen na podregiste po istom principu kao i za brokere fizička lica. U podregistru brokerskih društava u osiguranju koji obavljaju djelatnost u FBiH upisano je 8 društava, a u podregistru brokerskih društava koji su registrovani u RS i obavljaju djelatnost putem podružnice u FBiH je upisano njih ukupno 5.[35] Broker u osiguranju pravno lice se može osnovati u obliku dioničkog društva ili društva sa ograničenom odgovornošću, u skladu sa zakonom kojim se reguliše pravni položaj privrednog društva. Bitno je naglasiti da lice ovlašteno za zastupanje brokerskog društva u osiguranju mora biti registrovano kao broker u osiguranju (mora biti upisano u oba registra), kao i da svi zaposlenici u brokerskom društvu za osiguranje koji obavljaju poslove pribavljanja osiguranja moraju imati stručne kvalifikacije[36]. Da bi Agencija izdala odobrenje za rad, broker u osiguranju je dužan podnijeti zahtjev i priložiti istu dokumentaciju koju podnose zastupnici u osiguranju (vidi str. 6 – 7). Dodatni uslov za brokera fizičko lice jeste blokada njegove imovine u iznosu od 200.000,00 KM radi dobrog izvršavanja njegovih djelatnosti, kao dokumentacija kojom dokazuje da ima važeće osiguranje od profesionalne odgovornosti u slučaju greške ili propusta. Pravilnikom Agencije reguliše se način blokiranja imovine brokera u osiguranju kao i sve pojedinosti u vezi sa osiguranjem od odgovornosti iz njegove djelatnosti.[37]Agencija je dužna u roku od 30 dana od dana podnošenja zahtjeva i dokumentacije kojom se dokazuje ispunjavanje zakonskih uslova donijeti rješenje kojim odlučuje o podnesenom zahtjevu. Registracija brokera u osiguranju je ograničena na period od 2 godine. Broker je u obavezi da u roku od 30 dana prije isteka ovog roka ponovno podnese sve dokumente (u zavisnosti da li se radi o fizičkom ili pravnom licu), a ukoliko to ne učini registracija nije više važeća. Dodatno, registracija ne ostaje na snazi ukoliko se u postupku utvrdi da podnosilac zahtjeva nije lice podobno da djeluje kao broker u osiguranju.

Broker u osiguranju je dužan da ima poseban račun na koji će polagati sve iznose koje naplati za račun osiguranika i ne smije se koristiti u neke druge svrhe, kao npr. za isplatu nekih drugih povjerilaca brokera. Ukoliko dođe do nesolventnosti

[34] Registar brokera u osiguranju, Internet stranica Agencije za nadzor FBiH, https://nados.ba/bs/zastupnici/ 16.7.2024.

[35] Registar brokera u osiguranju, Internet stranica Agencije za nadzor FBiH, https://nados.ba/bs/zastupnici/ 16.7.2024.

[36] Stručne kvalifikacije podrazumijevaju položen stručni ispit za obavljanje poslova posredovanja u osiguranju.

[37] Član 1. Pravilnika o blokiranju imovine i osiguranju od odgovornosti iz djelatnosti brokera u osiguranju, *Službene novine FBiH*, broj 80/06.

brokera u osiguranju, iznosi sa posebnog računa će se koristiti za isplatu svih dugovanja prema klijentima po osnovu odštetnih zahtjeva.[38]

Obaveza plaćanja godišnje naknade i takse za registrovanje postoji i kod brokera u osiguranju. Godišnja naknada za brokerska društva u osiguranju, njihove podružnice u FBiH sa sjedištem u RS plaćaju godišnju naknadu u iznosu od 0,5% od ostvarene provizije u prethodnoj godini za tekuću godinu, ali ne manje od 1.000,00 KM, dok fizička lica plaćaju isti procenat, sa minimalnim iznosom 500,00 KM.[39]

Pored prednje navedenih, posebno je istaknuto da broker u osiguranju ima obaveze koje se mogu grupirati na sljedeći način: obaveza vođenja knjiga i dokumentacije o obavljanju djelatnosti, postupanje po zahtjevima Agencije za nadzor FBiH u pogledu izvještavanja i vođenja posla i nezavisnost u pogledu društva.

Uloga Agencija za nadzor FBiH. Agencija za nadzor FBiH ima regulatornu i nadzornu funkciju nad poslovanjem posrednika u osiguranju. Regulatorna funkcija se sastoji u tome da Agencija propisuje uslove za sticanje i provjeru stručnih znanja potrebnih za obavljanje poslova posredovanja u osiguranju, propisuje pravila za vođenje registara, podatke koji se upisuju u njih i način javnog pristupa registrima kao i postupak izdavanja odobrenja za obavljanje poslova zastupanja u osiguranju i uvjete za obavljanje poslova zastupanja u osiguranju za banke i javna preduzeća-poštanske operatere. Nadzorna funkcija, kako joj i samo ime govori, sastoji se u tome da Agencija vrši nadzor nad poslovanjem posrednika u osiguranju. Ukoliko u postupku nadzora utvrdi da postoje određene nepravilnosti, može donijeti odgovarajuće rješenje. U vršenju ove funkcije, posrednici su dužni da sarađuju sa Agencijom i dostavljaju joj podatke u obimu, na način i u rokovima koje odredi Agencija. Nadzor se može obaviti i u poslovnim prostorijama posrednika u osiguranju.

2. Republika Srpska

Temeljni statusni zakon iz oblasti prava osiguranja u RS je ZDO RS, čije norme su posvećene osnivanju, poslovanju, nadzoru i prestanku rada društava za osigruanje i filijala koje obavljaju djelatnost osiguranja u RS i kojim se osniva Agencija za osiguranje RS (u daljem tekstu: Agencija RS).[40]

Temeljni zakon kojim se uređuje distribucija osiguranja u RS je ZZOPOR RS, kojim se uređuju poslovi i djelatnost zastupanja u osiguranju, odnosno posredovanja u osiguranju i reosiguranju, uslovi za izdavanje i prestanak važenja ovlašćenja, odnosno dozvole, poslovanje i pravila poslovanja, kao i nadzor nad obavljanjem prednje navedenih poslova i djelatnosti.[41] Za razliku od istovrsnog zakona u FBiH,

[38] Čl. 9. st. 9. ZPPO FBiH.
[39] Odluka o naknadama FBiH.
[40] Čl. 1. ZDO RS.
[41] Čl. 1. ZZOPOR RS.

analizirajući naslov i predmet zakona u RS, zaključujemo da je zastupanje moguće samo u djelatnosti osiguranja, a posredovanje u osiguranju i reosiguranju. Zakon je donesen 2017. godine i podijeljen je na VII glava: I osnovne odredbe, II zastupanje u osiguranju, III posredovanje u osiguranju, IV osnivanje filijale društva za zastupanje u osiguranju i brokerskog duštva u osiguranju, V zajedničke odredbe, VI nadzor i kaznene odredbe i VII prijelazne i završne odredbe. Ukupno ima 51 član, što je dvostruko više članova nego što to ima istovrsni zakon FBiH. U FBiH posredovanje u privatnom osiguranju je širi pojam i on uključuje posredovanje preko zastupnika u osiguranju i posredovanje putem brokera u osiguranju. U RS to nije slučaj. Zakon pravi jasnu razliku između zastupanja u osiguranju i posredovanja u osiguranju i reosiguranju. Zastupanje u osiguranju se radi u ime i za račun društva za osiguranje, a obuhvata sve pripremne radnje u cilju zaključivanja ugovora o osiguranju. Posredovanje u osiguranju obuhvata posredovanje u osiguranju i posredovanje u reosiguranju i to su svi brokerski poslovi. Radi se o poslovima dovođenja u vezu osiguranika i društava za osiguranje u cilju zaključivanja ugovora o osiguranju. Dodatno, broker ima obavezu da pruža pomoć prilikom realizacije tako zaključenog ugovora.[42] Zakonom su također izričito isključeni poslovi koji se ne smatraju zastupanjem i posredovanjem u osiguranju, a to su: prikupljanje podataka o osiguranicima, odnosno ugovaračima osiguranja, njihovim rizicima i potrebama za zaključenje ugovora i pružanje svih opštih informacija o dostupnim proizvodima osiguranja.

U cilju sprečavanja pravne nesigurnosti i jasnosti ustanovljena je odredba ZZOPOR RS koja reguliše primjenu drugih propisa,[43] pod uslovom da ovim zakonom nisu propisani drugačiji uslovi. Kada su u pitanju ugovori o zastupanju i ugovori o posredovanju u zastupanju, na sve ono što nije uređeno predmetnim zakonom primjenjuje se ZOO RS, a kada su u pitanju lica koja obavljaju poslove zastupanja u osiguranju i posredovanja u osiguranju, a osnovana su u formi privrednog društva, na njih se primjenjuje Zakon o privrednim društvima.[44]

Poslove zastupanja u osiguranju obavljaju *zastupnici u osiguranju*. Zastupnik u osiguranju može biti: fizičko lice, preduzetnik, društvo za zastupanje, banka, mikrokreditno društvo i Preduzeće za poštanski saobraćaj RS a.d. Banja Luka i filijale društava čije je sjedište u FBiH.

Zastupnik u osiguranju fizičko lice obavlja poslove zastupanja u osiguranju na temelju ovlašćenja za zastupanje i upisa u odgovarajuće registre Agencije RS. Međutim sama dozvola i upis u registar nije dovoljan da zastupnik otpočne sa poslovima zastupanja u osiguranju. On može raditi isključivo na osnovu ugovora o radu ili nekog drugog pravnog odnosa sa drugim subjektima – zastupnicima u osiguranju (preduzetnikom za zastupanje u osiguranju, društvom za zastupanje

[42] Čl. 2. ZZOPOR RS.
[43] ZPPO FBiH ne sadrži ovu odredbu.
[44] *Sl. glasnik RS*, br. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019 i 17/2023.

u osiguranju, filijalom društava čije je sjedište u FBiH, bankom, mikrokreditnim društvom ili Poštama Srpske). Ukoliko je zastupnik u osiguranju zaposlen na osnovu ugovora o radu ili nekog drugog pravnog odnosa u društvu za osiguranje on nije zastupnik u osiguranju u smislu ovog zakona. Poslovima zastupanja u osiguranju mogu da se bave samo zastupnici koji ispunjavaju uslove propisane zakonom[45]. Ukoliko zastupnik fizičko lice ispunjava sve zakonom propisane uslove, Agencija RS će mu izdati ovlašćenje za rad i upisati ga u registar zastupnika u osiguranju fizičkih lica, na period od četiri godine od dana upisa u registar.[46] U Podregistar zastupnika fizičkih lica iz RS je upisano ukupno 615 zastupnika, a u Podregistar zastupnika fizičkih lica iz FBiH je upisano ukupno 3 zastupnika.[47] Ovlašćenje za zastupanje izdato zastupniku u osiguranju vrijedi na cijeloj teritoriji BiH. Jednom izdato ovlašćenje za zastupanje fizičkom licu može prestati na lični zahtjev zastupnika u osiguranju, istekom roka na koje je izdato i oduzimanjem ovlašćenja.[48]

Djelatnost zastupanja u osiguranju može da obavlja i preduzetnik za zastupanje u osiguranju. Dvije su osnovne pretpostavke koje se moraju ispuniti za to, a to su dozvola za zastupanje izdata od strane Agencije RS i rješenje o registraciji izdato od strane nadležnog registracionog organa. Prva dozvola predstavlja uslov za njegov upis u registar preduzetnika, pa ju je dužan prvu pribaviti, a upis u registre Agencije se vrši na osnovu podnesenog dokaza o izvršenoj registraciji.[49] U Podregistru Agencije RS su upisana 84 preduzetnika za zastupanje u osiguranju.[50] Preduzetnik se organizuje u skladu sa odredbama zakona kojim se uređuje obavljanje zanatsko-poduzetničke djelatnosti.[51] Da bi otpočeo sa obavljanjem djelatnosti potrebno je da ispuni uslove propisane zakonom. Jednom izdata dozvola za zastupanje preduzetniku može prestati da važi istekom roka važenja upisa u registre, ukoliko ne otpočne sa obavljanjem djelatnosti u roku od šest mjeseci od dana upisa u registre, i ako prestane da obavlja djelatnost šest mjeseci u kontinuitetu.

Preduzetnik može da zastupa jedno ili više društava za osiguranje istovremeno i to u istim ili različitim vrstama osiguranja, a razlika je u tome što mu je za zastupanje u istim vrstama osiguranja potrebna saglasnost zastupanih društava u pismenoj formi. Društvo za osiguranje zaključuje ugovor sa preduzetnikom, također u pismenoj formi i dostavlja ga Agenciji RS. Osim činjenice zaključenja ugovora, društvo ima obavezu da obavijesti Agenciju RS i o raskidu ugovora, bez obzira na razlog raskida.[52]

[45] *Sl. List RS*, br. 56/10 (u daljem tekstu: Odluka o tarifama RS).
[46] Čl. 28. ZZOPOR RS.
[47] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ 20.7.2024.
[48] Vidi čl. 38. ZZOPOR RS.
[49] Čl. 9. ZZOPOR RS.
[50] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ 20.7.2024.
[51] Zakon o samostalnim preduzetnicima, *Službeni glasnik Republike Srpske*, br. 98/24.
[52] Čl. 11. ZZOPOR RS.

Kao zastupnik u osiguranju može se pojaviti i društvo za zastupanje u osiguranju kojem je izdata dozvola za zastupanje i koje je upisano u registar poslovnih subjekata. Društvo se može osnovati u dva oblika: kao akcionarsko ili društvo sa ograničenom odgovornošću u skladu sa propisima koji regulišu privredna društva. Dozvola za zastupanje izdata društvu za zastupanje u osiguranju vrijedi četiri godine i na teritoriji BiH.

Izdata dozvola za zastupanje društvu od strane Agencije je uslov za njegov upis u registar poslovnih subjekata, a nakon upisa u taj registar vrši se upis u registre koje vodi Agencija RS. Registar društava za osiguranje koji vodi Agencija RS podijeljen je na dva podregistra: Podregistar društava za zastupanje u osiguranju iz RS, koji broji 17 društava i Podregistar društava za zastupanje u osigutanju iz FBiH koji broji ukupno 4 upisana društva.[53]

Jednako kao i preduzetnik za zastupanje u osiguranju i pod istim uslovima, društvo može da zastupa jedno ili više društava za osiguranje, kako u istim tako i različitim vrstama osiguranja. Društvo za zastupanje u osiguranju zaključuje pismeni ugovor sa društvom za osiguranje i dostavlja ga Agenciji RS, a ova obaveza društva prema Agenciji postoji i u slučaju raskida njihovog ugovora.

Društvo i preduzetnik za zastupanje u osiguranju imaju obavezu da tačno i ažurno vode poslovnu evidenciju, posjeduju i čuvaju cjelokupnu dokumentaciju koja se odnosi na obavljanje njihove djelatnosti. Poslovna evidencija ovih zastupnika u osiguranju uključuje vođenje podataka o zastupnicima fizičkim licima, društvima za osiguranje sa kojim su zaključili ugovor i licima koji prikupljaju podatke o potencijalnim osiguranicima/ugovaračima osiguranja, rizicima i potrebama, kao i onih koji pružaju neke opšte informacije o proizvodima osiguranja.

S obzirom da ugovor o zastupanju u osiguranju nije besplatni ugovor, njegov bitni elelement jeste provizija. Društvo i preduzetnik za zastupanje u osiguranju imaju, za svoj rad, pravo na proviziju. Proviziju plaća društvo za osiguranje u čije ime i za čiji račun zaključuje ugovor o osiguranju. Zakonom je propisano da Agencija RS, u slučaju da utvrdi ugroženost finansijskog položaja i finansijske discipline društava, kao i nesmetano funkcionisanje tržišta osiguranja zbog ugovorene provizije zastupnika, donosi akt kojim ograničava iznos provizije i uređuje druge međusobne odnose zastupnika u osiguranju sa društvima za osiguranje. Agencija RS je donijela Pravilnik o međusobnim odnosima zastupnika u osiguranju i društava za osiguranje i ograničenju provizije zastupnika u osiguranju[54] Tako npr. prema ovom Pravilniku, ograničenje iznosa provizije u vrsti osiguranje od autoodgovornosti je 27%, a za druge vrste neživotnih osiguranja ne može se ugovoriti viša stopa provizije od visine udjela režijskog dodatka u bruto premiji za tu vrstu osiguranja.[55]

[53] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ 20.7.2024.
[54] *Sl. glasnik RS*, br. 21/19 i 85/21.
[55] *Ibid,* čl. 3.

Djelatnost zastupanja mogu da obavljaju banke, mikrokreditna društva i Pošte Srpske na temelju dozvole za zastupanje izdate od strane Agencije. Agencija izdaje dozvolu nakon podnesenog zahtjeva i dokumentacije kojom se dokazuje ispunjavanje zakonom propisanih uslova.[56]

Posredovanje u osiguranju je, prije svega, uređeno u ZOO. Naime, odredbom čl. 813. ZOO propisano je da se ugovorom o posredovanju obavezuje posrednik da nađe i dovede u vezu sa nalogodavcem lice koje bi s njim pregovaralo o zaključenju određenog ugovora, a nalogodavac se obavezuje da mu isplati određenu naknadu, ako taj ugovor bude zaključen. Ukoliko ovo transponiramo na polje osiguranja, onda je posrednik broker u osiguranju, on nalazi i dovodi u vezu sa društvom za osiguranje potencijalne osiguranike/ugovrače osiguranja koji žele s njim zaključiti ugovor. ZZOPOR RS ovoj klasičnoj deifiniciji posredovanja iz ZOO dodaje još poslova koji predstavljaju obaveze brokera u osiguranju, a to je obavljanje pripremnih radnji za zaključenje ugovora o osiguranju kao i pružanje pomoći nakon zaključenog ugovora u pogledu njegovog izvršenja. Poslovi posredovanja se mogu podijeliti generalno u tri faze. Prva se odnosi na analizu potreba konkretnog osiguranika/ugovarača osiguranja i kreiranje ponude prema njegovim željama. Druga faza obuhvata pregovaranje sa društvom za osiguranje u cilju zaključenja ugovora. Konačno, treća i posljednja faza uključuje obavezu brokera da pruži pomoć osiguraniku nakon zaključenja ugovora o osiguranju, odnosno tokom njegovog trajanja.[57]

Poslove, odnosno djelatnost posredovanja u osiguranju obavljaju brokeri u osiguranju i to kao isključivu djelatnost. Kao broker u osiguranju se može pojaviti: fizičko lice, na temelju ovlašćenja za posredovanje, pravno lice, na temelju odobrenja za posredovanje, i filijale brokerskih društava čije je sjedište u FBiH. Navedeni subjekti stiču pravo da obavljaju poslove, odnosno djelatnost danom upisa u odgovarajuće registre Agencije RS, na temelju ispunjavanja zakonom propisanih uslova. Ovlašćenje za posredovanje se izdaje na period od četiri godine i vrijedi na teritoriji Bosne i Hercegovine, a prestaje da važi na isti način kao i ovlašćenje za zastupnika u osiguranju fizičko lice.[58] Brokersko društvo u osiguranju može da se osnuje u obliku akcionarskog društva i društva za ograničenom odgovornoću. U okviru registra brokerskih društava u osiguranju organizirana su dva podregistra: Podregistar brokerskih društava u osiguranju iz RS i Podregistar brokerskih društava u osiguranju iz FBiH. U okviru prvog podregistra upisano je sedam brokerskih društava, a tri u okviru drugog.[59]

Za dobijanje dozvole za posredovanje brokersko društvo u osiguranju mora da ispunjava iste uslove kao i društvo za zastupanje u osiguranju (za izbjegavanje

[56] Čl. 8. ZZOPOR RS.

[57] Marijan Ćurković, Zastupanje i posredovanje u osiguranju prema Zakonu o osiguranju, Novi propisi iz osiguranja – Zakon o osiguranju i Zakon o obveznim osiguranjima u prometu, Inženjerski biro, Zagreb, 2006, 52.

[58] Čl. 16. st. 3. ZZOPOR RS.

[59] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ 20.7.2024.

ponavljanja autori upućuju na str. 16 ovog rada) uz još jedan dodatni uslov koji se odnosi na dokaz o postojanju osiguranja od odgovornosti iz djelatnosti posredovanja u osiguranju u visini osigurane sume koja ne može biti manja od 600.000,00 KM po svakom odštetnom zahtjevu, odnosno 960.000,00 KM za sve odštetne zahtjeve u jednoj godini.[60] Dozvola za posredovanje izdata brokerskom društvu traje četiri godine od dana upisa u registar Agencije RS i vrijedi na teritoriji BiH, a prestaje da važi na isti način kao i dozvola za zastupanje društvu za zastupanje u osiguranju (vidi str. 17).

Broker u osiguranju ima obaveze, kako prema osiguraniku, odnosno ugovaraču osiguranja, tako i prema društvu za osiguranje. Zakonom je ustanovljena zaštitna uloga brokera u odnosu na osiguranika/ugovarača osiguranja. Ova uloga uključuje pružanje osiguraniku svih neophodnih informacija i pojašnjenja kako bi osiguranik donio najbolju odluku i zaključio ugovor o osiguranju u skladu sa svojim potrebama. Naravno, broker to ne radi samoinicijativno, nego isključivo na osnovu pismenog naloga ili ugovora koji zaključi sa klijentom. U tom smislu, kada broker dobije potrebne informacije od osiguranika/ugovarača osiguranja, pristupiće izradi analize rizika i načela pokrića koji predstavljaju najbolje rješenje.[61] On će to uraditi uzimajući u obzir više ugovora o osiguranju koji su dostupni na tržištu. Zakon ne govori o kojem broju je riječ, nego se koristi riječcom „dovoljno veliki broj ugovora". Šta znači dovoljno veliki broj ugovora vjerovatno zavisi od vrste osiguranja i dostupnosti na tržištu osiguranja. Na osnovu svih stručnih informacija kojima raspolaže i koje su mu poznate, broker će napraviti ocjenu finansijske sposobnosti društva za osiguranje za pokriće rizika osiguranika. Nakon što izradi analizu rizika i ocjenu finansijske sposobnosti društav za osiguranje, dolazi do izražaja njegova savjetodavna uloga. Na zahtjev osiguranika broker će savjetovati osiguranika koje od više društava za osiguranje da izabere za zaključenje ugovora, odnosno koje društvo mu pruža najveću sigurnost. Uz ovu obavezu vezuje se i obaveza brokera da osiguraniku dostavi sve ponude koje je pribavio od društava za osiguranje, sa uslovima osiguranja i u tom smislu mu izričito ukaže na pojedine odredbe uslova koje se tiču obima pokrića i isključenje. Nakon što izvrši izbor društva, osiguranik pristupa zaključenju ugovora. Ukoliko to izričito osiguranik zahtjeva, broker će posredovati njegovom zaključenju. Nakon zaključenja ugovora, broker dostavlja osiguraniku zaključeni ugovor o osiguranju. Uloga brokera i briga za zaštitu interesa osiguranika ne završava sa zaključenjem ugovora. Broker provjerava sadržaj polise osiguranja i ima obavezu da prati ugovor o osiguranju u čijem zaključenju je posredovao za vrijeme njegovog trajanja. U tom smislu, ukoliko to bude potrebno, dužan je predlagati izmjene već zaključenog ugovora. Posebno se naglašava obaveza brokera da pruža pomoć osiguraniku tokom trajanja ugovora. Ovo naročito može biti od značaja ukoliko se dogodi osigurani slučaj zbog kojeg

[60] Čl. 18. ZZOPOR RS.

[61] Nebojša Žarković, „Lični razgovor sa strankom u posredovanju i zastupanju u osiguranju", *Tokovi osiguranja*, 4/2020, 7-24.

se i zaključuje ugovor o osiguranju, pa je u tom smislu uloga brokera od posebne važnosti da vodi računa da osiguranik ostvari sva prava koja mu pripadaju iz ugovora i u zakonom propisanim rokovima. Konačno, broker je u svom djelovanju dužan da bude transaperentan, te učini dostupnim sve veze (kako pravne, tako i ekonomske) i proviziju sa konkretnim društvom za osiguranje.[62]

Osim što je dužan štititi interese osiguranika na putu izbora najboljeg i najpovoljnijeg ugovora o osiguranju, obaveza zaštite interesa postoji i u odnosu na društvo za osiguranju u istoj mjeri i obimu kao i u odnosu na osiguranika. Broker u osiguranju je dužan da konkretno društvo za osiguranje informiše o ponudi osiguranika, odnosno o njegovim zahtjevima i potrebama.

Brokersko društvo za osiguranje mora da ima poseban račun, na kojem će se nalaziti sredstva koja osiguranik/ugovarač osiguranja plati na ime premije osiguranja i sredstva koja društvo za osiguranje plati na ime naknade ili svote iz ugovora o osiguranju (koji je zaključen posredovanjem brokera), naravno ukoliko je za to posebno pismeno ovlašćen. Ova sredstva ne ulaze u imovinu, likvidacionu ili stečajnu masu brokerskog društva, ne mogu biti predmetom prinudnog izvršenja i koristiti se za naplatu povjerilaca brokerskog društva.[63]

Imajući u vidu da broker u osiguranju, koji je povezan sa osiguranikom/ugovaračem osiguranja i društvom za osiguranje i dužan da štiti interese obje ugovorne strane (pa često može doći do sukoba interesa, što mora izbjegavati), pitanje plaćanja provizije može biti zbunjujuće. Prema običajnom pravu proviziju posredniku plaća društvo za osiguranje[64]. Pravo na proviziju brokera u osiguranju je u ZZOPOR RS negativno određeno na način da broker nema pravo da od osiguranika, odnosno ugovarača osiguranja zahtijeva plaćanje provizije ili neke druge naplate, ako to nije izričito pismeno ugovoreno. Iz ovoga zaključujemo da broker ima pravo na proviziju koju će mu platiti osiguranik/ugovarač osiguranja ukoliko je to pravo stipulirano u ugovoru zaključenim sa osiguranikom. Ukoliko je to slučaj, onda broker nema pravo da proviziju naplati od društva za osiguranje.

III Distribucija osiguranja u Evropskoj Uniji

Četiri osnovne slobode predstavljaju stub jedinstvenog tržišta Evropske unije (u daljem tekstu: EU): sloboda osnivanja, sloboda pružanja usluga, sloboda kretanja ljudi i sloboda kretanja kapitala.[65] Djelatnost osiguranja generalno se

[62] Čl. 20. ZZOPOR RS.

[63] Detaljnije o samom poslovanju brokera: Željko Vojinović, „Uređenje unutrašnjih odnosa u posredničkom i zastupničkom poslovnom poduhvatu", *Tokovi osiguranja*, 4/2022, 40-53.

[64] Robert Merkin, Angus Rodger, *EC Insurance Law,* London, 1997, 80.

[65] Pored Direktive 2016&97 o kojoj će u nastavku biti više reči, za jedinstveno tržište osiguranja EU bitna je i Direktiva Solvency II. Detaljnije o ovoj direktivi: Nikolina Maleta, „Prilagodba regulatornog okvira Solvency II

klasificira kao jedna od značajnijih djelatnosti u zemljama članicama EU. Ono je oblikovano kroz tzv. generacije direktiva, ali i odlukama Suda pravde.[66] S obzirom da zastupnici i posrednici imaju bitnu ulogu u distribuciji osiguranja u okviru EU, a sve u cilju funkcionisanja zajedničkog tržišta, zakonodavstvo EU im posvećuje pažnju regulišući njihovo poslovanje direktivama i preporukama. Prvi propis koji se ticao djelatnosti zastupanja i posredovanja bila je Direktiva br. 77/92 CEE od 13.12.1976. godine, koja je prestala da važi 14.01.2005. godine.[67] Nakon ove Direktive, donesena je Preporuka br. 92/48/EE,[68] koja nije obvezujući akt. S obzirom da su i dalje među državama članicama postojale razlike, bilo je neophodno pristupiti daljoj regulaciji. Stoga, donijeta je Direktiva 2002/92/EZ Europskog parlamenta i Vijeća od 9.12.2002. godine o posredovanju u osiguranju,[69] koja je prestala da važi 30.9.2018. godine kada je donijeta Direktiva (EU) 2016/97 Europskog parlamenta i Vijeća od 20.01.2016. godine o distribuciji osiguranja.[70]

1. Direktiva br. 77/92/CEE

Dokaz da je Evropska zajednica posvećivala pažnju prodaji proizvoda osiguranja putem posrednika i zastupnika u osiguranju jeste Direktiva br. 77/92 CEE od 13.12.1976. godine. Cilj Direktive se može vidjeti iz njenog naslova, a to je reguliranje mjera za ostvarivanje dvije slobode: slobodu poslovnog nastana[71] i slobodu pružanja usluga[72] u pogledu djelatnosti koju obavljaju zastupnici i posrednici u osiguranju.[73] Direktiva se primjenjuje na posrednike u osiguranju-brokere i zastupnike

novim rizicima i izazovima suvremenog korporativnog upravljanja", *Tokovi osiguranja*, 3/2024, 869-885; Milo Marković, „Izazovi tržišta osiguranja u Srbiji na putu ka Solventnosti II", *Tokovi osiguranja*, 2/2024, 333-361.

[66] Jasna Pak, „Pružanje usluga osiguranja na jedinstvenom tržištu Evropske Unije" u *Uslovi za realizaciju prometa roba i usluga u pravu Evropske unije i jugoslovenskom pravu,* Institut za uporedno pravo, Monografija br. 137, Beograd, 2001, 223 – 267.

[67] Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities, *Službeni list Evropskih zajednica,* L 26, 31 januar 1977.

[68] Commission Recommendation of 18 December 1991 on insurance intermediaries od 18.12.1991. godine, *Službeni list* L 019, 28/01/1992, P. 0032 – 0033.

[69] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, *Službeni list Evropske unije,* Posebno izdanje 2013., 06. Pravo poslovnog nastana i sloboda pružanja usluga, Svezak 08.

[70] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) Text with EEA relevance, *Službeni list Evropske unije,* L 26, 2. veljače 2016.

[71] Uobičajeno se za slobodu poslovnog nastana u engleskoj terminologiji koristi izraz *Freedom of Establishment – FOE.*

[72] Uobičajeno se za slobodu pružanja usluga u engleskoj terminologiji koristi izraz *Freedom of Provide of Services – FOS.*

[73] Marijan Ćurković, "Obveza distributera na informiranje potrošača proizvoda osiguranja prema odredbama EU Direktive o distribuciji proizvoda osiguranja", *Zbornik radova sa 30. Susreta osiguravača i reosiguravača Sarajevo, (urednik Nikola Miljević),* Sarajevo, 2019, 147-159.

u osiguranju koji su činili klasične kanale prodaje kakvi su postojali u vrijeme donošenja Direktive u zemljama članicama. Direktiva je iscrpno u članu 2. stav 2. navodila sve nazive osoba koji su se bavili posredovanjem u osiguranju. Primjera radi, u Njemačkoj je to bio *versicherungsmakler* ili *versicherungsvertreter*, u Francuskoj *courtier d'assurance* ili *agent general d'assurance*, dok je u Ujedinjenom kraljevstvu to bio *Insurance broker* ili *Agent*, u zavisnosti od vrste djelatnosti koju je obavljao.[74] Unatoč donošenju ove Direktive, koja se istina nije primjenjivala direktno, nego su države članice imale obavezu da je transponiraju u domaće pravo, harmonizacija propisa, kao krajnji cilj, nije se ostvarila zbog značajnih razlika u poimanju pojma posredovanja u osiguranju između država članica. S obzirom na navedeno, Direktiva je dobila obilježje privremene i čekalo se donošenje nove direktive koja će pokušati ostvariti cilj koji nije ostvarila prethodna.

2. Preporuka br. 92/48/CEE

Da bi pokušala ublažiti razlike između država članica koje su ostale egzistirati uprkos donošenju Direktive br. 77/92 CEE, Evropska komisija se 1991. godine odlučila za donošenje pravno neobavezujućeg akta, Preporuke br. 92/48/EEC od 18.12.1991. godine o posrednicima u osiguranju. Preporukom su predložene mjere u pogledu nezavisnosti posrednika u osiguranju, njihovih profesionalnih uslova, znanja, kompetencija, osiguranja od profesionalne odgovornosti kao i njihove registracije u javnim registrima. Apelirano je na države članice da ovakva rješenja transponiraju u domaće zakonodavstvo a sve u cilju ostvarenja efikasnog jedinstvenog tržišta osiguranja, što je većina njih i uradila, a to je konstatovano u preambuli naredne donesene direktive.

3. Prva EU direktiva o posredovanju u osiguranju (IMD I/MID I)

Direktivom br. 77/92/EEZ učinjen je prvi korak u olakšavanju ostvarivanja slobode poslovnog nastana i slobode pružanja usluga za zastupnike i posrednike u osiguranju. Također, države članice su u velikoj su mjeri slijedile Preporuku Komisije 92/48/EEZ o posrednicima u osiguranju, koja je nesumnjivo doprinijela usaglašavanju nacionalnih odredbi o stručnim uvjetima i upisu u registar posrednika u osiguranju. Međutim, pored donošenja Direktive i Preporuke ostale su znatne razlike između država članica koje su podrivale održavanje jedinstvenog tržišta u pogledu obavljanja djelatnosti posredovanja u osiguranju i reosiguranju. Stoga je bilo neophodno Direktivu 77/92/EEZ zamijeniti novom Direktivom br. 2002/92/EC koja je donesena 9.12.2002. godine. Njen naziv u žargonu je bio Prva direktiva o posredovanju,

[74] Marijan Ćurković, "Nastanak i obuhvat regulatornih odredbi o distribuciji osiguranja", *Hrvatski časopis za OSIGURANJE, No. 1*, Zagreb, 2019, 23 – 38.

odnosno skraćeno MID I. Direktiva nije imala za cilj harmoniziranje propisa država članica o posredovanju u osiguranju, već je propisano da bi se trebala odnositi na osobe čije se poslovanje sastoji od pružanja usluga posredovanja u osiguranju trećim osobama u zamjenu za naknadu. Direktiva traži da se posrednici u osiguranju i reosiguranju moraju biti upisani u registar pri nadležnom tijelu države članice naravno pod uslovom da ispunjavaju odgovarajuće uvjete. Obaveza je država članica da uspostave jedinstveno informativno mjesto koje omogućava brz i jednostavan pristup informacijama iz različitih registara, koje se prikupljaju elektronskim putem i stalno ažuriraju. Direktiva definira da država članica definira znanja i sposobnosti koja moraju posjedovati posrednici u osiguranju i reosiguranju moraju posjedovati. Potrebno je uspostaviti efikasne postupke pritužbi u cilju rješavanja sporova na relaciji potrošač-posrednik u osiguranju, te uz postojeću sudsku zaštitu, poticati vansudsko rješavanje sporova. Posrednici moraju imati osiguranje od od profesionalne odgovornosti. Obaveza je posrednika da pruže potrebne informacije potrošačima prije zaključenja bilo kakvog ugovora i definira način informiranja. Odredbom člana 16. Direktive propisana je obaveza država članice da se usklade sa Direktivom do 15. januara 2015. godine, koju je većina država i ispunila.

4. Direktiva 2016/97 (IDD) o distribuciji osiguranja

S obzirom da se pristupilo donošenju nove direktive iz oblasti distribucije osiguranja, to nas upućuje na zaključak da prethodno navedena nije postigla svoj cilj. U njenoj preambuli istaknuto je je potrebno napraviti niz izmjena u MID I, a u interesu jasnoće bi je trebalo preinačiti, a sve u cilju usklađivanje nacionalnih odredbi u vezi s distribucijom osiguranja i reosiguranja. Također, naglašeno je da se novom direktivom želi postići minimalno usklađivanje i da to ne stoji na putu državama članicama da zadrže ili uvedu strožije odredbe u cilju zaštite potrošača. Nekoliko je faktora uticalo na potrebu donošenja nove direktive. Prvi od njih jeste kriza u finansijskom sektoru[75] nakon donošenja Prve direktive o posredovanju, potom tu je razvijanje novih kanala prodaje proizvoda osiguranja npr. putem interneta[76] i konačno ulazak finansijskih institucija (banke, pošte i sl.) u djelatnost prodaje osiguranja. Sve je to zahtijevalo izmjenu normativnog okvira posredovanja u osiguranju. Nakon što je Evropska komisija 2010. godine objavila *Consultation Document on the Rewiev of Insurance Mediation Directive,* započela je faza konsultacija, kao jedna od faza u procedu donošenja EU

[75] Vidi više kod: Ozren Uzelac, Marija Dukić Mijatović, „Sadržina i obim obaveza tokom procesa izrade i uvođenja proizvoda osiguranja na tržište prema Direktivi EU o distribuciji osiguranja", Evropska revija za pravo osiguranja, str. 9 - 18, I/2019, dostupno na: https://erevija.org/wp-content/uploads/2022/10/1-2019-1.pdf 29.7.2024.

[76] Vidi više kod: Maja Mihelja Žaja, Ljubica Milanović Glavan, Mateja Grgić, „Digitalna tehnologija kao čimbenik razvoja kanala distribucije u osiguranju", *Hrvatski časopis za osiguranje*, No. 3/2020, 191-214.

direktiva.[77] Provedeno je anketiranje nekoliko kategorija ispitanika, a nakon provedene ankete većina je bila za izmjenu Prve direktive o posredovanju. To je rezultat imalo prijedlog nove direktive o posredovanju u osiguranju (IMD 2 – *Insurance Mediation Directive 2)*, koju je Evropska komisija objavila 3. juna 2012. godine. Proces javne rasprave je trajao jako dugo (4 godine), nakon čega je postignut sporazum u pogledu konačnog teksta direktive, koja mijenja i naziv u Direktiva o distribuciji osiguranja (IDD – *Insurance Distribution Directive*), umjesto dosadašnjeg naziva Direktiva o posredovanju – IMD 2. Novi naziv naglašava nan koga se sada Direktiva primjenjuje, a to su svi subjekti koji učestvuju u postupku posredovanja u osiguranju, odnosno prodaje u osiguranju. Dana 20. januara 2016. godine prihvaćena je IDD i objavljena u Službenom glasilu EU br. 26/19 od 2. februara 2016. godine.[78] Stupila je na snagu 23. februara 2016. godine. Države članice su imale obavezu prenijeti je u nacionalna zakonodavstva u roku od 24 mjeseca, odnosno do 23. februara 2018. godine. S obzirom da je bilo potrebno donijeti tzv. delegirane akte Evropske komisije prije usklađivanja nacionalnih propisa sa propisima EU, kasnilo se i sa implementacijom IDD-a, pa je primjena Direktive odgođena za 1.10.2018. godine.[79]

IV Razvoj distribucije osiguranje u BiH *de lege ferenda*

Pitanju razvoja distribucije osiguranja pristupiće se kroz prizmu analize usklađenosti normativnog okvira u odnosu na IDD, kako bi se izveli zaključci u kojem pravcu treba ići reforma distribucije osiguranja u oba entiteta BiH.

ZPPO FBiH prvenstveno nije usklađen terminološki i u pogledu područja primjene. Njime se reguliše posredovanje u privatnom osiguranju, dok IDD propisuje pravila osnivanja i obavljanje poslova distribucije osiguranja i reosiguranja u Uniji. To znači da ZPPO FBiH ne obuhvata sve distributere osiguranja koji obavljaju ovu djelatnost, imajući u vidu da navodi da se posredovanje vrši preko zastupnika u osiguranju i preko brokera u osiguranju. Za razliku od njega, IDD propisuje da se ona odnosi na sve fizičke ili pravne osobe s poslovnim nastanom (ili koje ga planiraju uspostaviti) s ciljem osnivanja i obavljanja djelatnosti distribucije proizvoda osiguranja i reosiguranja. Direktiva propisuje da se ne odnosi na sporedne posrednike u osiguranju, uz ispunjenje određenih uslova. ZPPO FBiH u članu 2. stav 2. navodi da društvo za osiguranje ne može u FBiH vršiti djelatnost neposrednog osiguranja/reosiguranja preko posrednika koji nisu registrovani u skladu sa zakonom. IDD traži od država članica da osiguravaju da nadležna tijela prate tržišta generalno, uključujući i proizvode dodatnog osiguranja, dok ZPPO FBiH uopće ne regulira ovu obavezu.

[77] Marijan Ćurković, "Nastanak i obuhvat regulatornih odredbi o distribuciji osiguranja", 25.

[78] Dostupno na: https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32016L0097.

[79] Puni naslov: Direktiva (EU) 2018/411 Evropskog parlamenta i vijeća od 14. marta 2018. o izmjeni Direktive (EU) 2016/97 u pogledu datuma početka primjene mjera država članica za prenošenje, *Službeni list Europske unije* br. L 76/28.

Terminološka usklađenost u odnosu na IDD uprkos datumu stupanja na snagu ZZOPOR RS ne postoji. Naime, ovaj zakon razdvaja zastupanje u osiguranju i posredovanje u osiguranju i reosiguranju, pa se iz samog naslova naslućuje da je zastupanje moguće samo u osiguranju, dok je posredovanje moguće u osiguranju i reosiguranju.

Kada su u pitanju definicije, IDD sadrži 18 definicija koje se koriste za potrebe Direktive, dok je ZPPO FBiH specifičan u tom smislu jer ne sadrži uopšte definicije pojmova upotrijebljenih u zakonu, što svakako doprinosi pravnoj nesigurnosti i eventualnoj proizvoljnosti prilikom pojedinačnih tumačenja. Primjera radi, IDD definiše distribuciju osiguranja, distribuciju reosiguranja, posrednika u osiguranju, sporednog posrednika u osiguranju, distributera u osiguranju itd.

Za razliku od ZPPO FBiH, ZZOPOR RS sadrži u članu 2. definicije zastupanja u osiguranju, posredovanja u osiguranju i reosiguranju i odredbu o tome šta se to ne smatra zastupanjem i posredovanjem u osiguranju.

Iako ne postoji terminološka usklađenost, kako je naprijed navedeno (Direktiva propisuje distributere osiguranja: posrednik u osiguranju, sporedni posrednik u osiguranju i društvo za osiguranje, a ZPPO FBiH govori o zastupnicima i brokerima u osiguranju), ipak poslovi zastupnika u osiguranju se u velikoj mjeri poklapaju sa poslovima navedenim u definiciji distribucije osiguranja u Direktivi (predlaganje ugovora, savjetovanje, pripremne radnje, sklapanje ugovora, pomoć tokom trajanja ugovora, a posebno prilikom rješavanja odštetnog zahtjeva itd.), a u manjoj mjeri kod brokera u osiguranju. Međutim, postoji nešto što bismo mogli nazvati sadržajna neusklađenost između ova dva propisa. Naime, zastupnik u osiguranju u ZPPO FBiH radi u ime i za račun ili samo za račun jednog ili više društava, broker radi u ime osiguranika i dovodi u vezu lica koja traže osiguranje/reosiguranje i društva koja se bave tom djelatnošću, a IDD ne sadrži takve razlike nego distribuciju osiguranja definiše kao: *„djelatnost predlaganja ugovora o osiguranju, savjetovanje o njima ili obavljanja drugih pripremnih radnji za sklapanje ugovora o osiguranju, ili sklapanja takvih ugovora, ili pružanja pomoći pri upravljanju takvim ugovorima i njihovu izvršavanju, posebno u slučaju rješavanja odštetnog zahtjeva, uključujući pružanje informacija o jednom ili više ugovora o osiguranju u skladu s kriterijima koje odabiru potrošači putem internetske stranice ili nekog drugog medija i sastavljanje rang-liste proizvoda osiguranja, uključujući i usporedbu cijena i proizvoda ili popust na cijenu ugovora o osiguranju, ako potrošač može izravno ili neizravno sklopiti ugovor o osiguranju na internetskoj stranici ili drugom mediju“.*[80] Na temelju navedene definicije zaključujemo kako je ova djelatnost usmjerena samo prema potrošačima.

Sličan zaključak bi se mogao izvesti i u pogledu ZZOPOR RS kada se u pitanju termini koji se koriste u zakonu i područje primjene. Naime, Zakon ne poznaje termine kao i IDD, a to su distribucija osiguranja i s njim povezani termini, ali spominje

[80] Član 1. stav 1. tačka 1. IDD.

posredovanje u osiguranju (koje obuhvata i osiguranje i reosiguranje), dok i dalje zadržava termin zastupanje u osiguranju.

Kada je u pitanju upis u registar, ZPPO FBiH, propisuje registrovanje posrednika u osiguranju i uvjete za upis. IDD navodi obavezu država članica da se uspostavi sistem upisa putem interneta koji mora biti lako dostupan i omogućiti ispunjavanje obrasca za upis u registar izravno na internetu, koja obaveza nije provedena u FBiH. U odnosu na rokove rješavanja zahtjeva za upis, IDD ostavlja mnogo duži period (tri mjeseca od podnošenja zahtjeva) dok ZPPO FBiH rok od 30 dana za donošenje rješenja o zahtjevu, koja odredba je u interesu podnositelja zahtjeva, kao i bržeg i efikasnijeg ostvarivanja njihovih prava. Direktiva i Zakon su usklađeni u pogledu ograničenja korištenja usluga posrednika, pri čemu se insistira na tome da se mogu koristiti usluge samo distributera osiguranja koji su upisani u odgovarajuće registre.

IDD u pogledu stručnih i organizacijskih uvjeta distributera osiguranja propisuje da oni moraju posjedovati odgovarajuća znanja i sposobnosti kako bi primjereno izvršili svoje zadaće i dužnosti i da su se dužni stalno stručno osposobljavati i usavršavati u cilju održavanja nivoa učinkovitosti. Države članice moraju provjeravati i ocjenjivati njihovo znanje i stručnost (najmanje 15 sati godišnje), a može se zahtjevati i potvrda u tom smislu. Posrednici u osiguranju/reosiguranju moraju dokazati usklađenost sa relevantnim uvjetima stručnog znanja i sposobnostima iz Priloga 1 IDD. Za fizičke osobe se naglašava da moraju imati dobar ugled i definira šta to podrazumijeva. Naposlijetku, posrednici moraju imati osiguranje od profesionalne odgovornosti.

Upis u registar u ZZOPOR RS je odvojeno definiran za zastupnike i za brokere u osiguranju i uslovi koje moraju da ispune u zavisnosti od toga da li se radi o fizičkom ili pravnom licu. Posebno su razrađene obaveze brokera prema osiguraniku, odnosno ugovaraču osiguranja, što je u njihovom najboljem interesu.

IDD u posebnom poglavlju definira uvjete informiranja i pravila poslovnog ponašanja, uključujući opća načela, opće informacije, sukob interesa i transparentnost, izuzeća itd. ZPPO FBiH ne sadrži uopće odredbe o informiranju potrošača, tako da i u ovom segmentu postoji neslaganje i neusklađenost sa Direktivom. Osim toga, IDD sadrži posebno poglavlje u pogledu informiranja kada su u pitanju investicijski proizvodi osiguranja, koje ZPPO FBiH ne spominje niti na koji način.

Za razliku od ZPPO FBiH, ZZOPOR RS sadrži poseban član u kojem se detaljno normira obaveza pružanja informacija od strane zastupnika i brokera u osiguranju, kako sadržaj informacija tako i oblik u kojem one moraju biti saopštene osiguraniku, odnosno ugovaraču osiguranja.

ZPPO FBiH vrlo oskudno normira nadzor nad posrednicima u osiguranju, pri čemu je ta uloga data Agenciji za nadzor, a u slučaju nepravilnosti donosi rješenje koje je konačno i protiv njega se može pokrenuti upravni spor. Ovo rješenje nije u skladu sa odredbama IDD-a (član 31. stav 5.) koje propisuju da države članice jamče

da se pravo na žalbu primjenjuje na administrativne sankcije i druge mjere. Vezano za sankcije i druge mjere, Direktiva propisuje da će države članice jamče da će nadležna tijela uspostaviti djelotvorne mehanizme kojima će se omogućiti i potaknuti da se tim tijelima prijavljuju potencijalna ili stvarna kršenja nacionalnih odredaba kojima se Direktivs prenosi u zakonodavstvo, a ZPPO FBiH ne sadrži takve odredbe, niti propisuje posebne postupke za zaprimanje prijava kršenja.

ZZOPOR RS mnogo detaljnije reguliše nadzor na obavljanje poslova i djelatnosti zastupanja u osiguranju, odnosno posredovanja u osiguranju (kriterijumi i uslovi za ograničavanje iznosa provizije, neovlašteno obavljanje poslove, oduzimanje ovlaštenja/dozvole za rad) kao i prekršaje.

V Zaključak

Distribucija osiguranja predstavlja potpuno novi sistem posredovanja i zastupanja u osiguranju, koji je uveden u pravo osiguranja Evropske unije IDD direktivom 2016. godine. Novi sistem je uspostavio i nova pravila na tržištu osiguranja, a države članice su u obavezi da transponiraju odredbe Direktive u nacionalna zakonodavstva. Imajući u vidu da je BiH potpisala Sporazum o stabilizaciji i pridruživanju sa Evropskim zajednicama i njihovim država članicama, a dobila kandidatski status 15. decembra 2022. godine, u obavezi je da postepeno prilagođava svoje zakonodavstvo pravnoj stečevini Evropske unije (*Acquis communautaire*) i uspostavlja zonu slobodne trgovine s Evropskom unijom.

Analizom pravnog okvira u BiH koji se odnosi na posredovanje u osiguranju se može izvesti zaključak kako u oba entiteta odredbe nisu u potpunosti usaglašene sa sistemom EU. Naime, ZPPO FBiH je donesen 2005. godine, a izmjene su vršene u dva navrata, 2010. i 2016. godine, dok je ZZOPOR RS donesen 2017. godine.

Oba entitetska zakona o posredovanju (i zastupanju) u osiguranju nisu terminološki usklađena sa Direktivom, odnosno ne spominju uopšte distribuciju osiguranja. Iako ne postoji terminološka usklađenost, poslovi zastupnika u osiguranju se u velikoj mjeri poklapaju sa poslovima navedenim u definiciji distribucije osiguranja u Direktivi, a u manjoj mjeri kod brokera u osiguranju. Kada je u pitanju upis u registar, ni ZPPO FBiH ni ZZOPOR RS nisu uspostavili elektronski sistem (putem interneta) registrovanja posrednika u osiguranju. Cilj IDD-a je, između ostalog, povećati nivo zaštite potrošača kroz kontinuirano profesionalno osposobljavanje distributera osiguranja na godišnjem nivou, koja odredba nije propisana kao uvjet za obnavljanje upisa u odgovarajući registar posrednika i zastupnika u osiguranju. Konačno, zaštita potrošača se postiže propisivanjem vrlo striktnih pravila u vezi sa pružanjem informacija o proizvodima osiguranja, gdje FBiH u potpunosti zaostaje, jer ne sadrži niti jednu odredbu o tome, dok zakon RS sadrži poseban član u kojem se detaljno normira obaveza pružanja informacija od strane zastupnika i brokera

u osiguranju, kako sadržaj informacija tako i oblik u kojem one moraju biti saopštene osiguraniku, odnosno ugovaraču osiguranja.

Literatura

- Vojinović, Ž., „Uređenje unutrašnjih odnosa u posredničkom i zastupničkom poslovnom poduhvatu", *Tokovi osiguranja*, 4/2022.
- Maleta, N., „Prilagodba regulatornog okvira Solvency II novim rizicima i izazovima suvremenog korporativnog upravljanja", *Tokovi osiguranja*, 3/2024.
- Marković, M., „Izazovi tržišta osiguranja u Srbiji na putu ka Solventnosti II", *Tokovi osiguranja*, 2/2024.
- Mihelja Žaja, M., Milanović Glavan, LJ., Grgić, M., „Digitalna tehnologija kao čimbenik razvoja kanala distribucije u osiguranju", *Hrvatski časopis za osiguranje*, No. 3,191-214, 2020.
- Merkin, R., Rodger, A., *EC Insurance Law,* London, 1997.
- Mrkšić, D., Petrović, Z., Ivančević, K., *Pravo osiguranja*, II izmjenjeno i dopunjeno izdanje, Fakultet za poslovno pravo, Beograd, 2005.
- Pak, J., „Pružanje usluga osiguranja na jedinstvenom tržištu Evropske Unije" u: *Uslovi za realizaciju prometa roba i usluga u pravu Evropske unije i jugoslovenskom pravu,* Institut za uporedno pravo, Monografija br. 137., Beograd, 2001.
- Petrović Tomić, N., *Osnovi prava osiguranja,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2021.
- Ćurković, M., „Zastupanje i posredovanje u osiguranju prema Zakonu o osiguranju", Novi propisi iz osiguranja – Zakon o osiguranju i Zakon o obveznim osiguranjima u prometu, Inženjerski biro, Zagreb, 2006.
- Ćurković, M. "Nastanak i obuhvat regulatornih odredbi o distribuciji osiguranja", *Hrvatski časopis za OSIGURANJE*, No. 1, Zagreb, 2019.
- Ćurković, M., "Obveza distributera na informiranje potrošača proizvoda osiguranja prema odredbama EU Direktive o distribuciji proizvoda osiguranja", Zbornik radova sa 30. Susreta osiguravača i reosiguravača Sarajevo, (urednik Nikola Miljević), Sarajevo, 2019.
- Ćurković, M., „Posredovanje i zastupanje u osiguranju", Zbornik sa 7. savjetovanja o obradi i likvidaciji međunarodnih automobilskih šteta (Hrvatski ured za osiguranje, Ante Lui), Lovran, 1999.
- Ćurković, M., „Zastupanje i posredovanje u osiguranju prema Zakonu o osiguranju", Novi propisi iz osiguranja – Zakon o osiguranju i Zakon o obveznim osiguranjima u prometu, Inženjerski biro, Zagreb, 2006.

- Džidić, M., Marijan, Ć., *Pravo osiguranja*, Pravni fakultet Sveučilišta u Mostaru, Mostar, 2017.
- Uzelac, O., i Dukić Mijatović, M., „Sadržina i obim obaveza tokom procesa izrade i uvođenja proizvoda osiguranja na tržište prema Direktivi EU o distribuciji osiguranja", *Evropska revija za pravo osiguranja*, str. 9 -18, I/2019.
- Žarković, N., „Lični razgovor sa strankom u posredovanju i zastupanju u osiguranju", *Tokovi osiguranja*, 4/2020.

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DEVELOPMENT OF INSURANCE DISTRIBUTION IN BOSNIA AND HERZEGOVINA: DE LEGE FERENDA

PROFESSIONAL PAPER

Abstract

The authors present the legal framework and analyze regulatory provisions on insurance distribution in Bosnia and Herzegovina. The paper examines the legal provisions governing insurance distribution and, more specifically, seeks to answer whether the current regulatory framework is outdated and requires amendments. Relying on a comparative legal analysis of European Union legislation in this context, the authors argue that the legal framework for insurance distribution should be revised *de lege ferenda* and aligned with the Insurance Distribution Directive. The proposed amendments should aim at enhancing the efficient functioning of the insurance market and strengthening consumer protection.

Keywords: insurance distribution, insurance mediation, insurance products, European Union Insurance Distribution Directive.

I Introduction

Insurance distribution must be distinguished from the insurance activities.[2] Insurance activities are regulated by the Insurance Law of the Federation of Bosnia

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[2] See more: Nataša Petrović Tomić, *Osnovi prava osiguranja*, Faculty of Law, University of Belgrade, Belgrade, 2021, 113 et seq.

and Herzegovina[3] and consist of insurance operations, reinsurance activities, and activities directly related to insurance.

Insurance activities include the conclusion of insurance contracts and the fulfillment of obligations arising from such contracts. In addition to these actions, insurance activities also involve taking measures to prevent and mitigate risks that threaten insured property and individuals. In contrast, reinsurance activities refer to the conclusion and execution of reinsurance agreements, through which an insurance company transfers excess risk to a reinsurance company. Besides insurance and reinsurance activities, the insurance business also includes activities directly related to insurance operations. Traditionally, these activities encompass risk assessment and damage assessment, mediation for sales, the sale of insured damaged goods, and the provision of other intellectual and technical services related to insurance. The activities related to mediation for insurance sales constitute insurance distribution, which, as will be discussed later, is regulated by a separate law. The Insurance Company Law of the Republic of Srpska[4] provides a more precise definition of insurance activities,[5] explicitly stating that the insurance activities comprise the conclusion and execution of insurance and reinsurance contracts, as well as the activities of insurance intermediaries and agents.

Insurance mediation and insurance agencies play a crucial role in the functioning of the insurance sector.[6] The current legal framework in Bosnia and Herzegovina does not provide a direct definition of insurance distribution; however, it can be inferred indirectly. The insurance service distribution system consists of mediation in private insurance, which is conducted through insurance agents and brokers.

II Regulatory Framework for Insurance Distribution in Bosnia and Herzegovina

In general, all legal sources related to insurance can be classified into two categories: status-related sources and substantive legal sources. Status-related sources of insurance law regulate the legal position and status of insurance companies, insurance supervision, and similar matters. Substantive legal sources, on the other hand, govern contractual and legal relationships in the field of insurance law, whether based on legal provisions or contractual agreements.

[3] *Službeni glasnik BiH*, No. 23/17, hereinafter: ZOS FBiH.
[4] *Službeni glasnik Republike Srpske*, Nos. 17/05, 01/06, 64/06, and 74/10, hereinafter: ZDO RS.
[5] Article 2, Paragraph 1, ZDO RS.
[6] Marijan Ćurković, *„Posredovanje i zastupanje u osiguranju"*, Proceedings of the 7th Conference on the Processing and Settlement of International Motor Claims (*Croatian Insurance Bureau, Ante Lui*), Lovran, 1999, 33.

The regulatory framework for insurance distribution in Bosnia and Herzegovina (hereinafter: BiH) consists of six legal acts:

a) The Law of Obligations of the Federation of BiH,[7]
b) The Insurance Law of the Federation of BiH (ZOS FBiH),
c) The Law of Obligations of the Republic of Srpska,[8]
d) The Insurance Company Law of the Republic of Srpska (ZDO RS),
e) The Law on Mediation in Private Insurance,[9] and
f) The Law on Insurance Agency and Mediation in Insurance and Reinsurance.[10]

As stated in the introduction, ZOS FBiH, in its general provisions, and ZDO RS, in its introductory provisions, define the scope of insurance activities, explicitly recognizing that sales mediation falls under the broader category of insurance industry. These two laws serve as *lex generalis*, while ZPPO FBiH and ZZOPOR RS act as *lex specialis* in relation to this matter. ZOO FBiH and ZOO RS contain an important provision regulating the authority of insurance agents.[11] However, these two laws also serve as substantive legal sources concerning mediation contract and commercial agency contract. Their provisions apply to insurance agents and brokers in cases where the matter is not specifically regulated by ZPPO FBiH and ZZOPOR RS.[12]

1. Federation of Bosnia and Herzegovina

The fundamental insurance law in the Federation of Bosnia and Herzegovina (FBiH) is the Insurance Law of FBiH (ZOS FBiH), which regulates the establishment, operations, supervision, and termination of insurance and reinsurance companies founded in FBiH, as well as branches of insurance and reinsurance companies headquartered outside FBiH.[13] The law was enacted in 2017, divided into 15 chapters with a total of 230 articles, making it a rather extensive legal framework.

As mentioned in the introduction, insurance activities, reinsurance activities, and activities directly related to insurance operations constitute insurance. The latter category includes mediation in sales, which is regulated by the ZPPO FBiH as *lex specialis*. The law was enacted in 2005 and amended twice, in 2010 and

[7] *Službeni glasnik SFRJ*, No. 29/1978, 39/1985, 45/1989 – Constitutional Court decision, and 57/1989; *Službeni glasnik BiH*, No. 2/1992, 13/1993, and 13/1994; *Službeni glasnik iH*, No. 29/2003 and 42/2011; hereinafter: ZOO FBiH.

[8] *Službeni glasnik SFRJ*, No. 29/1978, 39/1985, 45/1989 – Constitutional Court decision, and 57/1989; *Službeni glasnik RS*, No. 17/1993, 3/1996, 37/2001 – other law, 39/2003, and 74/2004; hereinafter: ZOO RS.

[9] *Službeni glasnik BiH*, No. 22/05, 8/10, and 30/16; hereinafter: ZPPO FBiH.

[10] *Službeni glasnik Republike Srpske*, No. 47/17; hereinafter: ZZOPOR RS.

[11] Article 906, ZOO FBiH and ZOO RS.

[12] Miroslav Džidić, Marijan Ćurković, *Insurance Law*, Faculty of Law, University of Mostar, Mostar, 2017, 115.

[13] Article 1, ZOS FBiH.

2016. It is structured into six sections: I General Provisions, II Insurance Agents, III Insurance Brokers, IV Supervision of Insurance Intermediaries, V Penal Provisions, VI Transitional and Final Provisions. This is a relatively short law, consisting of only 19 articles. ZPPO FBiH governs insurance mediation in private insurance, the conditions for performing such activities, and the supervision of their execution within FBiH.[14] According to the legal framework, there are two types of insurance intermediaries: insurance agents and insurance brokers.

For an insurance company in FBiH to conduct direct insurance or reinsurance activities through an insurance intermediary, the intermediary must be registered in accordance with this law and listed in a special register maintained by the Insurance Supervision Agency of FBiH (hereinafter: Supervision Agency FBiH). It is important to note that this registration is valid throughout Bosnia and Herzegovina. If an insurance intermediary is registered in FBiH, they may also provide their services in the Republic of Srpska (RS), but only through an organizational unit established within RS, as further specified by law. The same applies *vice versa*—when an insurance intermediary is registered in RS and intends to operate in FBiH for the first time, they must notify the RS Supervision Agency in writing.[15]

The role of insurance agents and brokers is crucial in the insurance industry.[16]

An insurance agent is one of the two types of insurance intermediaries. ZPPO FBiH dedicates only two articles to insurance agents: one covering general provisions and another detailing their registration requirements.[17] Insurance agency activities may be performed by legal or natural persons engaged in professional business activities. Exceptionally, these activities may also be conducted by banks[18] and public enterprises—postal operators, provided they obtain the necessary license and are registered with the Supervision Agency FBiH. An insurance agent acts on behalf of and/or for the account of one or more insurance companies, meaning they are directly affiliated with insurers. To perform their duties, an insurance agent must enter into a written agreement with an insurance company, which the company is then obligated to submit to the Supervision Agency FBiH. The same obligation applies in the event of contract termination, regardless of the reason for termination. The insurance company must notify the Supervision Agency FBiH and publish the notification in a widely circulated daily newspaper in the insurance agent's business location, as well as on the company's website.[19] An insurance agent operates independently and performs the following tasks: initiating, proposing, and carrying out

[14] Article 1, ZPPO FBiH.
[15] Article 5, ZPPO FBiH.
[16] For more details, see: Dragan Mrkšić, Zdravko Petrović, Katarina Ivančević, *Insurance Law*, *II revised and expanded edition*, Faculty of Business Law, Belgrade, 2005, 90 et seq.
[17] Articles 6 and 7, ZPPO FBiH.
[18] Except in cases involving motor vehicle liability insurance.
[19] This obligation also applies in cases where the agency contract expires.

preparatory actions leading to the conclusion of an insurance contract, concluding insurance contracts, assisting in the implementation or execution of insurance contracts, particularly in case of a potential claim, and providing advisory services.

For an insurance agent to begin their professional activities, certain conditions must be met. These conditions vary depending on whether the agent is a natural person or a legal entity, and they must be registered with the FBiH Insurance Supervision Agency. Regarding the register of insurance agents who are natural persons, it is divided into two sub-registers: one containing the names of agents registered in FBiH and the other listing agents registered in RS who provide services in FBiH. The first sub-register includes a total of 1,149 insurance agents, while the second has only 5. Additionally, the Agency maintains a sub-register of public enterprises—postal operators and banks acting as insurance agents, which currently includes 13 registered agents.[20] The register of insurance agencies consists of two sub-registers within the main register. The sub-register of insurance agencies in FBiH contains 41 registered companies, while the sub-register of branches of insurance agencies from RS includes 5 registered branches. An insurance agency may be established as a joint-stock company or a limited liability company, in accordance with the law governing the status of commercial companies. For the FBiH Insurance Supervision Agency to issue a registration decision within 30 days from the date of application, an insurance agent must submit a registration request along with the legally prescribed documentation.[21] Agents are also required to pay an annual supervision fee and a registration fee, in accordance with the Agency's regulations. Insurance agencies, banks, public enterprises - postal operators, and company branches must pay an annual fee of 0.5% of the commission earned in the previous year, but not less than 1,000.00 KM. Natural persons pay the same percentage, but the minimum amount is reduced to 500.00 KM.[22] It is interesting that the law does not explicitly mention the right to commission when it comes to insurance agents. However, the Law of Obligations (ZOO), which regulates the commercial agency contract (a contract concluded between the agent and the company), stipulates that one of the agent's fundamental rights is compensation (commission).[23] The agent is entitled to a commission when a contract is concluded through their mediation, when they have directly concluded contracts (if authorized), as well as when the insurance company has concluded insurance contracts with clients the agent has introduced [24] The agent obtains the right to compensation once the contract is executed.[25] The agent is also entitled to

[20] Register of Insurance Agents, Website of the FBiH Insurance Supervision Agency, https://nados.ba/bs/zastupnici/ July 16, 2024.
[21] See: Article 7, ZPPO FBiH.
[22] Decision on Fees, *Official Gazette of FBiH*, No. 2/18 (hereinafter: Decision on Fees FBiH).
[23] M. Džidić, M. Ćurković, 126–127.
[24] Art. 804 ZOO.
[25] Paid premium by the policyholder.

commission even if the contract is not executed, provided that the insurance company is at fault for the non-execution.[26] The issue of commission is typically regulated by the agency contract with the insurance company, alongside other matters such as the agent's authority.[27] The amount of commission is determined by contract. If no contractual provision exists, the agent should not be left without compensation but is instead entitled to a customary fee.[28] Lastly, if the agent was authorized to collect the premium and did so, he is entitled to a special fee in that case.[29] When it comes to the expenses incurred by the agent in the course of their regular professional activities, he is not entitled to reimbursement unless otherwise agreed upon in the contract with the insurance company. However, if the agent has incurred special costs that benefited the company, he is entitled to reimbursement for those costs.[30]

At this point, it is useful to mention the provisions of the ZOO related to the insurance contract and regulate insurance agency. Namely, an insurer may authorize a person to act on their behalf, either with or without limitations on their authority. If an insurance agent acts without limitations on their authority, they may conclude insurance contracts on behalf of and for the account of the insurer, negotiate their amendments, or extend the validity of policies. Additionally, in such cases, the insurance agent may issue insurance policies, collect premiums, and receive statements related to the insurer. If there are limitations on the agent's authority that were unknown to the policyholder, it is considered that such limitations did not exist.[31]

The second type of intermediary in insurance is the *insurance broker*. The law dedicates an additional article to brokers compared to agents (Arts. 8–10), which regulate general provisions, registration, and broker obligations. Insurance brokerage activities may be performed by legal entities and individuals engaged in independent business activities. Unlike an insurance agent, who works for an insurance company, the exclusive professional purpose of an insurance broker is to act on behalf of the policyholder, meaning they are entirely independent of insurance companies. The broker's duties include the following: connecting parties seeking insurance or reinsurance with insurance or reinsurance companies, carrying out preparatory work for concluding insurance or reinsurance contracts, and assisting in contract execution and claim processing, particularly in the case of compensation claims.[32]

Unlike insurance agents, where the law does not explicitly mention the commission they are entitled to (although the ZOO does, as previously stated), in the case of insurance brokers, it is explicitly regulated that they receive a commission

[26] Art. 805 ZOO.
[27] N. Petrović Tomić, 122.
[28] Art. 806 (1) ZOO.
[29] Art. 807 ZOO.
[30] Art. 808 ZOO.
[31] Art. 906 ZOO.
[32] Only if contractually agreed.

from the insurance company and operate with complete freedom in choosing the insurance company.[33] It is done immediately after defining a broker, before the conditions for obtaining a license to operate.

For a broker to begin business activities, he must meet certain conditions, which vary depending on whether he is a natural or legal person. An insurance broker (both natural and legal persons) must be registered in a special register maintained by the FBiH Supervisory Agency. The register of natural person brokers is divided into two sub-registers: one containing the names of brokers registered in FBiH, and another listing brokers registered in RS who provide services in FBiH through an organizational unit in FBiH. The first sub-register contains 13 brokers, while the second has a total of 5.[34] The register for legal entity brokers is divided in the same manner as for natural persons. The sub-register of brokerage companies operating in FBiH contains 8 companies, while the sub-register of brokerage companies registered in RS and operating through a branch in FBiH lists a total of 5.[35] A legal entity insurance brokerage company can be established as a joint-stock company or a limited liability company, in accordance with the law regulating the legal status of business entities. It is important to emphasize that the person authorized to represent an insurance brokerage company must be registered as an insurance broker (and must be listed in both registers). Additionally, all employees in an insurance brokerage company who perform insurance procurement activities must have professional qualifications.[36] For the Agency to issue a business authorization, an insurance broker must submit an application and attach the same documentation required for insurance agents (see pages 6–7). An additional requirement for a natural person broker is the blocking of assets in the amount of 200,000.00 KM to ensure the proper execution of his activities, as well as documentation proving valid professional liability insurance in case of errors or omissions. The Agency's regulations govern the method of blocking the broker's assets and all details related to professional liability insurance.[37] The Agency is required to issue a decision on the submitted application within 30 days of receiving the request and the documentation proving compliance with legal requirements. The registration of an insurance broker is valid for a period of two years. The broker is obligated to resubmit all documents within 30 days before the expiration of this period (depending on whether it is a natural or legal person). If he fails to do so, the registration will no longer be valid. Additionally, registration will

[33] Article 8, Paragraph 2, ZPPO FBiH.
[34] Insurance Brokers Register, FBiH Supervisory Agency website, https://nados.ba/bs/zastupnici/, 16.7.2024.
[35] Insurance Brokers Register, FBiH Supervisory Agency website, https://nados.ba/bs/zastupnici/ 16.7.2024.
[36] Successfully passing the professional examination for conducting insurance brokerage activities.
[37] Article 1, Rulebook on Blocking of Assets and Liability Insurance for Insurance Brokers, *Službeni glasnik BiH*, No. 80/06.

be revoked if it is determined during the process that the applicant is not a suitable person to act as an insurance broker.

An insurance broker is required to maintain a separate account for depositing all amounts collected on behalf of policyholders, and these funds must not be used for other purposes, such as paying the broker's other creditors. In the case of the broker's insolvency, the funds from a special account will be used to settle all outstanding claims to clients based on compensation claims.[38]

The obligation to pay an annual fee and registration tax also applies to insurance brokers. The annual fee for brokerage companies in insurance, as well as their branches in FBiH with headquarters in RS, amounts to 0.5% of the commission earned in the previous year for the current year, but not less than 1,000.00 KM, while individuals pay the same percentage, with a minimum amount of 500.00 KM.[39]

In addition to the obligations, it is particularly emphasized that an insurance broker has duties that can be grouped as follows: maintaining books and records of business activities, complying with the requests of the FBiH Supervisory Agency in terms of reporting and business conduct, and maintaining independence from insurance companies.

The role of the FBiH Supervisory Agency. The FBiH Supervisory Agency has a regulatory and supervisory function over the operations of insurance intermediaries. The regulatory function consists of setting the conditions for acquiring and verifying the professional knowledge required for performing insurance mediation tasks, establishing rules for maintaining registers, determining the data entered them, ensuring public access to these registers, and regulating the procedure for issuing authorization to conduct insurance representation activities, including the conditions applicable to banks and public enterprises—postal operators. As the name suggests, the supervisory function entails overseeing the operations of insurance intermediaries. If the supervisory process identifies irregularities, the Agency may issue appropriate solution. In fulfilling this function, intermediaries are required to cooperate with the Agency and provide information as specified in terms of scope, format, and deadlines. Supervision may also be conducted on the business premises of the insurance intermediary.

2. Republic of Srpska

The fundamental statutory law in the field of insurance in the Republic of Srpska (RS) is the Insurance Law of RS (ZDO RS), whose norms are dedicated to the establishment, activities, supervision, and termination of insurance companies and

[38] Article 9, Paragraph 9, ZPPO FBiH.
[39] Decision on Fees FBiH.

branches engaged in insurance activities in RS, and which establishes the Insurance Agency of RS (hereinafter: Agency RS).[40]

The fundamental law governing insurance distribution in RS is the Law on Insurance Distribution (ZZOPOR RS), which regulates the activities of insurance agency and mediation in insurance and reinsurance, the conditions for issuing and terminating licenses, operations and rules of conduct, as well as supervision of the previously mentioned activities.[41] Unlike the corresponding law in the Federation of Bosnia and Herzegovina (FBiH), an analysis of the title and subject of the law in RS concludes that representation is only possible in the field of insurance, while mediation occurs in both insurance and reinsurance. The law was enacted in 2017 and is divided into seven chapters: I Basic Provisions, II Representation in Insurance, III Mediation in Insurance, IV Establishment of Branches of Insurance Representation and Brokerage Companies, V Common Provisions, VI Supervision and Penal Provisions, and VII Transitional and Final Provisions. It consists of a total of 51 articles, which is twice as many as its counterpart law in FBiH. In FBiH, mediation in private insurance is a broader concept that includes mediation through insurance representatives and mediation via insurance brokers. In RS, this is not the case. The law makes a clear distinction between representation in insurance and mediation in insurance and reinsurance. Representation in insurance is conducted in the name and on behalf of the insurance company and includes all preparatory actions aimed at concluding insurance contracts. Mediation in insurance encompasses both insurance mediation and reinsurance mediation, which are all brokerage activities. These involve connecting policyholders with insurance companies to conclude insurance contracts. Additionally, brokers are obligated to assist in the implementation of such contracts.[42] The law also explicitly excludes activities that are not considered representation and mediation in insurance, such as collecting data on policyholders or insurance contractors, their risks, and needs for concluding contracts, as well as providing general information about available insurance products.

In order to prevent legal uncertainty and clarity, a provision in the ZZOPOR RS has been established that regulates the application of other regulations[43], under condition that no different conditions are prescribed by this law. When it comes to contracts of representation and contracts of mediation in representation, the ZOO RS applies to everything that is not governed by the subject law. Regarding individuals performing representation and mediation in insurance, who are established as economic entities, the Law on Economic Societies applies to them.[44]

[40] Art. 1. ZDO RS.
[41] Art. 1. ZZOPOR RS.
[42] Art. 2. ZZOPOR RS.
[43] Which provisions are not present in the ZPPO FBiH.
[44] *Službeni glasnik RS,* No. 127/2008, 58/2009, 100/2011, 67/2013, 100/2017, 82/2019, and 17/2023.

Insurance representation is carried out by *insurance representatives*. An insurance representative can be: a natural person, an entrepreneur, a representation company, a bank, a microcredit company, or Preduzeće za poštanski saobraćaj RS a.d. Banja Luka, as well as branches of companies based in FBiH.

An insurance representative who is a natural person performs representation activities based on authorization for representation and registration in the relevant registers of the Agency RS. However, the mere authorization and registration in the register are not sufficient for the representative to begin his activities in insurance representation. He can only operate based on an employment contract or some other legal relationship with other entities – insurance representatives (entrepreneurs for insurance representation, insurance representation companies, branches of companies based in FBiH, banks, microcredit companies, or Pošte Srpska). If the insurance representative is employed based on an employment contract or some other legal relationship in an insurance company, he is not considered an insurance representative under this law. Only representatives who meet the conditions prescribed by law can engage in insurance representation.[45] If a natural person insurance representative meets all the legally prescribed conditions, the Agency RS will issue them an authorization to work and register them in the register of natural person insurance representatives for a period of four years from the date of registration.[46] A total of 615 representatives are registered in the Subregister of natural person representatives from RS, while a total of 3 representatives are registered in the Subregister of natural person representatives from FBiH.[47] The authorization for representation issued to an insurance representative is valid throughout the entire territory of BiH. Once issued, the authorization for representation for a natural person can cease upon the personal request of the insurance representative, expiration of the term for which it was issued, or revocation of the authorization.[48]

The activity of insurance representation can also be carried out by an entrepreneur engaged in insurance representation. Two fundamental conditions must be met for this; a representation license issued by the RS Agency and a registration decision issued by the competent registration authority. The first license is a prerequisite for their registration in the entrepreneurs' register, meaning he must obtain it first, while registration in the Agency's registers is done based on proof of completed registration.[49] A total of 84 entrepreneurs engaged in insurance representation are registered in the Subregister of the RS Agency.[50] The entrepreneur is

[45] *Službeni glasnik RS*, No. 56/10 (hereinafter: Decision on Tariffs RS).
[46] Art. 28. ZZOPOR RS.
[47] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ July 20, 2024.
[48] See: Art. 38. ZZOPOR RS.
[49] Art. 9. ZZOPOR RS.
[50] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ July 20, 2024.

organized in accordance with the provisions of the law regulating the performance of craft-entrepreneurial activities.[51] To begin operations, the entrepreneur must fulfill the conditions prescribed by law. Once issued, the representation license for an entrepreneur can cease to be valid upon the expiration of the registration period, if the entrepreneur does not commence activities within six months from the registration date, or if he ceases operations for six consecutive months.

An entrepreneur may represent one or more insurance companies simultaneously, either in the same or different types of insurance. However, if representing multiple companies in the same type of insurance, the entrepreneur must obtain written consent from all represented companies. The insurance company enters into a written contract with the entrepreneur and submits it to the RS Agency. Additionally, insurance companies are required to notify the RS Agency about the termination of such agreements, regardless of the reason for termination.[52]

An insurance representation company may also act as an insurance representative if it has been issued a representation license and is registered in the business entity register. Such a company can be established in two forms: as a joint-stock company or as a limited liability company, in accordance with regulations governing companies. The representation license issued to an insurance representation company is valid for four years and applies throughout the territory of Bosnia and Herzegovina.

The license issued by the Agency is a prerequisite for the company's registration in the business entity register, after which it is also entered into the registers maintained by the RS Agency. The register of insurance companies maintained by the RS Agency is divided into two subregisters: the Subregister of Insurance Representation Companies from RS, which includes 17 companies, and the Subregister of Insurance Representation Companies from FBiH, which includes 4 registered companies.[53]

Just like an entrepreneur engaged in insurance representation, and under the same conditions, a company can represent one or more insurance companies in either the same or different types of insurance. The insurance representation company must conclude a written agreement with the insurance company and submit it to the RS Agency. This obligation to notify the Agency also applies in cases of contract termination.

The company and the entrepreneur engaged in insurance representation are obliged to accurately and promptly maintain business records, as well as to possess and keep all documentation related to their activities. The business records of these insurance representatives include maintaining data about physical person representatives, insurance companies with which they have entered contracts, and

[51] Law on Independent Entrepreneurs, *Službeni glasnik Republike Srpske*, No. 98/24.
[52] Art. 11. ZZOPOR RS.
[53] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ July 20, 2024.

individuals who collect data about potential policyholders/contractors, risks, and needs, as well as those who provide general information about insurance products.

Since the insurance representation contract is not a gratuitous agreement, its essential element is the commission. The company and the entrepreneur engaged in insurance representation have the right to a commission for their work. The commission is paid by the insurance company on behalf of which the insurance contract is concluded. The law stipulates that if the RS Agency determines a threat to the financial position and financial discipline of companies, as well as the smooth functioning of the insurance market due to the contracted commission of representatives, it may issue a regulation that limits the amount of the commission and regulates other mutual relations between insurance representatives and insurance companies. The RS Agency has adopted the Rulebook on the Mutual Relations of Insurance Representatives and Insurance Companies and the Limitation of Insurance Representatives' Commissions.[54] For example, according to this Rulebook, the limit on the commission amount for liability insurance is 27%, and for other types of non-life insurance, a higher commission rate than the share of the overhead addition in the gross premium for that type of insurance cannot be agreed upon.[55]

Insurance representation activities can also be performed by banks, microcredit companies, and Pošte Srpske based on a representation license issued by the Agency. The Agency issues the license after receiving a request and documentation proving that the legal conditions have been met.[56]

Insurance mediation is primarily regulated in the Law of Obligations (ZOO). Specifically, Article 813 of the ZOO states that the mediation contract obligates the mediator to find and connect the client with a party that would negotiate the conclusion of a specific contract, and the client is obliged to pay a certain fee if the contract is concluded. If we transpose this to the field of insurance, the mediator is the insurance broker, who finds and connects potential policyholders/contractors with the insurance company to conclude a contract. The ZZOPOR RS adds further obligations for brokers in insurance to this classical definition of mediation from the ZOO, which includes performing preparatory actions for concluding insurance contracts and providing assistance after the contract is concluded regarding its execution. Mediation activities can generally be divided into three phases. The first phase involves analyzing the needs of the specific policyholder/contractor and creating an offer according to their wishes. The second phase encompasses negotiations with the insurance company to conclude the contract. Finally, the third and last phase includes the broker's obligation to provide assistance to the policyholder after the insurance contract is conclude, i.e. during its duration.[57]

[54] *Official Gazette RS*, No. 21/19 and 85/21.

[55] *Ibid*, Art. 3.

[56] Art. 8. ZZOPOR RS.

[57] Marijan Ćurković, Zastupanje i posredovanje u osiguranju prema Zakonu o osiguranju, Novi propisi iz osiguranja – Zakon o osiguranju i Zakon o obveznim osiguranjima u prometu, Inženjerski biro, Zagreb, 2006, 52.

The activities of insurance brokerage are carried out by insurance brokers as their exclusive activity. An insurance broker can be a natural person, based on a mediation authorization, a legal entity, based on a mediation approval, and branches of brokerage firms headquartered in the Federation of Bosnia and Herzegovina (FBiH). These entities acquire the right to perform their activities upon registration in the relevant registers of the Agency of the Republic of Srpska (RS), based on the fulfillment of legally prescribed conditions. The authorization for mediation is issued for a period of four years and is valid throughout Bosnia and Herzegovina, and it ceases to be valid in the same manner as the authorization for representation of a natural person in insurance.[58] An insurance brokerage company can be established as a joint-stock company or a limited liability company. Within the register of insurance brokerage companies, there are two subregisters: the Subregister of Insurance Brokerage Companies from RS and the Subregister of Insurance Brokerage Companies from FBiH. The first subregister contains seven registered brokerage companies, while the second contains three.[59]

To obtain a mediation license, an insurance brokerage company must meet the same conditions as a representation company in insurance (for the avoidance of repetition, the authors refer to page 16 of this work) along with an additional condition related to proof of liability insurance from mediation activities in insurance, with a coverage amount that cannot be less than 600,000 KM per individual claim, or 960,000 KM for all claims in one year.[60] The mediation license issued to the brokerage company lasts for four years from the date of registration with the Agency of RS and is valid throughout Bosnia and Herzegovina, and it ceases to be valid in the same manner as the license for representation issued to a representation company in insurance (see page 17).

The insurance broker has obligations towards both the insured and the insurance company. The law establishes the protective role of the broker in relation to the insured/contractor. This role includes providing the insured with all necessary information and clarifications so that the insured can make the best decision and conclude an insurance contract according to their needs. Naturally, the broker does this not on their own initiative but exclusively based on a written order or contract concluded with the client. In this sense, when the broker receives the necessary information from the insured/contractor, they will proceed to prepare a risk analysis and coverage principles that represent the best solution.[61] He will do this by considering multiple insurance contracts available in the market. The law does not specify

[58] Art. 16, para. 3, ZZOPOR RS.

[59] https://azors.rs.ba/bs/naslovna/ucesnici-na-trzistu/ July 20, 2024.

[60] Art. 18, ZZOPOR RS.

[61] Nebojša Žarković, „Lični razgovor sa strankom u posredovanju i zastupanju u osiguranju", *Tokovi osiguranja*, 4/2020, 7-24.

how many contracts are required but uses the phrase "a sufficiently large number of contracts". What makes a sufficiently large number likely depends on the type of insurance and availability in the insurance market. Based on all the professional information he has and that is known to him, the broker will evaluate the financial capacity of the insurance company to cover the risks of the insured. After conducting a risk analysis and assessing the financial capacity of the insurance company, the broker's advisory role becomes essential. At the request of the insured, the broker will advise which of several insurance companies to choose for concluding the contract, or which company offers the greatest security. This obligation is also linked to the broker's duty to provide the insured with all offers obtained from insurance companies, along with the terms of insurance, and in this respect, to explicitly point out certain provisions regarding the scope of coverage and exclusions. After choosing the company, the policyholder proceeds to conclude the contract. If explicitly requested by the policyholder, the broker will facilitate the conclusion of the contract. After the contract is concluded, the broker delivers the concluded insurance contract to the policyholder. The broker's role and responsibility to protect the interests of the policyholder do not end with the conclusion of the contract. The broker checks the content of the insurance policy and is obliged to monitor the insurance contract in which they mediated during its duration. In this sense, if necessary, they are required to propose amendments to the already concluded contract. The broker's obligation to assist the policyholder during the contract's duration is particularly emphasized. This is particularly important if an insured event occurs for which the insurance contract was concluded, the broker plays a crucial role in ensuring that the policyholder realizes all rights that belong to him under the contract and within the legally prescribed deadlines. Finally, the broker must be transparent in their actions, making all connections (both legal and economic) and commissions received from the specific insurance company available.[62]

In addition to being obligated to protect the interests of the policyholder in selecting the best and most favorable insurance contract, the duty to safeguard interests also applies to the insurance company to the same extent as it does to the policyholder. The insurance broker is required to inform the specific insurance company about the policyholder's offer, as well as their requirements and needs.

An insurance brokerage firm must have a separate account in which funds paid by the policyholder/contracting party as an insurance premium, as well as funds paid by the insurance company as compensation or settlement amounts under an insurance contract brokered by the firm, are kept, provided there is explicit written authorization for such an arrangement. These funds do not constitute the assets of the brokerage company, nor do they form part of its liquidation or bankruptcy

[62] Art. 20, ZZOPOR RS.

estate. They cannot be subject to forced execution or used to settle the brokerage company's creditors.[63]

Given that the insurance broker is connected to both the policyholder/contracting party and the insurance company and is responsible for protecting the interests of both contracting parties (which may often lead to conflicts of interest that must be avoided), the issue of commission payment can be confusing. According to customary law, the insurance company pays the commission to the intermediary.[64] The broker's right to a commission is negatively defined in the ZZOPOR RS, meaning that the broker is not entitled to demand payment of a commission or any other fee from the policyholder or contracting party unless explicitly agreed upon in writing. From this, it follows that a broker has the right to a commission paid by the policyholder/contracting party if such a right is stipulated in the contract concluded with the policyholder. If this is the case, the broker is not entitled to collect a commission from the insurance company.

III Insurance Distribution in the European Union

The four fundamental freedoms form the pillar of the European Union's (hereinafter: EU) single market: the freedom of establishment, the freedom to provide services, the free movement of people, and the free movement of capital. The insurance industry is generally classified as one of the more significant sectors in EU member states. It has been shaped through so-called generations of directives as well as decisions of the Court of Justice.[65] Since agents and intermediaries play a crucial role in the distribution of insurance within the EU, contributing to the functioning of the common market, EU legislation devotes attention to regulating their operations through directives and recommendations. The first regulation concerning the activity of insurance representation and intermediation was Directive No. 77/92/EEC of 13 December 1976, which ceased to be in force on 14 January 2005.[66] Following this directive, Recommendation No. 92/48/EEC was adopted.[67] However, as a non-binding

[63] See more about the business of brokers: Željko Vojinović, „Uređenje unutrašnjih odnosa u posredničkom i zastupničkom poslovnom poduhvatu", *Tokovi osiguranja*, 4/2022, 40-53.

[64] Robert Merkin, Angus Rodger, *EC Insurance Law*, London, 1997, 80.

[65] Jasna Pak, „Pružanje usluga osiguranja na jedinstvenom tržištu Evropske Unije" u *Uslovi za realizaciju prometa roba i usluga u pravu Evropske unije i jugoslovenskom pravu,* Institut za uporedno pravo, Monografija, No. 137, Belgrade, 2001, 223–267.

[66] Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities, *Official Journal of the European Communities*, L 26, 31 January 1977.

[67] Commission Recommendation of 18 December 1991 on insurance intermediaries, *Official Journal* L 019, 28 January 1992, 32–33.

act, it did not provide uniformity, and differences between member states persisted. Therefore, further regulation was necessary, leading to the adoption of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation.[68] This directive ceased to be in force on September 30, 2018, when it was replaced by Directive (EU) 2016/97 of the European Parliament and the Council of January 20, 2016, on insurance distribution.[69]

3.1. Directive No. 77/92/CEE

Evidence that the European Community dedicated attention to the sale of insurance products through intermediaries and agents is Directive No. 77/92 CEE, adopted on December 13, 1976. The objective of the Directive is evident from its title, i.e. the regulation of measures to implement two freedoms—the freedom of establishment[70] and the freedom to provide services[71] in relation to the activities performed by insurance agents and brokers.[72] The Directive applies to insurance intermediaries—brokers and agents who constituted the traditional sales channels that existed in EU member states at the time of its adoption. Article 2, paragraph 2 of the Directive exhaustively listed all designations for individuals engaged in insurance mediation. For example, in Germany, they were referred to as *Versicherungsmakler* or *Versicherungsvertreter*, in France as *courtier d'assurance* or *agent général d'assurance*, while in the United Kingdom, they were known as *Insurance broker* or *Agent*, depending on the type of activities they performed.[73] Despite the adoption of this Directive, which was not applied directly, but required member states to transpose it into their national laws, regulatory harmonization, as the ultimate goal, was not achieved due to significant differences in how the concept of insurance mediation was understood across member states. The Directive took on a temporary character, and the adoption of a new directive was anticipated to attempt to achieve the objective that the previous one had failed to fulfill.

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[68] *Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation*, Official Journal of the European Union, Special Edition 2013, Vol. 06, Right of Establishment and Freedom to Provide Services, Vol. 08.

[69] *Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) – Text with EEA relevance*, Official Journal of the European Union, L 26, 2 February 2016.

[70] Commonly referred to in English as *Freedom of Establishment - FOE.*

[71] Commonly referred to in English as *Freedom to Provide Services - FOS.*

[72] Marijan Ćurković, "Obveza distributera na informiranje potrošača proizvoda osiguranja prema odredbama EU Direktive o distribuciji proizvoda osiguranja", *Zbornik radova sa 30. Susreta osiguravača i reosiguravača Sarajevo, (editor Nikola Miljević),* Sarajevo, 2019., pp. 147-159.

[73] Marijan Ćurković, "Nastanak i obuhvat regulatornih odredbi o distribuciji osiguranja", *Hrvatski časopis za osiguranje, No. 1,* Zagreb, *2019.*, 23 – 38.

3.2. Recommendation No. 92/48/CEE

To mitigate the differences between member states that persisted despite the adoption of Directive No. 77/92 CEE, the European Commission decided in 1991 to issue a legally non-binding act, Recommendation No. 92/48/EEC of December 18, 1991, on insurance intermediaries. This Recommendation proposed measures concerning the independence of insurance intermediaries, their professional qualifications, knowledge, competencies, professional liability insurance, and their registration in public registers. Member states were urged to transpose these solutions into their national legislation to achieve an efficient single insurance market. Most member states complied with this appeal, a fact that was acknowledged in the preamble of the subsequent directive.

3.3. The First EU Directive on Insurance Mediation (IMD I/MID I)

Directive No. 77/92/EEC marked the first step in facilitating the freedom of establishment and the freedom to provide services for insurance agents and brokers. Additionally, member states largely followed Commission Recommendation 92/48/EEC on insurance intermediaries, which significantly contributed to harmonizing national provisions on professional requirements and registration of insurance intermediaries. However, despite the adoption of the Directive and the Recommendation, significant differences remained between member states, undermining the maintenance of a single market in terms of conducting insurance and reinsurance mediation activities. Therefore, it became necessary to replace Directive 77/92/EEC with a new Directive No. 2002/92/EC, which was adopted on December 9, 2002. Informally, it was referred to as the First Insurance Mediation Directive (IMD I or MID I). The directive did not aim to fully harmonize the national regulations of member states on insurance mediation. Instead, it was designed to apply to individuals engaged in providing insurance mediation services to third parties in exchange for compensation. The directive requires that insurance and reinsurance intermediaries be registered with the competent authority of the member state, provided they meet the necessary requirements. Member states are obligated to establish a centralized information point that enables quick and easy access to data from various registers, collected electronically and continuously updated. The directive mandates that member states define the knowledge and skills that insurance and reinsurance intermediaries must possess. It is necessary to implement effective complaint procedures to resolve disputes between consumers and insurance intermediaries, and encourage alternative dispute resolution mechanisms alongside traditional judicial protection. Intermediaries are required to have professional liability insurance. Additionally, they must provide relevant information to consumers before concluding any contract,

ensuring transparency in the information process. According to Article 16 of the Directive, member states were required to comply with the Directive by January 15, 2015, a requirement that most states successfully fulfilled.

3.4. Directive 2016/97 (IDD) on Insurance Distribution

Given that a new directive on insurance distribution was introduced, it indicates that the previously mentioned directive did not fully achieve its objective. The preamble to the new directive emphasized the necessity of making several amendments to MID I and in the interest of clarity, it should be amended. The goal was to harmonize national regulations concerning insurance and reinsurance distribution. Additionally, it was underlined that the new directive aimed at minimum harmonization, allowing member states to maintain or introduce stricter consumer protection measures. Several factors influenced the need for a new directive. The first was the financial sector crisis[74] after the adoption of the First Insurance Mediation Directive (MID I). Another factor was the emergence of new sales channels, such as online insurance distribution.[75] Finally, the entry of financial institutions (such as banks and post offices) into the insurance distribution business also called for a revision of the regulatory framework. In 2010, the European Commission published the *Consultation Document on the Review of the Insurance Mediation Directive*, initiating a consultation phase, a standard step in the EU directive adoption process.[76] Several categories of respondents were surveyed, and the results showed widespread support for amending MID I. This led to the proposal for a new directive on insurance mediation (IMD 2 – *Insurance Mediation Directive 2*), which the European Commission published on June 3, 2012. The public consultation process lasted four years, after which an agreement was reached on the final text of the directive. The directive was renamed to the *Insurance Distribution Directive* (IDD), replacing the previous term Insurance Mediation Directive – IMD 2. The new name emphasizes to whom the Directive now applies, namely all entities involved in the insurance mediation and sales process. On January 20, 2016, the IDD was adopted and published in the Official Journal of the EU No. 26/19 on February 2, 2016.[77] It entered into force on February 23, 2016. Member states were required to transpose it into national legislation within 24 months, i.e. by February 23, 2018. However, due to the need for delegated acts by

[74] See more: Ozren Uzelac, Marija Dukić Mijatović, „Sadržina i obim obaveza tokom procesa izrade i uvođenja proizvoda osiguranja na tržište prema Direktivi EU o distribuciji osiguranja", Evropska revija za pravo osiguranja, pp. 9-18, I/2019, available at: https://erevija.org/wp-content/uploads/2022/10/1-2019-1.pdf July 29, 2024.

[75] See more: Maja Mihelja Žaja, Ljubica Milanović Glavan, Mateja Grgić, „Digitalna tehnologija kao čimbenik razvoja kanala distribucije u osiguranju", Hrvatski časopis za osiguranje, No. 3, 191-214, 2020.

[76] Marijan Ćurković, "Nastanak i obuhvat regulatornih odredbi o distribuciji osiguranja", 25.

[77] Available at: https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32016L0097

the European Commission before national regulations could align with EU rules, the implementation of the IDD was delayed until October 1, 2018.[78]

IV Development of Insurance Distribution in BiH *de lege ferenda*

The issue of developing insurance distribution will be approached through the lens of analyzing the compliance of the regulatory framework with the IDD, in order to draw conclusions on the direction in which insurance distribution reform should proceed in both entities of BiH.

The Law on Insurance Intermediaries (ZPPO FBiH) is mainly not aligned terminologically and in terms of scope. It regulates mediation in private insurance, while the IDD stipulates rules for the establishment and conduct of insurance and reinsurance distribution activities in the Union. This means that the ZPPO FBiH does not cover all insurance distributors engaged in this activity, considering that it states that mediation is conducted through insurance agents and insurance brokers. In contrast, the IDD specifies that it applies to all natural or legal persons with a business establishment (or those planning to establish one) aimed at establishing and conducting insurance and reinsurance product distribution activities. The Directive stipulates that it does not apply to ancillary insurance intermediaries, subject to certain conditions. The ZPPO FBiH in Article 2, paragraph 2 states that an insurance company cannot conduct direct insurance/reinsurance activities in FBiH through intermediaries that are not registered in accordance with the law. The IDD requires member states to ensure that the competent authorities monitor markets generally, including additional insurance products, while the ZPPO FBiH does not regulate this obligation at all.

Terminological alignment with respect to the IDD does not exist despite the effective date of the Law on Insurance Intermediaries of the Republic of Srpska (ZZOPOR RS). Namely, this law separates representation in insurance from mediation in insurance and reinsurance, so it is implied from the title itself that representation is only possible in insurance, while mediation is possible in both insurance and reinsurance.

When it comes to definitions, the IDD contains 18 definitions used for the purposes of the Directive, while the ZPPO FBiH is specific in that it does not contain definitions of the terms used in the law, which certainly contributes to legal uncertainty and potential arbitrariness in individual interpretations. For example, the IDD defines insurance distribution, reinsurance distribution, insurance intermediary, ancillary insurance intermediary, insurance distributor, etc.

[78] Full title: Directive (EU) 2018/411 of the European Parliament and Council of March 14, 2018, amending Directive (EU) 2016/97 *regarding the start date for member states' transposition measures*, *Official Journal of the European Union*, No. L 76/28.

Unlike the ZPPO FBiH, the ZZOPOR RS contains in Article 2 definitions of representation in insurance, mediation in insurance and reinsurance, and provisions regarding what is not considered representation and mediation in insurance.

Although there is no terminological alignment, as previously mentioned (the Directive specifies insurance distributors: insurance intermediaries, ancillary insurance intermediaries, and insurance companies, while the ZPPO FBiH refers to agents and brokers), the activities of insurance agents largely overlap with those defined in the Directive's definition of insurance distribution (such as proposing contracts, providing advice, preparatory actions, concluding contracts, assisting during the term of the contract, especially when handling claims, etc.), to a lesser extent in the case of insurance brokers. However, there is something we might call substantive misalignment between these two regulations. Specifically, an insurance agent under the ZPPO FBiH acts on behalf of and for the account of one or more insurance companies, while a broker acts on behalf of the insured, connecting individuals seeking insurance/reinsurance with companies engaged in that activity. The IDD does not contain such distinctions and instead defines insurance distribution as: *"the activity of proposing insurance contracts, advising on them, or carrying out other preparatory actions for concluding insurance contracts, or concluding such contracts, or providing assistance in managing such contracts and executing them, especially in the case of resolving claims, including providing information on one or more insurance contracts in accordance with criteria chosen by consumers via a website or another medium, and compiling a ranking list of insurance products, including comparing prices and products or discounts on the price of insurance contracts, if the consumer can directly or indirectly conclude an insurance contract on the website or through another medium".*[79] Based on this definition, we conclude that this activity is directed solely at consumers.

A similar conclusion could be drawn regarding the ZZOPOR RS when it comes to the terms used in the law and the scope of application. Specifically, the law does not recognize terms like those in the IDD, such as insurance distribution and related terms, but it does mention insurance mediation (which includes both insurance and reinsurance), while still retaining the term insurance representation.

When it comes to registration in the registry, the ZPPO FBiH prescribes the registration of insurance intermediaries and the conditions for registration. The IDD states the obligation of member states to establish an online registration system that must be easily accessible and allow for the completion of the registration form directly on the internet, a requirement that has not been implemented in FBiH. Regarding the deadlines for resolving registration requests, the IDD allows for a much longer period (three months from the submission of the request), while the ZPPO FBiH sets a deadline of 30 days for making a decision on the request, which provision is in the interest of the applicant and facilitates quicker and more efficient realization

[79] Article 1, paragraph 1, point 1 of the IDD.

of their rights. The Directive and the Law are aligned in terms of restrictions on the use of intermediary services, insisting that only the services of insurance distributors registered in the appropriate registers can be utilized.

The IDD prescribes that insurance distributors must possess the necessary knowledge and skills to adequately perform their tasks and duties and that they are required to undergo continuous professional training and development to maintain their level of effectiveness. Member states must verify and evaluate their knowledge and expertise (at least 15 hours annually), and certification in this regard may be required. Insurance/reinsurance intermediaries must demonstrate compliance with the relevant professional knowledge and skill requirements outlined in Annex 1 of the IDD. For individuals, it is emphasized that they must have a good reputation, and what this entails is defined. Finally, intermediaries must have professional liability insurance.

The registration in the ZZOPOR RS is separately defined for agents and for brokers in insurance, with conditions they must fulfill depending on whether they are physical or legal entities. The obligations of brokers toward the insured or the policyholder are specifically elaborated, which is in their best interest.

The IDD defines the conditions for information provision and rules of business conduct in a special chapter, including general principles, general information, conflict of interest, and transparency, exceptions, etc. The ZPPO FBiH does not contain any provisions on consumer information, so there is also a discrepancy and lack of alignment with the Directive in this segment. Furthermore, the IDD includes a special chapter regarding information when it comes to investment insurance products, which the ZPPO FBiH does not mention in any way.

In contrast to the ZPPO FBiH, the ZZOPOR RS contains a specific article that details the obligation to provide information by insurance agents and brokers, including both the content of the information and the form in which it must be communicated to the insured or the policyholder.

The ZPPO FBiH very sparsely regulates supervision over insurance intermediaries, with this role assigned to the Supervisory Agency, and in the case of irregularities, it issues a decision that is final and against which an administrative dispute can be initiated. This decision is not in accordance with the provisions of the IDD (Article 31, paragraph 5) which stipulate that member states guarantee that the right to appeal applies to administrative sanctions and other measures. Regarding sanctions and other measures, the Directive specifies that member states guarantee that the competent authorities establish effective mechanisms to enable and encourage reporting of potential or actual violations of national provisions through which the Directive is transposed into legislation, while the ZPPO FBiH does not contain such provisions, nor does it prescribe specific procedures for receiving reports of violations.

ZZOPOR RS regulates the supervision of the activities and operations of insurance representation and mediation in much more detail (criteria and conditions

for limiting the number of commissions, unauthorized activities, revocation of authorizations/licenses for operation) as well as offenses.

V Conclusion

The distribution of insurance represents a completely new system of mediation and representation in insurance, which was introduced into European Union insurance law by the IDD directive in 2016. This new system established new rules in the insurance market, and member states are obligated to transpose the provisions of the Directive into their national legislation. Given that Bosnia and Herzegovina signed the Stabilization and Association Agreement with the European Communities and their member states, and received candidate status on December 15, 2022, it is required to gradually align its legislation with the *acquis communautaire* of the European Union and establish a free trade area with the European Union.

Analysis of the legal framework in Bosnia and Herzegovina concerning insurance mediation leads to the conclusion that in both entities, the provisions are not fully aligned with the EU system. Specifically, the ZPPO FBiH was enacted in 2005, with amendments made in two instances, in 2010 and 2016, while the ZZOPOR RS was adopted in 2017.

Both entity laws on mediation (and representation) in insurance are not terminologically aligned with the Directive, as they do not mention insurance distribution at all. Although there is no terminological alignment, the roles of insurance representatives largely overlap with the activities defined in the Directive's definition of insurance distribution, while to a lesser extent with insurance brokers. Regarding registration in the registry, neither ZPPO FBiH nor ZZOPOR RS has established an electronic system (via the internet) for the registration of insurance intermediaries. The goal of the IDD is, among other things, to increase the level of consumer protection through continuous professional training of insurance distributors on an annual basis, which provision is not stipulated as a condition for renewing registration in the relevant registry of intermediaries and representatives in insurance. Finally, consumer protection is achieved by prescribing very strict rules regarding the provision of information about insurance products, where FBiH lags significantly, as it contains no provisions on this matter, while the RS law includes a specific article detailing the obligation of representatives and brokers in insurance to provide information, including both the content of the information and the manner in which it must be communicated to the insured or the policyholder.

Literature

• Vojinović, Ž., „Uređenje unutrašnjih odnosa u posredničkom i zastupničkom poslovnom poduhvatu", *Tokovi osiguranja*, 4/2022.

- Maleta, N., „Prilagodba regulatornog okvira Solvency II novim rizicima i izazovima suvremenog korporativnog upravljanja", *Tokovi osiguranja*, 3/2024.
- Marković, M., „Izazovi tržišta osiguranja u Srbiji na putu ka Solventnosti II", *Tokovi osiguranja*, 2/2024.
- Mihelja Žaja, M., Milanović Glavan, LJ., Grgić, M., „Digitalna tehnologija kao čimbenik razvoja kanala distribucije u osiguranju", *Hrvatski časopis za osiguranje*, No. 3,191-214, 2020.
- Merkin, R., Rodger, A., *EC Insurance Law,* London, 1997.
- Mrkšić, D., Petrović, Z., Ivančević, K., *Pravo osiguranja*, II izmjenjeno i dopunjeno izdanje*,* Fakultet za poslovno pravo, Beograd, 2005.
- Pak, J.,„Pružanje usluga osiguranja na jedinstvenom tržištu Evropske Unije" u: *Uslovi za realizaciju prometa roba i usluga u pravu Evropske unije i jugoslovenskom pravu,* Institut za uporedno pravo, Monografija br. 137., Beograd, 2001.
- Petrović Tomić, N., *Osnovi prava osiguranja,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2021.
- Ćurković, M., „Zastupanje i posredovanje u osiguranju prema Zakonu o osiguranju", Novi propisi iz osiguranja – Zakon o osiguranju i Zakon o obveznim osiguranjima u prometu, Inženjerski biro, Zagreb, 2006.
- Ćurković, M. "Nastanak i obuhvat regulatornih odredbi o distribuciji osiguranja", *Hrvatski časopis za OSIGURANJE*, No. 1, Zagreb, 2019.
- Ćurković, M., "Obveza distributera na informiranje potrošača proizvoda osiguranja prema odredbama EU Direktive o distribuciji proizvoda osiguranja", Zbornik radova sa 30. Susreta osiguravača i reosiguravača Sarajevo, (urednik Nikola Miljević), Sarajevo, 2019.
- Ćurković, M., „Posredovanje i zastupanje u osiguranju", Zbornik sa 7. savjetovanja o obradi i likvidaciji međunarodnih automobilskih šteta (Hrvatski ured za osiguranje, Ante Lui), Lovran, 1999.
- Ćurković, M., „Zastupanje i posredovanje u osiguranju prema Zakonu o osiguranju", Novi propisi iz osiguranja – Zakon o osiguranju i Zakon o obveznim osiguranjima u prometu, Inženjerski biro, Zagreb, 2006.
- Džidić, M., Marijan, Ć., *Pravo osiguranja*, Pravni fakultet Sveučilišta u Mostaru, Mostar, 2017.
- Uzelac, O., i Dukić Mijatović, M., „Sadržina i obim obaveza tokom procesa izrade i uvođenja proizvoda osiguranja na tržište prema Direktivi EU o distribuciji osiguranja", *Evropska revija za pravo osiguranja*, str. 9 -18, I/2019.
- Žarković, N., „Lični razgovor sa strankom u posredovanju i zastupanju u osiguranju", *Tokovi osiguranja*, 4/2020.

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IZAZOVI REGULISANJA PLANIRANJA LIČNIH FINANSIJA KAO PROFESIJE

PREGLEDNI RAD

Sažetak

Planiranje ličnih finansija kao nova profesija vezuje se uglavnom za razvijene zemlje, čijem razvoju doprinosi postojanje razvijenog tržišta kapitala i sve većeg broja finansijskih usluga dostupnih potrošačima koji ne raspolažu neophodnim znanjima. U zemljama u kojima postoje posebni zakonski zahtevi ili sertifikacione šeme, profesionalno zvanje „finansijski planer" u pravnom prometu mogu koristiti samo finansijski savetnici koji su zadovoljili takve posebne zahteve, budući da je finansijski planer, a time i planer ličnih finansija, po pravilu najviši nivo u hijerarhiji sertifikacije finansijskih savetnika. U većini zemalja s razvijenim finansijskim tržištima uslovi za pružanje različitih usluga finansijskog savetovanja nisu homogeni, pa se postavlja pitanje da li je dovoljna posebna licenca za pružanje određenih finansijskih usluga ili finansijski savetnici moraju pohađati posebnu edukaciju i imati posebnu kvalifikaciju. U nedostatku jasno definisanih pravila i standarda, u radu se ukazuje na transnacionalnu privatnu regulaciju planiranja ličnih finansija kroz primere sertifikacionih šema. Analiza pravnog okvira EU u vezi sa investicionim savetovanjem i distribucijom osiguranja takođe ukazuje na propuste u definisanju standarda za određivanje „znanja i stručnosti" i odgovarajućih obuka. Najzad, poslovanje malog broja finansijskih savetnika u Srbiji regulisano je propisima u zavisnosti od vrste usluge koju pružaju, ali se može zaključiti da su upravo u oblasti posredovanja i zastupanja u osiguranju zahtevi koji se postavljaju u pogledu stručnosti i znanja detaljnije uređeni u poređenju sa ostalim finansijskim uslugama.

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I Uvod

Planiranje ličnih finansija predstavlja skup aktivnosti, tehnika i postupaka čiji je cilj iznalaženje najboljeg načina za ostvarivanje finansijskih ciljeva pojedinaca, koji bi trebalo da rezultira dobro promišljenim odlukama o daljim postupcima i izboru adekvatnih finansijskih usluga u skladu sa individualnim okolnostima, uverenjima i preferencijama pojedinca.[2] Planiranje ličnih finansija kao proces u najvećoj meri podrazumeva finansijsko savetovanje zasnovano na pažljivoj analizi ciljeva i potreba klijenata koji se, u nedostatku potrebnih znanja, oslanjaju na stručnu pomoć koja će im omogućiti što efikasnije ostvarenje finansijskih ciljeva uz što niže troškove. Povećanje broja finansijskih usluga i njihova složenost zahtevaju posebne kompetencije, znanja, stručnost i profesionalno iskustvo u različitim oblastima finansijskih tržišta, pa se opravdano postavlja pitanje standardizacije poslovanja finansijskih savetnika u procesu planiranja ličnih finansija.

Razvoj finansijskog planiranja kao profesije, pa time i planiranja ličnih finansija kao njegove podvrste, još uvek je na samom početku, a pred regulatorima je dug put ka razvoju adekvatnog regulatornog okvira. S obzirom na složenost i obuhvat usluga koje pružaju finansijski savetnici, a koje se odnose na različita finansijska tržišta i usluge različitog nivoa kompleksnosti, donošenje posebnog zakona kojim bi se uredilo njihovo poslovanje predstavljalo bi veliki izazov. U ovom radu ukazuje se, u najkraćim crtama, na retke primere kada se zakonom zahtevaju posebni uslovi za dobijanje licence za profesionalno zvanje finansijski planer. Budući da je finansijsko savetovanje u domenu kako korporativnih tako i ličnih finansija osnov finansijskog planiranja, poslovanje lica koja pružaju usluge planiranja ličnih finansija u sistemima gde se za upotrebu kvalifikacije „finansijski planer" ne zahteva provera posebnih znanja i veština može biti uslovljeno posedovanjem licence za finansijskog savetnika. Kao barijera za ulazak u sektor, licenca je slična drugim mehanizmima autorizacije kojima se ograničava pristup tržištu, kao što su registracija, sertifikacija i akreditacija, ali se od njih razlikuje po nivou uspostavljanja profesionalnih standarda, ovlašćenjima organa nadzora i posledicama kršenja uslova za sticanje licence i profesionalnih obaveza. Dobijanje licence podrazumeva i poštovanje profesionalnih standarda finansijskog savetovanja. Uporedno posmatrano, najčešće je reč o posebnim licencama za obavljanje poslova investicionog savetovanja, posredovanja u osiguranju, kao i u domenu poreskog planiranja i računovodstvenih usluga. U nedostatku državne regulacije, u radu se ukazuje na samoregulatorne mehanizme razvijene pod okriljem profesionalnih udruženja i značaj transnacionalne privatne regulacije profesija.

[2] Jonquil Lowe, *Be Your Own Financial Adviser: The comprehensive guide to wealth and financial planning,* Pearson Education, 2010, 3-4.

Pored nekoliko istaknutih primera sertifikacionih šema profesionalnih kvalifikacija finansijskih planera, naročito je značajan međunarodni standard ISO 22222:2005 Planiranje ličnih finansija (*Personal financial planning – Requirements for personal financial planners*)[3], koji predstavlja solidan osnov za utvrđivanje bitnih elemenata potrebnih veština, stručnih znanja i iskustva.

U toku poslednje decenije i u našoj zemlji sve češće se, pogotovo na društvenim mrežama, može primetiti oglašavanje usluga edukacije i/ili savetovanja o planiranju ličnih finansija od strane lica koja više podsećaju na motivacione govornike i „influensere" nego na profesionalne finansijske savetnike. U situacijama kada njihov savet prevazilazi edukaciju i može uticati na izbor potrošača kao korisnika finansijskih usluga, postavlja se pitanje adekvatnosti zaštite potrošača. Propisi Republike Srbije u oblasti tržišta kapitala i osiguranja u velikoj meri usklađeni su sa zahtevima Direktive 2014/65/EU o tržištu finansijskih instrumenata (dalje u tekstu: Direktiva MiFID II)[4] i Direktive EU o distribuciji osiguranja,[5] uključujući tu i zahteve koji se odnose na obezbeđenje transparentnosti, nezavisnosti i zaštite potrošača u oblasti investicionih saveta, odnosno razlikovanje između savetovanja i informisanja.[6] Međutim, potrebno je pratiti aktivnosti u EU koje su usmerene ka realizaciji Strategije za investiranje potrošača, kojom se najavljuje izmena odredaba pomenutih direktiva u cilju unapređenja profesionalnih kvalifikacija finansijskih savetnika u EU.[7] U tom smislu, u ovom radu su detaljno razmotreni ne samo izazovi normiranja finansijskog planiranja kao profesije, već i nedoumice u definisanju „kompetencija", kao i zahtevi koji se postavljaju u pogledu profesionalnih kvalifikacija i kontinuiranog obrazovanja finansijskih savetnika.

II Pojam, nastanak i razvoj planiranja ličnih finansija

1. Pojam i značaj planiranja ličnih finansija

Kao disciplinarna oblast, izučavanje ličnih finansija (*personal finance*) podrazumeva analizu i primenu koncepata, alata i tehnika povezanih s planiranjem

[3] International Organization for Standardization, ISO 22222:2005, *Personal financial planning* – Requirements for personal financial planners.

[4] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJ L 173*, 12. 6. 2014, 349–496.

[5] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), *OJ L 26*, 02/02/2016, 19–59.

[6] O razlici između obaveze informisanja i savetovanja u slučaju kada potrošači zaključuju ugovor sa osiguravačem vid. Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja, analiza i predlog unapređenja regulatornog okvira*, Beograd, 2015, 214.

[7] European Commission, *Retail Investment Strategy – Empowering Retail Investors on EU capital markets*, May 2023, *https://finance.ec.europa.eu/document/download/ce290ee2-1f05-41f6-9540-84c3605ccb0f_en?filename=230524-retail-investment-strategy-factsheet_en.pdf,* pristupljeno 15. 10. 2024.

i upravljanjem ličnim finansijskim aktivnostima i finansijskim aktivnostima domaćinstva, uključujući ostvarivanje prihoda, upravljanje potrošnjom i dûgom, štednju, ulaganje i zaštitu izvora prihoda i imovine, u cilju identifikacije praksi i politika čiji je cilj da poboljšaju dobrobit pojedinaca, porodica i domaćinstava. U najširem teorijskom smislu, lične finansije obuhvataju finansijsko planiranje, finansijsko savetovanje, finansijsku psihologiju i finansijsku terapiju.[8] Lične finansije podrazumevaju primenu principa finansija, upravljanja resursima, edukacije potrošača i sociologije i psihologije odlučivanja na proučavanje načina na koje pojedinci, porodice i domaćinstva stiču, razvijaju i alociraju novčana sredstva kako bi ispunili svoje sadašnje i buduće finansijske potrebe.[9]

Iako bi se, na prvi pogled, moglo pretpostaviti da se planiranje ličnih finansija vezuje za imućniji sloj stanovništva koji raspolaže viškom sredstava, njegov značaj se ogleda i u smanjenju rizika od negativnih posledica u slučaju promena spoljašnjih okolnosti (npr. finansijske krize) i ličnih okolnosti pojedinaca.[10] U tom smislu, planiranje ličnih finansija doprinosi ne samo poboljšanju upravljanja ličnim finansijama i uvećanju bogatstva pojedinaca, to jest podizanju životnog standarda, već i smanjenju rizika od individualnog bankrotstva i postizanju finansijske sigurnosti i stabilnosti. To, s druge strane, pozitivno utiče na važne makroekonomske ciljeve, kao što su privredni rast i održanje finansijske stabilnosti.

Finansijsko planiranje uključuje veliki broj oblasti pružanja finansijskih saveta. Kao segment finansijskog planiranja, planiranje ličnih finansija je zaokruženi proces koji obuhvata različite aktivnosti, tehnike i postupke koji za cilj imaju pronalaženje optimalnog načina ostvarivanja finansijskih ciljeva pojedinaca. Postoje dva modela pružanja usluga ličnog finansijskog planiranja: (a) specijalizovani model, gde klijent može individualno da radi s više finansijskih profesionalaca; i (b) model planera, gde klijent često radi sa finansijskim planerom koji služi kao posrednik između klijenta i drugih finansijskih stručnjaka.[11] Planiranje ličnih finansija obuhvata različite oblasti interesovanja klijenata kao što su: poresko planiranje odnosno ostvarivanje poreskih ušteda; upravljanje ličnim budžetom kao planiranje prihoda i rashoda, to jest odnosa između štednje i potrošnje; ulaganje sredstava, to jest njihovu upotrebu radi ostvarivanja budućih dobiti; upravljanje rizikom kroz različite vrste osiguranja; planiranje penzijskog osiguranja i obezbeđenje nadoknade gubitka prihoda od zaposlenja, planiranje zaostavštine i dr.

[8] John E. Grable, Swarn Chatterjee, „Defining Personal Finance", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, 2022, 3–17, 3.

[9] Jane Schuchardt et al., „Personal finance: An interdisciplinary profession", *Journal of Financial Counseling and Planning*, Vol. 18, No. 1. 2007, 61–69, 67.

[10] Lewis Altfest „Personal financial planning: origins, developments and a plan for future direction", *The American Economist,* Vol. 48, No. 2. 2004, 54.

[11] Kenneth Black, Konrad Ciccotello, Harold Skipper, „Issues in comprehensive personal financial planning", *Financial Services Review*, 11(1), 2002, 1–9.

S obzirom na to da je opseg usluga koje klijenti mogu očekivati od finansijskih savetnika širok, zbog različitosti u nacionalnim regulatornim sistemima pojavila se potreba za usaglašavanjem praksi i pravila poslovanja i na globalnom nivou. U tom smislu, najznačajniju inicijativu predstavlja donošenje međunarodnog standarda za planiranje ličnih finansija pod okriljem Međunarodne organizacije za standardizaciju. Međunarodni standard ISO 22222:2005 definisao je proces planiranja ličnih finansija kroz šest faza odnosno koraka i postavio zahteve u pogledu etičkog ponašanja, kompetentnosti i neophodnih iskustava ličnih finansijskih savetnika, bez obzira na njihov radnopravni status, kao i načine za proveru usklađenosti poslovanja.

Prvi korak procesa planiranja ličnih finansija jeste uspostavljanje profesionalnog odnosa između finansijskog savetnika i klijenta. Pored razumevanja njegovih prava i obaveza, obaveza finansijskog savetnika i karakteristika usluga koje pruža, pomenuti standard postavlja i zahtev za informisanjem klijenata o formalnim kvalifikacijama, stručnosti i iskustvu finansijskog savetnika, pored opisa usluga koje pruža i uslova angažovanja, odnosno cene usluge i ostalih zahteva koji se odnose na izvršenje ugovora. Cilj standardizacije tih zahteva jeste uspostavljanje dugoročnog odnosa zasnovanog na transparentnosti i poverenju.[12] Druga faza podrazumeva prikupljanje kvalitativnih i kvantitativnih podataka o finansijskom statusu i sklonostima klijenta i definisanje njegovih ciljeva i očekivanja, odnosno strategija koje će klijentu omogućiti realizaciju finansijskih ciljeva. Osnovna uloga planera ličnih finansija u ovoj fazi je da, kroz specifična pitanja, uopštene odgovore klijenata pretoči u tačno određene i merljive finansijske ciljeve i prioritete. Međutim, konkretan finansijski plan zavisiće od ciljeva klijenata, tačnije od njihovih prioriteta.[13]

Pošto su prikupljene neophodne informacije i definisani ciljevi i prioriteti klijenata, sledeća, treća faza, predstavlja analizu prikupljenih podataka i ocenu finansijskog položaja klijenta. Ishod procesa analize je odgovor na pitanje da li je realizacija postavljenih ciljeva klijenata izvesna. Ukoliko jeste, pristupa se formulisanju strategije. Formulisanje strategije podrazumeva izradu i prezentaciju finansijskog plana odnosno plana ličnih finansija, što prema pomenutom međunarodnom standardu predstavlja četvrti korak procesa planiranja ličnih finansija. Upravo zbog značaja predstavljanja finansijskog plana, neki autori smatraju da se taj korak zapravo sastoji iz dve odvojene faze: izrade finansijskog plana odnosno formulisanja preporuka i prezentacije preporuka klijentu.[14]

Poslednje dve faze odnose se na sprovođenje u delo finansijskih preporuka i praćenje finansijskog plana i odnosa u finansijskom planiranju. Finansijski savetnik može, neposredno ili posredno, učestvovati u primeni preporučene strategije za koju se klijent opredeli, što dalje može podrazumevati i koordinaciju procesom

[12] Gordana Stojanović, „Standardizovani zahtevi za planere ličnih finansija", *Bankarstvo*, br. 5/6, 2006, 56–57.
[13] Lawrence Gitman, Michael Joehnk, Randy Billingsley, *Personal Financial Planning*, South-Western, 2014, 2–7.
[14] Allen McLellan, *Foundations of Financial Planning: An Overview*, The American College Press, 2012, 32.

sprovođenja preporuka u postupku u kome bi učestvovala i druga stručna lica kao što su investicioni savetnici tržišta kapitala, poreski savetnici, advokati i dr. U toj fazi neophodno je da finansijski savetnik bude upoznat sa svim pravnim pitanjima i procedurama u sprovođenju finansijskog plana.[15] Najzad, proces planiranja ličnih finansija obično se ne svodi samo na izradu preporuka sadržanih u planu ličnih finansija, već na uspostavljanje dugoročnog profesionalnog odnosa, koji prevazilazi puku primenu preporuka i prerasta u praćenje napretka u realizaciji finansijskog plana. Prilikom promena realnih i ličnih okolnosti i izmena u finansijskoj situaciji klijenta, finansijski savetnik može revidirati finansijski plan.

II Uloga profesionalnih udruženja u nastanku i razvoju finansijskog planiranja

Kao deo šire celine finansijskog planiranja, planiranje ličnih finansija predstavlja relativno mladu delatnost koja se kontinuirano razvija, počev od šezdesetih godina prošlog veka, kada se pojavila u Sjedinjenim Američkim Državama (SAD). Prvi korak u nastanku modernog finansijskog planiranja bila je stručna konferencija održana u Čikagu 1969. godine, nakon koje je usledilo osnivanje prvih organizacija: Međunarodnog udruženja finansijskih savetnika (*International Association of Financial Counselors* (IAFC)), koje kasnije prerasta u Međunarodno udruženje za finansijsko planiranje (*International Association for Financial Planning* (IAFP)) i Međunarodnog koledža za finansijsko savetovanje (*International College for Financial Counseling*). Drugopomenuto udruženje je od sredine sedamdesetih godina prošlog veka veoma aktivno na polju pružanja edukacije, pa je razvilo sistem sertifikacije profesionalnih finansijskih planera (*Certified Financial Planner* (CFP)). Iz redova polaznika njegovih edukacija nastalo je novo udruženje pod nazivom Institut sertifikovanih finansijskih planera (*Institute of Certified Financial Planners* (ICFP)). To udruženje se 2000. godine spaja sa IAFP i tako nastaje novo Udruženje finansijskih planera (*Financial Planning Association* (FPA)).[16]

Kako profesionalno udruženje koje je pružalo usluge obrazovanja nije uspelo da nametne etičke standarde, u cilju jačanja profesionalnosti i etičkog poslovanja, 1985. godine osniva se Međunarodni odbor za standarde i praksu sertifikovanih finansijskih planera (*International Board of Standards and Practices for Certified Financial Planners* (IBCFP)), koji potom prerasta u Odbor za standarde sertifikovanih finansijskih planera (*Certified Financial Planner Board of Standards* (*CFP Board*)). To telo potom dobija nadležnost za sertifikaciju i izdavanje sertifikata o dobijanju zvanja sertifikovanog finansijskog planera – CFP sertifikat.[17]

[15] Antony Young, *Financial Planning in Practice*, Melbourne, 2013, 134.

[16] Više o istorijskom razvoju: Denby E. Brandon, Oliver H. Welch, *The History of Financial Planning: The Transformation of Financial Services,* John Wiley & Sons, 2009.

[17] CFP Board, *CFP Board Financial Planning Competency Handbook,* John Wiley & Sons, 2015.

Globalna ekspanzija finansijskog planiranja počinje 90-ih godina prošlog veka formiranjem Međunarodnog saveta sertifikovanih finansijskih planera (*International CFP Council*). Savet je nastojao da okupi srodna profesionalna udruženja širom sveta u cilju uspostavljanja standarda poslovanja i razvoja profesije. Pristupanjem Međunarodnog udruženja za finansijsko planiranje, osnovanog u Australiji, Australija postaje prva zemlja posle SAD koja dobija ovlašćenje za izdavanje CFP sertifikata. Potom se pridružuju profesionalna udruženja iz Japana, Velike Britanije, sa Novog Zelanda, iz Kanade, Nemačke, Francuske i dr. To je dovelo do priznavanja zvanja sertifikovanog finansijskog planera na globalnom nivou, koje je postalo sinonim za profesionalno i etičko obavljanje delatnosti finansijskog planiranja. Globalnom razvoju finansijskog planiranja naročito je doprinelo prenošenje nadležnosti za upravljanje sertifikacionim programom van granica SAD na udruženje koje se osniva 2004. godine, pod nazivom Odbor za standarde finansijskog planiranja (*Financial Planning Standards Board* (FPSB)), koje od svog osnivanja aktivno lobira za priznavanje finansijskog planiranja kao posebne delatnosti i regulisanje ove profesije.[18]

Nezavisno od navedenih međunarodnih udruženja, finansijsko planiranje razvijalo se i u zemljama Evrope, van okvira sertifikacionog programa CFP. Najvažniju ulogu u razvoju finansijskog planiranja na teritoriji evropskog kontinenta ima Evropsko udruženje za finansijsko planiranje (*European Financial Planning Association* (EFPA)), kao ključna profesionalna asocijacija koja razvija profesionalne standarde, promoviše stručnost, integritet i rukovodi procesom sertifikacije u okviru nekoliko nivoa profesionalnih sertifikata, a predstavlja i stožer Etičkog kodeksa. Pod okriljem te institucije intenzivno se lobira za unapređenje ne samo sistema profesionalnih standarda i panevropske sertifikacije finansijskih savetnika u EU već i regulative koja se odnosi na različite oblike finansijskog savetovanja u pravu EU, na šta se u ovom radu posebno ukazuje.[19]

III Regulisana profesija i zahtevi kompetencije (znanje, stručnost i iskustvo) u domenu planiranja ličnih finansija

1. Pojam regulisane profesije

U sociološkom smislu, profesija podrazumeva zanimanje koje ima monopol nad nekim kompleksnim delom znanja i praktičnih veština, za koje je potrebno školovanje odnosno određeni stepen obrazovanja, što je čini prepoznatljivom

[18] D. E. Brandon, O. H. Welch, 113.

[19] Fernando Zunzunegui, Paloma Corbal, Mariola Szymanska, Maria Debora Braga, Patrick Levaldaur, Emanuele Maria Carluccio, *Improving Qualifications for Financial Advisors in EU: Policy Proposals*, EFPA, Brussels, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466821, 10. 09. 2024.

u društvu.[20] Pojam profesije širi je od pojma zanimanja, koje podrazumeva skup poslova koji su u pogledu sadržaja, organizacije ili tehnologije srodni i međusobno povezani. Kao statistička jedinica, kvalifikacija je sposobnost obavljanja zadataka i dužnosti jednog zadatog posla i ima dve dimenzije a) nivo (stepen) kvalifikacije – koji se odnosi na složenost i obim zadataka i b) vrstu kvalifikacije – koju definiše oblast potrebnog znanja, kao i vrste proizvoda i usluga.[21] Koncept „profesije" predstavlja nadgradnju koncepta „zanimanje", jer podrazumeva određenu stručnost, odnosno znanja i praktične veštine, kontinuitet i stalnost obavljanja nekog zanimanja. Stručni autoritet podrazumeva da nosilac profesije pruža usluge onima koji ne poseduju adekvatna znanja u pogledu samog kvaliteta pružene usluge.[22] Da bi jedno zanimanje moglo da se smatra profesijom, neophodno je da budu zadovoljeni određeni uslovi: a) sistematičnost znanja; b) stručni autoritet; c) regulatorni okvir i nadzor nad obavljanjem delatnosti; d) etički standardi; e) postojanje specifične potkulture koja se temelji na dostizanju znanja, statusa, vrednosti, obrazaca ponašanja i posvećenosti nosilaca profesije.[23]

Prema Direktivi 2005/36/EC o priznavanju profesionalnih kvalifikacija[24] regulisanom profesijom smatra se profesionalna delatnost ili skup profesionalnih delatnosti kod kojih je pristup i obavljanje, odnosno način obavljanja delatnosti, na osnovu zakonskih, podzakonskih ili drugih akata donetih na osnovu zakonskih ovlašćenja, neposredno ili posredno uslovljen posedovanjem određenih profesionalnih kvalifikacija. Regulisanom profesijom smatra se i profesionalna delatnost ili skup profesionalnih delatnosti kojima se bave članovi stručnih organizacija s profesionalnim nazivom.[25]

Dakle, profesija se načelno smatra regulisanom ako je preduslov za rad u toj profesiji posedovanje određene diplome, položen poseban ispit, kao što je državni ispit, i/ili registracija pri strukovnom telu. Pritom je neophodno praviti razliku između obrazovne i stručne kvalifikacije.[26] Pod stručnom kvalifikacijom ne podrazumeva se samo stepen obrazovanja, već i kvalifikacije stečene nakon obrazovanja (radno iskustvo, licenca i dr.). Dakle, pojam profesije širi je od obrazovne (formalne) kvalifikacije koja se stiče završetkom formalnog obrazovanja, a dokazuje diplomom, sertifikatom ili drugom javnom ispravom koju izdaje nadležna obrazovna ustanova. Profesionalna kvalifikacija često podrazumeva i postojanje profesionalnog iskustva,

[20] Josip Županov, Željka Šporer, „Profesija sociolog", *Revija za sociologiju*, Vol. 14, No. 1-2, 1984, 15.
[21] Republički zavod za statistiku, *Klasifikacija zanimanja*, Beograd, 2011, 7.
[22] Jon A. Schmidt, „What Is a Profession?", *The Structure Magazine,* November 2008, 9.
[23] Ernest Greenwood, „Attributes of a Profession", *Social Work*, Vol. 2., No. 3. 1957, 45-55.
[24] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, *OJ L 255*, 30.9.2005, 22–142.
[25] Čl. 4 st. 5 Zakona o regulisanim profesijama i priznavanju profesionalnih kvalifikacija, *Službeni glasnik RS*, br. 66/2019.
[26] Tatjana Jovanić, *Uvod u ekonomsko pravo*, Beograd, 2024, 150.

a pre svega se zasniva na posedovanju određenih kompetencija. Kompetencije često predstavljaju posebne uslove za rad jer se odnose na određena znanja, sposobnosti, a ponekad i osobine ličnosti. Znanja predstavljaju sadržaje koji se stiču obrazovanjem ili praktičnim radom, a odnose se na poznavanje činjenica neophodnih za izvršavanje određenog posla.[27]

2. Izazovi obuhvata finansijskog planiranja i finansijsko savetovanje kao polazni okvir

Budući da je već ukazano da je planiranje ličnih finansija proces u čijoj je osnovi finansijsko savetovanje, valjalo bi definisati oba koncepta. Finansijsko planiranje je „proces saradnje koji pomaže da se maksimira potencijal klijenta za postizanje životnih ciljeva kroz finansijske savete koji integrišu relevantne elemente njegovih ličnih i finansijskih okolnosti".[28]

S druge strane, finansijsko savetovanje je profesija koja pomaže klijentima kroz usluge „prevencije i intervencije" kako bi im pomogla da ostvare svoje ciljeve. Praksa finansijskog savetovanja integriše veštine i znanja u interakcijama i odnosima između klijenta i savetnika i utiče na ishode procesa savetovanja.[29] Recipročna veza, između ostalog, podrazumeva i promene u praksi finansijskog planiranja usled izmena regulatornog okvira koji se odnosi na finansijsko savetovanje, a naročito odredaba koje se tiču unapređenja transparentnosti poslovanja, jačanja zahteva u pogledu profesionalnih obaveza učesnika na finansijskim tržištima i standarda zaštite ulagača.[30]

Jedna od mogućih karakteristika regulisanih profesija jeste postojanje barijera za ulazak u sektor u formi licenci, odnosno dozvole za obavljanje delatnosti koje najčešće daje nadležno regulatorno telo. U oblasti planiranja ličnih finansija, obaveza dobijanja licence uglavnom se ne vezuje za obavljanje poslova planiranja ličnih finansija kao procesa, već se, po pravilu, postavljaju zahtevi za dobijanje licence za pojedinačne finansijske usluge, naročito investiciono savetovanje i posredovanje i zastupanje u osiguranju. Po pravilu, poslovanje finansijskih savetnika u oblasti planiranja ličnih finansija nije jednim propisom regulisano sveobuhvatno, već posredno, propisima koji se primenjuju na različite oblike finansijskih usluga

[27] Borivoje Šunderić, Ljubinka Kovačević, *Radno pravo – priručnik za polaganje pravosudnog ispita*, Beograd, 2019, 117.

[28] Certified Financial Planner Board of Standards, *Side-by-side comparison of code of ethics and standards of conduct to current standards of professional conduct*, 2018, 34. *https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/cfp-board-code-and-standards-side-by-side-comparison.pdf*, pristupljeno 15. 11. 2024.

[29] Dorothy B. Durband, Marie Bell Carlson, Cherie Stueve, „The financial counseling profession", *Financial counseling* (eds. Dorothy B. Durband, Ryan Law, and Angela K. Mazzolini), Springer, 2019, 1 – 16, 1.

[30] Robert Van Beek, „Personal Finance: A Practice Perspective", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, 2022, 35 – 49.

kao što su brokersko-dilerski poslovi, investiciono savetovanje, životna i neživotna osiguranja, poresko savetovanje i dr.

Kako se može uočiti u malobrojnim zahtevima za polaganje ispita za planera ličnih finansija, investiciono savetovanje predstavlja prvu oblast zahteva u pogledu znanja i stručnosti. U najširem smislu, investiciono savetovanje odnosi se na finansijske instrumente i strategije ulaganja. Ovde bi bilo korisno ukazati na razliku između investicionog i finansijskog savetovanja u pravu SAD, gde su investicioni savetnici prvi put uklopljeni u regulativu. Finansijski savetnik može istovremeno biti i investicioni savetnik, ali svaki investicioni savetnik ne može uvek biti i finansijski savetnik.[31] Poslovanje investicionih savetnika regulisano je Zakonom o investicionim savetnicima iz 1940. godine,[32] poslovanje brokera i dilera Zakonom o prometu hartija od vrednosti iz 1934. godine,[33] a poslovanje posrednika i zastupnika u osiguranju regulisano je propisima saveznih država. Razlika između investicionih savetnika i onih što obavljaju brokersko-dilerske poslove s vremenom se smanjila, iako postoje dve odvojene licence.[34] Ipak, uprkos modernizaciji regulative, zbog različitih zahteva u pogledu različitih domena finansijskog savetovanja, neki autori smatraju da bi trebalo doneti poseban zakon o finansijskom savetovanju.[35] Jedna od zemalja u kojoj je uspostavljen sistem dozvole za finansijske savetnike jeste Australija, gde su izmene Zakona o korporacijama,[36] Zakona o profesionalnim standardima finansijskih posrednika[37] i donošenje Zakona o boljem savetovanju[38] dovele do redefinisanja obaveza finansijskih savetnika i jačanje uloge Komisije za hartije od vrednosti u pogledu licenciranja finansijskih savetnika.

Na nivou EU, pomenuta MiFID direktiva unapredila je sistem zaštite malih ulagača kroz uvođenje zabrane primanja novčanih kompenzacija od trećih lica, od strane pružalaca nezavisnih investicionih saveta ili onih što imaju ulogu portfolio menadžera. Direktiva MiFID II je značajna i po tome što je investicioni savet definisan kao posebna investiciona usluga. Pod investicionim savetom podrazumeva se pružanje ličnih preporuka klijentu, bilo na njegovu ili na inicijativu investicionog društva,

[31] U.S. Securities and Exchange Commission, *Investment Advisers: What You Need to Know Before Choosing One*, *https://www.sec.gov/investor/pubs/invadvisers.htm,* 6. 5. 2016.

[32] Sec 202 (11), Investment Advisers Act of 1940.

[33] Securities Exchange Act of 1934.

[34] Christine Lazaro, „The Future of Financial Advice: Eliminating The False Distinction Between Brokers and Investment Advisers", *St. John's Law Review*, Vol. 87. 2013, 381.

[35] C. Lazaro, 386.

[36] Corporations Amendment (*Future of Financial Advice*) Act 2012, kao i Corporations Amendment (*Further Future of Financial Advice Measures*) Act 2012.

[37] Australian Securities and Investments Commission, *Overview of the FOFA reforms*, *http://asic.gov.au/regulatory-resources/financial-services/future-of-financial-advice-reforms/fofa-background-and-implementation/*, pristupljeno 10. 10. 2024.

[38] *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021* (Better Advice Act).

a u vezi s jednom ili više transakcija finansijskim instrumentima.[39] Investicioni savetnici su u obavezi da investitorima pruže sve neophodne informacije, uključujući i troškove savetodavne usluge, osnovama na kojima se zasniva investicioni savet, a pre svega proizvodima koji su u procesu formulisanja preporuka za klijenta bili predmet razmatranja. Bez obzira na to da li je reč o nezavisnom investicionom savetu ili ne, Direktiva MiFID II uvodi obavezu investicionih savetnika da svoje preporuke zasnivaju u najboljem interesu klijenta,[40] na principu adekvatnosti, koji podrazumeva upoznavanje klijenta i formulisanje personalizovane preporuke, koja će biti u skladu sa individualnom sklonošću klijenta ka riziku.[41] Za pružanje investicionih saveta na komercijalnoj osnovi ili u meri koja zahteva komercijalno organizovano poslovanje, MiFID direktiva zahteva postojanje licence nadležnog nacionalnog nadzornog organa. Namera da se ostvari profit, bilo direktan bilo indirektan, određuje aktivnost kao komercijalnu. Čak i savetodavne usluge koje se nude besplatno u promotivne svrhe, koje indirektno podržavaju prodaju usluga što se naplaćuju, zahtevaju licencu.

U nedostatku jasno definisanih pravila koja se isključivo primenjuju na planere ličnih finansija, brojni aspekti planiranja ličnih finansija su neregulisani, usled čega se pojavio veći broj savetnika bez adekvatnih znanja i stručnog iskustva. To su prepoznala profesionalna udruženja finansijskih planera, a kao odgovor, usledilo je uvođenje akreditovanih sertifikacija. U tom smislu naročito je značajan pomenuti sertifikat *Certified Financial Planner* (CFP) Odbora za standarde sertifikovanih finansijskih planera za koji finansijski savetnici moraju ispuniti brojne uslove poput kontinuirane edukacije, sticanje određenog radnog iskustva, ispunjavanje zahteva za kontinuiranim profesionalnim usavršavanjem, polaganje odgovarajućih testova za ocenu kompetentnosti, poslovanje u skladu sa etičkim kodeksima.[42]

Još neka iskustva iz zemalja anglosaksonskog prava vredelo bi spomenuti kao ilustraciju kompleksnosti pitanja regulisanja kompleksnosti finansijskog planiranja kao nadgradnje finansijskog savetovanja i primer proliferacije državne kontrole nad samoregulatornim sistemima i kao njihovo prepoznavanje u regulativi. Svaki finansijski savetnik u Velikoj Britaniji mora biti upisan u registar koji vodi Agencija za nadzor nad poslovanjem finansijskih posrednika (*Financial Conduct Authority*). Agencija je preuzela i nadogradila sistem ocene obrazovnih programa koje i akredituje, a svaki savetnik koji pruža preporuke u vezi sa izborom finansijskog proizvoda mora posedovati i poseban sertifikat (*Statement of Professional Standing*), kao dokaz kontinuiranog usavršavanja i poslovanja u skladu sa etičkim kodeksom.[43] Velika Britanija

[39] Odeljak 1, Čl. 4. 1 (4) Direktive MiFID II.
[40] Čl. 24.1. Direktive MiFID II.
[41] Niamh Moloney, *EU securities and financial markets regulation,* Oxford University Press, United Kingdom 2014, 804.
[42] L. Altfest, 56.
[43] Financial Conduct Authority, https://www.fca.org.uk/firms/professional-standards-advisers

je dobar primer koregulacije u oblasti edukacije finansijskih planera. Supervizor je od Saveta za veštine finansijskih usluga (*Financial Services Skills Council*), kao profesionalnog tela, preuzeo i nadogradio sistem ocene obrazovnih programa, koji se razlikuju u zavisnosti od vrsta finansijskih usluga,[44] a takođe postavlja i standarde u pogledu kontinuiranog obrazovanja finansijskih savetnika. Slično britanskom primeru, Australijska komisija za hartije od vrednosti i investicije (*Australian Securities and Investment Commission*) precizno definiše konkretni sadržaj „specijalizovanog znanja finansijskih savetnika".[45]

Ipak, najbolji primer posebnog regulatornog režima za profesiju finansijskih planera jeste Kanada, tačnije Kvebek kao prva pokrajina gde je još 1998. godine donet Zakon o poštovanju distribucije finansijskih proizvoda i usluga.[46] Prema tom zakonu, naziv „finansijski planer" mogu da koriste samo lica koja su zadovoljila striktno navedene zahteve. U tom smislu, finansijski planer predstavlja više od „finansijskog savetnika", kao posebna kvalifikacija. Stožer sistema licenciranja je Agencija za finansijska tržišta, koja sertifikatom priznaje kvalifikaciju odobrenu od strane Kvebečkog instituta za finansijsko planiranje,[47] dok je nadležnost za davanje licenci za obavljanje drugih poslova (npr. investiciono savetovanje) po pravilu poverena samoregulatornoj organizaciji koja se naziva Kanadska regulatorna organizacija za investicionu industriju.[48] Pomenuti Kvebečki institut akredituje univerzitetske kurikulume za obrazovanje iz oblasti finansijskog planiranja i sprovodi profesionalnu obuku, na osnovu čega se polaže poseban ispit za finansijskog planera. Institut, takođe, vodi evidenciju o obavezama kontinuiranog obrazovanja finansijskih savetnika, poštovanju etičkog kodeksa i etičkim zahtevima.

3. Nedoumice definisanja „kompetencije" u propisima EU i uloga Evropskog udruženja za finansijsko planiranje u sertifikaciji finansijskih savetnika i planera

Profesionalna kvalifikacija obuhvata završeno formalno obrazovanje i dodatno stručno osposobljavanje i usavršavanje koje se obavlja tokom ili nakon završetka formalnog obrazovanja, a dokazuje se diplomom ili drugom javnom ispravom koju je izdala nadležna obrazovna ustanova, na osnovu čega je nosilac

[44] Financial Conduct Authority, *The FCA Handbook*, Appendix 4 – Appropriate Qualifications Table https://www.handbook.fca.org.uk/handbook/TC/App/4/1.pdf, 15. 10. 2024.

[45] Table A2.1., ASIC, *Regulatory Guide 146* – Licensing: Training of financial products advisers, July 2012. https://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf, pristupljeno 17. 10. 2024.

[46] Legisquebec 1998, *Act respecting the distribution of financial products and services*, http://legisquebec.gouv.qc.ca/en/showdoc/cs/D-9.2, pristupljeno 15. 10. 2024.

[47] Institut québécois de planification financière (IQPF) 2016, *Becoming a Financial Planner*, <https://www.iqpf.org/en/becoming-a-financial-planner>., 15. 10. 2024.

[48] Investment Industry Regulatory Organization of Canada, https://www.iiroc.ca/

profesionalne kvalifikacije stekao pravo obavljanja određene regulisane profesije. Ona, pored formalnog obrazovanja, podrazumeva postojanje „kompetentnosti" to jest „kompetencije" kao integrisanog skupa znanja, veština, sposobnosti i stavova, koji omogućuje pojedincu efikasno obavljanje aktivnosti u datoj profesiji.[49]

Evropska agencija za hartije od vrednosti i tržišta (ESMA) pod „znanjem i stručnošću" podrazumeva sticanje „odgovarajuće kvalifikacije" i „odgovarajućeg iskustva", kako bi se pri davanju saveta i informacija ispunile zakonske obaveze koje se odnose na informisanje klijenata, procenu da li su finansijski proizvodi podesni za konkretnog ulagača, kao i izveštavanje klijenata.[50] „Odgovarajuća kvalifikacija" je formalna kvalifikacija ili drugi oblik testiranja, odnosno obuke koji zadovoljava kriterijume predviđene Smernicama za ocenjivanje znanja i stručnosti Evropskog nadzornog tela za hartije od vrednosti i finansijska tržišta (dalje u tekstu: Smernice).[51] „Odgovarajuće iskustvo" podrazumeva da je zaposleni na poslovima pružanja finansijskih saveta uspešno pokazao sposobnosti u toku posla koji je obavljao, puno radno vreme, u periodu od najmanje šest meseci. S druge strane, Direktiva o distribuciji osiguranja ne pominje izraz „kvalifikacija", već „znanje i sposobnost", odnosno „znanje i kompetentnost", ali ih ne definiše.

Deluje da se u oba slučaja nastoji postići balans između potrebe za minimalnom harmonizacijom i neophodne fleksibilnosti za prilagođavanje postojećih praksi u zemljama članicama. Međutim, obe direktive, a naročito Direktiva MiFID II, propustile su da definišu standard minimalnog nivoa za određivanje „znanja i kompetencija". Ako je zamišljeno da cilj Smernica predstavlja harmonizacija znanja i kompetencija u oblasti finansijskog savetovanja, važno je razumeti fundamentalnu razliku između zahteva za sticanje kvalifikacije i zahteva za učestvovanje u programu obuke, tačnije treninga. Ukoliko su zahtevi različiti, postojaće različiti standardi i različiti nivoi znanja i kompetentnosti finansijskih savetnika. Dakle, kvalifikacija nije isto što i obuka jer se zasniva na potvrdi znanja i sposobnosti, a ne na pohađanju obuke za sticanje znanja i sposobnosti, koje se kroz kompetenciju verifikuje.[52]

Sam pojam „kvalifikacije" koja predstavlja formalni izraz procesa ocenjivanja i validacije od strane nadležnog organa, na osnovu čega se utvrđuje da je određeno lice ostvarilo ishod učenja prema datim standardima, podrazumeva upravo postavljanje standarda u pogledu ishoda. Evropski okvir za kvalifikacije i celoživotno učenje (EQF),[53] koji predstavlja primer uspostavljanja standarda kojima se nastoje uskladiti

[49] Definicija iz čl. 4, tačke 6) i 12) Zakona o regulisanim profesijama i priznavanju profesionalnih kvalifikacija.
[50] Čl. 24 i 25 Direktive MiFID II.
[51] European Securities and Markets Authority, *Guideliness for the Assessment of Knowledge and Competence*, No. 2015/1886, 3 January 2017.
[52] F. Zunzunegui et al., 18–22.
[53] Council Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, *OJ C 189, 15.6.2017*, 15–28.

interesi različitih sistema kvalifikacija u različitim oblastima stručnog obrazovanja prepoznaje pojam kvalifikaciju kao formalni izraz procesa ocene i validacije rezultata učenja (*learning outcomes*). U oblasti bankarstva i finansijskih usluga, taj sistem usklađen je sa Evropskim kreditnim sistemom za stručno obrazovanje i obuke (ECVET),[54] Evropskim referentnim okvirom za osiguranje kvaliteta za stručno obrazovanje i obuku (EQAVET)[55] i Evropskom trening mrežom za bankarstvo i finansijske usluge (EBTN).[56] Evropska trening mreža za bankarstvo i finansijske usluge predstavlja nevladinu organizaciju čiji je cilj postavljanje standarda za akreditaciju, sertifikaciju i kvalifikaciju znanja, veština i kompetencija u oblasti finansijskih usluga u EU. Pod njenim okriljem razvijen je tzv. „Trostruki E standard", koji se pretežno odnosi na bankarski sektor i predstavlja sistem priznavanja kvalifikacija akreditovanih institucija.

U nedostatku harmonizovanih pravila za finansijske savetnike koji pružaju nezavisne savete u pogledu različitih vrsta finansijskih usluga, a u cilju podrške njihovom usavršavanju i profesionalnom napredovanju, pod okriljem Evropskog udruženja za finansijsko planiranje (EPFA) razvijen je sistem sertifikacije finansijskih savetnika u različitim fazama i profesionalnim ulogama koji je u potpunosti usklađen sa gorenavedenim zahtevima Evropskog okvira kvalifikacija (EQF), ECVET i EQUAVET. Svaki od tih sertifikata ne samo da je upodobljen jednom od osam nivoa kvalifikacija prema EQF, već ga prati i zahtev za kontinuiranim profesionalnim razvojem, dok Etički kodeks EPFA predstavlja integralni deo standarda za dodelu svakog sertifikata. Najviši nivo EFPA sertifikata je „Evropski finansijski planer", što potvrđuje tvrdnju da je finansijsko planiranje proces koji obuhvata različite aktivnosti.[57] Kako je naglašeno, taj sertifikat odnosi se na „aktivnost finansijskog planiranja kao celinu" i podrazumeva validaciju znanja i veština u integrisanoj praksi finansijskog planiranja koje obuhvata upravljanje individualnim portfeljom, planiranje imovine, oporezivanje, penzijske planove i usluge osiguranja.

Tabela 1. EPFA sertifikacija

Vrsta EPFA sertifikata	**Nivo EQF**	**Namena sertifikata i zahtevi koji se postavljaju za akreditovane programe obuke**
The European Investment Assistant® Certificate (EIA)	3	Pružanje informacija o finansijskim proizvodima. Minimalno pet dana ili četrdeset časova (ili ekvivalent) obuke.

[54] Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Credit System for Vocational Education and Training, Official Journal of the European Union, *OJ C 155, 8.7.2009,* p. 11–18.

[55] Recommendation of the European Parliament and the Council of 18 June 2009 on the establishment of a European Quality Assurance Reference Framework for Vocational Education and Training, *HL C 155., 2009.7.8*, p. 1–10.

[56] http://www.ebtn-association.eu

[57] https://efpa-eu.org/index.php/standards-qualifications/, 10. 10. 2024.

Vrsta EPFA sertifikata	Nivo EQF	Namena sertifikata i zahtevi koji se postavljaju za akreditovane programe obuke
The European Investment Practitioner® Certificate (EIP)	4	Aktivnosti osnovnih usluga savetovanja. Minimalno 10 dana ili 80 časova (ili ekvivalent) ili pet dana dodatne obuke za imaoce EIA sertifikata.
The European Financial Advisor® Certificate (EFA)	5	Prošireni obuhvat usluga finansijskog savetovanja, što podrazumeva i procenu potreba klijenata i portfolio menadžment.
The European Financial Planner® (EFP)	6	Sve aktivnosti finansijskog planiranja, kako za individualne tako i za poslovne korisnike. Minimalno 40 dana obuke ili 320 časova (ili ekvivalent) ili 20 dana dodatne obuke za imaoce EFA sertifikata).

IV Zahtevi kompetentnosti u oblasti planiranja ličnih finansija prema propisima EU iz oblasti tržišta kapitala i osiguranja

Planiranje ličnih finansija kao profesija na nivou EU nije regulisano jedinstvenim propisima, iako se finansijsko planiranje, pod različitim nazivima, nalazi na spisku regulisanih profesija u nekim zemljama članicama.[58] Najznačajniji propisi koji se odnose na oblasti koje obuhvata finansijsko savetovanje jesu Direktiva 2014/65/EU o tržištu finansijskih instrumenata (MIFID II), kao i Uredba (EU) br. 600/2014 o tržištu finansijskih instrumenata (MiFIR).[59] U oblasti osiguranja, od najvećeg značaja je Direktiva o distribuciji osiguranja. Pored toga, od značaja su, naročito u oblasti informisanja potrošača, i propisi kao što su Direktiva 200/48/EC o ugovorima o kreditu za potrošače,[60] Direktiva 2014/17/EU o ugovorima o kreditima za kupovinu nepokretnosti,[61] Uredba (EU) br. 1286/2014 o dokumentima sa ključnim informacijama za pakete investicionih proizvoda za male ulagače i proizvode osiguranja[62] i sl.

[58] Primera radi, u Danskoj, finansijski savetnik (*Finansiel rådgiver*) pruža savete u oblasti kredita, depozita, osiguranja, penzijskih fondova i investicionih usluga. Finansijski savetnici su priznata profesija u Velikoj Britaniji, (*Chartered Financial Planner*), Austriji, Francuskoj (*Conseiller en investissements financiers*), Slovačkoj (*Finančný poradca*) itd. European Commission, *Regulated professions by country, with competent authorities*, http://ec.europa.eu/growth/tools-databases/regprof/index.cfm, pristupljeno 10. 10. 2024.

[59] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, *OJ L 173*, 12.6.2014, 84–148.

[60] Directive 2008/48/EC Of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJ L 133,* 22.5.2008, 66–92.

[61] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, *OJ L 60,* 28. 2. 2014, 34–85.

[62] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) *OJ L 352,* 9.12.2014, 1–23.

Članom 25(1) Direktive MiFID II uvedena je obaveza država članica da objave kriterijume na osnovu kojih će se procenjivati znanje i kompetentnost fizičkih lica koja daju investicione savete ili informacije o finansijskim instrumentima, investicionim uslugama ili pomoćnim uslugama klijentima u ime investicionog društva, a pomenute Smernice za ocenjivanje znanja i stručnosti predstavljaju dodatno uputstvo. Međutim, važno je napomenuti da čl. 3(1) te direktive omogućava zemljama članicama da za specifične usluge, uključujući i investiciono savetovanje, primene drugačije kriterijume od onih koji važe za druge usluge što se pružaju prekogranično. U tom smislu, pravila o stručnosti i kvalifikacijama koje se odnose na investicione savetnike lokalnog karaktera ne moraju zadovoljavati kriterijume postavljene za investicione savetnike koji usluge pružaju prekogranično. Smernice za ocenjivanje znanja i stručnosti nude različite opcije primene: objavljivanje od strane nadležnog regulatornog organa ili drugog nacionalnog tela karakteristika koje bi odgovarajuća kvalifikacija trebalo da ispuni; objavljivanje liste specifičnih odgovarajućih kvalifikacija za koje se smatra da ispunjavaju kriterijume Smernica;[63] ili putem objavljivanja i kriterijuma i liste specifičnih kvalifikacija. Važno je napomenuti da Smernice uspostavljaju minimalne standarde, tako da nacionalna tela mogu zahtevati viši nivo znanja i stručnosti za zaposlene koji daju savete ili informišu klijente. Tako široka margina delovanja uticala je na pojavu značajnijih razlika između zemalja članica.[64]

Direktiva o distribuciji osiguranja u čl. 10, kao i Aneksu I, uspostavila je minimalne kriterijume u pogledu znanja i kompetencija savetnika u oblasti usluga osiguranja. U smislu institucionalne arhitekture supervizije finansijskih institucija u EU (tzv. Lamfalussy),[65] taj aspekt poslovanja osiguravajućih društava regulisan je na prvom nivou (*Level 1*), odnosno kroz direktivu kao sekundarni izvor prava EU, dok su kvalifikacije za savetovanje u oblasti tržišta hartija od vrednosti regulisana kroz treći nivo (*Level 3*). Dakle, Direktiva o distribuciji osiguranja nije ostavila prostor Evropskom nadzornom telu za osiguranje i strukovno penzijsko osiguranje da detaljnije uređuje kriterijume u pogledu znanja i stručnosti, već je obaveza zemalja članica EU da transponuju odredbe ove direktive. Kako je reč o direktivi kojom se predviđa minimalna harmonizacija, zemlje članice mogu da predvide detaljnije i strože zahteve, što je dovelo do višestrukih odstupanja u pogledu regulisanja zahteva što se tiče znanja i stručnosti ne samo posrednika u distribuciji osiguravajućih usluga već i savetnika u oblasti ličnih finansija.

Najzad, valjalo bi ukazati i na neke razlike u regulisanju zahteva za znanjem i stručnošću, odnosno kompetencijama između sektora osiguranja i tržišta kapitala.[66]

[63] Ovo predstavlja izbor manjeg broja zemalja, poput Luksemburga (Circular CSSF 17/670 of 13 October 2017) i Španije (Guía Técnica 4/2017 de la Comisión Nacional del Mercado de Valores, para la evaluación de los conocimientos y competencias del personal que informa y que asesora, de 27 de junio de 2017). Izvor: F. Zunzunegui, et al.

[64] Vid naročito F. Zunzunegui, et al.

[65] https://finance.ec.europa.eu/regulation-and-supervision/regulatory-process-financial-services_en

[66] F. Zunzunegui et al., European Insurance and Occupational Pensios Authority, *Annexes I-VIII to the Report on the application of the Insurance Distribution Directive* (IDD), EIOPA-BoS-21/582, 6 January 2022.

Iako obe direktive, Direktiva MiFID II i Direktiva o distribuciji osiguranja, postavljaju opšti zahtev da lica koja pružaju informacije ili savete moraju imati neophodna znanja i stručnost, Smernice Evropskog nadzornog tela za hartije od vrednosti i tržišta kapitala više pažnje posvećuju sticanju kvalifikacije, dok je u pogledu osiguranja veći fokus na održavanju nivoa stručnosti, odnosno kvalifikacije, kroz kontinuirano stručno usavršavanje. Pored toga, Smernicama je definisan zahtev za znanjem i kompetencijama u smislu kvalifikacije koju treba obnavljati („kvalifikacija ili drugi test ili kurs obuke.. seminar, samostalne studije ili učenje")[67], odnosno ažurirati, dok Direktiva o distribuciji osiguranja predviđa program obuke koji odgovara zahtevu „kontinuiranog profesionalnog usavršavanja" (*Continuous Professional Development*).

Kriterijumi u pogledu znanja i kompetentnost za zaposlene koji klijentima daju informacije ili savete o investicionim proizvodima, investicionim uslugama ili pomoćnim uslugama predviđeni su Smernicama (čl. 17 i 18). Međutim, široko određenje ishoda učenja („razumevanje" odnosno „osnovno znanje") i praktičnih veština („proceniti", „ispuniti obaveze"), bez uvođenja merila i odabira jednog od osam nivoa kvalifikacija prema Evropskom okviru kvalifikacija, svakako ne podstiču harmonizaciju nacionalnih okvira. Štaviše, kriterijumi iz Smernica ne pružaju informacije o karakteristikama koje kvalifikacija mora zadovoljiti, npr. da li je predviđena nastava u učionicama ili na daljinu; trajanje obuke odnosno broj časova obuke za davanje saveta i davanje informacija; trening na nivou organizacije ili od strane eksternog tela, kao i uslovi koji se postavljaju za institucije koje pružaju usluge edukacije i obuka i polaganje ispita za dobijanje licence.[68]

U određenom broju zemalja organ nadzora propisuje pravila i standarde koje moraju primenjivati institucije koje su ovlašćene ili akreditovane da organizuju obuke i polaganje standardizovanih ispita. Međutim, nivo detalja se razlikuje jer u nekim zemljama organi nadzora imaju veće ingerencije.[69] Naročito se uočava nepostojanje standarda u pogledu održavanja obuka u smislu izbora između internih ili eksternih. Jedan od retkih primera normiranja tog kriterijuma jeste Luksemburg, gde postoji sloboda izbora finansijskih posrednika da sami procenjuju minimalno znanje i kompetentnost posrednika u skladu s formalnim procesom verifikacije od strane Komisije za nadzor nad finansijskim sektorom. Druga mogućnost je učestvovanje u eksternim programima obuka koje je Komisija sertifikovala.[70]

[67] Smernice, 15.

[68] European Commission, Staff Working Document „Report on the current framework for qualification of financial advisors in the EU and assessment of possible ways forward", Brussels, 30.6.2022 SWD(2022) 184 final, https://finance.ec.europa.eu/system/files/2022-07/220630-report-qualification-financial-advisors-framework_en.pdf, pristupljeno 17. 10. 2024. F. Zunzunegui et al, 32.

[69] Jedan od najboljih primera je nadležnost Češke narodne banke, koja je posebnom uredbom propisala detaljna pravila za obuke i polaganje ispita u oblasti tržišta kapitala (Decree No. 319/2017 of 21 September 2017 on professional qualification for distribution on the capital market), dok je u oblasti osiguranja to predviđeno zakonom (Law on the distribution of insurance and reinsurance July 26, 2018).

[70] Commission de Surveillance du Secteur Financier, *Circular CCSF* 17/665 – ESMA Guidelines for the Assessment of Knowledge and Competence, https://www.cssf.lu/en/Document/circular-cssf-17-665/,

S druge strane, Direktiva o distribuciji osiguranja jasnije određuje šta se smatra „minimalnim zahtevima profesionalnog znanja i kompetencija", navodeći u Aneksu i konkretne oblasti: (a) minimalno neophodno poznavanje odredaba i uslova ponuđenih polisa, uključujući i rizike, minimalno neophodno poznavanje proizvoda, premija i beneficija, kao i prednosti i nedostataka različitih investicionih opcija i finansijskih rizika za investicione proizvode zasnovane na osiguranju (uključujući rizike povezane sa štednjom, penzijskim planovima i sl.); (b) minimalno neophodno poznavanje važećih zakona koji regulišu distribuciju usluga osiguranja, propisa o zaštiti potrošača, sprečavanju pranja novca, zaštiti podataka, relevantnih poreskih propisa i relevantnog socijalnog i radnog prava i dr; (c) minimalno neophodno znanje o rešavanju pritužbi klijenata i postupanju sa žalbama; (d) minimalno neophodno znanje o proceni potreba kupaca; (e) minimalno neophodno znanje o osiguranju i, eventualno, drugim finansijskim tržištima; (f) minimalno neophodno poznavanje standarda poslovne etike; i (g) minimalna neophodna finansijska kompetencija.

Međutim, ni Smernice ESMA ni Direktiva o distribuciji osiguranja ne sadrže standarde u pogledu formata i organizacije i trajanja različitih pojavnih oblika kontinuiranog profesionalnog razvoja. Dok se u nekim zemljama ta mogućnost odnosno obaveza finansijskih savetnika uopšte ne predviđa, u oblasti osiguranja većina zemalja je prihvatila 15 časova na godišnjem nivou, koliko propisuje Direktiva o distribuciji osiguranja.[71]

Tabela 2.

Određeni kriterijumi u pogledu kvalifikacija	**Direktiva MiFID II i Uputstvo za ocenu znanja i kompetencija**	**Direktiva o distribuciji osiguranja**
Minimalni zahtevi u pogledu formalnog obrazovanja	/	/
Zahtev u pogledu kvalifikacije	Test ili obuka	Sertifikat kao opcija
Oblik profesionalne kvalifikacije	/	/
Broj časova obuke	/	/
Oblik kontinuiranog profesionalnog usavršavanja	/	/
Broj potrebnih časova kontinuiranog profesionalnog usavršavanja	/	15
Minimalni period potrebnog radnog iskustva za sticanje kvalifikacije	6 meseci	/

pristupljeno 10. 10. 2024.

[71] F. Zunzunegui et al., 44.

Određeni kriterijumi u pogledu kvalifikacija	Direktiva MiFID II i Uputstvo za ocenu znanja i kompetencija	Direktiva o distribuciji osiguranja
Maksimalni period za rad pod supervizijom	4 godine	/
Provera kvalifikacije	Unutrašnja ili spoljna, na godišnjem nivou	/

V Ka unapređenju i unifikaciji standarda profesionalnih kvalifikacija planera ličnih finansija i finansijskog savetovanja u EU

Evropska komisija je septembra 2020. godine usvojila Akcioni plan Unije tržišta kapitala,[72] a u okviru toga i Strategiju za investiranje malih ulagača (*Retail Investment Strategy*). Cilj te strategije je da obezbedi da mali investitori mogu u potpunosti iskoristiti prednosti tržišta kapitala i da pravila budu koherentna u svim pravnim instrumentima. Između ostalog, predviđa se da bi pojedinačni investitor trebalo da ima koristi od adekvatne zaštite, nepristrasnih saveta i poštenog tretmana. Aktivnost br. 8, predviđena Akcionim planom, predviđa da Komisija predloži moguće načine za unapređenje nivoa profesionalnih kvalifikacija finansijskih savetnika u EU, kroz izmene odredaba Direktive MiFID II i Direktive o distribuciji osiguranja, kao i uvođenje panevropske oznake za finansijske savetnike. Između ostalog, predviđa se da će Komisija predložiti da savetnici dobiju sertifikat koji dokazuje da je njihov nivo znanja i kvalifikacija dovoljan za pristup profesiji, a koji takođe pokazuje da kontinuirano učestvuju u adekvatnim oblicima kontinuiranog obrazovanja. U cilju pripreme aktivnosti usmerenih ka usklađivanju zahteva obe direktive, Evropsko nadzorno telo za osiguranje i strukovno penzijsko osiguranje sprovelo je analizu uslova koji su u zemljama članicama predviđeni kao osnov za dokazivanje znanja i kompetentnosti u finansijskom savetovanju o distribuciji investicionih proizvoda zasnovanih na proizvodima osiguranja, iz kojeg se vidi postojanje niza razlika na nivou zemalja članica.[73]

Na osnovu izveštaja evropskih tela za nadzor nad tržištem kapitala i osiguranja, Evropska komisija objavila je poseban radni dokument koji se odnosi na

[72] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A Capital Markets Union for people and businesses-new action plan*, Brussels, 24.9.2020, COM(2020) 590 final. https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan/action-8-building-retail-investors-trust-capital-markets_en, 30. 09. 2024.

[73] EIOPA, Report on the application of the Insurance Distribution Directive (IDD), EIOPA-BoS-21/581, January 2022; EIOPA, Annexes I-VIII to the Report on the application of the Insurance Distribution Directive (IDD), EIOPA-BoS-21/582, 6 January 2022.

kvalifikacije finansijskih savetnika u EU.[74] Iako je reč o radnom dokumentu, kao neformalnom izvoru koji nema obavezujući karakter, može se zaključiti da je analiza i upoređivanje zahteva u pogledu sticanja profesionalnih kvalifikacija finansijskih savetnika usmerena ne samo ka izmenama pomenutih direktiva u cilju harmonizacije uslova za dobijanje panevropske oznake, već i ka uvođenju dodatnog zahteva koji se odnose na stručna znanja finansijskih savetnika radi integrisanja preferenci investitora koje se odnose na održivost. U tom smislu, Evropsko nadzorno telo za hartije od vrednosti i tržišta kapitala usvojilo je posebne smernice još 2018. godine,[75] dok je Evropsko nadzorno telo za osiguranje i strukovno penzijsko osiguranje posebne smernice usvojilo 2022. godine.[76]

VI Umesto zaključka – osvrt na domaći okvir za sticanje zvanja i usavršavanje finansijskih savetnika

Planiranje ličnih finansija kao nova profesija vezuje se uglavnom za razvijene zemlje, a njenom razvitku doprinosi postojanje razvijenog tržišta kapitala i većeg broja finansijskih proizvoda dostupnih potrošačima koji ne raspolažu neophodnim znanjima. Međutim, ni u zemljama s razvijenim finansijskim tržištima uslovi za obavljanje poslova finansijskog savetovanja i planiranja ličnih finansija nisu homogeni. Jedan od glavnih razloga što planiranje ličnih finansija još uvek nije prepoznato kao profesija jeste upravo nedostatak adekvatno postavljenih zahteva u pogledu nivoa obrazovanja finansijskih savetnika. Napred navedena analiza pravnog okvira u EU jasno ukazuje na nedostatak harmonizacije, naročito u pogledu zahteva Direktive MiFID II o profesionalnim kvalifikacijama, s tim što je Direktiva o distribuciji osiguranja nešto jasnije definisala konkretan obuhvat minimalnih stručnih kompetencija u oblasti osiguranja. U tom smislu, na nivou EU identifikovana je potreba da se razvije jedinstvena taksonomija zahteva u pogledu kvalifikacija te da se usaglasi značenje i obuhvat termina „znanje", „kompetentnost", „kvalifikacija", „obuka" i sličnih izraza, kako bi bilo jasno da kompetentnost podrazumeva sticanje odgovarajuće kvalifikacije, a ne samo učešće u programu obuke.

Nerazvijenost i nestabilnost finansijskog tržišta u našoj zemlji, kao i u zemljama u okruženju i nedovoljno poverenje klijenata u finansijski sistem, sužavaju mogućnosti za profilisanje ove profesije, odnosno umanjuju potrebu za različitim aspektima finansijskog savetovanja. Niti u jednoj zemlji u okruženju planiranje

[74] European Commission, Staff Working Document „Report on the current framework for qualification of financial advisors in the EU and assessment of possible ways forward", Brussels, 30.6.2022, SWD(2022) 184 final.

[75] ESMA, *Guidelines on certain aspects of the MiFID II suitability requirements*, ESMA35-43-1163, 06/11/2018.

[76] EIOPA, *Guidance on the integration of sustainability preferences in the suitability assessment under the Insurance Distribution Directive (IDD)*, EIOPA-BOS-22-391, 20 July 2022.

ličnih finansija ne nalazi se na spisku regulisanih profesija, a zbog skromne ponude finansijskih proizvoda ne postoji velika tražnja za ovim profilom stručnjaka. Ipak, primetna je tendencija porasta broja lica koja sebe nazivaju finansijskim savetnicima i planerima ličnih finansija, a koji nude usluge edukacije i savetovanja.

U situacijama kada se finansijski savet odnosi na prodaju, posredovanje, upravljanje imovinom korisnika finansijskih usluga, investicioni savetnici su dužni, na osnovu Zakona o tržištu kapitala,[77] da se ponašaju u skladu s pravilima i standardima struke i ne smeju klijentima preporučivati kupovinu ili prodaju određenih finansijskih instrumenata samo radi ostvarivanja provizije. Zakonom je propisana obaveza investicionih savetnika da deluju u najboljem interesu klijenta i razmotre da li je finansijska transakcija primerena za klijenta, uzimajući u obzir ciljeve klijenta, njegovu mogućnost da podnese rizike iz preporučene transakcije, znanje i iskustvo klijenta i njegovu sposobnost da razume rizike u vezi sa uslugom koja mu se pruža. U skladu sa Zakonom o tržištu kapitala, kao i posebnim Pravilnikom,[78] Komisija za hartije od vrednosti Republike Srbije organizuje tri kursa za pohađanje nastave, polaganje ispita i dobijanje dozvole za obavljanje poslova odnosno sticanje zvanja brokera, portfolio menadžera i investicionog savetnika. Pravilnikom su, između ostalog, regulisani uslovi za pohađanje nastave, nastavne oblasti, organizacija ispita, postupak priznavanja strane školske isprave odnosno sertifikata o zvanjima stečenim u inostranstvu. Nastavni program, predavači i ispitivači određuju se aktom Komisije, a za sva tri zvanja posebno je predviđen broj časova nastave, kao i plan nastave i ispitne oblasti. Dakle, uslovi za dodelu sertifikata koji dobijaju investicioni savetnici od Komisije, kao osnov za dobijanje dozvole i upis u poseban Registar investicionih savetnika, detaljno je regulisan podzakonskim aktom, kao uostalom i zahtevi koji se posebno odnose na izdavanje dozvole. Zvanje investicionog savetnika jeste osnov za izdavanje dozvole, koja podrazumeva i zadovoljenje posebnih zahteva u pogledu radnog iskustva i zahteva koji se odnosi na neosuđivanost.

Na osnovu odredaba Zakona o osiguranju,[79] ovlašćeni posrednik odnosno zastupnik u osiguranju ne može obavljati poslove posredovanja odnosno zastupanja u osiguranju ako se nije profesionalno usavršio, ako se ne nalazi u registru aktivnih ovlašćenih posrednika/zastupnika u osiguranju, koji je javno dostupan na internet portalu NBS. Narodna banka Srbije je, na osnovu posebne Odluke o izmenama i dopunama Odluke o sticanju zvanja i usavršavanju ovlašćenih posrednika i ovlašćenih zastupnika u osiguranju,[80] zaključila Sporazum sa Privrednom komorom Srbije, koja je na osnovu ovog sporazuma ovlašćena ne samo za sprovođenje obuka za polaganje

[77] Videti naročito članove 179–181 Zakona o tržištu kapitala, *Sl. glasnik RS*, br. 129/2021.

[78] Pravilnik o sticanju zvanja i davanju dozvole za obavljanje poslova brokera, investicionog savetnika i portfolio menadžera, *Sl. glasnik RS*, br. 115/2023.

[79] Čl. 86 st. 1 i čl. 98 st. 1 i 2 Zakona o osiguranju, *Sl. glasnik RS*, br. 139/2014 i 44/2021.

[80] *Sl. glasnik RS*, br. 11/2017.

ispita za sticanje zvanja ovlašćenog posrednika i ovlašćenog zastupnika u osiguranju[81] već i za njihovo kontinuirano usavršavanje, što kao obaveza nije predviđeno propisima o tržištu kapitala. Naime, pomenutom Odlukom predviđena je obaveza ovlašćenih posrednika i ovlašćenih zastupnika u osiguranju da se profesionalno usavršavaju, i to najmanje 15 časova u kalendarskoj godini u kojoj obavljaju poslove posredovanja u osiguranju, odnosno zastupanja u osiguranju.

Van okvira finansijskih usluga, valjalo bi ukratko sagledati i zahteve za sticanje profesionalnog zvanja kao uslov za dobijanje dozvola za obavljanje poslova računovodstva i revizije, kao i posredovanja u prometu i zakupu nepokretnosti. U oblasti računovodstvenih usluga, prema Zakonu o računovodstvu,[82] zakonska obaveza obuke, polaganje ispita i kontinuirano usavršavanje postoji samo za računovođe koji se profesionalno bave pružanjem računovodstvenih usluga. Budući da ni pravna lica ni preduzetnici koji se ne bave pružanjem računovodstvenih usluga za vođenje poslovnih knjiga ne moraju angažovati lice s profesionalnim zvanjem računovođe, obaveza licence u domenu planiranja ličnih finansija zavisi od svrhe finansijskog savetovanja. Prema Zakonu o reviziji,[83] revizori mogu biti licencirani ovlašćeni revizori ukoliko su položili ispit za sticanje zvanja ovlašćeni (interni) revizor i imaju važeću licencu za obavljanje revizije; dok je samostalni revizor licencirani ovlašćeni revizor koji ima važeću dozvolu da obavlja reviziju kao preduzetnik. Profesionalno zvanje iz oblasti računovodstva mora biti stečeno kod organizacije koja je članica Međunarodne federacije računovođa (*International Federation of Accountants* – IFAC). U Srbiji status članice te organizacije imaju Savez računovođa i revizora i Komora ovlašćenih revizora. Te profesionalne organizacije, u skladu s pomenutim propisima, sprovode obuke za polaganje ispita, organizuju polaganje ispita i vode registre ovlašćenih računovođa i ovlašćenih javnih računovođa, odnosno ovlašćenih revizora i ovlašćenih internih revizora. Najzad, Zakonom o posredovanju u prometu i zakupu nepokretnosti[84] uređuju se uslovi i način obavljanja posredovanja u prometu i zakupu nepokretnosti i ustanovljava obaveza polaganja stručnog ispita. Program i način polaganja stručnog ispita, kao i vođenje evidencije o izdatim uverenjima, koji predstavlja jedan od osnova za upis u Registar posrednika, uređen je Pravilnikom o stručnom ispitu za posrednike u prometu i zakupu nepokretnosti.[85]

[81] U tom smislu, pohvalno je istaći i standardizaciju Priručnika za polaganje ispita, koji je javno dostupan. Privredna komora Srbije, *Priručnik za obuku za polaganje ispita i sticanje zvanja ovlašćenog posrednika i ovlašćenog zastupnika u osiguranju*, Beograd, februar 2024. Značajno je istaći da je u toj publikaciji vidno istaknuta obaveza posrednika i zastupnika u osiguranju da pružaju informacije u cilju zaštite prava i interesa ugovarača, obaveza kontinuiranog profesionalnog usavršavanja, zatim obaveza adekvatne procene potreba potrošača, standardi poslovne etike i dr.

[82] *Sl. glasnik RS*, br. 73/2019 i 44/2021 - dr. zakon.

[83] *Sl. glasnik RS*, br. 73/2019.

[84] *Sl. glasnik RS*, br. 95/2013, 41/2018 i 91/2019.

[85] *Sl. glasnik RS*, br. 75/2014 i 135/2022.

Poslovanje finansijskih savetnika u našoj zemlji regulisano je propisima iz oblasti tržišta kapitala i osiguranja, a u pogledu definisanja zahteva čini se da je u oblasti posredovanja i zastupanja u osiguranju nivo stručnosti i znanja detaljnije uređen. Pored primene postojećih propisa i nadležnosti Komisije za hartije od vrednosti i Narodne banke Srbije, kao kompetentnih tela, a u zavisnosti od ishoda inicijativa pod okriljem Akcionog plana Unije tržišta kapitala unutar EU što se tiče jedinstvenih kriterijuma za kvalifikacije i panevropske oznake finansijskog savetnika, pažnju bi trebalo usmeriti i na opciju u vidu formiranja profesionalnih udruženja, eventualno u obliku komore finansijskih savetnika sa obaveznim članstvom i zakonom poverenim nadležnostima, naročito u oblasti donošenja etičkih kodeksa i zahtevā u pogledu kontinuiranog usavršavanja finansijskih savetnika.

Literatura

- Altfest, L., „Personal financial planning: origins, developments and a plan for future direction", *The American Economist,* Vol. 48, No. 2 2004, 53-60.
- ASIC, *Regulatory Guide 146* – Licensing: Training of financial products advisers, July 2012. https://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf, pristupljeno 17. 10. 2024.
- Australian Securities and Investments Commission, *Overview of the FOFA reforms*, *http://asic.gov.au/regulatory-resources/financial-services/future-of-financial-advice-reforms/fofa-background-and-implementation/*, pristupljeno 10. 10. 2024.
- Black, K., Ciccotello, K., Skipper, H. „Issues in comprehensive personal financial planning", *Financial Services Review*, 11(1), 2002, 1–9.
- Brandon, D. E., Welch, O. H., *The History of Financial Planning: The Transformation of Financial Services,* John Wiley & Sons, 2009.
- CFP Board, *CFP Board Financial Planning Competency Handbook,* John Wiley & Sons, 2015.
- CFP Board, *Side-by-side comparison of code of ethics and standards of conduct to current standards of professional conduct*, 2018, https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/cfp-board-code-and-standards-side-by-side-comparison.pdf, 15 novembar 2024.
- Commission de Surveillance du Secteur Financier, *Circular CCSF* 17/665 – ESMA Guidelines for the Assessment of Knowledge and Competence, https://www.cssf.lu/en/Document/circular-cssf-17-665/, pristupljeno 10. 10. 2024.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A Capital Markets Union for people and businesses-new action*

plan, Brussels, 24. 9. 2020, COM(2020) 590 final. https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan/action-8-building-retail-investors-trust-capital-markets_en, pristupljeno 30. 09. 2024.

- Durband D. B., Carlson M. B., Stueve, C. „The financial counseling profession", *Financial counseling* (eds. Durband, D. B., Law, R., and Mazzolini, A. K.), Springer, 2019, 1 – 16.
- European Commission, *Regulated professions by country, with competent authorities*, http://ec.europa.eu/growth/tools-databases/regprof/index.cfm, pristupljeno 10. 10. 2024.
- European Commission, *Retail Investment Strategy – Empowering Retail Investors on EU capital markets*, May 2023, *https://finance.ec.europa.eu/document/download/ce290ee2-1f05-41f6-9540-84c3605ccb0f_en?filename=230524-retail-investment-strategy-factsheet_en.pdf,* pristupljeno 15. 10. 2024.
- European Commission, Staff Working Document „Report on the current framework for qualification of financial advisors in the EU and assessment of possible ways forward", Brussels, 30.6.2022 SWD(2022) 184 final, https://finance.ec.europa.eu/system/files/2022-07/220630-report-qualification-financial-advisors-framework_en.pdf, pristupljeno 17. 10. 2024
- EIOPA, *Annexes I-VIII to the Report on the application of the Insurance Distribution Directive (IDD),* EIOPA-BoS-21/582, 6 January 2022.
- EIOPA, *Report on the application of the Insurance Distribution Directive (IDD)*, EIOPA-BoS-21/581, January 2022.
- EIOPA, *Guidance on the integration of sustainability preferences in the suitability assessment under the Insurance Distribution Directive (IDD)*, EIOPA-BOS-22-391, 20 July 2022.
- ESMA, *Guideliness for the Assessment of Knowledge and Competence*, No. 2015/1886, 3 January 2017.
- ESMA, *Guidelines on certain aspects of the MiFID II suitability requirements*, ESMA35-43-1163, 06/11/2018.
- Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021 (*Better Advice Act*), Australia.
- FCA's Policy Statement PS 17/14: Markets in Financial Instruments Directive II implementation, July 2017, https://www.fca.org.uk/publications/policy-statements/ps17-14-mifid-ii-implementation, pristupljeno 05.10. 2024.
- Gitman, L., Joehnk, M., Billingsley, R., *Personal Financial Planning*, South-Western, 2014.
- Grable, J.E., Chatterjee, S., „Defining Personal Finance", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, 2022, 3-17.

- Greenwood, E., „Attributes of a Profession", *Social Work*, Vol. 2., No. 3. 1957, 45-55.
- Institut québécois de planification financière (IQPF) 2016, *Becoming a Financial Planner*, https://www.iqpf.org/en/becoming-a-financial-planner, pristupljeno 15. 10. 2024.
- International Organization for Standardization, ISO 22222:2005, *Personal financial planning* - Requirements for personal financial planners
- Investment Advisers Act of 1940 (USA).
- Jovanić, T., *Uvod u ekonomsko pravo*, Beograd, 2024
- Lazaro, C. „The Future of Financial Advice: Eliminating The False Distinction Between Brokers and Investment Advisers", *St. John's Law Review*, Vol. 87. 2013, 381.
- Lowe, J., *Be Your Own Financial Adviser,* Pearson Education, 2010
- McLellan, A., *Foundations of Financial Planning: An Overview*, The American College Press, 2012
- Moloney, N., *EU securities and financial markets regulation,* Oxford University Press, United Kingdom 2014.
- Petrović Tomić, N., *Zaštita potrošača usluga osiguranja, analiza i predlog unapređenja regulatornog okvira,* Beograd, 2015.
- Privredna komora Srbije, *Priručnik za obuku za polaganje ispita i sticanje zvanja ovlašćenog posrednika i ovlašćenog zastupnika u osiguranju*, Beograd, februar 2024.
- Republički zavod za statistiku, *Klasifikacija zanimanja*, Beograd, 2011.
- Securities Exchange Act of 1934 (USA).
- Schmidt, J.A. „What Is a Profession?", *The Structure Magazine,* November 2008.
- Šunderić, B., Kovačević, Lj. *Radno pravo – priručnik za polaganje pravosudnog ispita*, Beograd, 2019.
- Schuchardt J. et al., „Personal finance: An interdisciplinary profession", *Journal of Financial Counseling and Planning*, Vol. 18, No. 1. 2007, 61–69.
- Stojanović, G. „Standardizovani zahtevi za planere ličnih finansija", *Bankarstvo*, br. 5/6, 2006, 54-61.
- U.S. Securities and Exchange Commission, *Investment Advisers: What You Need to Know Before Choosing One*, *https://www.sec.gov/investor/pubs/invadvisers.htm,* pristupljeno 6. 6. 2016.
- Van Beek, R. „Personal Finance: A Practice Perspective", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, 2022, 35 – 49.
- Young, A., *Financial Planning in Practice*, Melbourne 2013.
- Zunzunegui, F., Corbal, P., Szymanska, M., Braga, M.D., Levaldaur, P., Carluccio, E. M., *Improving Qualifications for Financial Advisors in EU: Policy*

Proposals, EFPA, Brussels, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466821, pristupljeno 10. 09. 2024.
- Županov, J., Šporer, Ž. „Profesija sociolog", *Revija za sociologiju*, Vol. 14, No. 1-2, 1984, 11–46.

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CHALLENGES OF REGULATING PERSONAL FINANCIAL PLANNING AS A PROFESSION

REVIEW PAPER

Abstract

Personal financial planning, as a new profession, is primarily associated with developed countries, where the development is supported by a strong capital market and an increasing number of financial services available to consumers who lack the necessary knowledge. In countries with specific legal requirements or certification schemes, the professional title of "financial planner" can only be utilized by financial advisors who have met these specific criteria, as the financial planner, and thus the personal finance planner, typically represents the highest level in the certification hierarchy of financial advisors. In most countries with developed financial markets, the conditions for providing various financial advisory services are not homogeneous, which raises the question of whether a specific license for providing certain financial services is sufficient, or whether financial advisors must undergo specialized education and possess particular qualifications. In the absence of clearly defined rules and standards, the paper highlights the transnational private regulation of personal financial planning through examples of certification schemes. The analysis of the EU legal framework concerning investment advice and insurance distribution also indicates shortcomings in defining standards for determining "knowledge and expertise" and the corresponding training. Finally, the operations of a small number of financial advisors in Serbia are regulated by regulations depending on the type of service they provide. Still, it can be concluded that, particularly in the area of mediation and representation in insurance, the requirements regarding

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expertise and knowledge are more comprehensively regulated compared to other financial services.

Keywords: financial advising, personal finance, investing, insurance, knowledge and expertise, professional qualifications

I Introduction

Personal financial planning encompasses a set of activities, techniques, and procedures aimed at finding the best way to achieve individuals' financial goals. This should result in well-considered decisions regarding further actions and the choice of appropriate financial services in accordance with the individual's circumstances, beliefs, and preferences.[2] The process of personal financial planning mainly involves financial advisory services based on a careful analysis of the client's goals and needs. In the absence of the necessary knowledge, clients rely on expert assistance that enables them to efficiently achieve their financial objectives while minimizing costs. The increasing number of financial services and their complexity demand specific competencies, knowledge, expertise, and professional experience in various areas of financial markets, which raises the legitimate question of standardizing financial advisors' practices in personal financial planning.

The development of financial planning as a profession, and thus personal financial planning as its sub-field, is still at its beginning, and regulators face a long road ahead in establishing an adequate regulatory framework. Given the complexity and scope of services provided by financial advisors, which relate to various financial markets and services of differing levels of complexity, enacting specific legislation to regulate their operations would pose a significant challenge. This paper briefly highlights the rare examples in which the law mandates specific conditions for obtaining a license to practice as a financial planner. Since financial consulting in both corporate and personal finance is the basis of financial planning, the operations of individuals offering personal financial planning services in systems where the use of the title "financial planner" does not require verification of specific knowledge and skills may depend on holding a financial advisor license.

As a barrier to entry into the sector, such a license is similar to other authorization mechanisms that restrict market access, such as registration, certification, and accreditation. However, it differs in terms of the level of professional standards established, the powers of supervisory bodies, and the consequences of violating licensing conditions and professional obligations. Obtaining a license also implies

[2] Jonquil Lowe, *Be Your Own Financial Adviser: The comprehensive guide to wealth and financial planning,* Pearson Education, 2010, 3–4.

adherence to professional standards of financial consulting. In comparative terms, this often involves specific licenses for performing investment advisory services, insurance brokerage, as well as in the fields of tax planning and accounting services. In the absence of state regulation, this paper points to self-regulatory mechanisms developed under the auspices of professional associations and emphasizes the significance of transnational private regulation of professions. Among several notable examples of certification schemes for the professional qualifications of financial planners, the international standard ISO 22222:2005 *Personal financial planning – Requirements for personal financial planners*[3] is particularly significant, as it provides a solid foundation for establishing essential elements of the required skills, expertise, and experience.

Over the past decade, advertisements for education and/or advisory services related to personal financial planning have increasingly appeared in our country, particularly on social media. These services are often offered by individuals who resemble motivational speakers and "influencers" more than professional financial advisors. In situations where their advice goes beyond education and has the potential to influence consumers' choices as users of financial services, the question of adequate consumer protection arises. The regulations of the Republic of Serbia in the areas of capital markets and insurance are largely aligned with the requirements of Directive 2014/65/EU on Markets in Financial Instruments (hereinafter: MiFID II Directive)[4] and the EU Insurance Distribution Directive,[5] including provisions ensuring transparency, independence, and consumer protection in investment advisory services, as well as the distinction between advising and providing information.[6] However, it is necessary to monitor ongoing developments in the EU aimed at implementing the Retail Investment Strategy, which announces amendments to the provisions of the aforementioned directives to enhance the professional qualifications of financial advisors in the EU.[7] In this context, this paper examines not only the challenges of regulating financial planning as a profession but also the ambiguities in defining "competencies" and the requirements concerning professional qualifications and continuous education for financial advisors.

[3] International Organization for Standardization, ISO 22222:2005, *Personal financial planning* – Requirements for personal financial planners.

[4] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJ L 173*, 12. 6. 2014, 349–496.

[5] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), *OJ L 26*, 02/02/2016, 19–59.

[6] For a discussion on the difference between the duty to provide information and advisory obligations when consumers enter into contracts with insurers, see: Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja, analiza i predlog unapređenja regulatornog okvira*, Belgrade, 2015, 214.

[7] European Commission, *Retail Investment Strategy – Empowering Retail Investors on EU capital markets*, May 2023, *https://finance.ec.europa.eu/document/download/ce290ee2-1f05-41f6-9540-84c3605ccb0f_en?filename=230524-retail-investment-strategy-factsheet_en.pdf,* 15. 10. 2024.

II The Concept, Emergence, and Development of Personal Financial Planning

1. The Concept and Importance of Personal Financial Planning

As a disciplinary field, personal finance entails the analysis and application of concepts, tools, and techniques related to planning and managing personal and household financial activities. These activities include generating income, managing consumption and debt, saving, investing, and protecting income sources and assets. The ultimate goal is to identify practices and policies aimed at improving the well-being of individuals, families, and households. In its broadest theoretical sense, personal finance encompasses financial planning, financial advising, financial psychology, and financial therapy.[8] Personal finance involves applying principles of finance, resource management, consumer education, as well as sociology and decision-making psychology, to examine how individuals, families, and households acquire, grow, and allocate financial resources to meet their present and future financial needs.[9]

Although, at first glance, personal financial planning may seem relevant only to the wealthier category of the population that has surplus funds, its importance also lies in reducing the risks of negative consequences arising from changes in external circumstances (e.g. financial crises) and personal situations of individuals.[10] In this sense, personal financial planning contributes not only to improving financial management and wealth accumulation, that is, enhancing the standard of living, but also to reducing the risk of individual bankruptcy and achieving financial security and stability. This, in turn, has positive effects on key macroeconomic goals, such as economic growth and maintaining financial stability.

Financial planning encompasses a wide range of financial advisory services. As a segment of financial planning, personal financial planning is a comprehensive process involving various activities, techniques, and procedures to identify the optimal way to achieve an individual's financial goals. There are two primary models for delivering personal financial planning services: (a) the specialized model, in which the client works individually with multiple financial professionals, and (b) the planner model, where the client typically collaborates with a financial planner who acts as an intermediary between the client and other financial experts.[11] Personal financial

[8] John E. Grable, Swarn Chatterjee, „Defining Personal Finance", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, Berlin, 2022, 3–17, 3.

[9] Jane Schuchardt *et al.*, „Personal finance: An interdisciplinary profession", *Journal of Financial Counseling and Planning* 1/2007, vol. 18, 67.

[10] Lewis Altfest „Personal financial planning: origins, developments and a plan for future direction", *The American Economist* 2/2004, vol. 48, 54.

[11] Kenneth Black, Konrad Ciccotello, Harold Skipper, „Issues in comprehensive personal financial planning", *Financial Services Review* 1/2002, 1–9.

planning covers various areas of client interest, including tax planning, i.e. achieving tax savings; personal budgeting, which involves planning income and expenses, that is, balancing saving and spending; investment planning, or the allocation of funds to generate future returns; risk management through different types of insurance; retirement planning and securing compensation for loss of employment income; estate planning, and more.

Given the broad range of services that clients may expect from financial advisors, the diversity of national regulatory systems has created a need for harmonizing business practices and business rules on a global level. In this regard, one of the most significant initiatives has been the adoption of an international standard for personal financial planning under the auspices of the International Organization for Standardization (ISO). The ISO 22222:2005 International Standard defines the personal financial planning process through six phases or steps, and establishes requirements for ethical conduct, competency, and necessary experience of personal financial advisors, regardless of their employment status, as well as methods for ensuring compliance with business standards.

The first step in the personal financial planning process is establishing a professional relationship between the financial advisor and the client. In addition to understanding their rights and obligations, the duties of the financial advisor, and the characteristics of the services provided, the mentioned standard also requires informing clients about the advisor's formal qualifications, expertise, and experience, along with a description of the services offered and the terms of engagement, including service fees and other contractual requirements. Standardising these requirements aims to establish a long-term relationship based on transparency and trust.[12] The second phase involves collecting qualitative and quantitative data on the client's financial status and preferences, as well as defining their goals, expectations, and strategies that will enable them to achieve their financial objectives. The primary role of a personal financial planner at this stage is to articulate the client's general responses into specific, measurable financial goals and priorities through targeted questions. However, the specific financial plan will ultimately depend on the client's goals, particularly their priorities.[13]

Once the necessary information has been gathered and the clients' goals and priorities have been defined, the next, third phase involves analyzing the collected data and assessing the client's financial position. The result of the analysis process answers the question of whether achieving the clients' set goals is feasible. If so, the next step is strategy formulation. Strategy formulation includes the development and presentation of a financial plan, that is, personal finance plan, which, according to the aforementioned international standard, represents the fourth step

[12] Gordana Stojanović, „Standardizovani zahtevi za planere ličnih finansija", *Bankarstvo* 5-6/2006, 56–57.
[13] Lawrence Gitman, Michael Joehnk, Randy Billingsley, *Personal Financial Planning*, South-Western, 2014, 2–7.

in the financial planning process. Due to the significance of presenting the financial plan, some authors argue that this step actually consists of two separate phases: the development of the financial plan, or formulation of recommendations, and the presentation of recommendations to the client.[14]

The final two phases relate to the implementation of financial recommendations and the monitoring of the financial plan and financial planning relationships. The financial advisor may participate directly or indirectly in implementing the chosen strategy, which may further involve coordinating the implementation process with other professionals, such as capital market investment advisors, tax consultants, lawyers, and others. At this stage, the financial advisor must be familiar with all legal matters and procedures related to executing the financial plan.[15]

Finally, the financial planning process is typically not limited to merely developing the recommendations contained in the personal finance plan, but also involves establishing a long-term professional relationship that goes beyond the simple application of recommendations and evolves into monitoring progress in the implementation of the financial plan. In the event of changes in real and personal circumstances, or modifications in the client's financial situation, the financial advisor may revise the financial plan.

2. The Role of Professional Associations in the Emergence and Development of Financial Planning

As a part of the broader field of financial planning, personal financial planning is a relatively young profession that has been continuously evolving since the 1960s when it first emerged in the United States (USA). The first step in the development of modern financial planning was a professional conference held in Chicago in 1969, which led to the establishment of the first organizations: the International Association of Financial Counselors (IAFC), which later became the International Association for Financial Planning (IAFP), and the International College for Financial Counseling.

The latter association became highly active in providing financial education from the mid-1970s onward, developing a certification system for professional financial planners - *Certified Financial Planner* (CFP). From among the participants of its educational programs, a new organization emerged, named the *Institute of Certified Financial Planners* (ICFP). In the year 2000, this association merged with the IAFP, resulting in the creation of a new organization, the *Financial Planning Association* (FPA).[16]

[14] Allen McLellan, *Foundations of Financial Planning: An Overview*, The American College Press, 2012, 32.
[15] Antony Young, *Financial Planning in Practice*, Melbourne, 2013, 134.
[16] For more on historical developments, see: Denby E. Brandon, Oliver H. Welch, *The History of Financial Planning: The Transformation of Financial Services*, John Wiley & Sons, 2009.

As the professional association, which provided educational services, was unable to enforce ethical standards, the *International Board of Standards and Practices for Certified Financial Planners* (IBCFP) was established in 1985 to enhance professionalism and ethical conduct. This organization later evolved into the *Certified Financial Planner Board of Standards* (CFP Board), which then obtained the authority to certify and issue certificates for the Certified Financial Planner designation – the CFP certification.[17]

The global expansion of financial planning began in the 1990s with the formation of the *International CFP Council*. The Council aimed to unite similar professional associations worldwide to establish business standards and develop the profession. By joining the International Association for Financial Planning, founded in Australia, Australia became the first country after the U.S. to be authorized to issue the CFP certification. Following that, professional associations from Japan, the United Kingdom, New Zealand, Canada, Germany, France, and others joined. This led to the global recognition of the Certified Financial Planner designation, which has become synonymous with the professional and ethical practice of financial planning. The global development of financial planning was particularly supported by the transfer of authority for managing the certification program outside the U.S. to an association established in 2004, the *Financial Planning Standards Board* (FPSB). Since its establishment, the FPSB has actively advocated for the recognition of financial planning as a distinct profession and for its regulation.[18]

Independent of the aforementioned international associations, financial planning has also developed in European countries outside the framework of the CFP certification program. The most significant role in the development of financial planning on the European continent is played by the *European Financial Planning Association* (EFPA), as a key professional association that develops professional standards, promotes expertise and integrity, and conducts the certification process across several levels of professional certificates, as well as serving as the foundation for the Ethical Code. Under this institution, there is an intensive lobbying effort aimed at improving not only the system of professional standards and pan-European certification of financial advisors in the EU but also the regulations related to various forms of financial advice in EU law, which is particularly emphasized in this paper.[19]

[17] CFP Board, *CFP Board Financial Planning Competency Handbook,* John Wiley & Sons, 2015.
[18] D. E. Brandon, O. H. Welch, 113.
[19] Fernando Zunzunegui *et al., Improving Qualifications for Financial Advisors in EU: Policy Proposals*, EFPA, Brussels, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466821, 10. 09. 2024.

III Regulated Profession and Competency Requirements (Knowledge, Expertise, and Experience) in the Domain of Personal Financial Planning

1. The Concept of a Regulated Profession

In a sociological sense, a profession refers to an occupation that holds a monopoly over a complex segment of knowledge and practical skills, which requires education or a certain level of education, making it recognizable within society.[20] The term profession is broader than the term occupation, which refers to a set of related and interconnected jobs in terms of content, organization, or technology. As a statistical unit, qualification refers to the ability to perform the tasks and duties of a specific job and has two dimensions: a) the level (degree) of qualification – which relates to the complexity and scope of tasks, and b) the type of qualification – defined by the area of required knowledge, as well as the types of products and services.[21] The concept of a "profession" builds upon the concept of "occupation," as it entails specific expertise - knowledge and practical skills, along with continuity and long-term commitment to the field. Professional authority implies that the practitioner provides services to those who lack the necessary knowledge to assess the quality of the service itself.[22] For an occupation to be considered a profession, certain conditions must be met: a) systematic knowledge; b) professional authority; c) a regulatory framework and oversight of the practice; d) ethical standards; e) the existence of a specific subculture rooted in the pursuit of knowledge, status, values, behavioral patterns, and dedication among its practitioners.[23]

According to Directive 2005/36/EC on the recognition of professional qualifications,[24] a regulated profession is defined as a professional activity or a set of professional activities for which access, practice, or the manner of practice is directly or indirectly conditional upon possessing specific professional qualifications, as stipulated by legal, regulatory, or administrative provisions adopted under statutory authority. A profession is also considered regulated if it is practiced by members of professional organizations that grant a professional title.[25]

Thus, a profession is generally regarded as regulated if practicing it requires a specific degree, passing a qualifying exam (such as a state exam), and/or

[20] Josip Županov, Željka Šporer, „Profesija sociolog", *Revija za sociologiju* 1-2/1984, vol. 14, 15.
[21] Republic Statistical Office, Classification of Occupations, Belgrade, 2011, 7.
[22] Jon A. Schmidt, „What Is a Profession?", *The Structure Magazine,* November 2008, 9.
[23] Ernest Greenwood, „Attributes of a Profession", *Social Work* 3/1957, 45–55.
[24] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, *OJ L 255*, 30.9.2005, 22–142.
[25] Art. 4, para. 5 of the Law on Regulated Professions and Recognition of Professional Qualifications, *Official Gazette of the Republic of Serbia*, No. 66/2019.

registration with a professional body. In this context, it is essential to distinguish between educational and professional qualifications.[26] A professional qualification is not limited to formal education but also includes qualifications acquired after education, such as work experience, licensing, and other credentials. The concept of a profession extends beyond formal educational qualifications, which are obtained through formal education and verified by diplomas, certificates, or other official documents issued by relevant educational institutions. Professional qualifications often imply practical experience and are primarily based on the possession of specific competencies. These competencies frequently represent particular conditions for employment, encompassing specific knowledge, skills, and sometimes personal traits. Knowledge refers to the theoretical and practical understanding required to perform a particular job, acquired through education or practical work.[27]

2. Challenges of Financial Planning and Financial Advising as a Starting Framework

As previously mentioned, personal finance planning is a process fundamentally rooted in financial counseling, so it is essential to define both concepts. Financial planning is "a collaborative process that helps maximize a client's potential to achieve life goals through financial advice that integrates relevant elements of their personal and financial circumstances".[28]

On the other hand, financial advising is a profession that assists clients through "prevention and intervention" services to help them achieve their goals. The practice of financial advising integrates skills and knowledge in the interactions and relationships between the client and the counselor, influencing the outcomes of the counseling process.[29] The reciprocal relationship includes changes in the practice of financial planning due to modifications in the regulatory framework relating to financial counseling, particularly provisions concerning the enhancement of business transparency, strengthening requirements regarding the professional obligations of participants in financial markets, and standards for investor protection.[30]

[26] Tatjana Jovanić, *Uvod u ekonomsko pravo*, Belgrade, 2024, 150.
[27] Borivoje Šunderić, Ljubinka Kovačević, *Radno pravo – priručnik za polaganje pravosudnog ispita*, Belgrade, 2019, 117.
[28] Certified Financial Planner Board of Standards, *Side-by-side comparison of code of ethics and standards of conduct to current standards of professional conduct*, 2018, 34. *https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/cfp-board-code-and-standards-side-by-side-comparison.pdf*, accessed: 15. 11. 2024.
[29] Dorothy B. Durband, Marie Bell Carlson, Cherie Stueve, „The financial counseling profession", *Financial counseling* (eds. Dorothy B. Durband, Ryan Law, and Angela K. Mazzolini), Springer, 2019, 1.
[30] Robert Van Beek, „Personal Finance: A Practice Perspective", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, Berlin, 2022, 35–49.

One possible characteristic of regulated professions is the existence of entry barriers to the sector in the form of licenses or permits to perform activities, typically granted by the relevant regulatory body. In the field of personal finance planning, the obligation to obtain a license is generally not tied to the performance of personal finance planning as a process; instead, requirements are usually set for obtaining licenses for individual financial services, particularly investment counseling, brokerage, and insurance representation. Typically, the operations of financial counselors in the area of personal finance planning are not comprehensively regulated by a single statute but are instead indirectly governed by regulations applicable to various forms of financial services, such as brokerage and dealer transactions, investment advising, life and non-life insurance, tax counseling, etc.

As can be observed in the few existing requirements for certification exams for personal financial planners, investment advising represents the primary area of knowledge and expertise requirements. In the broadest sense, investment advising pertains to financial instruments and investment strategies. Here, it is useful to highlight the distinction between investment advising and financial advising in U.S. law, where investment advisors were first incorporated into regulation. A financial advisor may also be an investment advisor, but not every investment advisor can necessarily be a financial advisor.[31] The operations of investment advisors are regulated under the Investment Advisers Act of 1940,[32] while broker-dealer activities are governed by the Securities Exchange Act of 1934.[33] Meanwhile, the activities of insurance intermediaries and agents are regulated at the state level. Over time, the distinction between investment advisors and broker-dealers has diminished, despite the existence of separate licensing requirements.[34] However, despite modernization in regulations, due to differing requirements across various domains of financial advising, some authors argue that a dedicated Financial Advising Act should be enacted.[35] One country that has established a licensing system for financial advisors is Australia, where amendments to the Corporations Act,[36] the Financial Advisers Professional Standards Act,[37] and the introduction of the Better Advice Act[38] have

[31] U.S. Securities and Exchange Commission, Investment Advisers: *Investment Advisers: What You Need to Know Before Choosing One*, *https://www.sec.gov/investor/pubs/invadvisers.htm*, 6. 5. 2016.

[32] Sec 202 (11), Investment Advisers Act of 1940.

[33] Securities Exchange Act of 1934.

[34] Christine Lazaro, „The Future of Financial Advice: Eliminating The False Distinction Between Brokers and Investment Advisers", *St. John's Law Review*, 2013, vol. 87, 381.

[35] *Ibid*., 386.

[36] Corporations Amendment (*Future of Financial Advice*) Act 2012, and Corporations Amendment (*Further Future of Financial Advice Measures*) Act 2012.

[37] Australian Securities and Investments Commission, *Overview of the FOFA reforms*, *http://asic.gov.au/regulatory-resources/financial-services/future-of-financial-advice-reforms/fofa-background-and-implementation/*, accessed: 10. 10. 2024.

[38] *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021* (Better Advice Act).

redefined the obligations of financial advisors and strengthened the role of the Securities and Investments Commission in the licensing process.

At the EU level, the aforementioned MiFID Directive has enhanced retail investor protection by introducing a ban on financial incentives from third parties for providers of independent investment advice or portfolio management services. MiFID II is particularly significant as it defines investment advice as a distinct investment service. Investment advice refers to providing personalized recommendations to a client, either at their request or at the initiative of the investment company, concerning one or more financial instrument transactions.[39] Investment advisors are required to provide investors with all necessary information, including the costs of advisory services and the basis on which the investment advice is formulated, primarily the financial products considered during the recommendation process. Regardless of whether it pertains to independent investment advice or not, the MiFID II Directive establishes an obligation for investment advisors to base their recommendations on the best interest of the client[40] and adhere to the suitability principle, which entails understanding the client and formulating personalized recommendations aligned with their individual risk tolerance.[41] To provide investment advice on a commercial basis or at a scale requiring commercial organization, MiFID requires licensing from the relevant national supervisory authority. The intent to generate profit, whether directly or indirectly, determines whether an activity is classified as commercial. Even advisory services offered free of charge for promotional purposes, which indirectly support the sale of fee-based services, require a license.

In the absence of clearly defined rules specifically applicable to personal financial planners, many aspects of personal financial planning remain unregulated, resulting in a rise in the number of advisors lacking adequate knowledge and professional experience. This was recognized by professional associations of financial planners, which have responded by introducing accredited certifications. In this context, it is particularly significant to mention the *Certified Financial Planner* (CFP) certification from the Certified Financial Planner Board, for which financial advisors must meet numerous requirements, such as ongoing education, acquiring specific work experience, fulfilling continuous professional development requirements, and passing appropriate competency assessment tests, all while conducting their business in accordance with ethical codes.[42]

Some experiences from countries with Anglo-Saxon legal systems are worth mentioning to illustrate the complexity of regulating financial planning as an enhancement

[39] Section 1, art. 4.1(4) MiFID II Directive.
[40] Art. 24.1 MiFID II Directive.
[41] Niamh Moloney, *EU securities and financial markets regulation*, Oxford University Press, United Kingdom, Oxford, 2014, 804.
[42] L. Altfest, 56.

of financial advising and as an example of the proliferation of state control over self-regulatory systems and their recognition in regulation. Every financial advisor in the United Kingdom must be registered with the *Financial Conduct Authority* (FCA), the agency responsible for overseeing financial intermediary businesses. The FCA has adopted and enhanced a system for evaluating educational programs that it also accredits, and every advisor providing recommendations regarding the selection of financial products must possess a specific certificate (*Statement of Professional Standing*) as proof of ongoing development and compliance with ethical codes.[43] The UK serves as a good example of co-regulation in the domain of financial planners' education. The supervisor has adopted and enhanced the system for evaluating educational programs from the *Financial Services Skills Council*, a professional body which varies depending on the types of financial services.[44] Furthermore, it sets standards for the ongoing education of financial advisors. Similarly to the British example, the *Australian Securities and Investments Commission* (ASIC) precisely defines the specific content of "specialized knowledge for financial advisors".[45]

However, the best example of a specific regulatory regime for the profession of financial planners is Canada, specifically Quebec, which was the first province to enact the Act respecting the distribution of financial products and services back in 1998.[46] According to this law, only individuals who meet strictly defined requirements can use the title "financial planner". In this sense, a financial planner represents more than just a "financial advisor", as it requires a specific qualification. The cornerstone of the licensing system is the Financial Markets Authority, which certifies qualifications approved by the Quebec Institute of Financial Planning.[47] The authority responsible for granting licenses for other activities (e.g. investment advising) is typically entrusted to a self-regulatory organization known as the Investment Industry Regulatory Organization of Canada.[48] The Quebec Institute also accredits university curricula for financial planning education and conducts professional training, culminating in a special examination for financial planners. Additionally, the Institute maintains records of financial advisors' continuing education requirements, adherence to the ethical code, and ethical standards.

[43] Financial Conduct Authority, https://www.fca.org.uk/firms/professional-standards-advisers

[44] Financial Conduct Authority, *The FCA Handbook*, Appendix 4 – Appropriate Qualifications Table, https://www.handbook.fca.org.uk/handbook/TC/App/4/1.pdf, 15. 10. 2024.

[45] Table A2.1., ASIC, *Regulatory Guide 146* – Licensing: Training of financial products advisers, July 2012.https://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf, acessed: 17. 10. 2024.

[46] Legisquebec 1998, *Act respecting the distribution of financial products and services*, http://legisquebec.gouv.qc.ca/en/showdoc/cs/D-9.2, accessed: 15. 10. 2024.

[47] Institut québécois de planification financière (IQPF) 2016, *Becoming a Financial Planner*, <https://www.iqpf.org/en/becoming-a-financial-planner>., 15. 10. 2024.

[48] Investment Industry Regulatory Organization of Canada, https://www.iiroc.ca/

3. Ambiguities in Defining "Competence" in EU Regulations and the Role of the European Association for Financial Planning in the Certification of Financial Advisors and Planners

A professional qualification encompasses completed formal education and additional professional training and development that takes place during or after the completion formal education, validated by a diploma or other public document issued by an authorized educational institution, granting the qualification holder the right to practice a specific regulated profession. In addition to formal education, professional qualification implies the existence of "competence" as an integrated set of knowledge, skills, abilities, and attitudes that enable an individual to effectively perform activities within a given profession.[49]

The European Securities and Markets Authority (ESMA) defines "knowledge and expertise" as the acquisition of "appropriate qualifications" and "relevant experience" in order to fulfill legal obligations regarding the provision of advice and information to clients, assessing whether financial products are suitable for a specific investor, as well as client reporting.[50] "Appropriate qualification" refers to formal qualifications or other forms of testing or training that meet the criteria outlined in the Guidelines for Assessing Knowledge and Competence issued by the European Supervisory Authority for Securities and Markets (hereinafter: the Guidelines).[51] "Relevant experience" means that the employee providing financial advice has successfully demonstrated their competencies in a full-time professional capacity for at least six months. On the other hand, the Insurance Distribution Directive does not mention the term "qualification," but rather refers to "knowledge and ability" or "knowledge and competence," without providing a clear definition.

It appears that both directives aim to make a balance between the need for minimal harmonization and the necessary flexibility to adjust existing practices in EU member states. However, both directives, particularly MiFID II, have failed to establish a minimum standard for defining "knowledge and competence". If the Guidelines are intended to harmonize knowledge and competencies in the field of financial advisory services, it is crucial to understand the fundamental difference between the requirements for obtaining a qualification and the requirements for participating in a training program. If these requirements differ, there will be varying standards and different levels of knowledge and competence among financial advisors. Hence, a qualification is not the same as training, as it is based on validating knowledge

[49] Definition from art. 4, points 6) and 12) of the Law on Regulated Professions and the Recognition of Professional Qualifications.

[50] Art. 24 and 25 of the MiFID II Directive.

[51] European Securities and Markets Authority, *Guidelines for the Assessment of Knowledge and Competence*, No. 2015/1886, 3 January 2017.

and skills rather than attending training to acquire knowledge and skills, which are verified through competency assessment.[52]

The very concept of "qualification", which represents the formal expression of an assessment and validation process conducted by a competent authority to determine whether an individual has achieved a learning outcome based on established standards, inherently involves the establishment of outcome-based standards. The European Qualifications Framework for Lifelong Learning (EQF)[53] serves as an example of a framework aimed at aligning the interests of different qualification systems across various fields of vocational education, defines qualification as a formal expression of the process of assessment and validation of learning outcomes. In the field of banking and financial services, this system is aligned with the European Credit System for Vocational Education and Training (ECVET),[54] the European Quality Assurance Reference Framework for Vocational Education and Training (EQAVET),[55] and the European Banking & Financial Services Training Network (EBTN).[56] The European Banking & Financial Services Training Network is a non-governmental organization that aims to set standards for accreditation, certification, and qualification of knowledge, skills, and competencies in the financial services sector within the EU. Under its framework, the so-called "Triple E Standard" was developed, primarily focusing on the banking sector as a system for recognizing qualifications granted by accredited institutions.

In the absence of harmonized rules for financial advisors who provide independent advice regarding various types of financial services, and to support their advancement and professional development, the European Financial Planning Association (EFPA) has developed a certification system for financial advisors across different stages and professional roles that is fully aligned with the aforementioned requirements of the European Qualifications Framework (EQF), ECVET, and EQAVET. Each of these certifications not only corresponds to one of the eight qualification levels according to the EQF but is also accompanied by a requirement for continuous professional development. Furthermore, the EPFA Ethical Code constitutes an integral part of the standards for the issuance of each certificate. The highest level of EFPA certification is the "European Financial Planner", which confirms the claim that

[52] F. Zunzunegui *et al.* (2023), 18–22.

[53] Council Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, *OJ C 189, 15.6.2017*, 15–28.

[54] Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Credit System for Vocational Education and Training, Official Journal of the European Union, *OJ C 155, 8.7.2009,* 11–18.

[55] Recommendation of the European Parliament and the Council of 18 June 2009 on the establishment of a European Quality Assurance Reference Framework for Vocational Education and Training, *HL C 155., 2009.7.8*, 1–10.

[56] http://www.ebtn-association.eu, 10. 10. 2024.

financial planning is a process encompassing various activities.[57] As highlighted, this certification relates to "the activity of financial planning as a whole" and involves the validation of knowledge and skills in the integrated practice of financial planning, which encompasses managing individual portfolios, estate planning, taxation, pension plans, and insurance services.

Table 1. EPFA Certification

Type of EPFA Certificate	EQF Level	Purpose of the Certificate and Requirements for Accredited Training Programs
The European Investment Assistant® Certificate (EIA)	3	Providing information about financial products. Minimum of five days or forty hours (or equivalent) of training.
The European Investment Practitioner® Certificate (EIP)	4	Activities related to basic advisory services. Minimum of 10 days or 80 hours (or equivalent) or five additional days of training for EIA certificate holders.
The European Financial Advisor® Certificate (EFA)	5	Expanded scope of financial advisory services, including client needs assessment and portfolio management.
The European Financial Planner® (EFP)	6	All activities related to financial planning, for both individual and business clients. Minimum of 40 days of training or 320 hours (or equivalent) or 20 additional days of training for EFA certificate holders.

IV Competency Requirements in Personal Financial Planning According to EU Regulations in the Areas of Capital Markets and Insurance

Personal financial planning as a profession at the EU level is not regulated by uniform regulations, although financial planning, under various names, is included in the list of regulated professions in some member states.[58] The most significant regulations concerning the areas covered by financial advising are Directive 2014/65/EU on financial instruments markets (MiFID II), as well as Regulation (EU) No. 600/2014 on financial instruments markets (MiFIR).[59] In the field of insurance, the Insurance Distribution Directive is of utmost importance. In addition, regulations that are

[57] https://efpa-eu.org/index.php/standards-qualifications/, 10. 10. 2024.

[58] For example, in Denmark, a financial advisor (*Finansiel rådgiver*) provides advice on loans, deposits, insurance, pension funds, and investment services. Financial advisors are a recognized profession in the United Kingdom (*Chartered Financial Planner*), Austria, France (*Conseiller en investissements financiers*), Slovakia (*Finančný poradca*), etc. European Commission, *Regulated professions by country, with competent authorities*, http://ec.europa.eu/growth/tools-databases/regprof/index.cfm, accessed: 10. 10. 2024.

[59] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, *OJ L 173*, 12.6.2014, 84–148.

particularly significant in the area of consumer information include Directive 200/48/EC on consumer credit agreements[60] and Directive 2014/17/EU on credit agreements for the purchase of real estate[61] as well as Regulation (EU) No. 1286/2014 on key information documents for packaged investment products for retail investors and insurance products[62] and others.

Article 25(1) of the MiFID II Directive introduced the obligation for member states to publish the criteria based on which the knowledge and competence of individuals providing investment advice or information on financial instruments, investment services, or ancillary services to clients on behalf of an investment firm will be assessed. The mentioned Guidelines for the Assessment of Knowledge and Competence serve as additional guidance in this regard. However, it is important to note that Article 3(1) of the directive allows member states to apply different criteria for specific services, including investment advice, than those applicable to other cross-border services. In this context, the rules on expertise and qualifications for locally operating investment advisors do not necessarily have to meet the same criteria set for investment advisors providing services across borders. The Guidelines for the Assessment of Knowledge and Competence offer different implementation options: the competent regulatory authority or another national body may publish the characteristics that an appropriate qualification should fulfill; a list of specific relevant qualifications considered to meet the criteria of the Guidelines may be published;[63] a combination of both criteria publication and a list of specific qualifications may be used.

It is important to note that the Guidelines establish minimum standards, meaning that national authorities can require a higher level of knowledge and competence for employees who provide advice or inform clients. This broad regulatory discretion has led to significant differences between member states.[64]

The Insurance Distribution Directive (IDD), in Article 10 and Annex I, established minimum criteria regarding the knowledge and competence of advisors in the field of insurance services. Within the framework of the institutional architecture for

[60] Directive 2008/48/EC Of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJ L 133,* 22.5.2008, 66–92.

[61] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, *OJ L 60,* 28. 2. 2014, 34–85.

[62] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) *OJ L 352,* 9.12.2014, 1–23.

[63] This option has been chosen by a smaller number of countries, such as Luxembourg (Circular CSSF 17/670 of 13 October 2017) and Spain (Guía Técnica 4/2017 de la Comisión Nacional del Mercado de Valores, para la evaluación de los conocimientos y competencias del personal que informa y que asesora, of June 27, 2017). Source: F. Zunzunegui *et al*. (2023).

[64] See in particular: F. Zunzunegui *et al*. (2023).

the supervision of financial institutions in the EU (the so-called Lamfalussy process),[65] this aspect of insurance companies' operations is regulated at *Level 1*, meaning through a directive as a secondary source of EU law. In contrast, qualifications for advising in the securities market are regulated at *Level 3*. Thus, the Insurance Distribution Directive did not grant the European Insurance and Occupational Pensions Authority (EIOPA) the power to further regulate criteria for knowledge and expertise. Instead, it is the responsibility of EU member states to transpose the provisions of this directive into their national legislation. Since this directive prescribes minimum harmonization, member states may impose more detailed and stricter requirements. This has resulted in multiple divergences in how knowledge and expertise requirements are regulated, not only for intermediaries in insurance distribution services but also for personal finance advisors.

Finally, it is worth highlighting some differences in the regulation of knowledge and competence requirements between the insurance and capital markets sectors.[66] While both MiFID II and the Insurance Distribution Directive require that individuals who provide information or advice must possess the necessary knowledge and expertise, the Guidelines of the European Securities and Markets Authority (ESMA) place greater emphasis on obtaining a qualification. In contrast, in the insurance sector, the focus is more on maintaining a level of expertise and qualification through continuous professional development (CPD). Additionally, the Guidelines define knowledge and competence requirements in terms of a qualification that should be renewed or update ("qualification or another test or training course... seminar, self-study, or learning")[67], whereas the Insurance Distribution Directive prescribes a training program aligned with the "continuous professional development" (CPD) requirement.

The criteria regarding knowledge and competence for employees who provide clients with information or advice on investment products, investment services, or ancillary services are set out in the Guidelines (Articles 17 and 18). However, the broad definition of learning outcomes ("understanding" or "basic knowledge") and practical skills ("assess""fulfill obligations"), without introducing referent points or selecting one of the eight qualification levels according to the European Qualifications Framework (EQF), do not contribute to the harmonization of national frameworks. Moreover, the Guidelines' criteria do not specify the characteristics that a qualification must meet, such as whether the training is conducted in classrooms or remotely; the duration of training or the number of hours required for providing advice and information; whether the training is organized at the company level or

[65] https://finance.ec.europa.eu/regulation-and-supervision/regulatory-process-financial-services_en

[66] Fernando Zunzunegui *et al*., European Insurance and Occupational Pensios Authority, *Annexes I-VIII to the Report on the application of the Insurance Distribution Directive* (IDD), EIOPA-BoS-21/582, 6 January 2022.

[67] Guidelines, 15.

by an external body; and the requirements imposed on institutions that provide education, training, and examination services for licensing.[68]

In certain countries, the supervisory authority prescribes rules and standards that must be followed by institutions authorized or accredited to organize training and standardized examinations. However, the level of detail varies, as in some countries, supervisory bodies have broader powers.[69] Particularly, there is a lack of standards regarding the conduct of training between internal or external training. One of the few examples of regulating this criterion is Luxembourg, where financial intermediaries are given the freedom to assess intermediaries' minimum knowledge and competence, following a formal verification process by the Commission de Surveillance du Secteur Financier (CSSF). Another option is to participate in external training programs that have been certified by the Commission.[70]

On the other hand, the Insurance Distribution Directive more clearly defines what is considered "minimum requirements for professional knowledge and competence", specifying in the Annex concrete areas: (a) the minimum necessary understanding of the terms and conditions of the offered policies, including risks, the minimum necessary knowledge of products, premiums and benefits, as well as the advantages and disadvantages of different investment options and financial risks for insurance-based investment products (including risks related to savings, pension plans, etc.); (b) the minimum necessary knowledge of applicable laws regulating the distribution of insurance services, consumer protection regulations, anti-money laundering laws, data protection, relevant tax regulations, and relevant social and labor law, etc.; (c) the minimum necessary knowledge of handling customer complaints and dealing with grievances; (d) the minimum necessary knowledge of assessing customer needs; (e) the minimum necessary knowledge of insurance and, possibly, other financial markets; (f) the minimum necessary understanding of business ethics standards; and (g) the minimum required financial competence.

However, neither the ESMA Guidelines nor the Insurance Distribution Directive contains standards regarding the format, organization, and duration of various forms of continuous professional development. While in some countries,

[68] European Commission, Staff Working Document „Report on the current framework for qualification of financial advisors in the EU and assessment of possible ways forward", Brussels, 30. 6.2022 SWD(2022) 184 final, https://finance.ec.europa.eu/system/files/2022-07/220630-report-qualification-financial-advisors-framework_en.pdf, accessed: 17. 10. 2024. F. Zunzunegui *et al.* (2023), 32.

[69] One of the best examples is the Czech National Bank, which has established detailed regulations for training and examinations in the capital markets sector through a special decree (Decree No. 319/2017 of 21 September 2017 on professional qualification for distribution on the capital market), while in the insurance sector, these requirements are defined by law (Law on the distribution of insurance and reinsurance, July 26, 2018).

[70] Commission de Surveillance du Secteur Financier, *Circular CCSF* 17/665 – ESMA Guidelines for the Assessment of Knowledge and Competence, https://www.cssf.lu/en/Document/circular-cssf-17-665/, 10. 10. 2024.

this option or obligation for financial advisors is not foreseen at all, in the field of insurance, most countries have accepted 15 hours annually, as stipulated by the Insurance Distribution Directive.[71]

Table 2.

Criteria Regarding Qualifications	MiFID II Directive and Guidelines for Knowledge and Competence Assessment	Insurance Distribution Directive
Minimum Requirements Regarding Formal Education	/	/
Qualification Requirement	Test or Training	Certificate as an Option
Form of Professional Qualification	/	/
Number of Training Hours	/	/
Form of Continuous Professional Development	/	/
Number of Required Hours of Continuous Professional Development	/	15
Minimum Required Work Experience for Qualification	6 months	/
Maximum Supervision Period	4 years	/
Qualification Verification	Internal or external, annually	/

V Towards the Improvement and Unification of Standards for Professional Qualifications of Personal Finance Planners and Financial Advisors in the EU

The European Commission adopted the Capital Markets Union Action Plan in September 2020,[72] which includes the *Retail Investment Strategy*. This strategy aims to ensure that retail investors can fully benefit from capital markets and that the rules are coherent across all legal instruments. Among other things, it is anticipated that individual investors should benefit from adequate protection, unbiased

[71] F. Zunzunegui *et al*., p. 44.

[72] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A Capital Markets Union for people and businesses-new action plan*, Brussels, 24.9.2020, COM(2020) 590 final. https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan/action-8-building-retail-investors-trust-capital-markets_en, 30. 09. 2024.

advice, and fair treatment. Activity No. 8, as outlined in the Action Plan, proposes that the Commission suggest possible ways to improve the level of professional qualifications for financial advisors in the EU through amendments to the provisions of the MiFID II Directive and the Insurance Distribution Directive, as well as the introduction of a pan-European label for financial advisors. It is also expected that the Commission will propose that advisors receive a certificate proving that their level of knowledge and qualifications is sufficient for access to the profession, which will also demonstrate that they continuously participate in appropriate forms of continuing education.

To prepare activities aimed at aligning the requirements of both directives, the European Supervisory Authority for Insurance and Occupational Pensions conducted an analysis of the conditions that are set in member states as the basis for demonstrating knowledge and competence in financial advisory related to the distribution of investment products based on insurance products, revealing a range of differences at the level of member states.[73]

Based on reports from European supervisory bodies for capital markets and insurance, the European Commission published a special working document regarding the qualifications of financial advisors in the EU.[74] Although this is a working document, as an informal source that is not binding, it can be concluded that the analysis and comparison of requirements regarding the obtaining of professional qualifications for financial advisors is aimed not only at amending the aforementioned directives to harmonize the conditions for obtaining a pan-European label but also at introducing an additional requirement related to the professional knowledge of financial advisors to integrate investors' preferences concerning sustainability. In this context, the European Securities and Markets Authority adopted specific guidelines as far back as 2018,[75] while the European Supervisory Authority for Insurance and Occupational Pensions adopted specific guidelines in 2022.[76]

[73] IOPA, Report on the application of the Insurance Distribution Directive (IDD), EIOPA-BoS-21/581, January 2022; EIOPA, Annexes I-VIII to the Report on the application of the Insurance Distribution Directive (IDD), EIOPA-BoS-21/582, 6 January 2022.

[74] European Commission, Staff Working Document „Report on the current framework for qualification of financial advisors in the EU and assessment of possible ways forward", Brussels, 30.6.2022, SWD(2022) 184 final.

[75] ESMA, *Guidelines on certain aspects of the MiFID II suitability requirements*, ESMA35-43-1163, 06/11/2018.

[76] EIOPA, *Guidance on the integration of sustainability preferences in the suitability assessment under the Insurance Distribution Directive (IDD)*, EIOPA-BOS-22-391, 20 July 2022.

VI Instead of a Conclusion – Reflection on the National Framework for Obtaining Titles and Improving Financial Advisors Qualifications

As an emerging profession, personal financial planning is primarily associated with developed countries, where its growth is driven by a well-developed capital market and a wider range of financial products available to consumers who often lack the necessary knowledge. However, even in countries with developed financial markets, the conditions for providing financial advisory and personal financial planning services remain inconsistent. One of the main reasons personal financial planning has not yet been fully recognized as a profession is the lack of well-defined educational requirements for financial advisors. The previously mentioned analysis of the EU legal framework clearly highlights the lack of harmonization, particularly concerning the MiFID II Directive's requirements for professional qualifications. In contrast, the Insurance Distribution Directive provides a somewhat more precise definition of the minimum professional competencies in the insurance field. In this regard, at the EU level, there is a recognized need to develop a unified taxonomy of qualification requirements and to standardize the meaning and scope of terms such as "knowledge", "competence", "qualification", "training" and similar concepts. The goal is to ensure a clear understanding that competence implies obtaining an appropriate qualification rather than merely participating in a training program.

The underdevelopment and instability of the financial market in our country and neighboring countries, along with a general lack of trust in the financial system, limit the potential for this profession to take shape and reduce the demand for various aspects of financial advisory services. In none of the surrounding countries is personal financial planning recognized as a regulated profession, and due to the limited availability of financial products, there is little demand for specialists in this field. However, there has been a noticeable increase in individuals referring to themselves as financial advisors and personal finance planners who offer educational and advisory services.

In cases where financial advice involves selling, mediation, or asset management for financial service users, investment advisors are legally required, under the Capital Market Law,[77] to adhere to professional rules and standards. They are prohibited from recommending the purchase or sale of financial instruments solely to earn a commission. The law mandates that investment advisors act in the best interest of their clients, ensuring that financial transactions are suitable by taking into account the client's goals, risk tolerance, financial knowledge and experience, and ability to understand the risks associated with the service provided.

[77] See in particular art. 179–181 of the Capital Market Law, *Službeni glasnik RS*, No. 129/2021.

In accordance with the Capital Market Law and a specific Rulebook,[78] the Securities Commission of the Republic of Serbia organizes three courses for attending training, taking exams, and obtaining licenses for brokers, portfolio managers, and investment advisors. The Rulebook regulates various aspects, including eligibility requirements, subject areas, exam organization, and the process for recognizing foreign diplomas or certificates earned abroad. The curriculum, instructors, and examiners are determined by the Commission's official act, with specific course hours and exam content outlined for each of the three professional titles. Thus, the certification requirements for investment advisors, issued by the Commission as a prerequisite for obtaining a license and registration in the Investment Advisors Registry, are strictly regulated by secondary legislation. This also applies to the licensing requirements, including specific work experience conditions and a clean criminal record. Holding the title of investment advisor is a fundamental requirement for obtaining a license, which also entails meeting additional professional and ethical standards.

According to the provisions of the Insurance Law,[79] an authorized insurance broker or agent cannot engage in insurance mediation or representation activities without undergoing professional training and being listed in the publicly available Register of Active Authorized Brokers/Agents, on the National Bank of Serbia (NBS) online portal. Based on a Decision on Amendments to the Decision on Obtaining Titles and Professional Development for Authorized Insurance Brokers and Agents,[80] the National Bank of Serbia signed an Agreement with the Serbian Chamber of Commerce, granting it the authority not only to conduct training programs for the certification of authorized insurance brokers and agents,[81] but also to oversee their ongoing professional development, which is not mandated by capital market regulations.

Specifically, the mentioned Decision requires authorized brokers and agents to undergo at least 15 hours of professional training annually in any calendar year they engage in insurance mediation or representation.

Beyond the scope of financial services, it is worth briefly examining the professional qualification requirements for obtaining licenses in accounting, auditing, and real estate mediation. In the field of accounting services, the Accounting Law[82]

[78] Rulebook on Obtaining Titles and Licensing for Brokers, Investment Advisors, and Portfolio Managers, *Službeni glasnik RS*, No. 115/2023.

[79] Art. 86(1) and 98(1,2) of the Insurance Law, *Službeni glasnik RS*, No. 139/2014 and 44/2021.

[80] *Službeni glasnik RS,* No. 11/2017.

[81] In this regard, it is commendable that the Training Manual for Certification, which is publicly available, has been standardized. The Serbian Chamber of Commerce, *Training Manual for Certification of Authorized Insurance Brokers and Agents*, Belgrade, February 2024. Notably, this publication prominently highlights key obligations, including the duty of brokers and agents to provide information that protects policyholders' rights and interests, the requirement for continuous professional development, the necessity of assessing consumer needs appropriately, adherence to ethical business standards, and more.

[82] *Službeni glasnik RS*, No. 73/2019 and 44/2021 - other law.

mandates training, examination, and continuous professional development only for accountants who provide professional accounting services. Since neither legal entities nor entrepreneurs who do not engage in accounting services are required to employ a certified accountant for bookkeeping, the licensing requirement in personal financial planning depends on the purpose of financial advisory services. According to the Audit Law,[83] auditors can obtain licensed certified auditor status if they pass the certification exam for a certified (internal) auditor and hold a valid license to practice auditing. A self-employed auditor is a certified auditor with a valid permit to operate as an independent entrepreneur. A professional qualification in accounting must be obtained from an organization that is a member of the *International Federation of Accountants* (IFAC). In Serbia, this membership is held by the Association of Accountants and Auditors and the Chamber of Certified Auditors. These professional organizations, in accordance with the relevant regulations, conduct training for certification exams, organize examinations, and maintain official registers of certified accountants, certified public accountants, certified auditors, and certified internal auditors.

Finally, the Law on Mediation in Real Estate Transactions and Leasing[84] regulates the conditions and procedures for conducting real estate mediation and leasing services, establishing the mandatory professional examination requirement. The program and examination procedure, as well as the record-keeping of issued certificates, one of the prerequisites for registration in the Real Estate Brokers Register, are governed by the Rulebook on the Professional Examination for Real Estate Brokers.[85]

The regulation of financial advisors in our country falls under the legal framework of capital markets and insurance. When it comes to defining professional requirements, it appears that the field of insurance mediation and representation has a more structured and detailed approach to expertise and knowledge standards. In addition to enforcing existing regulations and the supervisory role of the Securities Commission and the National Bank of Serbia, as the competent authorities, attention should also be directed toward further developments within the EU's Capital Markets Union Action Plan, particularly regarding the harmonization of qualification criteria and the introduction of a pan-European financial advisor designation. Considering these regulatory trends, an additional step could involve establishing professional associations, potentially in the form of a financial advisors chamber with mandatory membership and legally assigned responsibilities, particularly in areas such as setting ethical standards and enforcing continuous professional development requirements for financial advisors.

[83] *Službeni glasnik RS*, No. 73/2019.
[84] *Službeni glasnik RS*, No. 95/2013, 41/2018, and 91/2019.
[85] *Službeni glasnik RS*, No. 75/2014 ... 135/2022.

Literature

- Altfest, L., „Personal financial planning: origins, developments and a plan for future direction", *The American Economist* 2/2004, vol. 48, 53–60.
- ASIC, *Regulatory Guide 146* – Licensing: Training of financial products advisers, July 2012. https://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf, accessed: 17. 10. 2024.
- Australian Securities and Investments Commission, *Overview of the FOFA reforms*, *http://asic.gov.au/regulatory-resources/financial-services/future-of-financial-advice-reforms/fofa-background-and-implementation/*, accessed: 10. 10. 2024.
- Black, K., Ciccotello, K., Skipper, H. „Issues in comprehensive personal financial planning", *Financial Services Review* 1/2002, 1–9.
- Brandon, D. E., Welch, O. H., *The History of Financial Planning: The Transformation of Financial Services,* John Wiley & Sons, 2009.
- CFP Board, *CFP Board Financial Planning Competency Handbook,* John Wiley & Sons, 2015.
- CFP Board, *Side-by-side comparison of code of ethics and standards of conduct to current standards of professional conduct*, 2018, https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/cfp-board-code-and-standards-side-by-side-comparison.pdf, accessed: 15.11.2024.
- Commission de Surveillance du Secteur Financier, *Circular CCSF* 17/665 – ESMA Guidelines for the Assessment of Knowledge and Competence, https://www.cssf.lu/en/Document/circular-cssf-17-665/, accessed: 10. 10. 2024.
- Durband D. B., Carlson M. B., Stueve, C. „The financial counseling profession", *Financial counseling* (eds. Durband, D. B., Law, R., and Mazzolini, A. K.), Springer, 2019, 1–16.
- European Commission, *Regulated professions by country, with competent authorities*, http://ec.europa.eu/growth/tools-databases/regprof/index.cfm, accessed: 10. 10. 2024.
- European Commission, *Retail Investment Strategy – Empowering Retail Investors on EU capital markets*, May 2023, *https://finance.ec.europa.eu/document/download/ce290ee2-1f05-41f6-9540-84c3605ccb0f_en?filename=230524-retail-investment-strategy-factsheet_en.pdf,* accessed: 15. 10. 2024.
- EIOPA, *Annexes I-VIII to the Report on the application of the Insurance Distribution Directive (IDD),* EIOPA-BoS-21/582, 6 January 2022.
- EIOPA, *Report on the application of the Insurance Distribution Directive (IDD)*, EIOPA-BoS-21/581, January 2022.

- EIOPA, *Guidance on the integration of sustainability preferences in the suitability assessment under the Insurance Distribution Directive (IDD)*, EIOPA-BOS-22-391, 20 July 2022.
- ESMA, *Guideliness for the Assessment of Knowledge and Competence*, No. 2015/1886, 3 January 2017.
- ESMA, *Guidelines on certain aspects of the MiFID II suitability requirements*, ESMA35-43-1163, 06/11/2018.
- Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021 (*Better Advice Act*), Australia.
- FCA's Policy Statement PS 17/14: Markets in Financial Instruments Directive II implementation, July 2017, https://www.fca.org.uk/publications/policy-statements/ps17-14-mifid-ii-implementation, accessed: 05.10. 2024.
- Gitman, L., Joehnk, M., Billingsley, R., *Personal Financial Planning*, South-Western, 2014.
- Grable, J.E., Chatterjee, S.,„Defining Personal Finance", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, 2022, 3–17.
- Greenwood, E.,„Attributes of a Profession", *Social Work* 3/1957, 45–55.
- Institut québécois de planification financière (IQPF) 2016, *Becoming a Financial Planner*, https://www.iqpf.org/en/becoming-a-financial-planner, accessed: 15. 10. 2024.
- International Organization for Standardization, ISO 22222:2005, *Personal financial planning* - Requirements for personal financial planners
- Jovanić, T., *Uvod u ekonomsko pravo*, Belgrade, 2024.
- Lazaro, C.„The Future of Financial Advice: Eliminating The False Distinction Between Brokers and Investment Advisers", *St. John's Law Review*, 2013, vol. 87.
- Lowe, J., *Be Your Own Financial Adviser,* Pearson Education, 2010.
- McLellan, A., *Foundations of Financial Planning: An Overview*, The American College Press, 2012.
- Moloney, N., *EU securities and financial markets regulation,* Oxford University Press, United Kingdom, Oxford, 2014.
- Petrović Tomić, N., *Zaštita potrošača usluga osiguranja, analiza i predlog unapređenja regulatornog okvira*, Belgrade, 2015.
- Chamber of Commerce and Industry of Serbia, *Priručnik za obuku za polaganje ispita i sticanje zvanja ovlašćenog posrednika i ovlašćenog zastupnika u osiguranju*, Belgrade, February 2024.
- Republički zavod za statistiku, *Klasifikacija zanimanja*, Belgrade, 2011.
- Schmidt, J.A.„What Is a Profession?", *The Structure Magazine,* November 2008.
- Šunderić, B., Kovačević, Lj. *Radno pravo – priručnik za polaganje pravosudnog ispita*, Belgrade, 2019.

- Schuchardt J. *et al*., „Personal finance: An interdisciplinary profession", *Journal of Financial Counseling and Planning* 1/2007, vol. 18, 61–69.
- Stojanović, G. „Standardizovani zahtevi za planere ličnih finansija", *Bankarstvo* 5-6/2006, 54–61.
- U.S. Securities and Exchange Commission, *Investment Advisers: What You Need to Know Before Choosing One*, *https://www.sec.gov/investor/pubs/invadvisers.htm,* accessed: 6. 6. 2016.
- Van Beek, R. „Personal Finance: A Practice Perspective", *De Gruyter Handbook of Personal Finance* (eds. John E. Grable, Swarn Chatterjee), De Gruyter, Berlin, 2022, 35–49.
- Young, A., *Financial Planning in Practice*, Melbourne, 2013.
- Zunzunegui F. *et al*., European Insurance and Occupational Pensios Authority, Annexes I-VIII to the Report on the application of the Insurance Distribution Directive (IDD), EIOPA-BoS-21/582, 6 January 2022.
- Zunzunegui, F. *et al.,* , *Improving Qualifications for Financial Advisors in EU: Policy Proposals*, EFPA, Brussels, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466821, accessed: 10. 09. 2024.
- Županov, J., Šporer, Ž. „Profesija sociolog", *Revija za sociologiju* 1-2/1984, vol. 14, 11–46.

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UTVRĐIVANJE ODGOVORNOSTI ZA PROUZROKOVANJE UDESA U POSTUPCIMA PO REGRESNOJ TUŽBI OSIGURAVAČA PROTIV OSIGURANIKA

Da li i kada osiguranik u svojstvu tuženog, u postupku po regresnoj tužbi svog osiguravača, može uspešno isticati da je lice kojem je njegov osiguravač isplatio naknadu štete na ime koje se osiguravač sada regresno obraća osiguraniku doprinelo prouzrokovanju udesa ili je pak isključivo odgovorno za udes? Da li bi sud u tim postupcima navedenu tvrdnju morao smatrati bitnom i izvoditi dokaze radi njenog utvrđivanja ili ne? Odgovor zavisi od okolnosti konkretnog slučaja, dok se u sudskoj praksi nailazi na različite primere čak i u situacijama kada su okolnosti slučaja iste.

Osiguravač stiče pravo da se regresira od svog osiguranika u situacijama kada je došlo do gubitka prava iz osiguranja,[2] ali je, usled pravila iz odredbe čl. 29 st. 2 Zakona o obaveznom osiguranju u saobraćaju, oštećenom licu nadoknadio štetu. Svoje regresno pravo osiguravač crpi iz odredbe čl. 29 st. 3 Zakona o obaveznom osiguranju u saobraćaju kojom je propisano da društvo za osiguranje koje naknadi štetu oštećenom licu prema stavu 2 ovog člana stupa u prava oštećenog lica prema licu odgovornom za štetu, i to za iznos isplaćene naknade, kamatu od isplate naknade i troškove postupka.

Ovde neće biti razmatrane sve situacije gubitka prava iz osiguranja, već samo situacije kada je u saobraćajnoj nezgodi učestvovao vozač-osiguranik koji

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[2] Odredbom člana 29 st. 1 Zakona o obavezном osiguranju u saobraćaju propisano je da osigurano lice gubi prava iz osiguranja u sledećim slučajevima: 1) ako vozač nije koristio motorno vozilo u складу sa njegovom namenom; 2) ako vozač nije imao vozačku dozvolu za upravljanje motornim vozilom određene kategorije, osim ako je vozilom upravljalo lice koje je kandidat za vozača za vreme obuke za upravljanje vozilom, uz poštovanje propisa kojima je ta obuka regulisana; 3) ako je vozaču oduzeta vozačka dozvola ili je isključen iz saobraćaja, ili mu je izrečena zaštitna mera zabrane upravljanja motornim vozilom, odnosno zaštitna mera zabrane upotrebe inostrane vozačke dozvole na teritoriji Republike Srbije; 4) ako je vozač upravljao motornim vozilom pod uticajem alkohola iznad dozvoljene granice, opojnih droga, odnosno zabranjenih lekova ili drugih psihoaktivnih supstanci; 5) ako je vozač štetu prouzrokovao namerno; 6) ako je šteta nastala zbog toga što je motorno vozilo bilo tehnički neisprvno, a ta je okolnost vozaču vozila bila poznata; 7) ako je vozač posle saobraćajne nezgode napustio mesto događaja a da nije dao svoje lične podatke i podatke o osiguranju.

je upravljao motornim vozilom pod uticajem alkohola iznad dozvoljene granice – čime je došlo do gubitka prava iz osiguranja – dok se drugi učesnik u toj nezgodi ili treće oštećeno lice obratilo zahtevom za naknadu štete vozačevom osiguravaču, koji je tu štetu nadoknadio i onda se regresnom tužbom obratio svom osiguraniku, prvopomenutom vozaču, koji se u toj parnici brani isticanjem da se odgovornost za nastanak saobraćajne nezgode nalazi na strani drugog učesnika u nezgodi. Pitanje je šta u tim postupcima treba da se smatra relevantnim činjenicama i da li i kada presuda doneta po tužbi oštećenog protiv osiguravača ima intervencijsko dejstvo.

Stavovi na tu temu, izraženi kroz sudske odluke, idu od toga da tuženi osiguranik u postupcima po regresnoj tužbi svog osiguravača uopšte ne može uspešno isticati da postoji doprinos drugog učesnika ili trećih lica nastanku štete, do toga da on ne samo što to može uspešno isticati već i da utvrđene činjenice i pravne kvalifikacije, iz postupka u kom je osiguravač obàvēzān na naknadu štete oštećenom, nemaju intervencijsko dejstvo u kasnijoj parnici po regresnoj tužbi osiguravača.

Tako se u jednoj odluci navodi sledeće:

„U lancu uzročnosti, sve i da se uzme kao nepobitno utvrđeno da su vozači vozila "Reno" i vozila "Mercedes" nepravilno parkirali svoja vozila što je uslovilo potrebu tuženog da vrši obilaženje vozila "Zastava Jugo", ne bi bilo mesta isključenju ni umanjenju odgovornosti tuženog. Tuženi je bio dužan da u saobraćaju predvidi i ovakvu situaciju i prilagodi upravljanje svojim vozilom, što nije učinio, naprotiv upravljao je vozilom pod dejstvom alkohola. Osim toga, odredbom čl.177 st. 4 ZOO je propisano da ako je nastanku štete delimično doprinelo treće lice, ono odgovara oštećeniku solidarno sa imaocem stvari, i dužno je snositi naknadu srazmerno težini svoje krivice. U konkretnom slučaju tužba za regres je usmerena samo prema licu čijom krivicom je došlo do nastanka štete, odnosno koje je izgubilo prava iz osiguranja upravljajući vozilom pod dejstvom alkohola u količini većoj od dozvoljene, a ukoliko tuženi smatra da postoji kakav doprinos trećih lica (vozača parkiranih vozila) može u posebnoj parnici da se u odnosu na njih regresira za deo štete koji bi otpao na njihov doprinos."[3]

Prema citiranoj presudi, u postupku po regresnoj tužbi osiguravača protiv osiguranika neće se ispitivati postojanje doprinosa za nastanak udesa, već tuženi osiguravaču mora isplatiti sve što je on isplatio oštećenom, a zatim, ukoliko je bilo doprinosa nastanku udesa na strani drugog učesnika ili trećeg lica, osiguranik se od njega ili njih može regresirati. Navedeno stanovište vodilo bi tome da se iz istog događaja potencijalno pokrenu tri parnična postupka, što svakako nije bila intencija zakonodavca.

U drugoj odluci se pak navodi sledeće:

„Iz spisa proizilazi da je kritičnog dana došlo do saobraćajne nezgode isključivom krivicom tuženika pa je povodom te nezgode tužilac - osiguravajuća organizacija, kod koga je vozilo tuženika bilo osigurano od autoodgovornosti presudom

[3] Пресуда Апелационог суда у Београду Гж. 6680/2020 од 25. 2. 2021. године.

P. (...) obavezan da oštećenom licu plati štetu koja je nastala na njegovom vozilu. Tužbom u ovoj pravnoj stvari tužilac traži da mu tuženik na osnovu krivice za nastalu štetu, a na ime regresa štete plati iznos koji je isplatio po navedenoj pravnosnažnoj presudi, pa je prvostepeni sud našao da je tužbeni zahtev osnovan, pozivajući se na intervencijsko dejstvo navedene presude. Navedeni zaključak prvostepenog suda se ne može prihvatiti. Presuda doneta u tom postupku a povodom odštetnog zahteva oštećenog lica vezuje samo činjenicama i pravnom kvalifikacijom koja se tiče postojanja obaveze osiguravača - tužioca na isplatu odštetnog zahteva, a osnov za obavezu osiguravača na isplatu štete u toj parnici je isključiva odgovornost ovde tuženika za nastalu štetu. O tome da li osiguravač ima pravo regresa prema tuženiku u tom postupku nije odlučivano, tako da činjenice i pravna kvalifikacija ranije donete presude ne obavezuju i ista nema intervencijsko dejstvo u predmetnoj parnici, u kojoj tek treba da se utvrde činjenice od značaj za postojanje osnova za obavezivanje tuženika po regresnoj tužbi a imajući u vidu odredbu čl. 29 st. 1 Zakona o obaveznom osiguranju u saobraćaju."[4]

Ovde se smatra da presuda, doneta po tužbi oštećenog protiv osiguravača drugog učesnika u udesu, u kojoj je utvrđena isključiva odgovornost tog drugog učesnika, nema intervencijsko dejstvo po regresnoj tužbi njegovog osiguravača, već se i u tom postupku mora utvrđivati ne samo da li su ispunjeni uslovi za gubitak prava iz osiguranja nego i da li je tuženi (osiguranik) isključivo odgovoran za nastanak saobraćajne nezgode. Takav stav je u suprotnosti s ciljem propisivanja intervencijskog dejstva presuda i u suprotnosti s načelom ekonomičnosti postupka, jer dovodi do toga da se iste činjenice utvrđuju u dva različita postupka. Pored toga, navedeno može dovesti do toga da se u ta dva postupka drugačije utvrdi činjenično stanje, što bi vodilo do pravne nesigurnosti.

Najispravnije i većinsko stanovište je da osiguranik, u postupku po regresnoj tužbi osiguravača, može uspešno isticati da postoji doprinos oštećenog, ili trećeg lica, nastanku saobraćajne nezgode, odnosno u tom postupku sud će biti dužan da utvrđuje uzrok nastanka nezgode, odnosno uzročno-posledičnu vezu između vožnje u alkoholisanom stanju i nezgode i eventualno postojanje doprinosa oštećenog, ili trećih lica, nastanku nezgode, osim ukoliko postoji intervencijsko dejstvo presude[5] koja je doneta u postupku između oštećenog i osiguravača. Ukoliko je osiguravač oštećenom isplatio naknadu štete koja je utvrđena pravnosnažnom presudom, pod uslovom da je u tom postupku osiguranik pozvan da učestvuje kao umešač,[6] pa je to svojstvo i imao ili je odbio da stupi u parnicu u svojstvu umešača, osiguranik, kao

[4] Решење Вишег суда у Ужицу Гж. 79/21 од 14. 4. 2021. године.

[5] Одредбом чл. 218 Закона о парничном поступку прописано је да у парници између странке и умешача који јој се придружио, умешач не може да оспорава утврђено чињенично стање, као и правне квалификације садржане у образложењу правноснажне пресуде (интервенцијско дејство пресуде).

[6] Вид. одредбе чл. 215–217 Закона о парничном поступку.

tuženi u postupku po regresnoj tužbi osiguravača, ne može sa uspehom isticati da postoji doprinos oštećenog, odnosno to da njegova vožnja u alkoholisanom stanju nije u uzročnoj vezi sa nastankom udesa. Ovo stoga što je te okolnosti osiguranik kao umešač mogao i morao da ističe u parnici po tužbi oštećenog protiv osiguranika, te ukoliko to jeste isticao pa je utvrđeno da nema doprinosa oštećenog, ili to nije ni isticao, on ne može u ovoj drugoj parnici (po regresnoj tužbi) da osporava utvrđeno činjenično stanje i pravne kvalifikacije iz te prve odluke.[7]

Međutim, ukoliko je osiguravač oštećenom naknadu isplatio u vansudskom postupku, ili u sudskom postupku povodom kog osiguranika nije pozvao da stupi u svojstvu umešača, sud će biti dužan da, u postupku po regresnoj tužbi osiguravača, ceni prigovor tuženog da postoji doprinos drugog učesnika, ili trećeg lica, nastanku udesa, te da utvrđuje doprinos svakog od učesnika nastanku udesa i da osiguravaču dosudi naknadu samo u stepenu doprinosa nastanku udesa njegovog osiguranika. Ovo zato što je osiguravač, bez obzira na to što je došlo do gubitka prava iz osiguranja i što će moći da se za isplaćene naknade regresira od svog osiguranika, dužan da se stara da se pravilno utvrde sve okolnosti konkretnog slučaja, odnosno da se pravilno utvrdi doprinos njegovog osiguranika, kao i visina pretrpljene štete, te da u skladu sa tim oštećenom licu isplati naknadu. Osiguravač je dužan da, bez obzira na to da li naknadu oštećenom isplaćuje u vansudskom postupku ili se vodi sudski postupak, ističe prigovor podeljene odgovornosti odnosno postojanje doprinosa oštećenog nastanku štete (ukoliko sumnja da takav doprinos postoji), te da u skladu sa procentom tog doprinosa umanji naknadu koju će isplatiti.

Takav stav je izražen i u presudi Vrhovnog kasacionog suda Rev. 1781/2021 od 19. 4. 2023. godine, u kojoj se navodi:

„Nadalje, kako je primarni uzrok nastanku saobraćajne nezgode bilo to što je vozilo kojim je upravljala BB prešlo u saobraćajnu traku kojom se tuženi kretao, te da brzinu vozila nije prilagodila uslovima na putu, pravilan je zaključak drugostepenog suda da je njen doprinos nastanku štetnog događaja 70%, dok je tuženi svojim ponašanjem sa 30% doprineo nastanku štete. Naime, kod činjenice da je tuženi prema nalazu i mišljenju veštaka neuropsihijatra motornim vozilom upravljao u početnoj fazi srednjeg stepena alkoholisanog stanja, u kom stanju dolazi do sužavanja vidnog polja, zakasnele reakcije i oslabljene pažnje, što za posledicu ima nebezbednu vožnju i ugroženu vozačku sposobnost i da brzinu kretanja vozila nije prilagodio uslovima na putu, to je ovakvim ponašanjem tuženi smanjio mogućnost izbegavanja nastanka saobraćajne nesreće. Činjenica da do saobraćajne nezgode ne bi došlo da drugi učesnik u saobraćaju nije prešao u saobraćajnu traku tuženog, ne isključuje njegovu odgovornost za nastanak iste, u situaciji kada se nezgoda i pri tim

[7] Odredbom чл. 218 ст. 2 и 3 предвиђени су изузеци од овог правила, као и када ће суд усвојити приговор умешача и дозволити да странке опет расправљају о чињеницама и правним питањима о којима је расправљано у претходној парници.

okolnostima mogla izbeći da vozačka sposobnost tuženog nije bila smanjena zbog dejstva alkohola i da se vozilo kretalo smanjenom brzinom zbog uslova na putu. S tim u vezi, neosnovani su navodi revizije tuženog da ne postoji uzročno-posledična veza između njegovog stanja alkoholisanosti i nebezbedne vožnje i nastale saobraćajne nezgode, te njegove odgovornosti za štetu. Sledom navedenog, pravilno je drugostepeni sud postupio kada je tuženog obavezao da tužiocu na ime regresa isplati 30% od ukupno isplaćenog iznosa štete trećim licima."

Stav da osiguranik kao tuženi u regresnom sporu ne može osporavati utvrđeno činjenično stanje i ukazivati na pogrešnu primenu materijalnog prava u pravnosnažnoj presudi, kojom je osiguravač obàvēzān da naknadi štetu oštećenom, ukoliko je odbio da kao umešač stupi u parnicu za naknadu štete između oštećenog i osiguravača, zauzet je u presudi Apelacionog suda u Beogradu Gž. 5911/2019 od 20. 1. 2021. godine. U ovoj presudi se navodi:

„Suprotno žalbenim navodima, pravilan je zaključak prvostepenog suda da je pitanje uzročno-posledične veze između štete koju je oštećena pretrpela i saobraćajnog udesa koji je skrivio tuženi, raspravljeno u parnici u koju je tuženi odbio da stupi i u kojoj je utvrđeno da je povreda oštećene posledica saobraćajnog udesa koji je skrivio tuženi. U takvoj situaciji, kada je posredstvom suda obavešten o parnici vođenoj između tužioca i oštećene u koju je odbio da stupi, tuženi ne može u smislu odredbe člana 218 stav 3 Zakona o parničnom postupku osporavati utvrđeno činjenično stanje i ukazivati na pogrešnu primenu materijalnog prava u pomenutoj presudi, kojom je osiguravač obavezan da naknadi štetu oštećenom licu. Tužilac je izvršio obavezu iz pomenute presude, te na tuženom, kao licu koje je odgovorno za štetu, saglasno navedenim zakonskim odredbama, stoji obaveza da utuženo potraživanje, kao regres isplati ovde tužiocu."

U presudi Apelacionog suda u Beogradu Gž. 6510/18 od 27. 2. 2019. godine jasno je izražen stav da osiguranik, ukoliko je stupio u parnicu kao umešač, ne može u parnici po regresnoj tužbi osiguravača osporavati utvrđeno činjenično stanje, pravne kvalifikacije niti utvrđenu visinu naknade štete, već je dužan da osiguravaču regresno isplati sve ono što je osiguravač isplatio oštećenom. Tako se ističe sledeće:

„Ovo zbog toga što presuda koja je doneta u parnici u kojoj se tuženom osiguravajućem društvu pridružilo lice za koje je utvrđeno da je odgovorno za štetu iz saobraćajnog udesa i to kao umešač, proizvodi prema tom licu specifično pravno dejstvo koje nastupa u kasnijem parničnom postupku koji protiv umešača, kao tuženog, pokreće osiguravajuće društvo, koje je naknadilo štetu oštećenima iz prethodne parnice po pravnosnažnoj sudskoj odluci, a sve u skladu sa odredbama člana 218. ZPP. Intervencijsko dejstvo presude se manifestuje u činjenici da u novoj parnici između umešača i stranke (iz prethodne parnice kojoj se pridružio) umešač ne može da osporava utvrđeno činjenično stanje, kao i pravne kvalifikacije sadržane u obrazloženju pravnosnažne presude niti utvrđenu visinu naknade štete. Zbog

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Primer:

I Pojam
Definicija
Definicija u uporednom pravu
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Primer: Nenad Grujić, *Raskid ugovora zbog neispunjenja i pravna dejstva raskida*, Beograd, 2016, 111; Susan Hodges, *Cases and Materials on Marine Insurance Law,* Cavendish Publishing Limited, London, 2002, 74.

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Primer: Nenad Grujić, *Raskid ugovora zbog neispunjenja i pravna dejstva raskida*, Beograd, 2016, 111–120.

Primer: Nenad Grujić, *Raskid ugovora zbog neispunjenja i pravna dejstva raskida*, Beograd, 2016, 111 i dalje.

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Primer: Vladimir Kapor, Slavko Carić, *Ugovori robnog prometa,* Deveto izdanje, Centar za privredni konsalting, Novi Sad, 1996, 67.

Katherine B. Posner, Tim Marland, Philip Chrystal, *Margo on Aviation Insurance,* Fourth edition, London, 2014, 429.

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Primer: Hugh Beale et al., *Contract Law,* 2nd edition, Bloomsbury Publishing, London, 2010, 54.

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Primer: Mirko Vasiljević (urednik), *Akcionarska društva, berze i akcije*, Beograd, 2006, 27; Marko Baretić, Saša Nikčević (urednici), *Zbornik Treće regionalne konferencije o obveznom pravu*, Zagreb, 2022, 44.

Fidelis Oditah (editor), *The Future for the Global Securities Market*, Oxford, 1996, 74.

Jürgen Basedow *et al*., (Hrsg.), *Anleger- und objektgerechte Beratung, Private Krankenversicherung, Ein Ombudsmann für Versicherungen,* Band 11, Nomos, Baden-Baden, 1999, 55.

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Primer: N. Grujić, 102.

S. Hodges, 231.

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Primer: M. Vasiljević (2012), 107.

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Primer: *Ibidem*.

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Primer: *Ibid*., 23.

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Primer: Predrag Šulejić, „Pravna priroda sredstava matematičke rezerve u osiguranju", *Pravo i privreda* 5–8/2006, 775.

Ebers Martin, „Information and Advising requirements in the Financial Services Sector: Principles and Peculiarities in EC Law", *Electronic Journal of Comparative Law* 2/2004, vol. 8, 238.

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Primer: Nataša Petrović Tomić, Miloš Radovanović, „Poravnanje o naknadi štete iz sredstava Garantnog fonda", *Harmonius, Journal of Legal and Social Studies in South East Europe*, 2017, 175.

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Primer: Farines Elise *et al*., , "The Pre-contractual and Contractual Infiormation in Life Insurance Policy", *Insurer's Precontractual Information Duty*, Turkish Chapter of AIDA, Istanbul 2013, 123.

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Primer: Nebojša Jovanović, „Otvaranje i zatvaranje privrednih društava", *Akcionarska društva, berze i akcije* (urednik Mirko Vasiljević), Beograd, 2006, 307.

Helmut Heiss, "The Common Frame of Reference (CFR) of European Insurance Contract Law", *Common Frame of Reference and Existing EC Contract Law* (ed. Reiner Schulze), Sellier European law publishers, GmbH, München, 2008, 13.

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Primer: N. Petrović Tomić, 164.

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Primer: N. Petrović Tomić (2014), 122.

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Primer: I. Jankovec (1995a), 16.

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Primer: Zakon o privrednim društvima, *Službeni glasnik RS*, br. 36/2011, 99/2011, 83/2014, 5/2015, čl. 13.

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Primer: Zakon o osiguranju – ZO, *Službeni glasnik RS*, br. 139/2014 i 44/2021, čl. 6 st. 3.

v) Član, stav i tačka propisa označava se skraćenicama čl., st. i tač., a paragraf skraćenicom par.

Primer: čl. 24 st. 1 tač. 5 ili par. 14.

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Primer: Zakon o privrednim društvima, čl. 7.

ZPU, čl. 25.

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Primer: nemački Trgovački zakonik iz 1897. godine (*Handelsgesetzbuch*), par. 29. britanski Kompanijski zakon iz 2006. godine (*Companies Act*; dalje u fusnotama: CA), čl. 67.

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Primer: Elisabeth Pollman, The Making and Meaning of ESG, Law Working Paper 659/2022, dostupno na adresi: http://ssrn.com/an+bstarct_id-4219857, 16. 6. 2023, 5.

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Primer: Elisabeth Pollman, The Making and Meaning of ESG, 5.

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Example:
I Concept
Definition
a) *Definition in Comparative Law*
) French Legislation

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Example: Susan Hodges, *Cases and Materials on Marine Insurance Law*, Cavendish Publishing Limited, London, 2002, 74–80.

Example: Philip Wood, Principles of international insolvency, Sweet &Maxwell, London 2007, 111 etc.

c) When citing a book by multiple authors (up to three), their names are separated by commas.

Example: Katherine B. Posner, Tim Marland, Philip Chrystal, *Margo on Aviation Insurance*, Fourth edition, London, 2014, 429.

d) If citing a book with more than three authors, only the first author's name and surname are given, followed by the abbreviation *et al.* in italics.

Example: Hugh Beale *et al.*, *Contract Law*, 2nd edn. Bloomsbury Publishing, London, 2010, 54.

e) A book edited by someone is cited by adding the designation "editor" or the abbreviation "ed." in parentheses after their name.

Example: Fidelis Oditah (editor), *The Future for the Global Securities Market*, Oxford, 1996, 74. Jürgen Basedow *et al.,* (Hrsg.), *Anleger- und objektgerechte Beratung, Private Krankenversicherung, Ein Ombudsmann für Versicherungen*, Band 11, Nomos, Baden-Baden, 1999, 55.

f) When citing a single book by a specific author, in repeated citations, use the first initial of the first name with a period and the last name, followed by the page number.

Example: S. Hodges, 231.

g) When citing multiple books by the same author, in repeated citations, use the first initial of the first name with a period and the last name, followed by the year of publication in parentheses, and the page number.

Example: M. Vasiljević (2012), 107.

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Example: *Ibidem*.

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a) Articles should be cited as follows:

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Example: Ebers Martin, "Information and Advising Requirements in the Financial Services Sector: Principles and Peculiarities in EC Law", *Electronic Journal of Comparative Law* 2/2004, vol. 8, 238.

b) When citing an article by multiple authors, their names and surnames should be separated by commas.

Example: Nataša Petrović Tomić, Miloš Radovanović, "Poravnanje o naknadi štete iz sredstava Garantnog fonda", *Harmonius, Journal of Legal and Social Studies in South East Europe*, 2017, 175.

If citing an article by more than three authors, only the first author's name and surname are to be cited, followed by the abbreviation *et al.* in italics.

Example: Farines Elise *et al*., "The Pre-contractual and Contractual Information in Life Insurance Policy", *Insurer's Precontractual Information Duty*, Turkish Chapter of AIDA, Istanbul 2013, 123.

c) A paper or article published in a proceedings or book edited by another person is cited as follows:

Author's first name, author's last name, opening quotation marks, title of the article, closing quotation marks, title of the proceedings or book in italics, in parentheses the designation "editor" or "ed.", and the name and surname of the editor, edition number if applicable, place of publication, year of publication, page number.

Example: Helmut Heiss, "The Common Frame of Reference (CFR) of European Insurance Contract Law", *Common Frame of Reference and Existing EC Contract Law* (ed. Reiner Schulze), Sellier European Law Publishers, GmbH, Munich, 2008, 13.

d) When citing an article by a specific author, in repeated citations, use the first initial of the first name with a period and the last name, followed by the page number.

Example: N. Petrović Tomić, 164.

e) When citing multiple articles by the same author, in repeated citations, use the first initial of the first name with a period and the last name, followed by the year of publication in parentheses, and finally the page number.

Example: N. Petrović Tomić (2014), 122.

f) If the same author has multiple works cited in the same year, add the Latin letters a, b, c, d, etc., after the year of publication, according to the order in which the works are cited, followed by the page number.

Example: I. Jankovec (1995a), 16.

3. STATUTES AND OTHER REGULATIONS

a) Regulations should be cited as follows:

Full name of the regulation, the official gazette in which the regulation was published in italics, the gazette number and year of publication.

Example: Act XXVIII of 2017 on Private International Law of Hungary, *Magyar Közlöny*, 2017-04-11, vol. 54.

b) In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

Example: Companies Act – CA, *Official Gazette of the Republic of Serbia*, No. 6/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021.

c) Article, paragraph, and point of the regulation are designated with the abbreviations art. and par..

Example: Art. 8, par. 25.

d) When citing a regulation repeatedly, its full name or the abbreviation introduced in the first citation should be given, along with the abbreviations art. or par. and the provision number.

Example: CA, art. 58.

e) Regulations in foreign languages should be cited as follows:

Full name of the regulation translated into English, year of publication or adoption, opening parenthesis, full name of the regulation in the original language in italics, any abbreviation under which the regulation will continue to appear, closing parenthesis, abbreviation art. or par. and provision number.

Example: German Commercial Code of 1897 (*Handelsgesetzbuch*), par. 29.

4. ONLINE SOURCES

a) Online sources should be cited as follows:

author's first name and surname, or the name of the organization that prepared the text, title of the text, possible place and year of publication, the website address in italics, the date of access, and the page number.

Example: Elisabeth Pollman, "The Making and Meaning of ESG", Law Working Paper 659/2022, available at: http://ssrn.com/abstract_id=4219857, accessed June 16, 2023, 5.

b) When citing an online source repeatedly, use the first initial of the author's first name with a period and the surname, or the name of the organization that prepared the text, the title of the text, and the page number.

Example: Elisabeth Pollman, The Making and Meaning of ESG, 5.

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