BEOGRAD 2025/ BROJ 2/ GODINA XLI
ISSN 1451 – 3757, UDK: 368

TOKOVI OSIGURANJA

ČASOPIS ZA TEORIJU I PRAKSU OSIGURANJA

IUS NULLO CONTINETUR LOCO
1956. BEOGRAD

Удружење осигуравача Србије
Association of Serbian Insurers

BELGRADE 2025/ No. 2/ XLI YEAR
ISSN 1451 – 3757, UDK: 368

INSURANCE TRENDS

JOURNAL OF INSURANCE THEORY AND PRACTICE

Удружење осигуравача Србије
Association of Serbian Insurers

IUS NULLO CONTINETUR LOCO
1956. BEOGRAD

Časopis za teoriju i praksu osiguranja
http://tokoviosiguranja.edu.rs/
UDK: 368
ISSN 1451 – 3757 (Štampano izd.)
ISSN 2956-0209 (Online)
Godina XLI, broj 2/2025
Izlazi tromesečno.

Izdavači
UDRUŽENJE OSIGURAVAČA SRBIJE P.U.
Beograd, Trešnjinog cveta 1g
INSTITUT ZA UPOREDNO PRAVO
Beograd, Terazije 41

Lektor
Draško Vuksanović

Prelom teksta
JP Službeni glasnik, Beograd

Redakcija
Trešnjinog cveta 1g, 11000 Beograd
tel. 011/2927-990
imejl: tokoviosiguranja@uos.rs

Štampa
JP Službeni glasnik, Beograd

Tiraž
200 primeraka

Časopis „Tokovi osiguranja" nalazi se na listi naučnih časopisa Ministarstva nauke, tehnološkog razvoja i inovacija Republike Srbije. Uvršćen je u kategoriju M 51 u grupi časopisa za društvene nauke u 2020, 2021, 2022, 2023, 2024. i 2025. godini.

Journal of Insurance Theory and Practice
http://tokoviosiguranja.edu.rs/
UDK: 368
ISSN 1451-3757 (Printed edition)
ISSN 2956-0209 (Online)
XL Year, No. 2/2025
The journal is published quarterly.

Co-publisher
ASSOCIATION OF SERBIAN INSURERS
Trešnjinog cveta 1g, Beograde
INSTITUTE OF COMPARATIVE LAW
Terazije 41, Belgrade

Editorial Office
Trešnjinog sveta 1g, 11000 Belgrade
Phone: +381 11/2927-990
e-mail: tokoviosiguranja@uos.rs

Print
JP Službeni glasnik, Belgrade

Circulation
200 copies

The journal Insurance Trends is on the list of periodicals of the Ministry of Science, Technological Development and Innovation of the Republic of Serbia. It is categorised as M 51, among the social science journals in 2020, 2021, 2022, 2023, 2024. and 2025.

ČLANCI – ARTICLES

UDK 347.72/.73
10.5937/TokOsig2502219V

Dr Mirko Vasiljević[1]

AFFECTIO SOCIETATIS I PRAVO PRIVREDNIH DRUŠTAVA

ORIGINALNI NAUČNI RAD

Apstrakt

Pojam *affectio societatis* u pravu privrednih društava izaziva dosta kontroverzi. Najpre, u pogledu toga da li uopšte postoji kao institut. Zatim, ako se i priznaje njegovo postojanje, i u pravnoj teoriji i u sudskoj praksi različito se gleda na njegovu ulogu. O tom institutu najviše je raspravljala francuska pravna doktrina i sudska praksa, kao i o institutu kauze, dok druga relevantna prava, poput nemačkog, britanskog, švajcarskog, ne prepoznaju ni jedan ni drugi institut. Srpska regulativa privrednih društava ne prepoznaje institut *affectio societatis* kao imenovani institut, ali se ipak otvara pitanje da li se može pretpostaviti da on postoji, kao nešto poput instituta kauze, koji, istina, srpski zakonodavac imenuje ali ne zahteva njegovo izričito navođenje u ugovoru s obzirom na to da se može pretpostaviti (oboriva pretpostavka) da postoji i da ima značaj opšteg uslova za zaključenje ugovora, poput drugih takvih opštih uslova (sposobnost ugovornih strana, saglasnost izjavljenih volja ugovarača, dopušten i dozvoljen predmet, kauza-osnov i propisana ili ugovorena forma).

U ovom radu raspravlja se pitanje pojmovnog određenja ustanove *affectio societatis* i konstatuje da ona ima subjektivno određenje (zajednička volja zaključenja ugovora o osnivanju privrednog društva i sticanja statusa člana tog društva) i objektivno određenje (unošenje određenog uloga za vršenje određene delatnosti radi sticanja dobiti uz zajednički rizik). Na ovim osnovama konstatuje se da je ovo institut drugačiji od drugih opštih uslova za zaključenje ugovora, pogotovo od instituta saglasnosti izjavljenih volja ugovarača i instituta kauze. Najzad, zaključuje se da se postojanje *affectio societatis* u ugovoru o osnivanju privrednog društva može i pretpostaviti utvrđivanjem njegovog i subjektivnog i objektivnog segmenta

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Rad primljen: 25.3.2025.
Rad prihvaćen: 7.4.2025.

(utvrđivanje zajedničke namere ugovarača) i, ujedno, naglašava važnost postojanja zbog višestruke uloge.

Uloga instituta *affectio societatis* može se sintetizovati u tri polja. Prvo, razgraničenje privrednog društva od drugih organizacionih formi koje mogu imati i prirodu nekog društva, ali ne privrednog, pravno valjanog (građansko društvo, društvo kreirano kao faktičko, tajno društvo) ili ne (fiktivno društvo, postojanje fiktivnog člana, simulovani ugovor). Drugo, razgraničenje ugovora o privrednom društvu od drugih ugovora koji mogu imati neke elemente ovog društva ali ne i sve (ugovor o radu, ugovor o kreditu ili zajmu, ugovor o depozitu, ugovor o konzorcijumu, ugovor glavnog izvođača i podizvođača i slično). I, treće, razgraničenje privrednog društva od drugih organizacionih formi (ekonomska interesna grupacija, udruženje, poslovno udruženje, zadruga, zadužbina, sindikat banaka, pul osiguranja i slično). Time se institutu praktično daje status izjednačen s prirodom drugih opštih uslova za zaključenje ugovora o privrednom društvu i drugih bitnih elemenata ovog ugovora, čiji izostanak može voditi i ništavosti ovog ugovora i na njegovoj osnovi nastalog privrednog društva; institut *affectio societatis* je inače krajnje redak u pravu privrednih društava zbog pravne sigurnosti svesnih trećih lica koja posluju s društvom.

Ključne reči: pojam *affectio societatis*, uloga *affectio societatis*, privredno društvo, ugovor o osnivanju društva, ništavost društva.

I Zakonski okvir

Pitanje pojmovnog određenja instituta *affectio societatis* i njegovog značaja za ugovor o osnivanju privrednog društva i privredno društvo u svakom slučaju kao polazište zahteva zakonsko određenje. U tu svrhu relevantan je i matični Zakon o privrednim društvima Srbije.[2] Na prvom mestu određenje pojma privrednog društva: „Privredno društvo je pravno lice koje obavlja delatnost u cilju sticanja dobiti."[3] Na drugom mestu određenje forme osnivačkog akta: „Osnivački akt… sačinjava se u pisanoj formi i registruje u skladu sa zakonom o registraciji."[4] Naposletku, određenje instituta ništavosti osnivačkog akta: „Osnivački akt ništav je ako:

1) nema formu propisanu ovim zakonom ili
2) je delatnost društva koja se navodi u osnivačkom aktu suprotna prinudnim propisima ili javnom poretku ili
3) ne sadrži odredbe o poslovnom imenu društva, ulozima članova, iznosu osnovnog kapitala ili pretežnoj delatnosti društva ili

[2] Zakon o privrednim društvima Srbije – ZOPD, *Službeni glasnik RS*, br. 36/11, 99/11, 83/14 – dr. zakon, 5/15, 44/18, 95/18, 91/19, 109/21.
[3] ZOPD, čl. 2.
[4] ZOPD, čl. 11, st. 8.

4) su svi potpisnici u trenutku zaključenja osnivačkog akta bili pravno ili poslovno nesposobni.

Osim iz razloga propisanih u stavu 1 ovog člana, osnivački akt ne može se oglasiti ništavim po drugom osnovu."

Pojmovno određenje privrednog društva u srpskom kompanijskom zakonu, kao i određenje forme osnivačkog akta društva i, konačno, određenje bitnih elemenata ovog osnivačkog akta koji su jedini podobni da kao pravnu posledicu, u slučaju nepostojanja nekog od njih, proizvedu ništavost tog akta, otvaraju važno, ne samo teorijsko pravno već i praktično pravno pitanje pravne relevantnosti u ovom smislu instituta *affectio societatis* u srpskom kompanijskom pravu, koji se kao takav i sa određenim pravnim dejstvom pojmovno ne pojavljuje u za ove potrebe relevantnom srpskom kompanijskom pravnom izvoru prava. Slične dileme otvarane su i u francuskoj pravnoj teoriji[5] i sudskoj praksi, s obzirom na to da relevantni francuski pravni izvori takođe ne imenuju izričito institut *affectio societatis* kao bitan element ugovora o osnivanju trgovačkog (privrednog) društva.[6] Reč je o francuskom Građanskom zakoniku (*Code civil*), koji definišući u jednoj odredbi pojam trgovačkog društva to doista ne sadrži, ali istovremeno u drugoj odredbi definiše ciljnu funkciju trgovačkog društva iz koje nesumnjivo sledi da se ovaj institut pretpostavlja.[7]

II Pojam *affectio societatis*

Pojmovno određenje instituta *affectio societatis*, kao i njegovu pravnu relevantnost za ugovor o osnivanju privrednog društva i kvalifikaciju privrednog

[5] Vid. Ivan Tchotourian, *Vers une définition de l' affectio societatis lors de la constitution d' une société*, Paris, 2011; Vincent Cuisinier, *L' affectio societatis,* Paris, 2008; Zdzislaw A. Neubauer, *L' affectio societatis dans la sociétés de capitaux,* thèse, Lille, 1994.

[6] Za ove svrhe francuska pravna teorija (i sudska praksa) referišu se na neke odredbe Code civil-a:
„Društvo se osniva od strane dva ili više lica koji saglasno ugovaraju da izvrše određeni poduhvat imovinom ili radom u cilju deobe dobiti ili uštede troškova koji iz toga nastanu.
Društvo se može osnovati, u slučajevima predviđenim zakonom, i aktom volje samo jednog lica.
Članovi društva se obavezuju da snose gubitke društva." (article 1832)
„Društvo može obavljati zakonom dozvoljenu delatnost i biti osnovano u zajedničkom interesu članova.
Društvom se upravlja u interesu društva, uzimajući u obzir pitanja društva i životne sredine svoje delatnosti." (article 1833)
„Ništavost društva može nastati samo po osnovu povrede odredaba člana 1832… i odredaba člana 1833 ili pri postojanju nekog od osnova ništavosti ugovora uopšte.
Za svaku odredbu koja je suprotna imperativnim odredbama ovog dela-naslova (titre), čija povreda nije sankcionisana ništavošću društva, smatra se da nije ni napisana.
Ništavost akata ili odlučivanja organa društva može nastati samo po osnovu povrede imperativnih odredaba ovog dela-naslova, izuzimajući poslednju alineju člana 1833, ili nekog osnova ništavosti ugovora uopšte," (article 1844-10)

[7] Upor. Code civil (1804, 2022), article 1832–1833 i article 1844–10; tako i : Code de commerce (1807, verzija na snazi 2025), article 235-1. Viš: I. Tchotourian, 165–179.

društva, pravna teorija ne čini na uniforman način, te se definicija ovog pojma ne može dati na siguran i jedinstven način. Izvesno je da je taj latinski pojam tvorevina pravne teorije i sudske prakse (bez uniformnog određenja i s bogatstvom poimanja, uključujući i negiranje njegove svrsishodnosti) te u tom smislu ima svoju originalnost.[8] O tom institutu najviše je pisala francuska pravna teorija, nastojeći da u relevantnoj pravnoj regulativi nađe njegov izvor. Za ove svrhe najčešće se poseže za odredbom člana 1833 francuskog Građanskog zakonika (*Code civil*), koja propisuje da se „društvo osniva u zajedničkom interesu članova", pri čemu deo teorije nalazi da je upravo taj „zajednički interes" sinonim pojma *affectio societatis*, dok drugi pod ovim pojmom vide „nameru (volju) udruživanja".[9] „Zajednički interes" se određuje kao interes celine članova da iz kolektivne dobiti povlače individualnu dobit. Taj interes konstituišu dva elementa: stvaranje profita društva i njegova podela među članovima na ravnopravnoj osnovi. U tom smislu smatra se da postoji „zajednica interesa članova", gde se nalazi njihov interes, tako da postoji blizak odnos „zajedničkog interesa" i „interesa društva".[10] Ipak, i pored te bliskosti i, po nekim gledanjima, čak i asimilacije „zajedničkog interesa" i „interesa društva", skorija sudska praksa se sve više izjašnjava u prilog autonomije pojma „zajednički interes". U svakom slučaju, „zajednica interesa članova" pretpostavlja voljno udruživanje članova i odlikuje se, po pravilu, aktivnim i zainteresovanim pristupom, konvergencijom interesa[11] i ravnopravnošću članova (otuda nedozvoljenost klauzula *leonina* – lavovske klauzule).[12]

[8] Patrick Serlooten, „L' affectio societatis, une notion à revisiter", *Mélange en l' honneur de Yves Guyon*, Paris, 2003, 1007–1017.

[9] Neki autori govore o nejasnoći ovog pojma i određuju ga kao „volju za udruživanjem", odnosno kao saglasnost volja svih učesnika ugovora o osnivanju privrednog (trgovačkog) društva, te ako u ovom smislu i postoji u svakoj formi društva, uključujući čak i jednočlano društvo, njegov sadržaj je varijabilan u zavisnosti od posebne motivacije članova, te ako i nastane s bliskošću članova „lakat uz lakat" može završiti i „leđa uz leđa". Dodaje se da je zajedničko pravilo u svim društvima da svaki član društva ima pravo učešća u upravljanju društvom, te učešća u donošenju kolektivnih odluka, bez posebnog sankcionisanja, izuzimajući eventualnu zloupotrebu prava manjine. Smatra se takođe da onaj ko kupuje akciju na berzi nema nikakvu nameru učešća u poslovima društva, već je samo prosto investitor („onaj koji kupuje jednu akciju radi nadziranja šta se dešava u društvu, da li taj ima dušu udruživanja" – razlika između člana „kontrolora" i člana samo investitora): Vid. Maurice Cozian, Alain Viandier, Folrence Deboissy, *Droit des sociétés*, Paris 2006, 64–65. Autori koji ovaj pojam definišu kao „nameru udruživanja" nalaze da francuski Građanski zakonik u definiciji pojma trgovačkog društva ne sadrži izričito ovaj element (Code civil, art. 1832), ali smatraju da izostanak *affectio societatis* vodi nepostojanju društva: Phillipe Merle, Anne Fauchon, *Droit commercial – sociétés commerciales*, Paris, 2001, 60–62. Drugi pak dodaju da to nije ni pojam „zajedničkog poduhvata" iz ove iste odredbe francuskog Code civil-a: Paul Le Cannu, Bruno Dondero, *Droit des sociétés*, Paris, 2012, 58–62. Konačno, neki ističu da francuska sudska praksa daleko izraženije od ove odredbe Code civil-a, ističe da nema društva bez „namere (volje) udruživanja", koju nazivaju *affectio societatis*: Yves Guyon, Droit des affaires, Tom I – *Droit commercial général et sociétés*, Paris, 2003, 130.

[10] I. Tchotourian, 171-172; Dominique Schmidt, „De l'intérét commun des sociétés", *J.C.P.,* 1994, I, 440.

[11] *Affectio societatis* je „volja udruživanja, prihvatanje zajedničkog interesa i konvergencija interesa": Joseph Hamel, Gaston Lagarde, Alfred Jauffret, *Droit commercial*, Tome I, 2 édition, 2 volume, Paris, 1980, 52.

[12] Y. Guyon piše o četiri modaliteta „zajedničkog interesa" koji odlikuje affectio societatis: prvo, voljni karakter saradnje između dvaju lica koji se smatra dominantnim; drugo, učešće u upravljanju koje se smatra

Intenzitet namere udruživanja zavisi od vrste društva – ako je rizik ortaka veći (neograničena odgovornost), *affectio societatis* je jače izražen. Što je društvo manje, čvršća je veza osnivača i članova društva s društvom. Čak i unutar istog društva *affectio societatis* nije uvek podjednako izražen kod svih članova (npr. akcije sa pravom glasa i bez prava glasa,[13] kupovina akcija na berzi ili udela u zatvorenim društvima, imenovani-privremeni akcionar koji nosi akcije drugog – stvarnog akcionara,[14] status komanditora, manjinski i većinski članovi i slično).[15] *Affectio societatis* ne postoji samo kod osnivanja društva već i tokom trajanja društva, onoliko dugo koliko društvo postoji (generalno), odnosno do trajanja članstva u društvu (pojedinačno) i mora da postoji kod svakog člana društva.[16] Kao *affectio societatis*, „zajednički interes", dakle, postoji kod svih članova i kod svih društava, s tim što je njegov intenzitet različit[17] (postoje, međutim, različita gledanja oko toga da li postoji kod jednočlanih društava, jer kao što je „jednočlano društvo" *contradictio in adiecto*, to je takođe i „zajednički interes" kod ovog društva – pristalice postojanja smatraju da se kod ovog društva „zajednički interes udruživanja" može posmatrati kao interes osnivanja društva i sticanja statusa člana tog društva).[18]

Za razliku od francuskog zakonodavca, koji i pored određenih nepreciznosti određenja pojma *affectio societatis*, upotrebom pojmova kao što su naročito „zajednički poduhvat", „zajednički interes", daje prostora za prepoznavanje ovog instituta,[19] srpski kompanijski zakonodavac je daleko restriktivniji u tom pogledu jer se ovaj institut ne može svakako prepoznati iz definicije pojma privrednog društva, kao ni iz određenja ništavosti osnivačkog akta, ali bi se eventualno određeni obrisi instituta

dominantnim; treće, konvergencija ili divergencija interesa koji je bitni element kvalifikacije i, četvrto, odsustvo postojanja subordinacije između članova što omogućuje takvu kvalifikaciju. Y. Guyon, 133–136.

[13] U vezi s ovim akcijama bez prava glasa postavlja se pitanje da li su akcionari koji poseduju samo ove akcije članovi društva ili ne i da li poseduju affectio societatis jer ne učestvuju u upravljanju društvom, kao bitnom odlikom za postojanje affectio societatis koji odlikuje članove društva. Odgovor francuske pravne teorije je ipak pozitivan jer postoje svi drugi elementi ovog instituta, a postoji i potencijalna mogućnost konverzije ovih akcija u akcije sa pravom glasa i time i pravom upravljanja. U svakom slučaju na pitanje da li akcionari imaju affectio societatis francuska pravna teorija odgovara pozitivno, čak i ako sasvim ignorišu učešće u upravljanju ili kontroli, jer akcionar kupujući akcije prihvata statut društva i jednu specifičnu uniju interesa u tom društvu. Vid. J. Hamel, G. Lagarde, A. Jauffret, 54, 58.

[14] Frederic Pollaud-Dulian, „L'actionnaire dans les opérations de portage", *Rev. soc. 1999,* 765.

[15] Y. Guyon, 133; Ph. Merle, A. Fauchon, 60–62; M. Cozian, A. Viandier, F. Deboissy, 64–66.

[16] Y. Guyon, 132.

[17] O nijansama odnosa „zajedničkog interesa" i *affectio societatis*, njihovom izjednačavanju, bliskosti, te gledanju na affectio societatis kao na širi pojam od pojma „zajednički interes", u smislu da je „zajednički interes" samo jedan od kriterijuma procene postojanja *affectio societatis*, te stavu da je moguće postojanje *affectio societatis* i bez postojanja „zajedničkog interesa" i, obrnuto, da je moguće postojanje „zajedničkog interesa" bez utvrđivanja postojanja *affectio societatis*, vid. I. Tchotourian, 171–176.

[18] P. Serlooten, 1012.

[19] Georges Naffah, „ L' affectio societatis, un critère qui n' en est pas un", *Mélange en l' honneur de Jean - Jaques Daigre*, Paris, 2017, 235–236.

mogli pročitati iz same ugovorne prirode osnivačkog akta privrednog društva[20] (osim jednočlanog društva), pogotovo iz osnivačke faze njegovog nastanka. Čini se da se snažan argument u prilog prepoznavanju ovog instituta u srpskom kompanijskom pravu može pronaći u institutu „prestanka društva po odluci suda" u slučaju ozbiljnih

[20] Opšti uslovi ugovornog prava koji se traže za punovažnost ugovora (upor. Slobodan Perović, *Obligaciono pravo,* Beograd, 1980, 245–366; Marija Karanikić Mirić, *Obligaciono pravo*, Beograd, 2024, 200–353) zahtevaju se podjednako i za ovaj ugovor, budući da i on *ima obligaciona dejstva* – materijalni uslovi (*sposobnost ugovornih strana* – isključenost maloletnika i punoletnih lica lišenih poslovne sposobnosti ili ograničene poslovne sposobnosti; *predmet* – dozvoljenost i određenost, *saglasnost volja* – bez zablude, pretnje i prinude, *kauza* – osnov) i formalni uslovi (formalizam – pismena forma, overa potpisa, upis u propisani registar i objava). Mane volje u nastanku ugovora o osnivanju privrednog društva mogu biti značajne za njegovu sudbinu, pogotovo zabluda (o predmetu, o ličnosti), ugovor može biti simulovan i fiktivan – koji je često prevaran („društvo fasada"). Za razliku od opštih pravila ugovornog prava, koja važe za ugovore koji imaju obligaciona dejstva, budući da ovaj ugovor može da ima i *statusna – institucionalna dejstva* (kada na njegovoj osnovi nastaje privredno društvo kao pravni subjekt), u ovom ugovoru ima i određenih posebnih pravila koja proizlaze iz ovog dejstva. Ipak, ugovorna priroda ovih društava dominira kod društava lica, dok institucionalna priroda dominira kod društava kapitala, pogotovo kod akcionarskog društva, čime se omogućuje da ova društva funkcionišu *tehnikom rada organa društva*, jer njima nakon osnivanja upravljaju organi, a ne osnivači i docniji članovi (akcionari). Ovo je, međutim, u potpunosti tačno za akcionarsko društvo sa javnim upisom akcija, koje i na ovaj način ispoljava sve odlike društva kapitala, ali ne i za društvo sa ograničenom odgovornošću (i delom i za akcionarsko društvo bez javnog upisa akcija) koje i nakon osnivanja zadržava dosta ličnih karakteristika, tako da su umesto organa društva, ipak, često u funkciji članovi ili akcionari društva (o ugovornoj i institucionalnoj koncepciji privrednog društva i stavu da je ono po svojoj prirodi i ugovor i institucija: Ph. Merle, A. Fauchon, 32–34). Drugi autori govore da je privredno (trgovačko) društvo ugovor po svom nastanku, a institucija s pravnim subjektivitetom po svom funkcionisanju (mada ugovorni elementi ne iščezavaju u potpunosti ne samo kod društava lica kod kojih i pored subjektiviteta društva skoro u potpunosti opstaju i tokom trajanja društva, već u dobroj meri i kod društva s ograničenom odgovornošću – slučaj kad se traži jednoglasnost za promenu osnivačkog akta), pogotovo kod društava kapitala, kod kojih vlada „zakon većine", te je teško prihvatiti da se to uklapa u teoriju ugovora, kao i sâm pravni subjektivitet koji od društva čini „pravno biće" i, naročito, kontinuitet društva i osnivanje s namerom trajanja (vid. P. L. Cannu, B. Dondero, 165–171).
Institucionalna teorija privrednog društva ima i neke posebne forme: teorija organizacije preduzeća (potvrda je forma jednočlanog društva koje se ne uklapa ni u ugovornu osnovu nastanka privrednog društva), teorija kolektivnog akta (odlikuje je stav o konvergenciji više konstitutivnih interesa). Vid. P. L. Cannu, B. Dondero, 175–179. Upravo ta statusna svojstva i čine ovaj ugovor specifičnim u odnosu na ugovore koji imaju samo obligaciona svojstva (po pravilu, ugovorom osnovano društvo traje neodređeno vreme, društvo ima neke korporacijske organe, ugovor se registruje, moguće je isključenje člana i istupanje člana iz društva, moguć je spor člana društva s drugim članom kao ugovornom stranom ali i sa društvom, ugovor se može promeniti i većinskom voljom, podrazumeva različitost prava članova, neravnopravnost članova uz ravnopravan tretman, prava manjinskih članova, dejstvo prema trećim licima, prinudni prestanak, sužene osnove ništavosti, dejstvo ništavosti *pro futuro*, prinudnu likvidaciju društva po osnovu ništavosti).
Dominantnost ugovorne teorije privrednih društava u francuskoj teoriji podupire i francuski zakonodavac (*Code civil* definiše u članu 1832 *privredno društvo kao ugovor*, uz istovremeno proširenje cilja-kauze privrednog društva), dok srpski zakonodavac privrednih društava daje koncesiju institucionalnoj teoriji („*privredno društvo je...pravno lice*" – ZOPD, član 2), što je upravo francuski zakonodavac, ne bez razloga, želeo da izbegne, a što ne znači da upravo institucionalna teorija ne čini most ka jednočlanom društvu, govoreći time u prilog potrebi dopunjavanja ove dve teorije: P. L. Cannu, B. Dondero, 26, 171–186.

nesporazuma među članovima društva koji parališu funkcionisanje društva (prestanak postojanja *affectio societatis*), kao i institutu istupanja člana društva iz društva (prestanak postojanja *affectio societatis* kod takvog člana društva).[21] I pored toga, srpska pravna teorija uglavnom i ne daje ovom institutu prirodu bitnog opšteg uslova nastanka privrednog društva (osim izuzetno),[22] poput određenja drugih opštih uslova ugovora o osnivanju bilo koje forme ovog društva koji slede iz zakonskog oblikovanja ništavosti osnivačkog akta.[23]

III Subjektivno (klasično) i objektivno (moderno) određenje pojma *affectio societatis*

Određenje pojma *affectio societatis* u tradicionalnom smislu u francuskom pravu (zakonodavstvu, pravnoj teoriji i praksi), koje i promoviše ovaj institut u kontekstu ugovora o osnivanju trgovačkih društava, kao što to proizlazi iz navedene sumarne analize, jeste subjektivno poimanje.[24] Pojmovi „zajednički interes", „zajednički poduhvat", namera (volja) osnivanja trgovačkog društva pripadaju psihološkoj sferi ljudske aktivnosti. Francuska pravna teorija je svesna teškoća dokazivanja takve namere (volje), te pledira da dokazi postojanja *affectio societatis* mogu proizlaziti iz različitih indicija (indirektni dokazi), koje uglavnom slede nakon zaključenja takvog ugovora, a kvalifikacija koju takvom pravnom poslu daju same ugovorne strane ne mora vezivati sudije, dok pobijanje kvalifikacije koje one daju svom pravnom poslu mora biti zasnovano na „posebno karakterističnim elementima",[25] što se pak pokazuje naročito važnim pri razgraničenju ovog pravnog posla od nekad bliskih instituta, poput faktičkog društva, društva kreiranog kao faktičko ili fiktivnog društva.

Uviđajući krhkost i ranjivost subjektivnog određenja pojma *affectio societatis*, francuski pravni pisci više posežu za objektivnim poimanjem ugovora o osnivanju trgovačkog društva (time i postojanja ili nepostojanja *affectio societatis*) i njegovom kvalifikacijom na bazi postojanja takvih elemenata: postojanje uloga u društvo[26] i raspodela rezultata poslovanja društva (učešće u dobiti – dividenda, snošenje rizika

[21] ZOPD, čl. 118, 138, 239, 469 i 121, 187–188, 192.

[22] Upor. Nebojša Jovanović, Vuk Radović, Mirjana Radović, *Kompanijsko pravo – pravo privrednih subjekata*, Beograd, 2020, 112–113; suprotno: Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *Kompanijsko pravo – pravo privrednih društava*, Beograd, 2023, 104–105.

[23] Upor. ZOPD, čl. 2, 11 i 13.

[24] To najbolje ilustruje formula da je „affectio societatis namera biti u društvu i ponašati se kao član društva". Ističe se, pritom, da to nije samo trenutna volja pri osnivanju društva ili pri docnijem ulasku u društvo, već je konstantna volja tokom trajanja članstva u društvu: Jean François Barbèri, „Le retour sur l' affectio societatis, une intention mal aimée", *Mélange en honneur de Patrick Serlooten*, Paris, 2015, 289–296.

[25] P. Le Cannu, B. Dondero, 58–59.

[26] „L' affectio societatis, koji se procenjuje prema momentu osnivanja društva, ne može biti negiran ne unosom uloga u društvo, što samo čini takvog člana dužnikom prema društvu, za koji je preuzeo obavezu

poslovanja).[27] Osim toga, ističe se da su mnogi članovi društava kapitala (pogotovo manjinski i naročito kod kotiranih akcionarskih društava gde je pri kupovini akcija na berzi u osnovi ugovor o investiranju, a ne ugovor o trgovačkom društvu) u suštini pasivni članovi (po samom zakonu su to i inače akcionari sa akcijama bez prava glasa) i ne učestvuju u upravljanju društvom (ostaju ipak prava informisanja i latentne kontrole, naročito institucionalnih investitora) u kom glasačka prava zavise od procenta kapital učešća – „glasanje po kapitalu" – nema jednakosti (ovo je moguće ugovoriti i kod društava lica, što je ipak ređi slučaj zbog svoje rizičnosti, te je pravilo „glasanje po glavama"). Takođe, *affectio societatis* po samom svom pojmu „zajedničkog interesa i namere udruživanja" isključen je i besmislen kod jednočlanog društva (ali shvaćen u smislu volje osnivanja društva ima svoj *ratio*). Najzad, neki autori smatraju da je *affectio societatis* u osnovi volja da se stupi u privredno društvo, te i ne može služiti kao karakteristični (bitni) element definicije samog pojma trgovačkog (privrednog) društva jer je to „začarani krug" (*cercle vicieux*).[28]

Okretanje dobrog dela francuske pravne teorije ka objektivnom određenju pojma člana trgovačkog društva i time određenja ugovora o njegovom osnivanju, na podlozi navedenih ključnih razloga (argumenata), ipak nije sasvim zasenilo subjektivno određenje pojma člana trgovačkog društva i na toj osnovi kreiranog instituta *affectio societatis*. Naime, i pokušaj određenja člana trgovačkog društva na osnovu objektivnih karakteristika (postojanje uloga u društvo i na toj osnovi sticanja članskih prava u društvu – imovinskih i neimovinskih-političkih) ima snažne protivargumente koji osnažuju opstajanje instituta *affectio societatis* i njegovo subjektivno određenje. Članstvo u društvu može se, naime, steći i bez ključnog objektivnog elementa – postojanje uloga u društvo – institut besplatnih akcija, na primer. Takođe, ne vodi svaki ulog u neki ekonomski poduhvat nastanku trgovačkog društva, što je osnova njegovog razgraničenja od nekih bliskih instituta (društvo kreirano kao faktičko, građansko društvo, fiktivno društvo, udruženje, ugovor o zajmu, kooperative i slično), a za ove svrhe postojanje instituta *affectio societatis* sa subjektivnim određenjem ima svoju svrsishodnost. Stoga institut *affectio societatis* i dalje egzistira u većinskoj francuskoj pravnoj teoriji (neki čak govore o „renesansi *affectio societatis*-a")[29] i sudskoj praksi, imajući time stvarnu i efektivnu ulogu, iako limitiran na višečlana društva (pojmovno kao takav isključen kod jednočlanog).[30] Ispravno je u francuskoj pravnoj teoriji zapaženo da je kritika ustanove *affectio societatis* najviše nastala na osnovu gledanja na njega kao na uniforman institut (jedinstven – monistička

unosa " – Cour de Paris, 10 mars 2004, Rev. Sociétés 2004, n. 1002, u: Jean – Paul Valuet, Alain Lienhard, Pascal Pisoni, *Code des sociétés et des marchés financiers – Commenté* 23 édition, Paris, 2007, 8.

[27] P. Le Cannu, B. Dondero, 65.

[28] A. Viandier, *La notion d' associé*, LGDJ, Paris, 1978, n. 77.

[29] Y. Guyon, 131.

[30] P. Le Cannu, B. Dondero, 66.

koncepcija), dok je on u suštini višeslojan (multiforman – pluralistička koncepcija).[31] On je istovremeno „i pokazatelj postojanja trgovačkog društva, regulator života društva i sredstvo razlikovanja člana društva od srodnih situacija".[32]

IV Uloga *affectio societatis* – razgraničenje trgovačkog društva od drugih izabranih (važnijih) srodnih ustanova

Affectio societatis ima višestruku ulogu u životu trgovačkog društva, odnosno u njegovom pravnom određenju, i to najmanje trostruku. Najpre, u kvalifikaciji postojanja društva ili njegovog nepostojanja (pogotovo razgraničenje od fiktivnog društva ili razgraničenje od društva kreiranog kao faktičko ako trgovačko društvo nema subjektivitet).[33] Zatim, u razgraničenju ovog ugovora od drugih ugovora s nekim klauzulama iz arsenala ugovora o privrednom društvu. Takođe, u razgraničenju trgovačkog društva od drugih formi udruživanja sa statusom pravnog lica ili formi udruživanja imovine bez statusa pravnog lica (forme nepodeljene imovine).[34] Najzad, ako se prihvati koncept postojanja i kod jednočlanog društva, posebna uloga volje kod osnivanja privrednog društva i postanka članom društva.[35]

1. Kvalifikacija postojanja društva

Kad je reč o kvalifikaciji postojanja trgovačkog društva ili njegovog nepostojanja, potrebno je izvršiti razgraničenje od dva bliska instituta: društva kreiranog kao faktičko društvo i fiktivnog društva.

Na prvom mestu, pojam *affectio societatis* koji po subjektivnom određenju kvalifikuje trgovačko društvo blizak je pojmu društva osnovanog kao faktičko. Naime, ako kod određenog ugovora ima objektivnih elemenata da se kvalifikuje kao trgovačko društvo ili društvo osnovano kao faktičko (u francuskoj praksi se postojanje ovakvog društva vrši upravo na osnovu utvrđivanja postojanja *affectio societatis* pri deobi imovine nakon prestanka vanbračne zajednice),[36] a same ugovorne strane nisu imenovale (identifikovale) taj ugovor, onda se njegova kvalifikacija može zasnivati na ponašanju tih strana. Ispravno se u tom smislu kaže da *affectio societatis* nije neki autonoman pojam, ako to nije na osnovu namere ispoljene ponašanjem.[37]

[31] Y. Guyon, 132–136.
[32] A. Viandier, 1978, n. 76.
[33] O spornosti: G. Naffah, 241–242.
[34] J. P. Valuet, A. Lienhard, P. Pisoni, 8.
[35] P. Serlooten, 1013 –1017. O spornosti pojma affectio societatis kod jednočlanog društva: G. Naffah, 239–240.
[36] Prosta kohabitacija između vanbračnih partnera nije dovoljna za utvrđivanje postojanja društva, potrebno je prepoznavanje postojanja affectio societatis i drugih bitnih svojstava društva: Y. Guyon, 61; J. Hamel, G. Lagarde, A. Jauffret, 55–56.
[37] P. Le Cannu, B. Dondero, 59.

Na drugom mestu, potrebno je razgraničiti trgovačko društvo i fiktivno društvo. Društvo čiji članovi nemaju nameru da se ponašaju kao njegovi članovi samim tim nije trgovačko društvo već fiktivno društvo (na primer ako je neko lice samo pojavno član društva, a u stvari je pozajmljeno ime[38] ili eventualno prikriveno jednočlano društvo čije osnivanje po zakonu nije moguće, a kod kog nema namere udruživanja već samo korišćenja prednosti koje zakon daje članu ovog društva kao jednočlanog). Društvo čiji članovi nemaju nameru da se ponašaju kao članovi trgovačkog društva, dakle fiktivno društvo, kao takvo je ništavo[39] (uza svu relativizaciju postojanja, odnosno ublažavanja osnova koji vode ništavosti društava u kompanijskom pravu). Ništavost tog društva uz eventualnu kvalifikaciju kao fiktivnog izuzetna je iz više razloga: najpre, stvarnu nameru članova društva teško je dokazati, a zatim, kao što je rečeno, zavisno od faktičkih i pravnih okolnosti, postoje različiti stepeni *affectio societatis* a time i *intuitu personae* odnosa; zatim, odsustvo *affectio societatis* nije jedina odrednica koja vodi kvalifikaciji jednog društva kao fiktivnog i time ništavog (to može biti i prevara, pozajmljeno ime, simulovani posao, tajni ugovor druge prirode, tobožnji član bez ikakve namere udruživanja, zloupotreba prava i slično – kada se primenjuju druga pravila zavisno od datog osnova) i, najzad, društvo može postati fiktivno i tokom svog poslovnog života ispražnjeno od svoje supstance („društvo fasada"), kada važe pravila prestanka društva u zavisnosti od osnova takvog statusa. Najzad, izostanak *affectio societatis* koji potencijalno vodi fiktivnosti društva, može da postoji kako kod celog društva tako i kod pojedinih članova – fiktivni član, što prema okolnostima slučaja ne vodi ništavosti društva već prestanku statusa takvog člana u tom društvu.[40]

2. Kvalifikacija ugovora o društvu i drugih ugovora

Institut *affectio societatis* ima važnu ulogu i pri razgraničenju trgovačkog (privrednog) društva i ugovora o osnivanju ovog društva od bliskih (srodnih) ugovora (koji katkad mogu biti kvalifikovani kao ugovori o društvu kreiranom kao faktičko i bez subjektiviteta).[41] Ta uloga *affectio societatis* ima poseban značaj i u slučaju njegovog nepostojanja na planu smanjenja osnova ništavosti osnivačkog akta ovog društva i time i samog društva, s obzirom na to da je u sadržaju nekog posla moguće prepoznati drugi pravni posao koji je pravno valjan i koji odgovara stvarnoj volji ugovornih strana. Naime, često se događa da ugovorne strane zaključe određeni ugovor ne dajući mu kvalifikaciju pravne prirode ili dajući mu pogrešnu kvalifikaciju (na primer,

[38] Ph. Merle, A. Fauchon, 62.
[39] P. Serlooten, 1013–1014.
[40] P. Le Cannu, B. Dondero, 60–62; Ph. Merle, A. Fauchon, 60–66; M. Cozian, A. Viandier, F. Deboissy, 64–66; I. Tchotourian, 21–194.
[41] P. Serlooten, 1015–1016; G. Naffah, 237–238.

kvalifikujući ugovor o društvu kao ugovor o zajmu zbog rizika nemogućnosti povraćaja uloga), te je potrebno određivanje njegove prirode, s ciljem utvrđivanja zajedničke namere ugovornih strana. U svakom slučaju, privredno društvo se uvek bazira na ugovoru s posebnim karakteristikama (osnivači i članovi društva s posebnim članskim pravima u tom svojstvu u privrednom društvu),[42] a nikad na samom zakonu ili drugom izvoru ili ugovoru koji nema karakteristike ugovora o osnivanju privrednog društva. Nesigurnost postavljanja granica između srodnih ugovora i pravilne kvalifikacije mogu voditi raznim prevarama (povoljniji poreski tretman i slično). Karakteristika saradnje i udruživanja koja odlikuje privredno društvo nije samo odlika osnivačkog akta ovog društva, ona se javlja i kod nekih drugih bliskih ugovora, ali ipak ima osobenu prirodu kod ugovora o društvu i daje ugovornim stranama svojstvo člana društva. I upravo postojanje *affectio societatis*, pre svega kao subjektivan pojam, najbolja je indikacija svojstva člana društva.

Na prvom mestu potrebno je razgraničenje ugovora o osnivanju privrednog društva i drugih ugovora koji za svoju karakteristiku imaju učešće u dobiti nastale na bazi predmeta tih ugovora. Ovde mislimo na ugovor o prodaji (klauzula o učešću prodavca u koristi proizvedene od predmeta prodaje – klauzula o varijabilnosti cene), ugovor o depozitu ili zajmu (učešće deponenta ili zajmodavca u koristi depozitara od predmeta depozita – varijabilna kamata umesto fiksne), ugovor o zakupu (klauzula o učešću zakupodavca od koristi zakupca iz predmeta zakupa).[43] Sve te situacije podsećaju na ugovor o privredom društvu gde članovi društva ulažu neki ulog u društvo s pravom učešća u dobiti društva (ali i u riziku) nastale delatnošću društva. Kvalifikacija ugovora o društvu (često društvu kreiranom kao faktičko) kod ovih ugovora ne može postojati ako nema klauzule o učešću u dobiti i snošenju rizika. Takođe, same za sebe klauzule u tim ugovorima o učešću u dobiti ili klauzula o učešću u gubicima ne vode automatski kvalifikaciji ugovora kao ugovora o društvu. Dakle, ugovor o osnivanju privrednog društva uvek ima neki zajednički cilj osnivača („zajednički interes") i izražen *affectio societatis* (subjektivno određenje kao zajednička namera ugovornika da budu članovi društva) koji ne postoji kao takav (postoje posebni interesi ugovornih strana) u ovim i drugim srodnim ugovorima[44] (*zajednički cilj i namera udruživanja*, kao i akti materijalizacije *affectio societatis* – učešće u dobiti i snošenje rizika, postojanje uloga, kao i učešće u upravljanju i kontroli – neophodni kvalifikativi za sticanje svojstva člana društva – ne postoje u ugovorima o prodaji gde prodavac i kupac u principu imaju odvojene ugovorne ciljeve po pravilu interesno suprotstavljene; isti je slučaj i kod ugovora o zakupu, ugovora o uslugama, ugovora o mandatu, ugovora o ostavi, ugovora o prevozu, ugovora o zastupanju, ugovora o koncesiji, ugovora o zajmu

[42] P. L. Cannu, B. Dondero, 62–63.
[43] I. Tchotourian, 574–602.
[44] *Ibid*., 483–602.

i kreditu, ugovora o razmeni, izdavačkog ugovora,[45] ugovora o udruživanju privrednih društava radi ostvarenja drugih ciljeva a ne dobiti, pri čemu zajednički cilj u smislu građanskog ili privrednog društva postoji kod ugovora o konzorcijumu i slično).[46] Takođe, kod tih ugovora nema učešća jedne ugovorne strane u poslovima upravljanja druge ugovorne strane („princip nemešanja" – osim kod ugovora o kreditu kod kog finansijska organizacija može da ugovori određene restriktivne kreditne klauzule koje zadiru u upravljanje društvom, kada je ponekad otvoreno pitanje da li se radi o kreditu ili ugovoru o društvu kreiranom kao faktičko),[47] a nema ni obaveze snošenja rizika nastalog u vezi s predmetom datog ugovora („nema zajedničkog rizika"). Kod ugovora o kreditu (zajmu) sa tim klauzulama važan element je i procena toga da li predmet ovih ugovora predstavlja ulog sa sticanjem svojstva člana društva ili zajam sa sticanjem svojstva zajmodavca (kreditora). Uz procenu prirode tih klauzula neza-obilazan element za kvalifikaciju ugovora jeste i subjektivno određenje postojanja ili nepostojanja *affectio societatis* (namera udruživanja i sticanja svojstva člana društva) za kvalifikaciju postojanja društva ili ugovora (o zajmu, kreditu).

Posebni osnovi razgraničenja sreću se kod ugovora o osnivanju privrednog društva i ugovora o radu. Naime, za razliku od drugih ugovora ugovornog prava (trgovačkih i građanskih), kod kojih u principu postoji ravnopravnost ugovornih strana (sa specifičnostima ugovora po pristupu, tipskih ugovora i slično), kod ugovora o radu javlja se načelo subordinacije poslodavca u odnosu na zaposlenog (i pored relativizacije ovog načela kod novih formi ugovora o radu), nasuprot tome član društva nije u subordiniranom položaju u odnosu na ostale članove (uprava društva koju čine članovi društva je ovlašćenik članova), u društvo stupa svojom voljom i sa postojanjem *affectio societatis* („zajednički interes"), uz ravnopravnost između članova a ne subordinaciju, i u tom svojstvu ne može dobijati naloge od uprave društva, niti učestvovati u kontroli i upravljanju društvom (ipak, moguće su neke forme partici-pacije u upravljanju ili saodlučivanja po osnovu rada a ne po osnovu svojstva člana društva). Zaposleni u principu ima fiksnu ili delom varijabilnu (zavisno od rezultata rada) zaradu, ali je ona nezavisna od dobiti i rizika poslovanja društva (u redovnim okolnostima). U tim okvirima i na tim osnovama razgraničavaju se ugovor o društvu i ugovor o radu, pa i kad ugovor o radu sadrži klauzulu o učešću zaposlenih u delu dobiti društva (sličnost sa ulogom u radu). Ipak, takva klauzula ugovora o radu ne pretvara zaposlenog u člana društva s postojanjem *affectio societatis* (ipak učešće u dobiti i gubicima društva, kao bitne odrednice postojanja *affectio societatis*, daje mogućnost pobijanja pretpostavke statusa zaposlenog i postojanja statusa člana

[45] O razgraničenju ugovora o društvu i izdavačkog ugovora: Y. Guyon, 135; J. Hamel, G. Lagarde, A. Jauffret, 52–53; I. Tchotourian, 549–550.

[46] J. Hamel, G. Lagarde, A. Jauffret, 20–58; Y. Guyon, 93–129; M. Cozian, A. Viandier, 53–86; P. L. Cannu, B. Dondero, 63–80; I. Tchotourian, 552–571.

[47] Y. Guyon, 134–135.

društva), a status zaposlenog, za razliku od statusa člana društva, omogućuje mu poseban kišobran kolektivnih ugovora o radu i socijalne zaštite.

Čistu distinkciju između ugovora o radu i ugovora o privrednom društvu pored relativizacije načela subordinacije savremenim formama ugovora o radu u izvesnom smislu kvari i kumulacija svojstva zaposlenog i člana (akcionara) društva (akcionarstvo zaposlenih – participacija u vlasništvu društva), s tim što su različiti instituti (ugovor o radu i ugovor o sticanju akcija društva), te i različita prava (i obaveze) po osnovu svakog od njih pojedinačno posmatrano.[48] Ponekad ipak nije lako napraviti takvu distinkciju, zavisno od toga da li je zaposleni i većinski akcionar ili samo podjednaki.[49] Situaciju može još više da komplikuje mogućnost uloga u društvo u radu ili uslugama (društva slobodnih profesija, na primer). Ako je član takvog društva sa ulogom u uslugama (režiser filma) i ima učešće u dobiti samo po osnovu takvog uloga, onda nema ugovora o radu i takav član nije podvrgnut načelu subordinacije i uživa privilegiju ravnopravnosti sa ostalim članovima društva. Ako je takav član manjinski, moguća je situacija da ima efektivno manju moć od rukovodioca društva koji ima ugovor o radu.[50] U principu, smatra se da je u takvim slučajevima na onom ko smatra da je reč o trgovačkom (privrednom) društvu da i dokaže postojanje *affectio societatis*, mada neke odluke francuskih trgovačkih sudova zauzimaju stav da se taj dokaz može i pretpostavljati da postoji.[51]

3. Kvalifikacija privrednog društva i drugih srodnih instituta

Najzad, institut *affectio societatis* ima važnu ulogu i kod razgraničenja trgovačkog društva od drugih formi udruživanja sa statusom pravnog lica ili formi nepodeljene imovine bez statusa pravnog lica (npr. sanaslednici, stečajna masa, susvojina, zajednička imovina, ugovor između supružnika – bračni ugovor itd.).[52]

Trgovačko (privredno) društvo i razne forme nepodeljene imovine imaju dodirnu tačku što njihova imovina predstavlja neku formu nepodeljene imovine. Tačka njihovog razgraničenja, međutim, nalazi se u činjenici da u formama nepodeljene imovine dominira individualni interes svakog od posednika i što se njima upravlja na bazi principa jednoglasnosti (ili preko izabranog ovlašćenika, čija su ovlašćenja svakako uža od ovlašćenja uprava privrednih društava) sa ciljem očuvanja vrednosti

[48] I. Tchotourian, 564–571.

[49] Francuska teorija ističe da se francuska sudska praksa u takvim slučajevima kumulacije ponekad zadovoljava malo načelom subordinacije, tako da prihvata da i većinski član društva može biti subordiniran upravi društva: P. L. Cannu, B. Dondero, 64.

[50] *Ibid*, 64–65.

[51] Y. Guyon, 136.

[52] G. Naffah, 237.

te imovine. S druge strane, privredno društvo jeste forma upravljanja nepodeljenom imovinom na kolektivni način, zavisno od prirode društva, sa lukrativnim ciljem uvećanja vrednosti i sticanja dobiti. Konačno, forme privrednog društva odlikuje pravni subjektivitet (osim društva kreiranog kao faktičko i u nekim pravima i nekih drugih formi, poput tajnog društva i slično), što u principu nije slučaj sa formama nepodeljene imovine. Ipak, forme nepodeljene imovine mogu biti organizovane i kao društva kreirana kao faktička, a ključni kriterijum za takvu kvalifikaciju njihovog statusa čini upravo utvrđivanje postojanja ili nepostojanja *affectio societatis* – utvrđivanje zajedničke namere ugovornika za udruživanjem radi lukrativnih ciljeva zajedničke eksploatacije nepodeljene imovine (kombinacija subjektivnog i objektivnog poimanja). U tom smislu se izjašnjavala i francuska sudska praksa, kao i vodeća pravna doktrina, da „u nedostatku namere udruživanja nema društva" (po pravilu kreiranog kao faktičko) već samo nepodeljena imovina.[53]

U pojmovnom smislu privredna društva su lukrativne organizacije sa lukrativnim ciljem sticanja dobiti (ovaj cilj neka prava šire i na teren „uštede troškova"). Za razliku od privrednih društava koja u srpskom pravu imaju pravni subjektivitet, postoje i razne forme udruženja koje takođe imaju pravni subjektivitet, ali čija je ključna tačka razgraničenja od privrednih društava ciljna funkcija: umesto jednodimenzionalne lukrativne privrednih društava, kod udruženja ona je multidimenzionalna i po svojoj vokaciji nelukrativna (ne radi raspodele dobiti) – politička, kulturna, sportska, humanitarna. I udruženja, kao i privredna društva, nastaju na ugovornoj osnovi, članovi im mogu biti i fizička i pravna lica, imaju pravni subjektivitet, postojanje uloga, zajednički cilj u skladu s ciljnom funkcijom, obavljaju neku ekonomsku delatnost.[54] Članovi udruženja sarađuju radi realizacije zajedničkog cilja udruženja i motivisani su umesto sa *affectio societatis* privrednog društva (zajednički interes raspodele dobiti) sa svojevrsnim *affectio associationis* (zajednički interes nije raspodela dobiti).[55] U nedostatku tog zajedničkog cilja udruženje je fiktivno, što je osnov njegovog prestanka u zakonom predviđenom postupku. To razgraničenje udruženja i privrednih društava u praksi, nažalost, nije tako poštovano, budući da su neke forme sa statusom udruženja u suštini bliže privrednim društvima nego udruženjima (parakomercijalizacija), a uživaju privilegovaniji poreski status i druga

[53] I. Tchotourian, 496–507.

[54] Srpski Zakon o udruženjima (*Službeni glasnik RS*, br. 51/09, 99/11 – dr. zakoni i 44/18 – dr. zakon) poznaje i udruženja sa subjektivitetom i udruženja bez subjektiviteta, a takođe, iako definiše udruženja kao „nedobitne organizacije", omogućuje i osnivanje udruženja „radi određenih delatnosti u cilju sticanja dobiti", što nije pravno konzistentno i na liniji je približavanja statusa udruženja statusu privrednih društava (čl. 2.). Tako: M. Vasiljević, T. Jevremović Petrović, J. Lepetić, 45.

[55] Kad je ciljna funkcija privrednog društva sticanje i raspodela dobiti, onda je to jasna tačka razgraničenja od udruženja čija to nije ciljna funkcija, ali kada je ciljna funkcija privrednog društva „ušteda troškova", kako je to definisao kao mogućnost francuski zakonodavac, onda je to moguće organizovanjem ili privrednog društva ili udruženja. Više: I. Tchotourian, 518–525.

manje restriktivna zakonska ograničenja samo zato što su po svom formalnom statusu i registraciji udruženja (izražen primer brojnih nevladinih a i nekih strukovnih organizacija). Faktički, razgraničenje privrednih društava i udruženja preti da se istopi komercijalizacijom statusa udruženja i obavljanjem ekonomskih, čak i komercijalnih delatnosti. Dodatno, moguća je transformacija privrednog društva u udruženje sa kontinuitetom pravnog subjektiviteta, kao i transformacija udruženja u privredno društvo i bez kontinuiteta pravnog subjektiviteta (srpski kompanijski zakon isključuje mogućnost transformacije poslovnog udruženja u privredno društvo).[56]

Kad je reč o kvalifikaciji statusa i pravne prirode zadruga (kooperativa) u odnosu na kvalifikaciju statusa privrednih društava i udruženja, čini se da ona nije do kraja jasna i nekontroverzna. Ono što je izvesno, zadruge se ne uklapaju u tu binarnu podelu (privredna društva i udruženja), već imaju mnoge svoje specifičnosti zasnovane na činjenici da imaju i neka svojstva privrednih društava, ali i neka svojstva udruženja. Te specifičnosti najbolje odražavaju zadružna načela, neka bliska privrednim društvima, a neka udruženjima: prvo, princip otvorenosti zadruge i promenljivosti kapitala; drugo, princip jednakosti zadrugara i glasanje „po glavama" (od ovog principa se ponekad odstupa ali limitativno) a ne „po kapitalu"; treće, princip altruizma (relativizuje se ipak time što se ostatak čistog prihoda deli na zadrugare prema izvršenom radu ili prema vrednosti poslovanja sa zadrugom, a ne prema ulogu, a isti princip se primenjuje i kod raspodele likvidacionog viška); četvrto, princip dobrovoljnosti statusa zadrugara; peto, princip uzajamnosti i solidarnosti (kod nekih formi zadruga).[57]

Najzad, postojanje *affectio societatis* je izuzetno važno i kod razgraničenja privrednog društva od nekih drugih formi organizovanja, poput evropske ekonomske interesne grupacije, fondacije i slično. Evropska ekonomska interesna grupacija kao i privredno društvo regulisana je zakonom koji uređuje privredna društva, poput regulative poslovnog udruženja (druge forme udruženja regulisane su posebnim zakonom), iako i jedna i druga statusna forma nema kao privredno društvo za ciljnu funkciju sticanje dobiti, već ostvarivanje nekih „zajedničkih interesa svojih članova" (poslovno udruženje), odnosno radi ostvarivanja određenih „ekonomskih interesa i aktivnosti njenih članova" (grupacija).[58]

Poput drugih formi nedobitnih organizacija i fondacija razlikuje se od privrednog društva po tome što je njena ciljna funkcija nedobitna i sastoji se u realizaciji nekog dela od javnog (opšteg) interesa. Kao i druge nedobitne organizacije, i fondacija ima pravni subjektivitet i upisuje se u propisani registar. Imajući u vidu ciljnu funkciju i predmet delatnosti fondacije *affectio societatis*, za razliku od privrednog društva sa subjektivitetom ili bez subjektiviteta, jeste pojam koji je u osnovi odsutan kod ove

[56] ZOPD, čl. 579; *Ibid*., 509–518.
[57] M. Vasiljević, T. Jevremović Petrović, J. Lepetić, 764.
[58] ZOPD, čl. 578 i 580 v. *Ibid*., 911–914.

ustanove – opšti interes kod fondacije ne vezuje se za njene osnivače već za njenu misiju (delatnost). Za razliku od privrednog društva koje živi u profitnoj sferi, život fondacije nalazi se u nekomercijalnoj sferi. Kako fondaciju može osnovati više osnivača, to ima određenih elemenata saradnje više aktera na realizaciji cilja fondacije, što daje određene obrise prisustva *affectio societatis* i kod fondacije. Isti slučaj je i sa funkcijom imovine fondacije. Najzad, ako ciljna funkcija privrednog društva, pored lukrativne može biti delom i, kao u francuskom pravu, „ušteda troškova", onda su ovo određeni elementi *affectio societatis* i u statusu fondacije. Ipak, razgraničenje je nesumnjivo u ciljnoj funkciji (nelukrativna) i delatnosti fondacije (opšti interes), što se ni u kom slučaju ne sreće kod privrednog društva.[59]

V Kvalifikacija privrednog društva na osnovu pravnog subjektiviteta

Ugovor o privrednom društvu u kontekstu razgraničenja od drugih ugovora ugovornog prava posmatra se kao posebna vrsta ugovora – ugovorna priroda, mada je on, za razliku od svih drugih imenovanih (i neimenovanih) ugovora po svojoj prirodi originalan jer, za razliku od tih drugih ugovora koji sami po sebi konstituišu svoj početak pravnog života pravnovaljanim zaključenjem, dotle ugovor o društvu kao takav ne započinje takvim zaključenjem svoj pravni život, već kao takav predstavlja samo *iustus titulus* (pravni osnov) za konstituisanje novog pravnog instituta – privrednog društva upisom u propisani registar, čime stiče pravni subjektivitet (*modus aquirendi* – način sticanja).[60] U svakom slučaju, pravni subjektivitet privrednog društva, u zemljama koje svakoj pravnoj formi ovih društava daju subjektivitet, predstavlja značajan element distinkcije privrednog društva i svojstva člana društva u odnosu na druge ugovore (često srodne ugovorima o privrednim društvima) građanskog i trgovinskog prava koji imaju i neke bitne odlike ugovora o društvu (učešće u dobiti ili nekad i snošenju rizika, postojanje uloga, neke elemente zajedničkog cilja i udruživanja, katkad i neke forme kontrole ili učešća u upravljanju), ali redovno ne sve kumulativno i redovno uz nepostojanje u subjektivnom smislu određen *affectio societatis* (zajednička namera udruživanja u društvo i sticanja svojstva člana, s obzirom na to da osim ugovora o društvu ovi drugi ugovori ne vode nastanku pravnog subjekta, koji, u zavisnosti od forme društva, ima odvojen pravni život od svog osnivačkog akta koji ima ugovornu prirodu a od ovog momenta institucionalnu prirodu – društva kapitala ili mešovitu prirodu – društva lica.

U zemljama koje nekim formama privrednih društava ne daju pravni subjektivitet (društva lica u anglosaksonskom i delom germanskom pravu), kao

[59] I. Tchotourian, 540–544.
[60] Y. Guyon, 136.

i u zemljama u kojima postoje neke forme građanskih ili i trgovačkih društava bez pravnog subjektiviteta (tajno društvo, društvo kreirano kao faktičko),[61] pravni subjektivitet nije element bitan za kvalifikaciju postojanja ugovora o društvu (društvo kreirano kao faktičko, tajno društvo i drugo) ili nekog drugog imenovanog ugovora. U ovom slučaju bitan element distinkcije postaje upravo *affectio societatis*, pre svega u svom subjektivnom poimanju (zajednička namera udruživanja u društvo i sticanje svojstva člana društva). Srpsko kompanijsko pravo, za razliku od nekih uporednih zakonodavstava, ne poznaje privredna društva bez pravnog subjektiviteta (*partnership, offene Handelsgesellschaft, société en participation, stille Gesellschaft, silent partnership, Kommanditgesellschaft*). Pravni subjektivitet privrednih društava traje do prestanka u trenutku brisanja iz registra (i objavom brisanja).

VI *Affectio societatis* i ništavost privrednog društva

Kontroverze pravnog režima instituta *affectio societatis* (kao zajedničke namere postanka članom društva),[62] u smislu postojanja ili nepostojanja ovog instituta (poput kontroverzi oko postojanja instituta kauze-osnova ugovora sa kojim se inače ne identifikuje, kao što se i ne identifikuje sa opštim uslovom nastanka ugovora – *saglasnošću volja*),[63] posebno prisutna i raspravljana u francuskoj pravnoj

[61] Uporedni zakoni romanske pravne tradicije priznaju pravni subjektivitet svim formama trgovačkih društava (izuzetak je samo la société en participation, gde je sporno da li je u pitanju društvo ili udruženje). Taj stav usvaja i srpsko pravo. Prema tome, po ovom sistemu, uprkos ugovornoj osnovi, sva trgovačka društva spadaju u društva-institucije. Više: Đorđe Mirković, *Dve teorije o pravnoj prirodi trgovačkih društava*, Beograd, 1934; J. Hamel, G. Lagarde, A. Jauffret, 17–20, 45–46.
Nasuprot tome, u germanskom sistemu samo su tzv. kolektivistička društva (društvo sa ograničenom odgovornošću, komanditno društvo na akcije i akcionarsko) društva-institucije i imaju pravni subjektivitet, dok ga društva-ugovori (javno trgovačko i komanditno) – individualistička društva nemaju. U angloameričkom sistemu company (corporation) jesu društva-institucije i imaju pravni subjektivitet, dok su razne vrste partnership a društva-ugovori i bez pravnog su subjektiviteta (što važi i za komanditno društvo jer mu pravni poredak ne priznaje subjektivitet, iako se upisuje u registar). Vid. L. C. B. Gower, *Principles of Modern Company Law*, London, 1992, 3–8; Terence Prime, Gary Scanlan, *The Law of Partnership*, London, 1995, 1–80, Robert Hamilton, *The Law of Corporations*, Minnesota, 1991, 16–20.

[62] Značaj ovog instituta posebno se ogleda na dva terena: prvo, na planu pravne valjanosti ugovora o društvu (da li društvo može biti podvrgnuto ništavosti ili ne) i, drugo, na planu pravne kvalifikacije ugovora o društvu (razgraničenje ovog ugovora od drugih različitih formi pravne saradnje – udruženje, nepodeljena imovina, sindikat, konzorcijum, pul, interesna grupacija, sistem glavnog izvođača i podizvođača, razne forme građanskog ortakluka, kao i raznih imenovanih ugovora: prodaja, izdavački ugovor, zajam i kredit, zakup, ugovor o radu i slično). Tako: I. Tchotourian, 14–15.

[63] U francuskoj teoriji se ističe da je pojam kauze kod ugovora o društvu širi od pojma *affectio societatis:* G. Naffah, 236.
U srpskom pravu kauza (osnov) se ubraja u opšte uslove za zaključenje punovažnog ugovora (pored sposobnosti ugovaranja, saglasnosti izjavljenih volja i predmeta, a kad je to posebno propisano ili ugovoreno, i forma ugovora): ZOO, čl. 51–52.

teoriji i praksi, razume se, imaju svog odraza i u pogledu pravnih posledica nepostojanja zajedničke namere ovakve prirode. Osnovno pravno pitanje koje se u vezi nepostojanja *affectio societatis* članova određenog privrednog društva postavlja jeste pitanje da li po ovom osnovu može nastati ništavost takvog društva (*affectio societatis* osnov ništavosti društva), nezavisno od činjenice da li je inače ništavost privrednih društava izuzetna pojava ili ne.

Ništavost osnivačkog akta i time registracije društva (odnosno samim tim ništavost društva) izuzetno je retka pojava zbog preventivne kontrole pri upisu u registar (sud, upravna organizacija), a u nekim zemljama (Nemačka) postoji i obavezna notarijalna forma osnivačkog akta (i svih promena), što uglavnom sprečava postojanje takvog osnova. Uz to, tu je i institut tzv. regularizacije osnivačkog akta koji ima elemente ništavosti u ostavljenom roku (podnosiocu prijave upisa) od organa koji vodi postupak upisa u registar.[64]

U EU je „ništavost privrednog društva" (ništavost osnivanja) uređena tzv. Prvom direktivom (član 11): utvrđuje šest osnova „ništavosti," te nacionalna prava članica ne mogu utvrditi više osnova, ali mogu manje ili čak i ne poznavati institut ništavosti osnivačkog akta privrednog društva, uz pojačanje mera njegove prethodne kontrole (pre registracije). Tu direktivu zamenila je tzv. Kodifikovana direktiva (2017).[65] Kodifikovana direktiva (član 12) zadržava iste osnove ništavosti iz odredbe člana 11 tzv. Prve direktive i uređuje ih strogo limitativno i imperativno: 1) ako ne postoji osnivački akt ili ako nije postupljeno po pravilima preventivne kontrole ili zahtevanih pravnih formalnosti, 2) ako je predmet delatnosti kompanije nezakonit ili suprotan javnom poretku, 3) ako osnivački akt ili statut ne sadrži ime kompanije, iznos pojedinačnog upisa kapitala, ukupan iznos upisanog kapitala ili predmet

Kauza daje odgovor na pitanje zašto se neko obavezuje – kauza je razlog pravnog obavezivanja. Kauza ima svoje subjektivno poimanje (svodi se na unutrašnju volju – motiv obvezivanja), objektivno poimanje (ekonomski fakt – ekonomski cilj posla) i mešovito – subjektivno-objektivno. Svaka ugovorna obaveza mora imati dopuštenu kauzu (osnov). Izostanak postojanja kauze, prividnost kauze ili nedopuštena kauza (protivna prinudnim propisima, javnom poretku ili dobrim običajima) vode ništavosti ugovora. Kauza (osnov) obaveze ne mora biti izražena u ugovoru – oborivo se pretpostavlja da postoji. Vid. S. Perović, 323–338; M. Karanikić Mirić, 309–310 i 317–324.

Institut kauze kao opšteg uslova za zaključenje ugovora u srpskom pravu preuzet je iz francuskog Građanskog zakonika (Code civil, art. 1108 i 1131–1133), dok ovaj institut nije nikad postojao u švajcarskom, britanskom i nemačkom pravu. Reforma francuskog Građanskog zakonika (Code civil, 2016, art. 1128, 1162 i 1168–1170) na formalnom planu ukinula je institut kauze kao opšteg uslova za zaključenje ugovora (mada ima shvatanja da je promena više terminološka nego suštinska) i umesto nje propisala „dopuštenu i određenu sadržinu ugovora" (pod njom se podrazumevaju „sve obaveze koje iz njega nastaju, odnosno svi njihovi predmeti)". U relevantnoj srpskoj pravnoj građi ističe se da je „kauza obligacije nestala, fokus je pomeren na protivčinidbu, a predmet obligacije zamenjen je sadržinom ugovora". Vid. Marija Karanikić Mirić, 312–317.

[64] Stefan Grundmann, *European Company Law*, Cambridge, 2012, 153–154, 187–188.

[65] Directive EU relating to certain aspects of company law – codification (Kodifikovana direktiva kompanijskog prava EU), 2017/1132, OJ L 169/17.

delatnosti kompanije, 4) propuštanje postupanja po odredbama nacionalnog prava koje se tiču uplate minimalnog iznosa kapitala, 5) nesposobnost svih osnivača, 6) ako je, suprotno nacionalnom pravu koje reguliše kompanije, broj osnivača manji od dva. Primetno je da taj relevantni kompanijskopravni izvor prava u EU ne operiše institutom *affectio societatis* kao mogućim osnovom ništavosti trgovačkog društva (ali ni osnovima ništavosti ovog društva propisanim opštim pravilima ugovornog prava), što je podelilo francusku pravnu teoriju i sudsku praksu u pogledu toga da li ovo i dalje mogu biti osnovi ništavosti ovih društava.[66] Srpski zakonodavac jedan isti institut – „ništavost društva" – razlaže na praktično tri podinstituta, na način koji nije pravno konzistentan: *ništavost osnivačkog akta i time ništavost društva* (utvrđuje zakon koji uređuje privredna društva), *ništavost registracije društva koja sama po sebi ne znači i ništavost društva* (utvrđuje zakon koji uređuje registraciju privrednih subjekata).[67] Tako zakon koji uređuje privredna društva sadrži limitativno propisane osnove ništavosti osnivačkog akta: 1) nepostojanje bitnih elemenata osnivačkog akta propisanih zakonom za svaku formu društva, 2) delatnost suprotna prinudnim propisima ili javnom poretku, 3) nepostojanje propisane pismene forme, 4) pravna i poslovna nesposobnost svih osnivača u momentu potpisivanja osnivačkog akta, dok zakon koji uređuje postupak registracije privrednih subjekata reguliše ništavost registracije osnivanja privrednog društva i osnove te ništavosti koji ne moraju biti i osnovi ništavosti društva: 1) ako su u prijavi navedeni neistiniti podaci (eventualno „pozajmljeno lice" – fiktivni ili simulovani član ili prevara ako se dokaže), 2) ako je registracija izvršena na osnovu lažnog dokumenta, dokumenta izdatog u nezakonito sprovedenom postupku ili dokumenta sa neistinitim činjenicama (mogući institut prevare ugovornog prava) i 3) ako postoje drugi zakonom predviđeni razlozi – *osnovi ništavosti osnivačkog akta* iz zakona koji uređuje privredna društva, kao i osnovi ništavosti iz zakona koji uređuje obligacione odnose).[68] U svakom slučaju, ništavost utvrđuje sud (razlozi mogu biti i otklonjeni do glavne rasprave – tzv. regularizacija akta i društva – usklađivanje sa zakonom, uključujući i uspostavljanje eventualno nedostajućeg elementa *affectio societatis*),[69] a ništavost deluje samo *pro futuro*

[66] I. Tchotourian, 110-146.

[67] Tatjana Jevremović Petrović, „Ništavost osnivačkog akta u srpskom pravu", *Pravo i privreda*, br. 4 –6/2017, 71–94; francuska teorija i praksa (zakonodavna i sudska) koriste jedinstven institut ništavost društva (na osnovu izričite odredbe u zakonu: nepostojanje bitnih elemenata osnivačkog akta, nedozvoljenost predmeta, fiktivno društvo, opšta pravila ugovornog prava o ništavosti, prevara – pri čemu najveći broj imperativnih normi u zakonu nije sankcionisan ništavošću, već se za klauzule u osnivačkom aktu društva koje su im suprotne smatra da nisu ni napisane): M. Cozian, A. Viandier, F. Deboissy, 66–75.

[68] Upor. ZOPD, čl. 13; Zakon o postupku registracije u Agenciji za privredne registre (ZOPRuAPR, čl. 33), *Službeni glasnik RS*, br. 99/11, 83/14, 31/19 i 105/21; Zakon o obligacionim odnosima (ZOO, čl. 103), *Službeni glasnik SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89; *Službeni list SRJ*, br. 31/93, i *Službeni glasnik RS*, br. 18/20.

[69] Privredno društvo koje je osnovano u propisanom postupku i koje je registracijom steklo subjektivitet, a koje ne ispunjava sve uslove za osnivanje, ako regularizacija nije moguća ili nije sprovedena

(*ex nunc*) i vodi postupku prinudne likvidacije društva (*ništavost je dakle izjednačena s prestankom postojanja društva*).[70]

Srpsko kompanijsko pravo, dakle, razdvaja osnove ništavosti osnivačkog akta i time i ništavosti društva, od osnova ništavosti same registracije društva (koji se dele na samostalne osnove ove ništavosti koji ne moraju voditi istovremeno i ništavosti osnivačkog akta i time i ništavosti društva i „pozajmljene osnove" ništavosti: osnovi ništavosti osnivačkog akta i opšti osnovi ništavosti iz ugovornog prava, koji vode i ništavosti registracije društva ali mogu voditi i ništavosti osnivačkog akta i time i ništavosti samog društva). Čini se, dakle, da takvim rešenjem u srpskom pravu nije više otvoreno pitanje da li se osnovi ništavosti u smislu obligacionog prava primenjuju i na ništavost osnivačkog akta privrednog društva i time i na ništavost samog društva (s obzirom na to da osnivački akt ima ugovornu prirodu), kako to izričito omogućuje i francuski zakonodavac.[71]

U svakom slučaju, za temu kojom se u ovom radu bavimo *affectio societatis* nije naveden u smislu mogućeg osnova ništavosti osnivačkog akta i time i ništavosti društva, kao ni u smislu mogućeg osnova ništavosti registracije društva koja ne mora

u odgovarajućem sudskom postupku, oglašava se ništavim. Takvo društvo se u teoriji naziva faktičko društvo – tobožnje društvo (société de fait). Za razliku od faktičkog (tobožnjeg) društva (société de fait) koje je osnovano i upisano u registar, ali koje je ništavo, de facto društvo (société crée de fait) jeste društvo koje nije osnovano u propisanoj formi – nije sačinjen osnivački akt u pisanoj formi (iako on faktički postoji) i nije upisano u registar. Za faktičko društvo postoji registracija i ono je poprimilo formu trgovačkog društva i prema trećim licima, te ga otuda treba tako i prihvatiti, kao i njegove osnivače, zavisno od forme društva, dok de facto društvo nije moguće konstituisati kao subjekta prava prema trećim licima, mada ga je moguće konstituisati u unutrašnjim odnosima (na ovoj osnovi počiva i koncept tzv. tajnog društva). Vid. M. Cozian, A. Viandier, 512; M. Cozian, A. Viandier, F. Deboissy, 520–526; Ph. Merle, A. Fauchon, 679–683; J. Hamel, G. Lagarde, A. Jauffret, 129–136; P. L. Cannu, B. Dondero, 919–927; I. Tchotourian, 69–78.

U francuskoj sudskoj praksi sudovi čak priznaju i izvestan stepen affectio societatis i vanbračnoj zajednici i čak štite poverioce konkubine smatrajući da su dvoje ljubavnika kao članovi ortačkog društva. U nedostatku društva – braka, dakle, ta zajednica može postojati i imati elemente nepodeljenosti (solidarna odgovornost). Osim između vanbračnih drugova, de facto društvo (društvo kreirano kao faktičko) može postojati i između sanaslednika, kao i u nekim poslovnim slučajevima (uzajamna pomoć u seoskim radovima, sistem glavnog izvođača i podizvođača, zajednički troškovi u nekim profesijama – pogotovo u slobodnim profesijama, ugovor o zajmu ili ugovor o plaćenom radu sa učešćem u dobiti). Vid. M. Cozian, A. Viandier, 514–516.

Isto tako, u Francuskoj je suđeno da je odnos između glavnog izvođača i podizvođača odnos koji postoji u de facto društvu (društvu kreiranom kao faktičko), te prestanak plaćanja glavnog izvođača vodi solidarnoj neograničenoj odgovornosti podizvođača. Vid. J. Hamel, G. Lagarde, A. Jauffret, 131–133.

[70] ZOPD, čl. 14, st. 3 i 4; Kodifikovana direktiva (2017), čl. 12. S. Grundmann, 154–155.

[71] *Code civil* (article 1844-10) i *Code de commerce* (art. 235-1). Francuska pravna teorija ne odriče primenu opštih pravila ugovornog prava i na ništavost osnivačkog akta privrednog društva, kada je ništavost apsolutna i svako se može na nju pozvati, bez roka zastarelosti, odnosno prekluzije. Ipak, priznaje se da je ništavost osnivačkog akta privrednog društva, i na ovom i na opštem planu, izuzetno retka pojava u praksi, i to iz dva razloga: prvo, stroga preventivna kontrola suda pri upisu u registar i, drugo, ostavljanje mogućnosti u pokrenutom postupku ništavosti za tzv. regularizaciju situacije (otklanjanje osnova ništavosti u ostavljenom roku). Vid. Ph. Merle, A. Fauchon, 83–88; M. Cozian, A. Viandier, F. Deboissy, 71–72;

nužno voditi (ali zavisno od osnova ništavosti i može voditi) i ništavosti osnivačkog akta društva i time i ništavosti društva. Time ostaje otvoreno pitanje da li osnov ništavosti osnivačkog akta (a takođe i privrednog društva) može biti i utvrđenje nepostojanja *affectio societatis*, mada bi iz limitativnog određenja osnova ništavosti ovog akta u zakonu koji uređuje privredna društva sledilo da to nije moguće jer to nije limitativno utvrđeni osnov ništavosti („osim iz propisanih razloga… osnivački akt ne može se oglasiti ništavim po drugom osnovu").[72] Ipak, kako zakon koji uređuje postupak registracije proširuje te osnove ništavosti privrednog društva iz matičnog zakona koji uređuje privredna društva, i kako pored dva nova imenovana osnova ništavosti (koji u osnovi imaju prirodu prevare ugovornog prava)[73] sadrži i generalni osnov ništavosti „ako postoje drugi zakonom predviđeni razlozi", a upotreba malog slova u reči „zakon" znači ne samo osnovi koje uređuje zakon koji reguliše privredna društva već i drugi zakoni, gde svakako spada zakon koji uređuje obligacione odnose (generalna norma o apsolutnoj ništavosti ugovora i posebni instituti ništavosti: prevara,[74] simulovani – prividni ugovor – fiktivno društvo, zabrana zloupotrebe prava),[75] a kako ovaj zakon poznaje i mane volje (sa kojima se ne identifikuje affectio

[72] ZOPD, čl. 13, st. 2.

[73] ZOO, čl. 65.

[74] I. Tchotourian, 147–165.

[75] „Ugovor koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima ništav je ako cilj povređenog pravila ne upućuje na neku drugu sankciju ili ako zakon u određenom slučaju ne propisuje što drugo" (ZOO, čl. 103). Institut prevare (ZOO, čl. 65), institut prividnog (simulovanog) ugovora (ZOO, čl. 66), institut zabrane zloupotrebe prava (ZOO, čl. 13).
U francuskoj teoriji ističe se da ništavost društva može postojati samo po osnovima striktno propisanim zakonom. U prvom redu, osnov ništavosti društva je *ništavost osnivačkog akta* (po opštim pravilima građanskog prava: mane volje, nesposobnost ugovornih strana, nedozvoljenost predmeta delatnosti, nepostojanje kauze, nepostojanje bitnih elemenata, nedostatak propisane forme, prevara), osim ako dođe do njegove regularizacije (usklađivanje sa zakonom, uspostavljanje *affectio societatis*). U principu, odriče se mogućnost ništavosti osnivačkog akta društva kapitala zbog mana volje i nesposobnosti ugovornih strana. Ništavost će uslediti i u slučaju *prevare* (*fraus omnia corrumpit*). Ništav je u odnosu na treća lica i simulovan ugovor (fiktivno društvo), ali je punovažan disimulovan ugovor (ako se dokaže). Ako je reč o pozajmljenom imenu osnivača, *lice – pozajmljeno ime* lično je odgovorno prema društvu, ostalim članovima i savesnom trećem licu (a za društvo se može primeniti institut prevare ako se dokaže). Ništavost društva ne mora uslediti ako je osnivački akt *delimično ništav* (npr. u odnosu na neke osnivače koji nemaju poslovnu sposobnost). Ništavost ne mora uslediti ni kada se radi o nekim nedozvoljenim klauzulama za koje se smatra da nisu ni napisane (npr. clausula leonina). U francuskom pravu, *nedostatak formalnosti registracije i objave* tradicionalno se smatraju apsolutnom ništavošću jer nemaju za cilj da zaštite osnivače već treća lica, s tim što se priznaje da to u praksi skoro i ne postoji. Francuska teorija i praksa generalno, međutim, smatraju da ništavost privrednog društva kao institut ima lošu reputaciju i *zalažu se za obeshrabrivanje ovih postupaka i ohrabrivanje instituta koji bi otklanjali osnove ništavosti:* preventivna kontrola, „razređivanje" osnova ništavosti (ugovorni kapacitet, kauza, saglasnost, predmet, prevara i zloupotreba prava, simulovani i fiktivni članovi, specifični osnovi vezani za prirodu ugovora o osnivanju privrednog društva; pooštravanje uslova za podnošenje tužbe za ništavost – zastarelost tužbe, mogućnost regularizacije; ublažavanje dejstava ništavosti: odsustvo retroaktivnosti, zaštita trećih savesnih lica; uvođenje *subinstituta ništavosti*: *klauzule koje se smatraju da nisu napisane*, *tužba za regularizaciju*, tužba

societatis kao osnov ništavosti (relativna ništavost, rušljivost), to se čini da affectio societatis može biti ovaj osnov ništavosti ugovora o društvu (s tim što njegov izostanak ne isključuje moguću regularizaciju, bilo da nedostaje kod samo jednog člana društva, manjine ili većine, ali ne i ako nedostaje kod svih članova društva).[76]Takav stav zauzima i deo francuske teorije (koja je inače jako podeljena u ovom pogledu) i sudska praksa (koja takođe nije uniformna) koji su nosioci gledišta da je ovaj institut shvaćen u svom subjektivnom smislu neodvojiv element osnivačkog akta trgovačkog društva – odsustvo *affectio societatis* osnov je ništavosti privrednog društva jer se društvo tada smatra fiktivnim (a fiktivno društvo je ništavo a ne nepostojeće).[77]

Srpsko kompanijsko pravo, bez sumnje, nije zaljubljeno u institut ništavosti društva (moguć zbog ugovorne prirode u načinu nastanka, mada kod svih društava sa pravnim subjektivitetom, ipak, ništavost osnivačkog akta ne vodi automatskoj ništavosti – prestanku postojanja društva nastalog na njegovoj osnovi, već društvo

za pokretanje pitanja odgovornosti za ništavost; drugi mogući supstituti ništavosti društva: *nepostojeće društvo,* ništavost same registracije): P. L. Cannu, B. Dondero, 227–243; J. Hamel, G. Lagarde, A. Jauffret, 129–130 i 133–134; M. Cozian, A. Viandier, F. Deboissy, 66–75.

„Ako je neki član bio samo pozajmljeno ime da bi omogućio nekom drugom da stekne i eksploatiše neko dobro pod pokrićem građanskog društva, tada nije bilo ni zajedničke volje članova, ni zajedničkih uloga, ni podele dobiti ili pokrivanja gubitaka; prema tome, društvo ovako konstituisano je fiktivno i sva aktiva (imovina), naročito sve nepokretnosti koje je takvo društvo steklo, moraju biti vraćene njihovim pravim vlasnicima" – *Rev. sociétés* 1974, 740, note Sortais, u: J. P. Valuet, A. Lienhard, P. Pisoni, 9.

„Čim je utvrđeno da je društvo bilo društvo fasada, bez obavljanja delatnosti, čiji je kapital skoro u potpunosti posedovao upravljač sa svojom suprugom i da se ovaj angažovao koliko u ime društva toliko i u svoje ime, sledi da je upravljač autor simulovanih poslova i kao takav lično je odgovoran prema poveriocu naknade koja mu je obećana (preuzeta) od strane društva", Cour de Paris, 28. oct. 1999, Bull. Joly 2000, 219, u: J. P. Valuet, A. Lienhard, P. Pisoni, 9.

U nemačkom pravu: Zakon o društvu sa ograničenom odgovornošću (GLLA, sec. 75), *Federal Law Gazette*, Nr. 1892/477; 1898/846; 2004/3166, 3214; 2005/837; 2006/2553; 2007/542; 2008/2026, 2586; 2009/1102, 2479, 2509 smatra da se većina nedostataka osnivačkog akta, i pored zahtevne prethodne kontrole (notarska priroda), otklanja samim činom registracije. Ipak, ozbiljniji i važniji nedostaci (ako osnivački akt nema odredbe o minimalnom osnovnom kapitalu, ako ne sadrži odredbe o svrsi kompanije a nedostatak nije otklonjen jednoglasnom odlukom skupštine članova društva) mogu voditi njegovom poništaju od strane suda, po podnetom zahtevu bilo kog člana društva ili člana nadzornog odbora ili direktora. *U principu, radi se o istim osnovima koji obavezuju sud da po službenoj dužnosti pokrene postupak prinudne likvidacije kompanije*. U meri u kojoj su ovi osnovi identični, preduzeti koraci mogu voditi ili likvidaciji kompanije ili deklarisanju ništavosti koja, suprotno opštim pravilima ugovornog prava, ne vodi dejstvu od nastanka kompanije *(ex tunc),* već samo od trenutka proglašenja ništavim upisa u registar – pro futuro *(ex nunc),* što je dejstvo i likvidacije društva. Vid. Meister Burkhardt, Martin Heidenhain, Joachim Rosengarten, *The German Limited Liability Company*, Frankfurt am Main, 2010, 97–98.

[76] Svi osnovi ništavosti privrednog društva mogu biti regularizovani (dovedeni u sklad sa zakonom), osim nedozvoljenosti predmeta delatnosti: Više: I. Tchotourian, 45–69.

[77] *Ibid*., 31–45, 83–110. Suprotno: „Kada titulari udela društva s ograničenom odgovornošću priznaju da od početka nisu imali affectio societatis nužan za konstituisanje društva, takvo društvo u suštini se pokazuje kao društvo koje nikad nije postojalo i pseudočlanovi se mogu pozivati na prevaru imperativnih normi zakona, ma koliko bilo njihovo učešće u toj prevari" – Civ. 3, 22 jun 1976, D 1977, 619, note Diener, u: J. P. Valuet, A .Lienhard, P. Pisoni, 10.

mora da prestane postojati na način predviđen zakonom), pre svega zbog potrebe zaštite savesnih trećih lica s kojima takvo društvo posluje do utvrđenja eventualne ništavosti, otuda u meri u kojoj ga i ne isključuje svodeći ga na izuzetak, propisuje niz specifičnosti ovog instituta u odnosu na ugovorno pravo (suženje osnova, pravno dejstvo *pro futuro*, forme preventivne kontrole ugovora o društvu, propisivanje rokova za utvrđenje ništavosti i restrikcija aktivne legitimacije za podnošenje tužbe za utvrđenje da je „registracija osnivanja privrednog društva ništava" na „lica koja imaju pravni interes",[78] delimična ništavost,[79] fikcija da neke nedozvoljene klauzule nisu napisane, mogućnost tzv. regularizacije – dovođenje u sklad sa zakonom i to od strane samog društva i članova društva, razdvajanje instituta ništavosti osnivačkog akta i time i ništavosti društva od instituta ništavosti same registracije društva i slično). Postojanje tih i drugih brojnih specifičnosti ništavosti ugovora o društvu i ništavosti privrednog društva u odnosu na opšta pravila o ništavosti ugovora iz sfere ništavosti i pogotovo mogućnosti regularizacije (osim nedozvoljene delatnosti) – dovođenje u sklad sa zakonom od strane samih članova društva i društva, a što, po opštim pravilima o ništavosti, nije moguće kod osnova apsolutne ništavosti, to se čini da ništavost ugovora o privrednom društvu i samog društva ima prirodu relativne ništavosti (rušljivosti) u smislu ugovornog prava, a ne apsolutne ništavosti.

VII Umesto zaključka

Institut *affectio societatis*, koji izrekom kao takav ne prepoznaje srpski zakon koji uređuje privredna društva, ali koji, po našem uverenju, implicitno pretpostavlja, poput kauze (osnova), koji zakon koji uređuje obligacione odnose formalno uređuje ali ne zahteva da izričito u ugovoru bude izražen, s obzirom na to da se oborivo pretpostavlja da postoji – važan je institut prava privrednih društava. Ovo najmanje po dva osnova: prvo, za kvalifikaciju postojanja i pravnovaljanosti ugovora o osnivanju privrednog društva, takvog postojanja privrednog društva i određenja člana društva (društvo nije fiktivno, nije ništavo, član nije fiktivan ili „pozajmljeno ime") i, drugo, za razgraničenje ovog ugovora od brojnih drugih ugovora ugovornog prava koji mogu

[78] ZOPRuAPR, čl. 33.

[79] Delimična ništavost (ZOO, čl. 105). U francuskom pravu od osnova ništavosti treba razlikovati klauzule koje se smatraju nedozvoljenim, te se smatra kao da nisu ni napisane (primena principa „korisno se štetnim ne kvari"), ali ne vode ništavosti društva. U ove klauzule spadaju: lavovske klauzule; klauzule koje upravi daju primanja koja nisu utvrđena zakonom; klauzule o fiksnoj dividendi članova nezavisno od dobiti; klauzule koje ograničavaju slobodu opoziva predsednika upravnog odbora; klauzule koje određuju da upravni odbor odlučuje valjano s manje od polovine članova; klauzule koje su suprotne nadležnosti skupštine da promeni statut; klauzule koje ograničavaju pravo svakog akcionara da glasa pisanim putem ili da prisustvuje sednici; klauzule koje nameću većinu iznad 75% za promenu statuta; klauzule koje ograničavaju podizanje tužbe za društvo (derivativna tužba). M. Cozian, A. Viandier, 83–84; I. Tchotourian, 78–80.

sadržati neke klauzule koje ih približavaju ugovoru o društvu, kao i za razgraničenje ovog ugovora od nekih drugih organizacionih formi obavljanja određenih delatnosti koje nemaju prirodu privrednog društva (*de facto* društva – društva kreirana kao faktička, tajna društva, udruženja, poslovna udruženja, kooperative, sindikat banaka, pulovi osiguranja, ekonomske interesne grupacije, fondacije i drugo) ili za razgraničenje formi nepodeljene imovine.

Institut *affectio societatis* u svom subjektivnom poimanju svodi se na psihološki pojam „zajedničke namere" za ostvarivanjem određenog „zajedničkog ekonomskog interesa" (dobit) udruživanjem određene ekonomske vrednosti (ulog) i uz zajedničko snošenje rizika, što je objektivni fakt (objektivno poimanje), dakle u svojoj celovitosti odražava ga subjektivno-objektivno poimanje (mešovito određenje). Za razliku od objektivnog fakta koji je kao materijalizovan lako dokaziv, subjektivno određenje kao psihološki pojam nije vidljivo kao materijalni fakt, ali je dokazivo i pretpostavljivo (oboriva pretpostavka) da postoji i kad nije izraženo, i to celovitom sadržinom ugovora (poput evolucije instituta kauze u francuskom pravu na koji se više ne gleda kao na opšti uslov za zaključenje ugovora, već se njegovo postojanje dokazuje na osnovu „dopuštene i određene sadržine ugovora"). Uostalom, i institut tumačenja nejasnog ugovora ili pojedinih ugovornih odredaba svodi se na utvrđivanje „zajedničke namere ugovarača" (što je inače i ciljna funkcija instituta *affectio societatis*), što, iako psihološki fenomen, poput subjektivnog određenja ovog instituta, ima svoje zakonsko utemeljenje u srpskom ugovornom pravu.[80]

Sve u svemu, *affectio societatis* može biti od značaja u pravu privrednih društava i, s puno opravdanja i argumenata, može biti stavljen u isti rang s drugim elementima neophodnim za postojanje privrednog društva (ulog, dobit, rizik). To važi za sve forme privrednih društava, s tim što je svakako jače izražen kod zatvorenih formi društava (ortačko, komanditno, društvo s ograničenom odgovornošću), i to ne samo u fazi osnivanja društva već i tokom trajanja društva, i to kod svih članova društva. Najbolji dokaz za to je činjenica da gubitak tog elementa privrednog društva, pod određenim okolnostima, kod nekog člana društva lica ili kod članova društva s ograničenom odgovornošću koji imaju zakonom propisani iznos kapital učešća može voditi prestanku postojanja društva odlukom suda ili do istupanja takvog člana društva iz društva. Takva uloga *affectio societatis* postoji i kod akcionarskog društva prilikom osnivanja društva (sticanje statusa člana društva), a docnije tokom života društva nešto se relativizuje, naročito kod akcionarskog društva čijim se akcijama trguje na organizovanim finansijskim tržištima, pogotovo kada kupci tako kupljenih akcija više imaju status investitora (akcije bez prava glasa) nego akcionara. Ipak, da *affectio societatis* ne iščezava sasvim ni kod tih društava, dokaz je činjenica da pod određenim okolnostima gubitak identifikacije s društvom može voditi prestanku društva odlukom suda.

[80] ZOO, čl. 99.

Najzad, *affectio societatis* ima naglašeni značaj kod društava bez pravnog subjektiviteta ili drugih organizacionih formi ili nepodeljenih formi imovine (*de facto* društva – društva kreirana kao faktička, tajna društva, društva lica u nekim pravima, udruženja, nepodeljena imovina i slično), koje forme često nastaju faktički bez ikakvog formalnog akta, te upravo okretanje ovoj ustanovi vodi njihovoj legitimaciji, identifikaciji i pravnoj kvalifikaciji (kod društava s pravnim subjektivitetom tu ulogu u dobroj meri može obaviti taj subjektivitet i zahtevi forme njegovog sticanja). Sve to može voditi samo jednom zaključku – pojam *affectio societatis* nije jednoznačan već pluralan i nije nepromenljiv već promenljiv. Upravo ta varijabilnost ovog pojma omogućuje i njegovu adaptabilnost i prilagodljivost promenjenim faktima. To je i ključni razlog objašnjenja ovog instituta davanjem primata subjektivnom poimanju („namera udruživanja i sticanja svojstva člana društva") ili objektivnom poimanju („ostvarenje zajedničkih ekonomskih interesa sticanja dobiti i snošenja rizika na bazi ravnopravnosti članova") ili subjektivno-objektivnom poimanju (mešovita teorija objašnjenja *affectio societatis*).

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UDC 347.72/.73
10.5937/TokOsig2502219V

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AFFECTIO SOCIETATIS AND COMPANY LAW

ORIGINAL SCIENTIFIC PAPER

Abstract

The concept of *affectio societatis* in company law generates considerable controversy. First, regarding whether it exists as a legal construct at all. Then, if its existence is acknowledged, both legal theory and judicial practice differ on its role. The French legal doctrine and judicial practice have discussed this concept most extensively, as well as the concept of cause, while other relevant jurisdictions, such as German, British, and Swiss law, recognize neither of these concepts. Serbian company law does not explicitly recognize the *affectio societatis* as a named legal institution, but the question remains whether it can be presumed to exist, similar to the institution of cause, which the Serbian legislator does name but does not require to be explicitly stated in a contract, as it can be presumed (as a rebuttable presumption) to exist and to have significance as a general condition for concluding a contract, like other such general conditions (legal capacity of contracting parties, mutual consent, lawful and permitted subject matter, cause/basis, and prescribed or agreed form).

This paper discusses the conceptual definition of *affectio societatis*, stating that it has both a subjective definition (a common will to conclude a contract for establishing a company and acquiring the status of a member of that company) and an objective definition (contributing a certain share for the purpose of conducting specific activities to generate profit under shared risk). Based on these premises, the paper concludes that this is a concept different from other general contractual conditions, especially from mutual consent and cause. Ultimately, it concludes that the existence of *affectio societatis* in a company formation contract can be presumed by establishing both its subjective and objective components (determining the common intentionion of the contracting parties), and it emphasizes the importance of its existence due to its multiple roles.

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The role of *affectio societatis* can be synthesized into three areas. First, to differentiate a company from other organizational forms that may have the nature of an association but not of a legally valid commercial company (civil associations, de facto companies, secret companies, or fictitious entities). Second, to distinguish a company contract from other contracts that may contain some company-like elements but not all (employment contracts, loan or credit agreements, deposit agreements, consortium agreements, contractor-subcontractor agreements, etc.). Third, to distinguish companies from other organizational forms (economic interest groupings, associations, cooperatives, foundations, banking syndicates, insurance pools, etc.). This gives the concept a status comparable to other general conditions for concluding a company formation contract and other essential elements of such a contract, whose absence could render both the contract and the company established upon it null and void; yet, *affectio societatis* remains rare in company law due to the need to protect third parties who act in good faith when doing business with the company.

Keywords: concept of *affectio societatis*, role of *affectio societatis*, company, company formation contract, nullity of a company.

I LEGAL FRAMEWORK

The question of the conceptual definition of the *affectio societatis* and its significance for company formation contract and the company itself, in any case, requires a legal definition. For this purpose, the relevant legal source is the Company Law of Serbia.[2] Firstly, the definition of a company: "A company is a legal entity that conducts activities with the aim of making a profit".[3] Secondly, the definition of the form of the formation act: "The formation act… shall be made in written form and registered in accordance with the law on registration".[4] Finally, the definition of the grounds for the nullity of the formation act as follows: "The formation act shall be null and void if:

1) it does not have the form prescribed by this law, or
2) the activity of the company specified in the formation act is contrary to mandatory regulations or public order, or
3) it does not contain provisions regarding the company's business name, the contributions of the members, the amount of the share capital, or the principal activity of the company, or

[2] Company Law - CL, *Official Gazette of RS*, Nos. 36/11, 99/11, 83/14 – other law, 5/15, 44/18, 95/18, 91/19, 109/21.
[3] CL, art. 2.
[4] CL, art. 11, par. 8.

4) all signatories were legally or business incapable at the time of concluding the formation act.

Apart from the reasons prescribed in paragraph 1 of this article, the formation act cannot be declared null on any other basis."

The conceptual definition of a company under Serbian company law, as well as the definition of the form of the formation act of the company and, finally, the specification of the essential elements of this formation act, whose absence alone can lead to the nullity of the act, raises a significant legal question not only of a theoretical nature but also of a practical one. This question pertains to the legal relevance of the *affectio societatis* concept in Serbian company law, which, as such, does not appear in the relevant legal sources of Serbian company law with a clearly defined legal effect. Similar dilemmas have been raised in French legal theory[5] and judicial practice, considering that the relevant French legal sources also do not explicitly name the *affectio societatis* as an essential element of the company formation contract.[6] This pertains to the French Civil Code (*Code civil*), which defines the concept of a company in one provision, without explicitly mentioning it. However, another provision, defines the goal of a company, from which it is undeniably implied that this concept is presumed.[7]

II THE CONCEPT OF *AFFECTIO SOCIETATIS*

The conceptual definition of the *affectio societatis*, as well as its legal relevance for the contract of formation of a commercial company and the qualification of a commercial company, is not uniform in legal theory. Thus, the definition of this

[5] See Ivan Tchotourian, *Vers une définition de l' affectio societatis lors de la constitution d' une société*, Paris, 2011; Vincent Cuisinier, *L' affectio societatis,* Paris, 2008; Zdzislaw A. Neubauer, *L' affectio societatis dans la sociétés de capitaux,* thèse, Lille, 1994.

[6] For these purposes, French legal doctrine and case law often refer to several provisions of the *Code civil*:
"A company is formed by two or more persons who agree, by contract, to carry out an enterprise by contributing property or labor with the aim of sharing any resulting profit or savings. A company may also be formed, in cases provided by law, by the will of a single person. Members of the company undertake to share in the company's losses." (art. 1832).
"A company may carry out any activity permitted by law and must be formed in the mutual interest of its members. It must be managed in the interest of the company, taking into account social and environmental issues." (art. 1833).
"A company may be declared null only for violation of the provisions of Article 1832, art. 1833, or for any general ground of contract nullity. Any clause contrary to mandatory provisions of this section (titre), whose violation is not sanctioned by nullity, shall be deemed unwritten. The nullity of acts or decisions of the company's bodies may result only from the violation of mandatory provisions of this section, except for the final paragraph of Article 1833, or from general grounds of contract nullity." (art. 1844-10).

[7] Cf. *Civil Code* of 1804, arts. 1832–1833, 1844-10; see also: *Code de commerce* of 1807, art. 235-1 (version in force as of 2025). I. Tchotourian, 165-179.

term cannot be provided in a clear and distinct manner. It is certain that this Latin term is a creation of legal theory and judicial practice (without a uniform definition and with a wide range of interpretations, including the denial of its usefulness), and in this sense, it has its originality.[8] French legal theory has written most extensively on this institution, attempting to find its source in the relevant legal regulation. For these purposes, reference is most often made to Article 1833 of the French Civil Code (*Code civil*), which stipulates that "a company is formed for the mutual interest of its members". Some theorists consider that this "mutual interest" is a synonym for the concept of *affectio societatis*, while others see it as referring to the "intention (will) to associate".[9] "Mutual interest" is defined as the collective interest of the members to derive individual profit from the collective gain. This interest consists of two elements: generation of profit by the company and its distribution among the members on an equal basis. In this sense, it is considered that there is a "community of interest among the members," where their interest is found, establishing a close relationship between "mutual interest" and "the interest of the company".[10] However, despite this closeness and, in some views, even the assimilation of "mutual interest" and "the interest of the company", recent judicial practice increasingly supports the autonomy of the concept of "mutual interest". In any case, "the community of interest among the members" entails voluntary association of the members and is characterized by active and interested participation, convergence of interests[11]

[8] Patrick Serlooten, L'affectio societatis, une notion à revisiter, *Mélanges en l'honneur de Yves Guyon,* Paris, 2003, 1007–1017.

[9] Some authors discuss the ambiguity of this concept and define it as a "will to associate," i.e., as the consensus of wills of all participants in the company formation contract. Even though it may be present in every company form, including single-member companies, its content is variable and depends on the specific motivation of the members. Thus, what may begin with closeness between members "shoulder to shoulder" may end up "back to back." It is further added that a common rule in all companies is that each member has the right to participate in the management of the company and in collective decision-making, without any specific sanction, except in cases of potential abuse of minority rights. It is also considered that a person who purchases a share on the stock exchange has no intentionion of participating in the company's operations but is merely an investor ("Does someone who buys a single share just to monitor what is happening in the company have the soul of association?"— the distinction between a 'controlling' member and a mere investor): see Maurice Cozian, Alain Viandier, Florence Deboissy, *Droit des sociétés*, Paris, 2006, 64–65. Authors who define this concept as an "intentionion to associate" argue that the French Civil Code, in its definition of a commercial company, does not expressly contain this element (*Code civil, art. 1832*), but consider that the absence of *affectio societati*s leads to the nonexistence of the company: Philippe Merle, Anne Fauchon, *Droit commercial – sociétés commerciales*, Paris, 2001, 60–62. Others add that this element is not even the notion of a "joint undertaking" found in the same provision of the French Code civil: *Paul Le Cannu, Bruno Dondero, Company Law,* Paris, 2012, 58–62. Finally, some emphasize that French court law, even more than this provision of the Code civil, insists that there is no company without the "intentionion (will) to associate," which it calls *affectio societatis*: Yves Guyon, *Droit des affaires, Tom I – Droit commercial général et sociétés*, Paris, 2003, 130.

[10] I. Tchotourian, 171-172; Dominique Schmidt, „De l'intérêt commun des sociétés", *J.C.P.,* 1994, I, 440.

[11] Affectio societatis is "the will to associate, acceptance of a mutual interest, and convergence of interests": Joseph Hamel, Gaston Lagarde, Alfred Jauffret, *Droit commercial*, Tome I, 2nd edition, Vol. 2, Paris, 1980, 52.

and equality among the members (hence the inadmissibility of the *clausula leonina* – the leonine clause).[12]

The intensity of the intention to join together depends on the type of company - if the risk of the partners is greater (unlimited liability), the *affectio societatis* is more strongly expressed. The smaller the company, the stronger the connection between the founders and members of the company. Even within the same company, the *affectio societatis* is not always equally expressed among all members (e.g., shares with voting rights and without voting rights,[13] the purchase of shares on the stock exchange, or stakes in closed companies, appointed or temporary shareholders who hold the shares of another - actual shareholder,[14] the status of limited partners, minority and majority members, etc.).[15] The *affectio societatis* does not only exist at the time of the formation of the company but continues throughout the duration of the company, as long as the company exists (in general) or at least for as long as a person is a member (individually), and must be present with each member of the company.[16] As *affectio societatis*, the "mutual interest", therefore, exists among all members and all companies, although its intensity varies[17] (there are, however, different views on whether it exists in single-member companies, since, as "a single-member company" is a *contradictio in adiecto*, so it is "mutual interest" in this company - those in favor of its existence argue that the "mutual interest of association" in this company can be seen as the interest of establishing of the company and acquiring the status of a member of that company).[18]

[12] Y. Guyon discusses four modalities of the "mutual interest" that characterizes affectio societatis: first, the voluntary nature of cooperation between two persons, which is considered predominant; second, participation in management, also considered predominant; third, convergence or divergence of interests, a key qualification factor; and fourth, the absence of subordination between members, which enables such qualification. Y. Guyon, 133–136.

[13] In relation to non-voting shares, the question arises whether shareholders who possess only such shares are company members and whether they possess affectio societatis, given their lack of participation in company management, which is regarded as an essential feature for the existence of affectio societatis. French legal theory nonetheless responds affirmatively, since all other elements of this institution exist, and there is a potential possibility for conversion of these shares into voting shares, thereby granting management rights. In any case, in response to the question of whether shareholders possess affectio societatis, French legal theory affirms this, even when participation in management or control is entirely absent, as the shareholder, by purchasing shares, accepts the company's statute and a specific union of interests within the company. J. Hamel, G. Lagarde, A. Jauffret, 54, 58.

[14] Frederic Pollaud-Dulian, L'actionnaire dans les opérations de portage, *Rev. soc. 1999,* 765.

[15] Y. Guyon, 133; Ph. Merle, A. Fauchon, 60–62; M. Cozian, A. Viandier, F. Deboissy, 64–66.

[16] Y. Guyon, 132.

[17] On the nuances in the relationship between the "mutual interest" and affectio societatis, their identification, closeness, and the view that affectio societatis is a broader concept than "mutual interest"—in the sense that the "mutual interest" is only one of the criteria used to assess the existence of affectio societatis, and that affectio societatis may exist without the presence of a "mutual interest" and vice versa, see I. Tchotourian, 171–176.

[18] P. Serlooten, 1012.

Unlike the French legislator, who, despite certain imprecisions in defining the concept of *affectio societatis*, gives space for recognizing this institution through terms such as "joint venture,""mutual interest,"[19] the Serbian company legislator is much more restrictive in this regard, because this institution cannot be clearly identified from the definition of a commercial company, nor from the definition of the nullity of the formation act. However, certain outlines of the institution could potentially be inferred from the contractual nature of the formation act of the commercial company[20] (except for single-member companies), especially from the founding

[19] Georges Naffah, „ L' affectio societatis, un critère qui n' en est pas un", *Mélange en l' honneur de Jean - Jaques Daigre,* Paris, 2017, 235–236

[20] The general requirements of contract law necessary for the validity of a contract (cf. Slobodan Perović, *Law of Obligations*, Belgrade, 1980, 245–366; Marija Karanikić Mirić, *Law of Obligations*, Belgrade, 2024, 200–353) are equally required for this type of contract, given that it also has *obligational effects* - material requirements (*legal capacity of contracting parties* - exclusion of minors and adults deprived of or with limited legal capacity; *subject matter* - legality and definiteness; *consent* - free from error, threat, or coercion; cause - legal basis) and formal requirements (formality – written form, signature certification, registration in the prescribed registry and publication). Defects in consent at the time of the company's founding contract may be significant for its validity, particularly in the case of error (regarding the subject matter, or the person). The contract may be simulated or fictitious - often fraudulent ("façade companies"). Unlike general rules of contract law that apply to contracts with obligational effects, this contract may also have *status-based or institutional effects* (when a company arises from it as a legal entity), and thus certain special rules derive from these effects. Nevertheless, the contractual nature dominates in partnerships, while the institutional nature prevails in capital companies, especially in joint-stock companies. This enables such companies to function through the mechanism of corporate bodies, which govern the company after its incorporation, rather than the founders or subsequent shareholders. However, this is fully true for public joint-stock companies that display all the characteristics of a capital company, but not for limited liability companies (and to some extent also for private joint-stock companies), which retain personal elements even after formation. In such companies, members or shareholders often act instead of corporate bodies. (On the contractual and institutional concept of companies and the view that a company is both a contract and an institution by its nature: Ph. Merle, A. Fauchon, 32–34.) Other authors state that a company is a contract upon its formation, but an institution with legal personality in its functioning (although contractual elements do not disappear completely - not only in partnerships, where they persist almost entirely despite the company's legal personality, but also significantly in limited liability companies, e.g., when unanimity is required to amend the formation act). This is especially true for capital companies, where the "rule of the majority" prevails, making it difficult to align with the contract theory. Also relevant is the very legal personality, which renders the company a "legal being", and especially the company's continuity and the intention to establish it as a lasting entity. (See P. L. Cannu, B. Dondero, 165–171).
The institutional theory of the company also has special forms: enterprise organization theory (confirmed by the single-member company form, which doesn't fit a contractual basis); collective act theory, marked by the convergence of multiple constitutive interests (See P. L. Cannu, B. Dondero, 175–179). These status-based characteristics make this contract specific compared to purely obligational contracts. A company is typically founded for an indefinite time, has corporate bodies, its contract is registered, it allows for the exclusion or withdrawal of a member, disputes can arise between members or with the company, the contract can be amended by majority, and it includes diversity of member rights, minority protections, third-party effects, compulsory dissolution, limited grounds for nullity, nullity has pro futuro effect, and may result in forced liquidation of the company based on nullity. The dominance of the contractual theory of companies in French legal theory is supported by the French legislature – the Code Civil in Article

phase of its formation. It seems that a strong argument in favor of recognizing this concept in Serbian company law can be found in the institution of "the dissolution of the company by court decision" in cases of serious disagreements among the company members that paralyze the functioning of the company (the dissolution of *affectio societatis*), as well as in the institution of a member's withdrawal from the company (the dissolution of *affectio societatis* in such a member).[21] Nevertheless, Serbian legal theory generally does not treat this concept as an essential general condition for the formation of a commercial company (with few exceptions),[22] unlike the treatment of other general conditions in company formation contracts defined by the legal rules on nullity.[23]

III SUBJECTIVE (TRADITIONAL) AND OBJECTIVE (MODERN) DEFINITION OF *AFFECTIO SOCIETATIS*

The definition of *affectio societatis* in the traditional sense in French law (legislation, legal theory, and practice), which promotes this concept in the context of the contract for the formation of commercial companies, as shown from the aforementioned summary analysis, is a subjective understanding.[24] The terms "mutual interest", "joint venture", and the intention (will) to form a commercial company belong to the psychological realm of human activity. French legal theory is aware of the difficulties in proving such intention (will) and argues that evidence of the existence of *affectio societatis* can arise from various indications (indirect evidence), which typically follow after the conclusion of such a contract. The qualification that the contracting parties give to their legal transaction does not necessarily bind the judges, but the rejection of the qualification they attribute to their legal act must be based on "particularly characteristic elements",[25] which is especially important when

1832 defines a company as a contract while broadening the purpose/causa of the company. The Serbian legislator, however, gives preference to the institutional theory, defining a company as a "legal person" (Article 2 of the Company Law), which the French legislator intentionally avoided – although institutional theory provides a bridge to the single-member company, supporting the idea that both theories should be combined (See P. L. Cannu, B. Dondero, 26, 171–186).

[21] CL, arts. 118, 138, 239, 469, 121, 187–188, 192.

[22] Compare: Nebojša Jovanović, Vuk Radović, Mirjana Radović, *Kompanijsko pravo – pravo privrednih subjekata*, Belgrade, 2020, 112–113.
contra: Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *Kompanijsko pravo – pravo privrednih društava*, Belgrade, 2023, 104–105.

[23] Compare: CL, arts. 2, 11, and 13.

[24] *Affectio societatis* is explained as the "intention to be in the company and act as a member of the company". This isn't just a temporary will at the time of the company's formation, but a continuous intention throughout one's membership in the company. Jena Francois Barberi, "Le retour sur l' affectio societatis, une intentionion mal aimée", *Mélange en honneur de Patrick Serlooten,* Paris, 2015, 289–296.

[25] P. Le Cannu, B. Dondero, 58–59.

distinguishing this legal act from sometimes closely related institutions, such as de facto companies, companies created as de facto or fictitious companies.

Recognizing the fragility and vulnerability of the subjective definition of *affectio societatis*, French legal scholars increasingly turn to an objective understanding of the contract for the formation of a commercial company (and thus the existence or non-existence of *affectio societatis*) and its qualification based on the existence of such elements: the existence of capital contributions to the company[26] and the distribution of the company's business results (participation in profits - dividends, bearing the risk of business operations).[27] Furthermore, it is emphasized that many members of capital companies (especially minority shareholders and particularly in publicly listed companies, where buying shares on the stock exchange is essentially an investment contract, not a company contract) are essentially passive members (by law, these are also shareholders with non-voting shares) and do not participate in the management of the company (however, they still have rights to information and latent control, especially institutional investors), where voting rights depend on the percentage of capital participation - "voting by capital" - and not equality (although this may be contractually agreed upon in partnerships, it is less common due to risk, and the rule is "voting by head"). Additionally, *affectio societatis* by its very concept of "mutual interest and intention to join together" is excluded and meaningless in a single-member company (but understood in the sense of the will to establish a company, it has its *ratio*). Finally, some authors believe that *affectio societatis* is fundamentally the will to enter into a business company, and thus cannot serve as a characteristic (essential) element of the definition of the very concept of a commercial (business) company, because it forms a "vicious circle" (*cercle vicieux*).[28]

The turn of a large portion of French legal theory toward the objective definition of the term of a member of a commercial company and, thus, the qualification of the contract formation based on the aforementioned key arguments, has not entirely overshadowed the subjective definition of the term of a member of a commercial company and the concept of *affectio societatis* created on that basis. Namely, even the attempt to define a member of a commercial company based on objective characteristics (the existence of contributions to the company and, on this basis, the acquisition of membership rights in the company - both property and non-property/political rights) has strong counterarguments that reinforce the persistence of the *affectio societatis* concept and its subjective definition. Membership in a company,

[26] "L' *affectio societatis*, which is assessed at the time of the company's formation, cannot be denied by the mere absence of contribution to the company, which only makes such a member a debtor of the company for the obligation undertaken" – Cour de Paris, 10 mars 2004, Rev. Sociétés 2004, n. 1002, in: Jean – Paul Valuet, Alain Lienhard, Pascal Pisoni, *Code des sociétés et des marchés financiers – Commenté* 23 édition, Paris, 2007, 8.

[27] P. Le Cannu, B. Dondero, 65.

[28] A. Viandier, *La notion d' associé,* LGDJ, Paris 1978, No. 77.

for example, can be acquired even without the key objective element - the existence of a contribution to the company, such as the institute of free shares, for example. Additionally, not every contribution to a business venture leads to the formation of a commercial company, which forms the basis for distinguishing it from some closely related institutions (a company created as a de facto, civil society, fictitious company, association, loan agreement, cooperative, etc.), and for these purposes, the existence of the *affectio societatis* concept with a subjective definition is purposeful. Thus, the *affectio societatis* concept continues to exist in the majority of French legal theory (some even speak of a "renaissance of *affectio societatis*")[29] and judicial practice, thereby playing a real and effective role, albeit limited to multi-member companies (conceptually excluded in single-member companies).[30] It is correctly noted in French legal theory that the criticism of the *affectio societatis* concept primarily stems from viewing it as a uniform institution (a singular, monistic concept), whereas it is, in fact, multi-layered (a pluralistic concept).[31] It is simultaneously "both an indicator of the existence of a company, a regulator of the company's life, and a means of distinguishing a company member from related situations."[32]

IV THE ROLE OF *AFFECTIO SOCIETATIS* – DISTINGUISHING COMMERCIAL COMPANIES FROM OTHER SELECTED (IMPORTANT) RELATED INSTITUTIONS

Affectio societatis plays a multifaceted role in the life of a commercial company, as well as in its legal definition, with at least a threefold function. Firstly, it is crucial in determining the existence or non-existence of a company (especially in distinguishing it from a fictitious company or a company created as a de facto company if the company lacks subjectivity).[33] Secondly, it plays a role in distinguishing this contract from other contracts that include clauses from the arsenal of commercial company contracts. Thirdly, it helps in differentiating a commercial company from other forms of association with legal personality or forms of asset association without legal personality (forms of undivided property).[34] Finally, if the concept of the existence of a single-member company is accepted, *affectio societatis* also plays a specific role in the will to establish the commercial company and in becoming a member of the company.[35]

[29] Y. Guyon, 131.
[30] P. Le Cannu, B. Dondero, 66.
[31] Y. Guyon, 132–136.
[32] A. Viandier, 1978, no. 76.
[33] On the dispute: G. Naffah, 241–242.
[34] J. P. Valuet, A. Lienhard, P. Pisoni, 8.
[35] P. Serlooten, 1013 –1017. On the dispute regarding the concept of affectio societatis in single-member companies: G. Naffah, 239–240.

1) Qualification of the Existence of a Company

When it comes to the qualification of the existence or non-existence of a commercial company, it is necessary to distinguish it from two closely related institutions: a company created as a de facto company and a fictitious company.

First, the concept of *affectio societatis*, which in its subjective definition *qualifies a commercial company*, is closely related to the concept of a company established as a de facto company. Namely, if a particular contract has objective elements that would qualify it as a commercial company or a company created as a de facto company (in French practice, the existence of such a company is determined based on the establishment of *affectio societatis* when dividing property after the termination of a non-marital partnership),[36] and the contracting parties have not specifically identified (named) the contract as such, then its qualification may be based on the behavior of those parties. It is correctly stated in this sense that *affectio societatis* is not an autonomous concept unless it is based on the intention expressed through behavior.[37]

Secondly, it is necessary to distinguish a commercial company from a *fictitious company*. A company whose members do not have the intention to behave as its members is, therefore, not a commercial company but a fictitious company (for example, if a person is merely nominally a member of the company, but in fact, their name has been borrowed[38] or it is potentially a disguised single-member company, which legally cannot be established, and there is no intention to unite, but merely to take advantage of the benefits provided by the law to a member of such a company as a single-member one). A company whose members do not intend to behave as members of a commercial company is, therefore, a fictitious company, and as such, it is null and void[39] (despite the relativization of existence, or the mitigation of the grounds for the nullity of companies in corporate law). The nullity of such a company, with its potential qualification as fictitious, is exceptional for several reasons: firstly, the actual intention of the members is difficult to prove, and then, as mentioned earlier, depending on the factual and legal circumstances, there are different degrees of *affectio societatis*, and thus varying *intuitu personae* relationships; secondly, the absence of *affectio societatis* is not the only criterion leading to the qualification of a company as fictitious and, therefore, null (this could also involve fraud, a borrowed name, simulated transactions, secret contracts of another nature, a supposed member

[36] Simple cohabitation between non-marital partners is not sufficient to establish the existence of a partnership. Recognition of affectio societatis and other essential characteristics of a partnership is necessary. Y. Guyon, 61. J. Hamel, G. Lagarde, A. Jauffret, 55–56.

[37] P. Le Cannu, B. Dondero, 59.

[38] Ph. Merle, A. Fauchon, 62.

[39] P. Serlooten, 1013–1014.

with no intention of joining, abuse of rights, and so on – where other rules apply depending on the given basis); and finally, a company can become fictitious during its business life, emptied of its substance ("a façade company"), in which case the rules regarding the dissolution of the company apply depending on the grounds for such a status. Finally, the absence of *affectio societatis*, which potentially leads to the fictitiousness of a company, can exist both for the entire company and for individual members – a *fictitious member*, which, depending on the circumstances, may not lead to the nullity of the company but to the cessation of the status of that particular member within the company.[40]

2) Qualification of the Company Contract and Other Contracts

The concept of *affectio societatis* plays a crucial role in distinguishing a commercial (economic) company and the contract for the formation of this company from other related contracts (which may sometimes be qualified as company contracts created as a de facto company, without subjectivity).[41] This role of *affectio societatis* is of particular importance in the case of its absence, as it can reduce the grounds for the nullity of the formation act of the company and, therefore, the company itself. This is because it is possible to identify another legal transaction within the content of a deal, which is legally valid and corresponds to the true will of the contracting parties. Often, the contracting parties conclude a certain contract without specifying its legal nature or incorrectly qualifying it (for example, qualifying a company contract as a loan agreement due to the risk of failure to return the invested contributions), and it is necessary to determine its nature in order to establish the common intention of the contracting parties. In any case, a commercial company is always based on a contract with specific characteristics (founders and members of the company with special membership rights in that company),[42] never solely on the law or another source or contract that does not have the characteristics of a contract for the formation of a commercial company. The uncertainty of defining the boundaries between related contracts and correct qualification can lead to various fraudulent actions (such as seeking a more favorable tax treatment, etc.). The characteristic of cooperation and association that distinguishes a commercial company is not only a feature of the formation act of the company, but it also appears in some other similar contracts. However, it still has a special nature in the case of a company contract, as it gives the contracting parties the status of company members. Thus, the existence of *affectio societatis*, primarily as a subjective concept, is the best indication of the status of a company member.

[40] P. Le Cannu, B. Dondero, 60–62; Ph. Merle, A. Fauchon, 60–66; M. Cozian, A. Viandier, F. Deboissy, 64–66; I. Tchotourian, 21–194.
[41] P. Serlooten, 1015–1016; G. Naffah, 237–238.
[42] P. L. Cannu, B. Dondero, 62-63.

Firstly, it is necessary to distinguish between the contract for the formation of a commercial company and other contracts that are characterized by participation in profits arising from the subject matter of those contracts. Here, we refer to the contract of sale (which includes a clause regarding the seller's share of the profit from the sold item - a variable pricing clause), the contract of deposit or loan (which contains a clause granting the depositor or lender a share in the profit generated from the depositary's use of the funds – a variable interest rate instead of a fixed one), and lease agreements (with a clause about the lessor's share of the tenant's profit from the leased property).[43] These situations resemble a commercial company contract, where the members contribute some capital to the company with the right to participate in the company's profits (and bear its risks) from the company's activities. The qualification of such contracts (often de facto companies) cannot exist without a clause on profit participation and risk-bearing. Also, the mere inclusion of clauses regarding participation in profits or losses in such contracts does not automatically lead to the qualification of the contract as a company agreement. In fact, the contract for the formation of a commercial company always involves a common goal for the founders ("mutual interest") and the expression of *affectio societatis* (subjective determination as the common intention of the parties to become members of the company), which does not exist in the same way (there are separate interests of the contracting parties) in these and other related contracts[44] (*a common goal and intention to unite*, as well as the materialization of *affectio societatis* – participation in profits and bearing risks, the existence of contributions, and involvement in management and control – are necessary qualifications for acquiring the status of a company member). In contracts of sale, where the seller and buyer typically have separate and often conflicting interests, these criteria do not exist; the same applies to contracts for lease, services, mandate, deposit, transportation, agency, concessions, loan and credit, exchange, publishing,[45] and other contracts that deal with the association of economic entities for achieving goals other than profit generation (e.g., consortium agreements, etc.).[46] Additionally, these contracts do not involve one party's participation in the management of the other party's business ("principle of non-interference", except in loan contracts, where a financial organization might include restrictive credit clauses that affect the company's management). In such cases, the question arises whether this constitutes a loan or a company contract created as a de facto company.[47] There is also no obligation to bear the risks associated

[43] I. Tchotourián, 574–602.
[44] *Ibid*., 483–602.
[45] On the distinction between a company contract and a publishing contract: Y. Guyon, 135; J. Hamel, G. Lagarde, A. Jauffret, 52–53; I. Tchotourián, 549–550.
[46] More: J. Hamel, G. Lagarde, A. Jauffret, 20–58; Y. Guyon, 93–129; M. Cozian, A. Viandier, 53–86; P. L. Cannu, B. Dondero, 63–80; I. Tchotourián, 552–571.
[47] Y. Guyon, 134–135.

with the subject of the contract ("no common risk"). In the case of loan agreements with these clauses, an important element is assessing whether the subject of the contract represents a contribution with the acquisition of the status of a company member or simply a loan, with the lender (creditor). When evaluating the nature of these clauses, an indispensable element for the qualification of the contract is the subjective determination of the existence or non-existence of *affectio societatis* (the intention to unite and acquire the status of a company member) for the qualification of a company or a contract (loan, credit).

Special grounds for distinction arise in the case of the contract for the formation of a commercial company and an employment contract. Unlike other contracts in contractual law (commercial and civil contracts), where there is generally equality between the contracting parties (with specificities based on the type of contract, approach, etc.), in an employment contract, there is a *principle of subordination* of the employer to the employee (despite the relativization of this principle in newer forms of employment contracts). In contrast, a company member is not subordinated to the other members (the management of the company, composed of company members, is authorized by the members), but joins voluntarily and with *affectio societatis* ("mutual interest"), with equality between the members rather than subordination. As such, a company member cannot receive orders from the company's management or participate in the company's control and management (however, some forms of participation in management or co-decision may be possible based on work and not on membership in the company). An employee, in general, receives a fixed or partially variable salary (depending on work results), which is independent of the company's profits and business risks (under normal circumstances). In these frameworks, and based on these grounds, the distinction is made between a company contract and an employment contract, even if the employment contract includes a clause about employee participation in company profits (similar to work involvement). However, such a clause in an employment contract does not turn the employee into a company member with *affectio societatis* (although participation in profits and losses, which are essential components of *affectio societatis*, opens up the possibility of challenging the presumption of the employee's status and the status of a company member). The status of an employee, unlike that of a company member, provides special protection under collective labor agreements and social security regulations.

The clear distinction between an employment contract and a contract for the formation of a commercial company, despite the relativization of the subordination principle in modern forms of employment contracts, is somewhat complicated by the accumulation of the employee's and shareholder's status (employee-shareholder participation in the company's ownership). This introduces different legal institutions (employment contract vs. acquisition of shares in the company), and consequently,

different rights (and obligations) based on each of them considered individually.[48] Sometimes, however, this distinction is not always easy to make, depending on whether the employee is also a majority shareholder or just an equal one.[49] The situation may be further complicated by the possibility of contributions to the company in work or services (such as in service-providing companies or professions like freelance activities, for example). If a member of such a company is involved in providing services (such as a film director) and receives a share of the profits solely based on that contribution, then there is no employment contract, and such a member is not subject to the principle of subordination, and enjoys equality with the other members of the company. If such a member is a minority shareholder, there could be a situation where they effectively hold less power than the manager of the company, who has an employment contract.[50] In principle, it is understood that in such cases, the party asserting that there is a commercial (economic) company must prove the existence of *affectio societatis* (the intention to form a company), although some decisions by French commercial courts suggest that this proof can be presumed to exist.[51]

3) Qualification of Commercial Companies and Other Related Legal Institutes

Finally, the concept of *affectio societatis* plays an important role in distinguishing commercial companies from other forms of associations with the status of legal entities, or forms of undivided ownership without legal personality (e.g., inheritance, bankruptcy estate, co-ownership, joint property, marriage contracts between spouses - marital agreements, etc.).[52]

Commercial (economic) companies and various forms of undivided ownership share the characteristic that their assets represent a form of undivided property. However, the point of distinction lies in the fact that, in forms of undivided property, the individual interests of each co-owner prevail, and the management is based on the principle of unanimity (or through an appointed representative, whose powers are certainly more limited than those of the management of commercial companies)

[48] I. Tchotourián, 564-571.

[49] French theory emphasizes that French judicial practice in such cases of accumulation sometimes relies on the principle of subordination, accepting that even a majority member of the company can be subordinated to the company's management: P. L. Cannu, B. Dondero, 64.

[50] French theory also emphasizes that French judicial practice considers that if an "alleged member" of the company performs only certain executive tasks in the company, without participating in management, their activity (conduct) does not have the characteristics of a contribution in services: see P. L. Cannu, B. Dondero, 64–65.

[51] Y. Guyon, 136.

[52] G. Naffah, 237.

aimed at preserving the value of the property. On the other hand, a commercial company is a form of collective management of undivided property, depending on the nature of the company, with a lucrative goal of increasing value and generating profit. Ultimately, commercial companies are characterized by legal personality (except for companies created as factual partnerships, and some other forms, such as secret partnerships, etc.), which is generally not the case with forms of undivided ownership. Nevertheless, undivided ownership forms can be organized as factual companies, and the key criterion for qualifying their status is determination of the existence or absence of *affectio societatis* - the common intention of the parties to form an association for lucrative purposes involving through joint exploitation of undivided ownership (a combination of subjective and objective understanding). In this regard, French case law and leading legal doctrine have stated that "in the absence of the intention to associate, there is no company" (typically created as a factual one), but only undivided ownership.[53]

In conceptual terms, commercial companies are lucrative organizations with the goal of profit generation (this goal sometimes extends to "cost-saving" purposes). Unlike commercial companies, which in Serbian law have legal personality, there are other forms of associations that also have legal personality, but the key distinguishing factor is the purpose: while commercial companies have a single-dimensional lucrative goal, associations have a multi-dimensional, non-lucrative purpose (e.g., political, cultural, sports, or humanitarian). Both associations and companies are founded on a contractual basis, their members can be both physical and legal persons, they have legal personality, a shared goal in line with their function, and engage in economic activities.[54] Members of an association cooperate to achieve the common goal of the association and are motivated not by the *affectio societatis* of a commercial company (a common interest in profit distribution), but by a specific *affectio associationis* (a common interest not related to profit distribution).[55] In the absence of this common goal, an association is considered fictitious, which sets grounds for its termination in the legally prescribed procedure. In practice, the distinction between associations and commercial companies is not always respected, as some forms with the status of associations are closer to commercial companies than to associations (paracommercialization), and they enjoy a more favorable tax

[53] I. Tchotourian, 496–507.

[54] The Serbian Law on Associations, *Official Gazette of RS*, Nos. 51/09, 99/11 – other laws, and 44/18 – other law) recognizes associations with and without legal personality. Although it defines associations as "non-profit organizations", it also allows for the establishment of associations "for the purpose of carrying out specific activities aimed at generating profit", which is legally inconsistent and tends to blur the line between associations and companies (art. 2). M. Vasiljević, T. Jevremović Petrović, J. Lepetić, 45.

[55] When the goal of a company is profit-making and distribution, the distinction from associations is clear. But when the company's goal is "cost saving," as defined by French legislation, then the structure could be either a company or an association. I. Tchotourian, 518–525.

status and fewer legal restrictions merely because they are formally registered as associations (a clear example being many NGOs and some professional organizations). In reality, the boundary between commercial companies and associations threatens to disappear due to the commercialization of the association status and the engagement in economic or even commercial activities. Furthermore, it is possible for a commercial company to transform into an association with continuity of legal personality, as well as for an association to transform into a commercial company without continuity of legal personality (Serbian company law excludes the possibility of transforming a business association into a commercial company).[56]

As for the qualification of the status and legal nature of a cooperative in relation to the qualification of the status of commercial companies and associations, this issue remains somewhat unclear and controversial. What is certain is that cooperatives do not fit into this binary division (commercial companies and associations), as they have many of their specific characteristics based on the fact that they possess certain traits of both commercial companies and associations. These specificities are best reflected in the cooperative principles, some of which are closer to commercial companies and others to associations. These include: first, the principle of openness and variable capital; second, the principle of equality of cooperative members and voting "per capita" (this principle is sometimes deviated from, but in a limited manner), rather than "per capital"; third, the principle of altruism (though this is relativized by the fact that the remaining net income is distributed to members based on their work performed or value of business with the cooperative, not according to contribution, and the same principle applies to the distribution of liquidation surplus); fourth, the principle of voluntary membership in the cooperative; and fifth, the principle of mutuality and solidarity (in some forms of cooperatives).[57]

Finally, the existence of *affectio societatis* is extremely important when distinguishing commercial companies from some other forms of organization, such as European Economic Interest Groupings, foundations, and similar entities. European Economic Interest Groupings are regulated by the company law governing commercial companies, unlike other forms of associations regulated by separate laws. However, both forms of legal entities, while not having the goal of profit generation like a commercial company, focus on achieving "mutual interests of their members" (business association) or "economic interests and activities of its members" (groupings).[58]

Like other forms of non-profit organizations, foundations differ from commercial companies in that their goal is non-lucrative and consists of achieving some part of the public (general) interest. Just like other non-profit organizations, foundations have legal personality and are registered in the prescribed register.

[56] CL, art. 579; also *Ibid*., 509–518.
[57] M. Vasiljević, T. Jevremović Petrović, J. Lepetić, 764.
[58] CL, arts. 578 and 580; *Ibid.,* 911–914.

Given the purpose of foundations and their activities, *affectio societatis* is absent in the foundation context, unlike in commercial companies, where the general interest is not tied to the founders but to the mission (activities) of the foundation. Furthermore, unlike a commercial company, which operates in the profit-making sphere, a foundation functions in a non-commercial sphere. While a foundation can have multiple founders, there are some cooperative elements toward mutual goals, it still aligns with a certain form of *affectio societatis*. The same applies to the function of the foundation's assets. Finally, if the goal of a business company can include, alongside profit, something like "cost saving" (as recognized in French law), then certain elements of *affectio societatis* may also be found in the status of a foundation. However, the distinction remains clear in terms of the goal (non-lucrative) and the nature of the activities (public interest), which is not found in a commercial company.[59]

V QUALIFICATION OF COMMERCIAL COMPANIES BASED ON LEGAL PERSONALITY

The contract of a commercial company, in the context of distinguishing it from other contracts under contract law, is considered a special type of contract, of a contractual nature. However, it is original in its nature, unlike all other named (and unnamed) contracts, because, unlike those other contracts, which, by their mere conclusion, constitute the start of their legal life as valid, the contract of a company does not begin its legal life through such a conclusion. Instead, it serves only as an *iustus titulus* (legal basis) for the establishment of a new legal entity – a commercial company – by registration in the prescribed register, through which it acquires legal personality (*modus acquirendi* – mode of acquisition).[60] In any case, the legal personality of a commercial company, in countries where each legal form of these companies is granted personality, represents a significant element of distinction between a commercial company and the status of a company member in comparison with other contracts (often related to company contracts) in civil and commercial law. These contracts may have some important characteristics in common with company contracts (such as participation in profits or sometimes bearing risks, contributions, some elements of a common goal and association, and sometimes even some forms of control or participation in management), but they generally do not encompass all of these characteristics and often lack the specific *affectio societatis* (the common intention to form an association and acquire the status of a member). Unlike contracts for a company, these other contracts do not lead to the creation of a legal entity, which, depending on the form of the company, has a separate legal

[59] I. Tchotourian, 540–544.
[60] Y. Guyon, 136.

existence from its formation act, which has a contractual nature, but once established, the company takes on an institutional nature – either a capital-based company or a mixed nature – a company of persons.

In countries that do not grant legal personality to certain forms of commercial companies (such as partnerships in Anglo-Saxon and partially in Germanic law), as well as in countries where there are certain forms of civil or commercial companies without legal personality (such as secret companies, companies created or de facto companies),[61] legal personality is not a critical element for qualifying the existence of a company contract (whether it is a factual partnership, a secret company, or another type), or any other designated contract. In this case, the crucial element of distinction becomes *affectio societatis*, primarily in its subjective understanding (the common intention to form an association and acquire the status of a company member). Serbian company law, unlike some comparative legislations, does not recognize commercial companies without legal personality (such as *partnership, offene Handelsgesellschaft, société en participation, stille Gesellschaft, silent partnership, Kommanditgesellschaft*). The legal personality of commercial companies continues until their dissolution, marked by deletion from the registry (and the announcement of the deletion).

VI *AFFECTIO SOCIETATIS* AND THE NULLITY OF A COMMERCIAL COMPANY

Controversies surrounding the legal concept of the *affectio societatis* (the common intention to form an association as a company member),[62] in terms of the existence or non-existence of this concept (similar to debates over the existence of the concept of cause in contract law, which it is not identified with the general condition of contract formation, namely the agreement of wills)[63], are particularly

[61] Comparative laws of the Romanic legal tradition recognize legal personality for all forms of commercial companies (the only exception is la société en participation, where it is debated whether it constitutes a company or an association). This view is adopted in Serbian law. Thus, according to this system, despite their contractual basis, all commercial companies are considered institutional companies. Đorđe Mirković, *Dve teorije o pravnoj prirodi trgovačkih društava*, Belgrade, 1934; J. Hamel, G. Lagarde, A. Jauffret, 17–20, 45–46.

[62] The importance of this concept is reflected in two areas: the legal validity of the partnership agreement (whether the company can be subject to nullification or not); the legal qualification of the partnership agreement (distinguishing it from other forms of legal cooperation, such as associations, undivided property, unions, consortiums, pools, interest groupings, main contractor and subcontractor systems, various forms of civil partnerships, as well as other named contracts such as sales, publishing agreements, loans, credit, leases, employment contracts, etc.). I. Tchotourián, 14–15.

[63] In French legal theory, it is noted that the concept of causa in company contracts is broader than affectio societatis: G. Naffah, 236. In Serbian law, causa is considered a general condition for the validity of a contract (in addition to contractual capacity, the agreement of declared wills, and subject matter, and

present and discussed in French legal theory and practice. These controversies are also reflected in the legal consequences of the absence of a common intention of this nature. The fundamental legal question raised in connection with the absence of *affectio societatis* among the members of a particular commercial company is whether, based on this, the nullity of such a company can arise (with *affectio societatis as the basis for the nullity of the company*), regardless of whether the nullity of commercial companies is an exceptional phenomenon.

The nullity of the formation act, and thus the registration of the company (and thereby the nullity of the company itself), is a *very rare occurrence due to the preventive control* during registration process (by courts or administrative bodies). In some countries (such as Germany), there is even a mandatory notarial form for the formation act (including all amendments), which generally prevents the existence of such a basis. Moreover, there is the institution of so-called *regularization of the formation act*, which involves elements of nullity within a specified period (submitted to the registration authority responsible for the registration process).[64]

In the EU, the "nullity of a commercial company" (nullity of the formation) is regulated by the so-called First Directive (Article 11), which establishes s*ix grounds for* "*nullity*". National laws of member states cannot establish more grounds, but they can have fewer or even not recognize the institution of the nullity of the formation act of a commercial company, instead strengthening measures of prior control (before registration). This directive was replaced by the so-called Codified Directive (2017).[65] The Codified Directive (Article 12) retains the same grounds for nullity as those outlined in Article 11 of the First Directive, regulating them in a strictly limiting and imperative manner: 1) if there is no formation act or if the rules of preventive

when required by law or agreement, the form of the contract): the Law on Contract and Torts, arts. 51–52. Causa answers the question of why someone is obligated – it is the reason for the legal obligation. It has a subjective interpretation (related to internal will – the motive for the obligation), an objective interpretation (economic fact - the economic goal of the contract), and a mixed interpretation (subjective–objective). Every contractual obligation must have a permitted causa (basis). The absence of causa, fictitious causa, or an impermissible causa (contrary to mandatory provisions, public order, or good morals) leads to nullity of the contract. The cause (basis) of the obligation does not need to be expressed in the contract - it is rebuttably presumed to exist. S. Perović, 323–338; M. Karanikić Mirić, 309–310 and 317–324.
The concept of causa as a general contractual requirement in Serbian law was adopted from the French *Civil Code* (Code civil, Arts. 1108 and 1131–1133), whereas it has never existed in Swiss, British, or German law. The 2016 reform of the French *Civil Code* (Code civil, 2016, Arts. 1128, 1162, and 1168–1170) formally abolished causa as a general contractual condition (though some argue the change is more terminological than substantive), replacing it with "permissible and specific content of the contract" (which includes "all obligations arising from it, i.e., all of their subject matters"). In the relevant Serbian legal doctrine, it is emphasized that "the cause of the obligation has disappeared, the focus has shifted to consideration the counter-obligation, and the subject of the obligation has been replaced with the content of the contract". See M. Karanikić Mirić, 312–317.

[64] See Stefan Grundmann, European Company Law, Cambridge 2012, 153–154, 187–188.

[65] Directive EU relating to certain aspects of company law – codification, 2017/1132, OJ L 169/17.

control or required legal formalities have not been followed, 2) if the company's activity is illegal or contrary to public order, 3) if the formation act or statute does not contain the company name, the amount of individual capital contributions, the total amount of subscribed capital, or the company's activity, 4) failure to comply with national law provisions regarding the payment of the minimum capital amount, 5) legal incapacity of all founders, 6) if, contrary to national law regulating companies, the number of founders is fewer than two. It is noticeable that this relevant EU company law source does not operate with the concept of *affectio societatis* as a possible ground for the nullity of a commercial company (nor does it recognize the grounds for nullity of this company as prescribed by the general rules of contract law), which has divided French legal theory and judicial practice regarding whether this can still serve as grounds for the nullity of such companies.[66]

The Serbian legislator dissects the same institution – "nullity of the company" – into practically three sub-institutions in a manner that is not legally consistent: *nullity of the formation act*, and thus nullity of the company (regulated by the law governing commercial companies), *nullity of the registration of the company, which by itself does not imply the nullity of the company* (regulated by the law governing the registration of commercial entities).[67] Thus, the law regulating commercial companies contains exhaustively prescribed grounds for the nullity of the formation act: 1) the absence of essential elements of the formation act prescribed by law for each form of company, 2) activities contrary to mandatory regulations or public order, 3) the absence of a prescribed written form, 4) the legal and business incapacity of all founders at the time of signing the formation act. The law governing the registration process of commercial entities regulates the nullity of the company's founding registration and the grounds for this nullity, which do not necessarily coincide with the grounds for the nullity of the formation act or the company itself: 1) if false information is provided in the registration application (possibly a "borrowed person" – a fictitious or simulated member or fraud if proven), 2) if registration was carried out based on a false document, a document issued through an unlawful procedure, or a document containing false facts (which could lead to a contract law fraud issue), and 3) if there are other legally prescribed reasons – *grounds for the nullity of the formation act* as prescribed by the law governing commercial companies, as well as grounds for nullity from the law governing obligations).[68]

[66] I. Tchotourian, 110-146.

[67] Tatjana Jevremović Petrović, "Ništavost osnivačkog akta u srpskom pravu", *Pravo i privreda*, No. 4–6/2017, 71–94; French theory and practice (both legislative and judicial) use a unified institute of nullity of the company (based on an explicit provision in the law: absence of essential elements of the formation act, impermissible subject, fictitious company, general rules of contract law on nullity, fraud – with the majority of imperative norms in the law not being sanctioned with nullity, but clauses in the formation act of the company that contradict these norms are considered to be non-existent): M. Cozian, A. Viandier, F. Deboissy, 66–75.

[68] Compare: CL, art. 13; Law on Registration Procedure with the Business Registers Agency, art. 33, *Official Gazette of the Republic of Serbia*, No. 99/11, 83/14, 31/19, and 105/21; Law on Contract and Torts, *Official*

In any case, nullity is determined by the court (with possible rectification before the main hearing – through so-called *regularization* of the act and company – compliance with the law, including potentially addressing the missing element of *affectio societatis*).[69] Nullity has effect *pro futuro* (ex nunc) and leads to a procedure for the forced liquidation of the company (therefore, n*ullity is equated with the cessation of the company's existence*).[70]

Serbian company law, therefore, separates the grounds for the nullity of the formation act and thus the nullity of the company from the grounds for the nullity of the company's registration (which are divided into independent grounds for nullity, which do not necessarily lead to the nullity of the formation act and thus the nullity of the company, and "borrowed grounds" for nullity: grounds for the nullity of the formation act and general grounds for nullity from contract law, which lead to the nullity of the company's registration but may also lead to the nullity of the formation act and thus the nullity of the company itself). It seems, therefore, that such a solution in Serbian law has resolved the question of whether the grounds for nullity in the sense of contract law apply to the nullity of the formation act of a commercial

Gazette of SFRY, no. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89; *Official Gazette of the FRY*, no. 31/93, and *Official Gazette of the RS*, no. 18/20, art. 103.

[69] A business entity that has been established through the prescribed procedure and has gained legal personality through registration but does not fulfill all the conditions for its formation, if regularization is not possible or has not been carried out through an appropriate judicial procedure, is considered null and void. Such a company is theoretically referred to as a fictitious company – société de fait. In contrast to a fictitious company (société de fait) that has been established and registered but is null, a de facto company (société crée de fait) is a company that has not been established in the prescribed form – the founding act has not been created in written form (although it factually exists) and it has not been registered. For a fictitious company, registration exists, and it has taken the form of a commercial company in relation to third parties, and it should therefore be accepted as such, along with its founders, depending on the form of the company. However, a de facto company cannot be constituted as a legal subject in relation to third parties, although it is possible to form it in internal relations (this is the basis for the concept of the so-called secret company). See M. Cozian, A. Viandier, 512; M. Cozian, A. Viandier, F. Deboissy, 520–526; Ph. Merle, A. Fauchon, 679–683; J. Hamel, G. Lagarde, A. Jauffret, 129–136; P. L. Cannu, B. Dondero, 919–927; I. Tchotourian, 69–78.
In French case law, courts even recognize a certain degree of *affectio societatis* in an extramarital union and even protect the creditors of the concubine, considering the two lovers as members of a partnership. In the absence of a marriage-based partnership, such a union can exist and have elements of indivisibility (solidary liability).
Apart from between extramarital partners, a *de facto* company (a company created as a fact) can also exist between *co-heirs*, as well as in some business cases (mutual assistance in rural work, the system of main contractor and subcontractor, joint expenses in some professions – especially in the liberal professions, loan agreements or paid work contracts with profit-sharing). M. Cozian, A. Viandier, 514–516.
Similarly, in France, it has been ruled that the *relationship between the main contractor and the subcontractor* is one that exists in a *de facto company* (a partnership created as a fact), and the cessation of payments by the main contractor leads to the joint unlimited liability of the subcontractor. See J. Hamel, G. Lagarde, A. Jauffret, 131-133.

[70] CL, art. 14, paras. 3. and 4.; Codified Directive (2017), art.12. See S. Grundmann, 154–155.

company and thus to the nullity of the company itself (given that the formation act has a contractual nature), as explicitly allowed by the French legislator.[71]

In any case, in the topic discussed in this paper, *affectio societatis* is not presented as a possible ground for the nullity of the formation act and thus the nullity of the company, nor as a possible ground for the nullity of the registration of the company, which does not necessarily lead (but depending on the grounds for nullity, it could lead) to the nullity of the formation act of the company and thus the nullity of the company. This leaves the question open as to whether the absence of *affectio societatis* can be a ground for the nullity of the formation act (and thus the commercial company), although from the limiting determination of the grounds for the nullity of this act in the law regulating commercial companies, it would follow that this is not possible since it is not a explicitly prescribed ground for nullity ("except for prescribed reasons… the formation act cannot be declared null on other grounds").[72] However, as the law regulating the registration procedure extends those grounds for the nullity of a commercial company from the company law, and as it contains two new specific grounds for nullity (which essentially relate to fraud under contract law),[73] as well as a general ground for nullity "if other legally prescribed reasons exist", and considering that the use of lowercase in the word "law" refers not only to the grounds regulated by the law governing commercial companies but also to other laws, including the law governing obligations (with general norms about absolute nullity of contracts and special institutions for nullity: fraud,[74] simulated contracts, fictitious companies, prohibition of the abuse of rights),[75] and since this

[71] *Code civil* (article 1844-10) and *Code de commerce* (art. 235-1). French legal theory does not exclude the application of general contract law rules to the nullity of the founding act of a business partnership, when the nullity is absolute, and anyone can invoke it, with no statute of limitations or deadline for preclusion. However, it is acknowledged that the nullity of the founding act of a business partnership is, in practice, an extremely rare occurrence, and this is due to two reasons: first, the strict preventive control by the court during registration, and second, the possibility of so-called regularization in the case of a nullity procedure (removal of the grounds for nullity within a given period). See Ph. Merle, A. Fauchon, 83–88; M. Cozian, A. Viandier, F. Deboissy, 71–72.

[72] CL, art.13, para. 2.

[73] Law on Contract and Torts, art.65

[74] I. Tchotourian, 147-165.

[75] "A contract that is contrary to mandatory rules, public order, or good morals is void if the violated rule does not prescribe another sanction or if the law does not prescribe anything else in a specific case" (Law on Contract and Torts, art.103). The institute of fraud (Law on Contract and Torts, art. 65), the institute of a fictitious (simulated) contract (Law on Contract and Torts, art. 66), and the institute of the prohibition of abuse of rights (Law on Contract and Torts, art.13).
In French theory, it is emphasized that the *nullity of a company* can only exist based on reasons strictly prescribed by law. First and foremost, the ground for the nullity of a company is the *nullity of the formation act* (under the general rules of civil law: defects in will, incapacity of the contracting parties, illegality of the object of the activity, absence of cause, absence of essential elements, failure to meet the prescribed form, fraud), unless regularization occurs (alignment with the law, establishment of *affectio societatis*). In principle, the possibility of the nullity of a founding act of a capital company due to defects in will

law also recognizes flaws in the will (which *affectio societatis* is not identified with as grounds for nullity – relative nullity, destructibility), it seems that *affectio societatis* can be a ground for the nullity of a company contract (provided that its absence does not preclude potential *regularization*, whether missing in just one member,

and incapacity of the contracting parties is excluded. Nullity will also occur in the *case of fraud (fraus omnia corrumpit)*. A simulated contract (a fictitious company) is void in relation to third parties, but a dissimulated contract is valid (if proven). If the founder's name is borrowed, the *person,* i.e. *borrowing the name*, is personally liable towards the company, other members, and diligent third parties (and the fraud institute can be applied to the company if proven). Nullity of a company do es not have to occur if the founding act is *partially null* (e.g., in relation to founders who lack business capacity). Nullity also does not necessarily occur if there are some prohibited clauses that are considered not to have been written (e.g., *clausula leonina*). In French law, *the lack of registration and publication* formalities is traditionally considered an absolute nullity because it does not aim to protect the founders but rather third parties. However, it is acknowledged that in practice, this rarely happens. French theory and practice generally consider the nullity of a business company to be an institute with a bad reputation and *advocate for discouraging such actions and encouraging institutes that would eliminate the grounds for nullity*: preventive control, "dilution" of grounds for nullity (contractual capacity, cause, consent, object, fraud, abuse of rights, simulated and fictitious members, specific grounds related to the nature of the company founding agreement; tightening the conditions for filing a lawsuit for nullity - statute of limitations for lawsuits, possibility of regularization; softening the effects of nullity: absence of retroactivity, protection of third diligent parties; *introducing sub-institutes of nullity: clauses considered as not written, lawsuit for regularization, l*awsuit for responsibility for nullity; other possible substitutes for the nullity of a company: *non-existent company*, nullity of the registration itself): P. L. Cannu, B. Dondero, 227–243; J. Hamel, G. Lagarde, A. Jauffret, 129–130 and 133–134; M. Cozian, A. Viandier, F. Deboissy, 66–75.

"If a member's name was merely borrowed to allow another to acquire and exploit some property under the cover of a civil partnership, then there was neither a common will of the members, nor common contributions, nor a sharing of profits or covering of losses; therefore, such a company is fictitious, and all assets (property), particularly any real estate acquired by such a company, must be returned to their rightful owners"— *Rev. sociétés* 1974, 740, note Sortais, in: J.P. Valuet, A. Lienhard, P. Pisoni, 9.

"Once it is established that the company was a façade company, with no actual operations, whose capital was almost entirely owned by the manager and his wife, and that this manager acted both on behalf of the company and in his own name, it follows that the manager is the author of simulated transactions and, as such, is personally liable to the creditor for compensation promised (undertaken) by the company", Cour de Paris, 28 October 1999, *Bull. Joly* 2000, 219, in: J. P. Valuet, A. Lienhard, P. Pisoni, 9.

In German Law: *The Law on Limited Liability Companies* (*GLLA*, sec. 75), *Federal Law Gazette*, 1892/477; 1898/846; 2004/3166, 3214; 2005/837; 2006/2553; 2007/542; 2008/2026, 2586; 2009/1102, 2479, 2509, stipulates that most deficiencies in the formation act, despite the required prior control (notarial nature), are rectified by the mere act of registration. However, more serious and important deficiencies (such as if the formation act does not include provisions on the minimum share capital, or if it does not contain provisions on the purpose of the company and the deficiency is not corrected by a unanimous decision of the company's members) can lead to its annulment by the court, upon the request of any member of the company, a member of the supervisory board, or a director. *In principle, these are the same grounds that require the court to initiate a procedure for forced liquidation of the company ex officio*. To the extent that these grounds are identical, the steps taken may lead either to the liquidation of the company or to the declaration of its nullity, which, contrary to the general principles of contract law, does not have retroactive effect (*ex tunc*), but only takes effect from the moment the registration is declared null – *pro futuro (ex nunc)*, which also applies to the liquidation of the company. Meister Burkhardt, Martin Heidenhain, Joachim Rosengarten, *The German Limited Liability Company*, Frankfurt am Main, 2010, 97–98.

a minority, or the majority, but not if it is absent in all members of the company).[76] This view is also held by part of French theory (which is, in fact, highly divided in this regard) and judicial practice (which is also not uniform) that sees this institution in its subjective sense as an inseparable element of the formation act of a commercial company – the absence of *affectio societatis* is a ground for the nullity of the commercial company because, in such a case, the company is considered fictitious (and a fictitious company is null and void, not nonexistent).[77]

Serbian company law, undoubtedly, is not particularly inclined toward the institution of the nullity of the company (which is possible due to the contractual nature of its creation, though in all companies with legal personality, nullity of the formation act does not automatically lead to the nullity of the company's existence based on that act; rather, the company must cease to exist in the manner prescribed by law). This is primarily due to the need to protect third parties acting in good faith with whom such a company does business until the potential nullity is established. Thus, to the extent that it does not exclude it, it narrows the grounds for nullity, prescribing a range of specific rules regarding this institution in relation to contract law (narrowing grounds, legal effects *pro futuro*, forms of preventive control in company contracts, deadlines for determining nullity, and restrictions on the active legitimacy for filing a lawsuit to determine that the "registration of the company formation is null" for "persons with legal interest",[78] partial nullity,[79] fiction that certain prohibited clauses are not written, the possibility of *so-called regularization* - bringing the company into compliance with the law by the company itself and its members, as well as the distinction between the nullity of the formation act (and thus the nullity of the company itself) and the nullity of the registration of the company, and similar).

[76] All grounds for the nullity of a business company can be regularized (brought into compliance with the law), except for the unlawfulness of the subject of activity: I. Tchotourian, 45–69.

[77] See also I. Tchotourian, 31-45, 83–110. Contrary to this: "When the shareholders of a limited liability company acknowledge that they never had the necessary affectio societatis required to constitute the company, such a company essentially proves to have never existed, and pseudo-members may invoke fraud regarding the imperative legal norms, regardless of their involvement in that fraud"– Civ. 3, June 22, 1976, D 1977, 619, note Diener, in: J. P. Valuet, A. Lienhard, P. Pisoni, 10.

[78] Law on Registration Procedure with the Business Registers Agency, art. 33.

[79] Partial nullity (Law on Contract and Torts, art. 105).
In French law, a distinction must be made *between grounds for nullity and clauses considered impermissible,* which are thus treated as if they were never written (application of the principle "the useful is not spoiled by the harmful"), but do not lead to the nullity of the company. Such clauses include: *leonine clauses*; clauses granting the management compensation not established by law; clauses providing for a fixed dividend for members regardless of profit; clauses restricting the freedom to dismiss the chair of the board of directors; clauses stipulating that the board of directors may validly decide with less than half of its members present; clauses contrary to the general meeting's authority to amend the articles of association; clauses restricting each shareholder's right to vote in writing or to attend the meeting; clauses imposing a supermajority of over 75% to amend the articles; and clauses limiting the right to bring a derivative action on behalf of the company. See M. Cozian, A. Viandier, 83–84; I. Tchotourian, 78–80.

The existence of these and other numerous specificities of the nullity of the partnership agreement and the nullity of the company, in comparison to the general rules on contractual nullity, particularly the possibility of regularization (except in cases of unlawful business activity) i.e., compliance with the law by the company and its members, which, under general rules on nullity, is not permitted in cases of absolute nullity, leads to the conclusion that the nullity of the company contract and of the company itself appears to have the character of relative nullity (voidability) under contract law, rather than absolute nullity.

VII INSTEAD OF A CONCLUSION

The legal concept of *affectio societatis*, although not explicitly recognized as such under Serbian company law, is, in our view, implicitly presumed, similar to the concept of causa (legal basis), which is formally regulated by the Law on Obligations, though it does not require explicit articulation in the contract, given that its existence is rebuttably presumed. This concept represents an important element of company law. Its relevance can be demonstrated on at least two grounds. First, it is essential for determining the existence and legal validity of a company formation contract, the existence of the company itself, and the status of its members (ensuring that the company is not fictitious or null and that the member is not a nominal figurehead or a "borrowed name"). Second, it is essential for distinguishing the founding agreement from numerous other contractual arrangements under general contract law that may contain clauses resembling those found in a company contract. It also helps distinguish such contracts from other organizational forms used for carrying out certain activities that do not constitute companies (such as de facto companies - entities established as informal or secret companies, associations, cooperatives, bank unions, insurance pools, economic interest groups, foundations, and others), as well as from arrangements involving undivided co-ownership of property.

The legal concept of *affectio societatis*, in its subjective understanding, refers to the psychological concept of a "common intention" to achieve a specific "common economic interest" (i.e., profit) through the pooling of resources (contributions) and the acceptance of joint risk, which constitutes an objective fact (objective understanding). Thus, *affectio societatis* must be understood as a mixed concept, encompassing both subjective and objective understandings. Unlike the objective fact, which is materialized and thus easily provable, the subjective determination, as a psychological notion is not visible but can be inferred and rebuttably presumed from the overall content of the contract, even if not explicitly articulated, which is materialized and easily provable, the subjective determination, as a psychological notion, is not visible as a material fact. However, it can be both proven and presumed (through a rebuttable presumption) to exist even when not expressly stated, based on the

overall content of the contract. This is analogous to the evolution of the concept of cause (causa) in French law, which is no longer regarded as a general condition for the contract formation, but rather its existence is "permissible and concrete content of the contract". Moreover, the legal mechanism of interpreting unclear contracts or particular contractual provisions is directed toward identifying the "common intention of the contracting parties", which, in fact, is the core function of the legal concept of *affectio societatis*. Though a psychological phenomenon, like the subjective aspect of this concept, it nonetheless has a solid legal basis in Serbian contract law.[80]

In sum, *affectio societatis* is of substantial importance in company law and may, with good reason, be considered on par with other constitutive elements of a commercial company, such as capital contribution, profit, and risk-sharing. This applies to all company forms, although it is more strongly expressed in closely held companies (partnerships, limited partnerships, and limited liability companies), not only at the time of formation but also throughout the company's existence, and among all members of the company. Perhaps the best evidence of this lies in the fact that the loss of *affectio societatis,* under certain circumstances, by a member of a partnership or by a member of a limited liability company - even when they hold the legally prescribed amount of capital participation - can lead either to the dissolution of the company by a court decision or to the withdrawal of such a member from the company. This role of *affectio societatis* is also present in joint-stock companies at the moment of their formation (acquiring the status of a shareholder), but later during the company's life, it becomes somewhat relativized, particularly in joint-stock companies whose shares are traded on organized financial markets. This is especially the case when the purchasers of such shares are better characterized as investors (e.g., holding non-voting shares) than as traditional shareholders. Nevertheless, *affectio societatis* does not entirely disappear. Under certain conditions, a shareholder's loss of identification with the company may still justify the company's dissolution by judicial decision.

Finally, *affectio societatis* is of particular importance in companies without legal personality or in other organizational forms or undivided property structures (such as de facto companies, secret partnerships, unregistered joint ventures, or various forms of co-ownership), which often arise without formal documentation. In these contexts, recourse to *affectio societatis* is what enables their legitimation, identification, and legal classification. In contrast, where companies have legal personality, this role is often fulfilled by the very fact of legal personality and the formal requirements for acquiring it. All of this leads to a single conclusion: the concept of *affectio societatis* is is not univocal, but plural in meaning, and it is not immutable, but subject to change. It is precisely this variability that allows its adaptability to

[80] Law on Contract and Torts, art. 99.

changing factual circumstances. This is the key reason for explaining the concept through different perspectives - whether one prioritizes the subjective understanding (the intention to associate and acquire the status of a company member), the objective understanding ("the realization of a common economic interest through profit generation and risk-sharing based on member equality"), or a subjective-objective understanding, (the mixed theory of *affectio societatis* that integrates both).

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UDK 005.21:334.72.021
10.5937/TokOsig2502273J

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KORPORATIVNO UPRAVLJANJE U DRUŠTVIMA ZA OSIGURANJE

ORIGINALNI NAUČNI RAD

Apstrakt

Korporativno upravljanje predstavlja deo prava privrednih društava koji uređuje upravljanje i kontrolu u privrednom društvu. Poslednjih godina, naročito nakon finansijske krize, oblast korporativnog upravljanja posebno postaje važna u finansijskim organizacijama, uključujući i društva za osiguranje, i na njih se sve češće primenjuju posebna pravila u upravljanju i kontroli poslovanja. Srpsko pravo razvilo je posebna pravila o korporativnom upravljanju u društvima za osiguranje pod jakim uticajem evropske regulative i brojnih izvora mekog prava koji preporučuju odgovorno i održivo upravljanje u društvima za osiguranje i nastoje da pored ostvarivanja klasičnih ciljeva zaštite interesa društva naročito podstaknu zaštitu interesa korisnika usluga osiguranja i drugih nosilaca interesa.

Od najznačajnijih pitanja korporativnog upravljanja u društvima za osiguranje ističu se načela njihovog poslovanja i rad u interesu društva i njegovih akcionara u cilju zaštite interesa korisnika osiguranja. Posebno su uređena i poslednjih godina unapređena pravila o strukturi i sastavu organa uprave društava za osiguranje. Pod uticajem prava EU razvijen je složen sistem upravljanja u tim društvima i njegov cilj je oprezno i savesno vođenje poslova društva. Ključne odlike efektivnog sistema upravljanja čine adekvatna i transparentna organizaciona struktura sa strogim razgraničenjem i podelom nadležnosti i efikasan sistem prenosa informacija.

Poslednjih godina preovladava shvatanje da dužnost rada u interesu društva za osiguranje treba razumeti tako da obuhvati i principe i standarde ekološki

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i društveno odgovornog održivog poslovanja. Time se pred upravu više nego ikad stavlja težak zadatak sprovođenja sve kompleksnijih pravila poslovanja i sistema upravljanja. Radi toga je nužno njihovo dalje usavršavanje i konkretizacija uslova koje članovi uprave društava u finansijskom sektoru moraju da ispune, kako bi imali dovoljno znanja i veština u razumevanju i upravljanju rizicima održivog poslovanja.

Ključne reči: korporativno upravljanje, društva za osiguranje, dužnost pažnje, dužnost rada u interesu društva, održivo poslovanje.

I Uvod

Korporativno upravljanje predstavlja značajan deo prava privrednih društava koji bliže uređuje odnos između privrednog društva i njegove uprave. Najčešće se definiše kao sistem upravljanja i kontrole društva.[2] Važan je deo opšte teorije kompanijskog prava, pod čijim je uticajem poslednjih godina izraženo modernije, efikasnije i održivo uređenje i poslovanje privrednih društava kako kod nas, tako i u uporednom pravu.

Oblast korporativnog upravljanja uređena je u značajnoj meri zakonskim odredbama, i to kako opšteg karaktera – u odnosu na sva privredna društva, tako i posebnim propisima. Posebna pravila najčešće se odnose na samo neke forme društava (na primer, akcionarska društva), društva koja imaju neka osobena svojstva (na primer, javna društva) ili društva koja obavljaju posebne delatnosti (poput delatnosti banaka ili u oblasti delatnosti osiguranja). Delatnost osiguranja predstavlja jedan od onih segmenata posebnog kompanijskog prava u kome je izražen razvoj, modernizacija i unapređenje mnogobrojnih i složenih posebnih pravila korporativnog upravljanja. Otud društva za osiguranje, kao i druga društva u finansijskom sektoru privlače izuzetnu pažnju u načinu uređenja njihove organizacije i poslovanja i njihovog upravljanja i nadzora.

Ovaj rad ima cilj da prikaže osnovna pravila i principe korporativnog upravljanja u oblasti osiguranja. Na prvom mestu će njegova pažnja biti okrenuta važećim pravilima i principima u Republici Srbiji. Ipak, oni će biti stavljeni u širi teorijski i regulatorni kontekst u meri u kojoj obim i cilj ovog rada to dozvole. Budući da se poslednjih godina mnogo pažnje okreće ne samo ka kvalitetnom i modernom,

[2] To je definicija koju je komisija na čelu sa A. Kedberijem (*A. Cadbury*) dala u Izveštaju o finansijskim aspektima korporativnog upravljanja još 1992. godine, najpoznatijim u nizu dokumenata koji uređuje korporativno upravljanje u privrednim društvima. Pod njegovim uticajem razvijeni su brojni kodeksi korporativnog upravljanja širom sveta. *Committee on the Financial Aspects of Corporate Governance*, *Report of the Committee on the Financial Aspects of Corporate Governance*, December 1992, dostupno na adresi: https://www.ecgi.global/sites/default/files/codes/documents/cadbury.pdf, 31. 8. 2024, 14, tač. 2.5. Izveštaj se popularno naziva i *Kedberi izveštajem i Izveštajem Kedberi komisije.*

već na prvom mestu održivom upravljanju, ovo je prava prilika da se i ono razmotri kroz korporativno upravljanje u društvima za osiguranje. Smatra se da pored javnih akcionarskih društava upravo društva iz finansijskog sektora najviše mogu da doprinesu jačanju i primeni ESG principa i standarda, ostvarivanju dugoročnih ciljeva u poslovanju društava, i uopšte unapređenom korporativnom upravljanju.[3]

II Korporativno upravljanje u privrednim društvima

Tradicionalno se oblast korporativnog upravljanja razume tako da obuhvata pitanja unutrašnjeg i spoljašnjeg upravljanja i kontrole u društvu.[4] Dok unutrašnje korporativno upravljanje razmatra unutrašnju organizaciju društva i upravljanje putem organa društva, spoljno korporativno upravljanje definiše se kao skup uticaja na društvo i naročito njegovu upravu (na primer, preuzimanje). Spoljni uticaj nije u većoj meri izražen kod društava koja obavljaju finansijske delatnosti, te je od manjeg značaja i za društva za osiguranje.[5] Najvažniji krug pitanja korporativnog upravljanja koja se odnose na društva za osiguranje, kao i kod drugih društava u oblasti finansijskih delatnosti predstavlja upravljanje i kontrolu putem stručnih i nezavisnih organa. Suština pravila korporativnog upravljanja otud uređuje ulogu, nadležnosti i odgovornost organa društva, prava, obaveze i posebne dužnosti pojedinih lica, kao i nadzor koji se vrši nad njima.[6]

Među pitanjima koja najčešće ulaze u krug pravila i principa korporativnog upravljanja naročito se ističu ona o donošenju poslovnih odluka, postupanju prema određenim standardima i u skladu sa dužnostima prema privrednom društvu. Pravo i obaveza određenih lica da upravljaju društvom nameće potrebu regulisanja njihovog odnosa sa privrednim društvom, ali i sa drugim nosiocima interesa u privrednom društvu: njegovim akcionarima, poveriocima i zaposlenima. Među klasičnim pitanjima korporativnog upravljanja nalazi se broj i vrsta organa u privrednom društvu, njihov sastav i nadležnosti, kao i međusobni odnos organa. Polemiše se o prednostima

[3] Michele Siri, Shanshan Zhu, „Integrating Sustainability in EU Corporate Governance Codes", *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Eds. Danny Busch, Guido Ferrarini, Seraina Grünewald), Second Edition, Palgrave Macmillan, Cham, 2024, 211–212.

[4] Klaus J. Hopt, „Corporate Governance of Banks and Financial Institutions: Economic Theory, Supervisory Practice, Evidence and Policy", *European Business Organization Law Review*, Vol. 22, Nr. 1/2021, 14. U našoj literaturi na prvom mestu vid. Mirko S. Vasiljević, *Korporativno upravljanje: Izabrane teme*, Udruženje pravnika u privredi Srbije, Beograd, 2013, 27.

[5] Hopt ističe da je to zbog nepostojanja razvijenog evropskog tržišta kojim se preuzima kontrola društava u oblasti finansijskog poslovanja (K. J. Hopt, 14), ali je sigurno od značaja i postojanje i nadzor nad ispunjenjem strogih uslova koji se nameću u sticanju učešća i uslovima radi imenovanja lica za člana uprave tih društava.

[6] Arthur van den Hurk, Michele Siri, „Comparative regulation of corporate governance in the insurance sector", *Governance of Financial Institutions* (Eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 44.

i izazovima centralizovanog i decentralizovanog upravljanja, dodatnog nadzora u privrednom društvu i jačanju uloge nezavisnih lica. Naročito se ističu pitanja imenovanja, razrešenja i nadzora direktora i drugih članova uprave u privrednom društvu. Savremena pravila i principi korporativnog upravljanja posvećuju posebnu pažnju u uređenju prava, obaveza i dužnosti tih lica.

Poslednjih godina važna tema korporativnog upravljanja postala je rodno ravnopravna zastupljenost u organima upravljanja privrednog društva, ali i korporativno upravljanje koje u obzir uzima upravljanje ekološkim, klimatskim, društvenim i drugim rizicima. Osim tih, u korporativnom upravljanju se posebno govori i o različitim situacijama sukoba interesa članova uprave sa drugim nosiocima interesa u društvu. Među njima najveću pažnju teorija, zakonodavstvo i praksa posvećuju naknadama koje primaju članovi uprave, ali i različitim posebnim situacijama sukoba interesa – u grupama društva, u blizini stečaja, prilikom preuzimanja.

Iako na prvi pogled korporativno upravljanje u svim društvima nailazi na iste probleme, makar kod javnih akcionarskih društava, već godinama unazad je postalo jasno da posebni rizici postoje u poslovanju društava u finansijskom sektoru. Od finansijske krize početkom ovog veka jasno je da se društva iz oblasti finansijskih usluga suočavaju sa posebnim izazovima. Njihovo loše upravljanje može da dovede do najtežih, sistemskih negativnih posledica, što uslovljava posebnu pažnju u brižljivom uređenju korporativnog upravljanja koje odgovara potrebama tih društava. Zbog toga korporativno upravljanje postaje važan deo celokupnog uređenja društava u finansijskom sektoru i komplementaran je sa njihovim nadzorom.[7] Smatra se da pravila korporativnog upravljanja nameću takvo postupanje uprave prilikom upravljanja društvom i njegovog nadzora da obezbede njegovu finansijsku stabilnost.[8]

Već je istaknuto da je poslednjih godina posebno izražena potreba za odgovornim i održivim poslovanjem, što je značajno uticalo na regulisanje korporativnog upravljanja društava koja obavljaju važne delatnosti, uključujući i delatnost osiguranja. Ipak, vredi istaći da će ovo i u budućnosti biti jedno od vodećih pitanja za sva, pa i društva koja obavljaju delatnost osiguranja. Zbog toga će unapređenje i dalji razvoj u ovoj oblasti sigurno ići u pravcu održivog, profesionalnog i kvalitetnog korporativnog upravljanja u svim, a posebno društvima u finansijskom sektoru.

III Korporativno upravljanje u društvima za osiguranje

Sve teme korporativnog upravljanja koje načelno zanimaju opštu kompanijskopravnu teoriju i zakonodavstvo važne su i za poseban deo korporativnog

[7] Guido Ferrarini, „Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda", ECGI Law Working Paper N° 347/2017, March 2017, dostupno na adresi: *https://ssrn.com/abstract=2925721*, 31. 8. 2024, 15.

[8] *Ibid*.

upravljanja u društvima za osiguranje. U srpskom pravu ova pitanja su najvećim delom regulisana odredbama Zakona o osiguranju.[9] Osim toga, na društvo za osiguranje (kao i na društva za reosiguranje, društva za posredovanje u osiguranju, društvo na zastupanje u osiguranju i zastupnika u osiguranju) se primenjuju opšte odredbe kompanijskog prava i korporativnog upravljanja ukoliko nisu drugačije uređena posebnim odredbama.[10] Od podzakonskih propisa je od najvećeg značaja Smernica br. 2 Narodne banke Srbije o korporativnom upravljanju u društvima za osiguranje, usvojena radi organizovanja adekvatnijeg korporativnog upravljanja u društvima za osiguranje.[11] Ipak, cilj Smernice je da sugeriše način organizovanja i obavljanja aktivnosti upravljanja i nadgledanja kako bi se poboljšala efikasnost rada društava za osiguranje. Reč o izvoru mekog prava, te primena pravila definisanih Smernicom nije obavezujuća, ali je preporučena za društva za osiguranje.[12]

Radi ispunjenja obaveze harmonizacije domaćih sa propisima EU srpsko pravo usklađuje se sa pravom EU. U oblasti osiguranja, i naročito korporativnog upravljanja najvažniji izvor EU je Direktiva 2009/138 o otpočinjanju i obavljanju poslova osiguranja i reosiguranja – Solventnost II.[13] Njene odredbe detaljno su dalje razrađene Delegiranim aktom Evropske komisije 2015/35 koji gradi tri kruga (stuba) pravila – prvi se odnosi na pravila o kapitalu, drugi, za ovaj rad od najvećeg značaja, razrađuje pravila koja se odnose na unapređeno upravljanje, dok se treći odnosi na veću transparentnost.[14] Odredbe prava EU uticale su na veliki broj odredbi Zakona o osiguranju, uključujući i pravila o učešću, strukturi i radu organa i posebno sistemu upravljanja u društvima za osiguranje. Radi dalje implementacije odredbi EU u srpsko pravo Narodna banka Srbije je usvojila Strategiju za implementaciju Solventnosti II u Republici Srbiji u maju 2021. godine.[15]

[9] Zakon o osiguranju - ZO, *Službeni glasnik RS*, br. 139/2014 i 44/2021.

[10] ZO, čl. 18.

[11] Narodna banka Srbije, Smernica br. 2 o korporativnom upravljanju u društvima za osiguranje, dostupno na adresi: *https://www.nbs.rs/export/sites/NBS_site/documents/propisi/propisi-osig/smernica_2_korp_upravljanje.pdf* 31. 8. 2024.

[12] Vid. odeljak „Ciljevi Smernice", 1.

[13] Direktiva 2009/138 o otpočinjanju i obavljanju poslova osiguranja i reosiguranja – Solventnost II (*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 Reinsuranc*e (Solvency II) recast), *OJ L* 335, 17. 12. 2009; dalje u tekstu i fusnotama: Direktiva Solventnost II).

[14] Delegirana Uredba (EU) 2015/35 kojom se dopunjuje Direktiva 2009/138/EC Evropskog parlamenta i Saveta o preuzimanju i obavljanju poslova osiguranja i reosiguranja (Solventnost II) (*Commission delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) – Consolidated text*, *OJ* L 12, 17. 1. 2015).

[15] Narodna banka Srbije, Strategija za implementaciju Solventnosti II u Republici Srbiji, maj 2021, dostupno na adresi: *https://www.nbs.rs/export/sites/NBS_site/documents/osiguranje/strategija_solventnost_II.pdf* 31. 8. 2024.

Brojni drugi izvori „mekog" prava posebno su važni u ovoj oblasti. Izrađeni su u okviru EU – kao što je, na primer, Zeleni papir o korporativnom upravljanju u finansijskim institucijama iz 2010. godine koji se odnosi na sve finansijske institucije.[16] Posebno se u materiji osiguranja ističe aktivnost Evropskog nadzornog tela u oblasti osiguranja i strukovnog penzionog osiguranja (*European Insurance and Occupational Pensions Authority* – EIOPA) koje je izradilo Uputstvo o sistemu upravljanja u društvima za osiguranje.[17] Na globalnom nivou važan izvor predstavljaju OECD Uputstva o upravljanju u društvima za osiguranje sa najnovijim izmenama iz 2017. godine.[18] Korporativno upravljanje u društvima za osiguranje obuhvaćeno je i Osnovnim pravilima osiguranja koje je izradilo Međunarodno udruženje nadzornih tela u osiguranju.[19]

1. Načela poslovanja društva za osiguranje

Zakon o osiguranju predviđa osnovna načela poslovanja društva za osiguranje, reosiguranje, posredovanje u osiguranju, zastupanje u osiguranju i zastupnika u osiguranju.[20] Prvo načelo definiše *dužnost zakonitog poslovanja*. Na osnovu njega, *društva za osiguranje su dužna da prilikom obavljanja svoje delatnosti to čine u skladu sa zakonom, opštim aktima, aktima poslovne politike, pravilima struke osiguranja i aktuarske struke, kao i u skladu sa dobrim poslovnim običajima i poslovnom etikom*. Pored toga, definisano je i *načelo postupanja sa dužnom pažnjom*, i ono podrazumeva da *društva prilikom poslovanja postupaju u skladu s načelom opreznog i savesnog postupanja*.

[16] Zeleni papir: Korporativno upravljanje u finansijskim institucijama i politike naknade (European Commission, *Green Paper: Corporate governance in financial institutions and remuneration policies*, COM(2010) 284 final, Brussels, 2. 6. 2010).

[17] EIOPA Uputstvo o sistemu upravljanja (European Insurance and Occupational Pensions Authority, Guidelines on system of governance, EIOPA BoS 14/253 EN, 1 January 2014), dostupno na adresi: *https://www.eiopa.europa.eu/publications/guidelines-system-governance_en* 31. 9. 2024.

[18] OECD Uputstva o upravljanju u društvima za osiguranje (OECD Guidelines on Insurer Governance, Edition 2017), dostupno na adresi: *https://web-archive.oecd.org/temp/2017-11-16/95651-48071279.pdf* 31. 8. 2024.

[19] Osnovni principi osiguranja i zajednički okvir za nadzor međunarodno aktivnih osiguravajućih grupa (International Association of Insurance Supervisors, Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups, Updated, November 2019), dostupno na adresi: *https://www.iaisweb.org/uploads/2022/01/191115-IAIS-ICPs-and-ComFrame-adopted-in-November-2019.pdf* 31. 8. 2024.

[20] ZO, čl. 19. U daljim izlaganjima će ovaj rad razmotriti pravila koja se odnose na akcionarska društva za osiguranje. Ne samo da je to najčešća forma društva kod nas, već se i na ostale forme i vrste društava iz oblasti osiguranja shodno primenjuju odredbe koje uređuju korporativno upravljanje u akcionarskom društvu za osiguranje. Retko se u teoriji i praksi raspravlja o uzajamnim društvima za osiguranje. Više o nekim pitanjima upravljanja u toj formi u uporednom pravu vid. Henry Hansmann, The ownership and governance of mutual insurance companies, 9 August, 2022, dostupno na adresi: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186367* 31. 8. 2024, 27–32

Ovde je reč o standardu koji je preuzet iz evropskih propisa. Na opšti način su obuhvaćena različita postupanja društva za osiguranje nametanjem standarda dužne pažnje i opreznog i savesnog postupanja, umesto da se taksativno nabrajaju dozvoljene ili ograničene aktivnosti, kako je to bilo ranije predviđeno u pravu EU.[21] Zahtev zakonitog i pažljivog postupanja komplementaran je sa strogim pravilima koja uređuju adekvatnost kapitala (kvantitativni aspekt regulative) i sistem upravljanja društvom (kvalitativni aspekt regulative), uz stalni nadzor nadzornog tela u ovim ključnim oblastima.

Ovde nije reč o nekim posebnim dužnostima koja, da nisu istaknuta, ne bi obavezivala društvo. Naime, ne treba posebno naglasiti da društva svakako imaju obavezu zakonitog, pa i poslovanja sa dužnom pažnjom. Isticanje opštih načela poslovanja govori o posebnom društveno-političkom značaju koji ima pružanje finansijskih usluga, među kojima je i obavljanje delatnosti osiguranja. Zakonodavac time naglašava ozbiljnost koju očekuje od subjekata koji obavljaju ovu delatnost i nameće najstrože uslove poslovanja. Ne samo da obavezuje na poštovanje imperativnih propisa, već ukazuje i na značaj uvažavanja pravila struke, običaje i poslovnu etiku i pojačanu pažnju prilikom poslovnog odlučivanja.[22] U ovoj oblasti, mnogo više nego drugima dolazi do izražaja ne samo poštovanje propisa i savesno postupanje, već i korporativna kultura, vrednosti kojima stremi društvo i poštovanje etičkih principa.[23] Po pravilu će sve te vrednosti dolaziti od uprave društva i onih lica koja su najviše odgovorna da obezbede sigurno i efikasno poslovanje društva za osiguranje. Zbog toga je i njihovo unapređenje i usklađenost sa pravilima dobrog upravljanja od velikog značaja za postizanje ciljeva koji se očekuju od društava za osiguranje.

Ipak, sve veći broj i složenost pravila i principa (naročito u razvijenom sistemu održivog upravljanja u društvima za osiguranje) čine poslovno odlučivanje kompleksnijim i time težim. Usled toga je i dužnost da društvo za osiguranje ne prekrši neko od važećih pravila ili standarda postalo ozbiljan teret i izazov za lica koja vode poslove društva.[24] Ovim načelima poslovanja zakonodavac zapravo postavlja više standarde u obavljanju delatnosti, naročito prilikom donošenja poslovnih odluka. Takođe ukazuje i na interese kojima mora da se vodi društvo za osiguranje. To nije samo klasično obavljanje delatnosti radi sticanja dobiti, već zahtevnije poslovanje

[21] A. van den Hurk, M. Siri, 65.

[22] U tom pravcu se sve češće razume cilj privrednog društva koji se zasniva na primarnom interesu akcionara, s tim da on uključuje osnovna načela poslovne etike i održivog poslovanja. Guido Ferrarini, „Corporate Purpose and Sustainability Due Diligence", *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Eds. Danny Busch, Guido Ferrarini, Seraina Grünewald), Second Edition, Palgrave Macmillan, Cham, 2024, 124.

[23] A. van den Hurk, M. Siri, 44.

[24] Načelno, o uticaju ESG na poslovno odlučivanje i dužnost pažnje vid. Thilo Kuntz, „How ESG is weakening the business judgement rule", *Research Handbook on Environmental, Social and Corporate Governance* (Ed. Thilo Kuntz), Edward Elgar Publishing, Cheltenham, UK – Northampton, MA, USA, 2024, 68–69.

sa dodatnim dužnostima za koje je nužno stručno, odgovorno i savesno postupanje. Pravo EU takođe naglašava obavezu poštovanja pravila koja su usvojena na osnovu Direktive Solventnost II i ustanovljava odgovornost članova uprave za njihovo poštovanje.[25] I Direktiva se u uređenju odgovornosti članova uprave značajnije oslanja na principe nego što predviđa konkretna pravila kako su to činili raniji propisi, što se smatra da doprinosi jačanju te odgovornosti.[26]

Shodno tome, *definisanje interesa privrednog društva koje obavlja poslove osiguranja podrazumeva usklađenost sa ovim posebno naglašenim načelom*. Načelo zakonitog i pažljivog postupanja će biti posebno važno i prilikom procene da li su određena lica sa posebnim dužnostima postupala u skladu sa tako definisanim interesom društva za osiguranje. O tome će više reči biti kasnije.

2. Učešće i kontrola u društvima za osiguranje

Iako Zakon o privrednim društvima[27] detaljno uređuje pojmove povezanih lica, značajnog i većinskog učešća, odnosno kontrole, ova pitanja posebno su detaljno i često strože uređena pravilima Zakona o osiguranju. Posebna pravila definišu povezana lica, opšte pojmove učešća u drugom licu, posebno i kvalifikovanog, značajnog i kontrolnog učešća i pojam bliske povezanosti.[28] Osim toga, ona uređuju uslove uzajamnog učešća i posledice sticanja učešća u određenom stepenu.

Razlog posebnog uređenja tih pitanja je višestruk. Pored potrebe pojačanog nadzora nad onim licima koja imaju učešće ili kontrolu nad društvima za osiguranje i uticaja na pravila o kapitalu, naročito su značajna u domenu korporativnog upravljanja radi izbegavanja situacija sukoba interesa. Otud je definisanje učešća, kontrole i povezanosti sa društvom za osiguranje ključno radi uspostavljanja posebnih dužnosti određenih lica prema društvu za osiguranje.

Ipak, opravdano se može postaviti pitanje da li je za posebno definisanje prava, obaveza i dužnosti u društvu za osiguranje nužno i posebno definisanje osnovnih pojmova, kako to čini Zakon o osiguranju, i uporedo sa postojećim definicijama u opštem kompanijskom pravu.[29] Pravila Direktive Solventnost II drugačije su i, prema

[25] Direktiva Solventnost II, čl. 40.

[26] Paola Manes, „Corporate Governance, the Approach to Risk and the Insurance Industry under Solvency II", *Solvency II: A Dynamic Challenge for the Insurance Market* (Eds. Mans Andenas, Renzo G. Avesani, Paola Manes, Francesco Vella, Philip R. Wood), Mulino, Bologna, 2017, 114.

[27] Zakon o privrednim društvima – ZOPD, *Službeni glasnik RS*, br. 36/2011, 99/2011, 83/2014 – dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019 i 109/2021.

[28] ZO, čl. 28–30.

[29] Tako je, videćemo, neke pojmove Zakon o osiguranju posebno regulisao, dok su pojedini pojmovi ili ustanove koje koristi ostali bez definicije. Tako, na primer, pojam kontrole nije posebno definisan. To može da dovede do nesklada između posebno definisanih i opštih pojmova iz Zakona o privrednim društvima. Zakon o osiguranju sadrži samo posebnu definiciju kontrolnog učešća (kao učešće u društvu od 50% ili

našem mišljenju, bolje pristupila tom problemu, te taj propis izričito definiše samo one opšte pojmove za koje onda vezuje tačno određene i posebne posledice.[30]

a) Pojam učešća i kontrole

Smatra se da *jedno lice ima učešće u drugom licu* kada ono posredno ili neposredno ima mogućnost efektivnog vršenja uticaja na upravljanje ili poslovnu politiku drugog lica. Naročito je ima putem prava ili mogućnosti ostvarivanja prava glasa, odnosnom učešćem u kapitalu. Ipak, mogućnost efektivnog uticaja na upravljanje i poslovnu politiku mogu se zasnivati i na drugim okolnostima, uključujući ugovorni, poslovni ili drugi odnos sa tim licem.

Za razliku od opštih pravila kompanijskog prava, Zakon o osiguranju posebno definiše tzv. *kvalifikovano učešće u jednom pravnom licu* kao ono u kome jedno lice ima posredno ili neposredno pravo ili mogućnost ostvarivanja 10% ili više prava glasa ili učešća u njegovom kapitalu. Takođe, mogućnost efektivnog vršenja uticaja na upravljanje ili poslovnu politiku takođe znači postojanje kvalifikovanog učešća.[31] Narodna banka Srbije je u Smernici br. 2 definisala preporuke radi dobrog korporativnog upravljanja koje se odnose na akcionare koji imaju kvalifikovano učešće. Insistira se na sigurnim metodama registracije i prenosa vlasništva, pravovremenom i redovnom informisanju, učešću u radu skupštine i glasanju, naročito kada odlučuju o izboru i razrešenju članova uprave i prilikom raspodele dobiti.[32]

Značajno je učešće vezano za prag od 20% ili više prava glasa, odnosno učešće u njegovom kapitalu. Značajno učešće postoji i kroz mogućnost efektivnog vršenja značajnog uticaja na upravljanje ili poslovnu politiku pravnog lica.

Kontrolno učešće ima lice sa 50% ili više glasačkih prava ili učešća u vlasništvu pravnog lica. Osim toga, kontrolno je i učešće koje omogućuje imenovanje više od polovine članova organa upravljanja ili nadzora u pravnom licu ili daje mogućnost efektivnog vršenja kontrolnog uticaja na upravljanje ili poslovnu politiku pravnog lica. Kontrola se u ovom kontekstu konkretno vezuje, dakle, za većinsko učešće u pravnom licu, kao i imenovanje članova organa u društvu. Druge vrste kontrole obuhvaćene su opštom mogućnošću efektivnog vršenja kontrolnog

više prava glasa ili kapitala društva) koja ne odgovara pojmu kontrole iz Zakona o privrednim društvima iz čl. 62 st. 5, a ono svoju primenu ima ne samo radi utvrđivanja kontrolnog učešća, već i u druge svrhe (npr. kod opštih pravila o dužnostima u privrednom društvu).

[30] Na primer, Direktiva Solventnost II ne definiše opšte pojmove kontrole, većinskog učešća itd., izuzev pojma kvalifikovanog učešća za koje onda vezuje posebne posledice – na primer, u nadzoru nad sticanjem kvalifikovanog učešća. Vid. čl. 13 st. 20 i 21, kao i čl. 24 Direktive Solventnost II.

[31] Ovde nije dovoljno precizno predviđena razlika između učešća i kvalifikovanog učešća, budući da se ono u oba slučaja definiše kao „mogućnost efektivnog vršenja uticaja na upravljanje ili poslovnu politiku drugog lica".

[32] Odsek II: Prava akcionara Smernice br. 2.

uticaja na pravno lice i ostavljaju širok prostor za okolnosti koje bi do nje mogle da dovedu.[33]

Blisko su povezana ona fizička ili pravna lica kada među njima postoji odnos značajnog ili kontrolnog učešća ili trajna povezanost sa trećim licem putem kontrolnog učešća. Ovaj poslednji slučaj bliske povezanosti upućuje na različite odnose posrednih, naročito veza u grupi društava.

Zakonodavac je, najzad, imao naročito potrebu i da definiše *posredno učešće* pod kojim smatra situaciju kada jedno lice nema neposredno učešće (vlasništvo) u drugom pravnom licu, iako postoji mogućnost da efektivno ostvari učešće u upravljanju ili kapitalu koristeći neposredno učešće drugog lica. Način i uspostavljanje korišćenja tuđeg učešća nisu definisani, ali su to najčešće slučajevi posrednog učešća putem kontrole u (višestepenim) kontrolisanim društvima.

b) Pojam povezanih lica

Zakon o osiguranju sadrži širok krug lica kako bi ukazao na brojne odnose kojima bi oni mogli da utiču na akcionarsko društvo za osiguranje i njegovo poslovanje.[34] Otuda je definisanje povezanih lica od naročitog značaja za uspostavljanje standarda i poštovanje pravila i principa dobrog korporativnog upravljanja. Definisanje kruga ovih lica od značaja je i za druga pravila (o kapitalu, o nadzoru itd.). Ipak, poseban pojam povezanih lica (koji sadržinski nije jednak opštem pojmu povezanih lica iz Zakona o privrednim društvima) nespretan je i neusaglašen sa drugim opštim pravilima kompanijskog prava.[35]

Pod povezanim licima definisana su *međusobno povezana lica*. Njihova povezanost uspostavlja se upravljanjem, kapitalom ili na drugi način. Razlog povezivanja među licima je postizanje nekog zajedničkog cilja, dok je njegova posledica međusobni uticaj na poslovanje ili rezultate poslovanja ovih lica. Lista povezanih lica je otvorena – te se posebno nabrajaju najčešće veze. Među njima su naročito istaknute veze kojima se uspostavlja učešće u pravnom licu, mogućnost uticaja na finansijski položaj drugog lica, odnosi iz različitih ugovora (punomoćje, ugovor o radu ili ugovor o delu), lični i porodični odnosi.

[33] O pojmu kontrole u opštoj teoriji kompanijskog prava vid. Tatjana Jevremović Petrović, *Grupe privrednih društava*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, 80–118.

[34] ZO, čl. 30.

[35] Primera radi, na društva za osiguranje se shodno primenjuje deo Zakona o privrednim društvima koji uređuje posebne dužnosti prema društvu, iako je za primenu tih odredbi od značaja i pojam povezanog lica. Naši autori uočili su ovaj nesklad i istakli da ne treba osporavati potrebu posebnih definicija povezanih lica u specijalizovanim društvima (uključujući i društva za osiguranje), ali da bi trebalo sistemski pristupiti tom pitanju, te ih jedinstveno definisati. Jelena Lepetić, „Povezana lica u poslovnom pravu", *Pravo i privreda*, br. 10–12/2015, 21–23, 28–29, 38.

Kao *lica povezana za akcionarskim društvom za osiguranje* navedeni su članovi grupe društava u kojoj se to društvo nalazi, članovi njihovih uprava i lica koja su porodičnim odnosima ili učešćem (vlasništvom), odnosno kontrolnim učešćem neposredno ili posredno povezani sa tim licima.

c) Prava akcionara u društvima za osiguranje

U smernicama Narodne banke Srbije radi unapređenja korporativnog upravljanja usvojeno je nekoliko važnih preporuka kojima se društva za osiguranje podstiču da osiguraju puno uživanje prava akcionara uz poštovanje njihovog ravnopravnog tretmana.[36] Posebno se naglašava potreba zaštite manjinskih akcionara, objavljivanje politike dividendi, naknada, informacija o institucionalnim investitorima, kontroli u društvu za osiguranje i sporazumima akcionara. Preporučuje se podsticanje učešća akcionara u radu društva, uz ravnopravni tretman svih akcionara iste vrste akcija, domaćih i stranih akcionara, kontrolnih i spoljnih akcionara.

3. Organi akcionarskog društva za osiguranje

Najvažniji organizacioni oblik društva koje obavlja delatnost osiguranja predstavlja društvo za osiguranje (ili reosiguranje) u formi akcionarskog društva.[37] Njegovi organi organizovani su prema modelu dvodomnog upravljanja, i čine skupštinu, nadzorni odbor i izvršni odbor.[38] Organizacija i pravila o radu organa akcionarskog društva za osiguranje u velikoj meri se oslanjaju na opšta pravila kompanijskog prava, i otud ovde značajnu primenu ima, osim Zakona o osiguranju koji uređuje opšta pravila o strukturi i nadležnostima organa akcionarskog društva za osiguranje, i Zakon o privrednim društvima. Važne su i smernice kojima Narodna banka Srbije podstiče društva za osiguranje da unaprede pravila korporativnog upravljanja.

Ipak, klasični model upravljanja društvom ne može se do kraja primeniti na društva za osiguranje, imajući u vidu njihovu delatnost. Naime, akcionarska društva za osiguranje i drugi subjekti u delatnosti finansijskih usluga imaju najvažnije mesto među učesnicima na tržištu. Osim toga imaju važnu ulogu u stabilnosti finansijskog sistema. Najzad, vrše značajnu društvenu ulogu. Zbog toga je i obavljanje njihove

[36] Odsek II i III: Prava akcionara i Ravnopravan tretman akcionara Smernice br. 2.

[37] Osim te forme, Zakon o osiguranju omogućava da se društvo za osiguranje (ali ne i reosiguranje) osnuje i kao društvo za uzajamno osiguranje. O formama društava za osiguranje, i uopšte radi obavljanja poslova osiguranja vid. čl. 20 Zakona o osiguranju. Odredbe o organima, upravi i članovima uprave posebno su uređeni za akcionarsko društvo za osiguranje, ali se shodno primenjuju na akcionarsko društvo za reosiguranje i društvo za uzajamno osiguranje (čl. 80 Zakona o osiguranju). U daljem tekstu neće posebno biti reči o ovim dvema formama, već će biti reči samo o akcionarskom društvu za osiguranje. Takođe neće posebno biti reči ni o društvima za posredovanje u osiguranju, niti o društvu za zastupanje u osiguranju.

[38] ZO, čl. 50.

delatnosti mnogo više usmereno ostvarivanju širih, društvenih ciljeva, naročito korisnika usluga osiguranja. To je razlog da zakonodavac posebnu pažnju okreće ka kvalitetnijem i sigurnijem upravljanju u društvima za osiguranje. Posebno se bavi strukturom organa i sastavom njihovih članova, sa namerom da obezbedi nezavisno upravljanje i kontrolu kvalifikovanih lica.[39] Za sva društva u finansijskom sektoru posebno je važna struktura i naročito kvalifikacije članova uprave. U njima, više nego u običnim društvima, postoji manja konkurencija, iako je oblast značajnije regulisana, a obavljanje delatnosti daleko je složenije od delatnosti van finansijskog sektora.[40]

Najzad, kod ovih društava poseban značaj imaju pravila o objavljivanju informacija, i naročito transparentnosti – ali ne samo u klasičnom smislu objavljivanja iz opšte teorije kompanijskog prava i radi zaštite interesa akcionara ili poverilaca i drugih lica.[41] Ovde je, zapravo, transparentnost u funkciji lakšeg i efikasnijeg organizovanja nadzora nad delatnostima društva za osiguranje.[42] Takođe, naročito je kod društava za osiguranje izražena potreba upravljanja rizikom i nadzor nad njegovim sprovođenjem, te stroga podela nadležnosti i unutrašnja kontrola predstavljaju ključne funkcije u korporativnom upravljanju društava za osiguranje.[43]

a) Struktura organa i njihove nadležnosti

Skupštinu akcionarskog društva za osiguranje čine svi akcionari društva. Njen delokrug obuhvata brojna statusna pitanja, odlučuje o kapitalu društva i njegovom povećanju i smanjenju, imovinskim i pitanjima koja se tiču poslovnih rezultata društva.[44] U odnosu sa drugim organima najvažniji delokrug skupštine predstavlja imenovanje i razrešenje članova nadzornog odbora društva. Imperativno pravilo zabranjuje prenos posebno predviđenih nadležnosti akcionarskog društva za osiguranje na druge organe, čime se postiže stroga podela nadležnosti u ovoj formi društva.

Nadzorni odbor akcionarskog društva za osiguranje čine najmanje tri člana koje imenuje i razrešava skupština. U delokrug nadzornog odbora ulaze pitanja o poslovnim ciljevima, strategiji i poslovanju društva za osiguranje, važne izborne nadležnosti, budući da imenuju, vrše nadzor nad radom, određuju naknade za

[39] K. J. Hopt, 13, 18.

[40] Jonas Abraham Akuffo, *Corporate Governance and Accountability of Financial Institutions: The Power and Illusion of Quality Corporate Disclosure*, Palgrave Macmillan, 2020, 40.

[41] O osnovnim funkcijama objavljivanja u kompanijskom pravu vid. više Tatjana Jevremović Petrović, „Obavezno objavljivanje kao instrument zaštite poverilaca u kompanijskom pravu", Pravo i privreda, br. 4–6/2011, 187–215.

[42] K. J. Hopt, 24.

[43] U tom kontekstu ključnom se smatra uloga odbora direktora. Vid. Danny Busch, Guido Ferrarini, Gerard van Solinge, „Governing Financial Institutions: Law and Regulation, Conduct and Culture", *Governance of Financial Institutions* (Eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 13.

[44] ZO, čl. 52.

rad i razrešavaju članove izvršnog odbora društva, imenuju i razrešavaju aktuara društva, predlažu skupštini društvo za reviziju i daju i opozivaju prokuru; brinu o poslovnoj politici, izveštavanju o poslovanju društva i sistemu internih kontrola i strategiji, uspostavljanju sistema upravljanja rizicima i nadzorom nad njim. Takođe imaju značajne nadležnosti u radu skupštine društva, emisiji akcija i odlučivanju o taksativno navedenim pitanjima vezanim za imovinska pitanja i kapital društva. Od pravila dobrog korporativnog upravljanja posebno su važne njihove nadležnosti u pogledu izbegavanja ili rešavanja sukoba interesa akcionara, povezanih i drugih lica sa dužnostima prema društvu.

Izvršni organ akcionarskog društva za osiguranje čini *izvršni odbor* sa najmanje dva člana. Osim zastupanja koje je u nadležnosti predsednika izvršnog odbora, najvažnije nadležnosti ovog organa su u vođenju poslova i nadzoru u organizaciji društva i aktivnostima zaposlenih.[45] Ima rezidualni krug nadležnosti u pitanjima koja nisu u nadležnosti skupštine i nadzornog odbora. Na ovom organu leži posebna dužnost u pravilnoj organizaciji poslovanja, i naročito potrebi formiranja komisija i drugih tela koja će unaprediti rad odbora i olakšati komunikaciju i razmenu informacija i politika unutar društva.

b) Imenovanje i razrešenje lica za članove organa uprave

Radi jednostavnijeg regulisanja brojnih pitanja koja se odnose na lica koja čine članove organa nadzornog i izvršnog odbora Zakon o osiguranju definiše da upravu akcionarskog društva za osiguranje čine nadzorni i izvršni odbor, a zatim posebno predviđa uslove pod kojima jedno lice može biti imenovano za člana ovih odbora.[46]

Predviđeni su uslovi za obavljanje funkcije člana uprave kroz pravilo tzv. *fit and proper*. Pravilo potiče iz prava EU i ustanovljeno je radi definisanja minimalnih uslova i standarda za imenovanje lica koja obavljaju određene funkcije u društvima za osiguranje, ali i drugim subjektima koji obavljaju delatnosti finansijskih usluga. Posebno se kod lica koja efektivno upravljaju društvom ili u njemu imaju vodeći položaj zahteva da sve vreme ispunjavaju profesionalne kvalifikacije, znanje i iskustvo koje je neophodno za oprezno i savesno upravljanje (i podvodi ga pod pojam *fit*). Osim toga, od tih lica zahteva se i da imaju dobru poslovnu reputaciju i integritet (kao element pojma *proper*).[47] Pod tim se dalje obrazlaže potreba procene poštenog i finansijski razumnog postupanja lica koje se imenuje na osnovu njegovih ličnih karakteristika, kao i privatnog i profesionalnog postupanja.[48]

[45] ZO, čl. 57–58.
[46] ZO, čl. 59, st. 1 i 62
[47] Direktiva Solventnost II, čl. 42.
[48] Delegirani akti Evropske komisije 2015/35, čl. 273, st. 4.

U društvima koja obavljaju delatnost osiguranja u EU ovaj uslov ima širi domašaj i odnosi se na sva lica koja se nalaze na najvažnijim pozicijama u društvu. To su osim akcionara i druga lica koja efektivno upravljaju društvom ili zauzimaju vodeće pozicije na mestima sa kojih se upravlja tim i drugim licima u grupi.[49] Pojam lica koja efektivno upravljaju društvom širi je od članova odbora (članova uprave) i smatra se da obuhvata i lica na vodećim pozicijama van odbora.[50] Takođe se odnosi na ona lica koja zauzimaju ključne pozicije u društvu. Pod njima se smatraju najmanje oni na pozicijama u sistemu upravljanja – lice zaduženo za upravljanje rizikom, usklađenost, interni nadzor i aktuarsku funkciju.[51]

Delegiranim aktom Evropske komisije se dalje razrađuje pravilo *fit and proper*. Ističe se da se radi procene moraju uzeti stručne i druge profesionalne kvalifikacije, znanje i iskustvo u oblasti osiguranja ili finansijskom sektoru i posebne dužnosti koje je lice obavljalo do tada u prethodnom radnom iskustvu.[52] Takođe je nužno voditi računa o različitoj stručnosti i kvalifikacijama članova odbora kako bi oni profesionalno mogli da organizuju upravljanje i nadzor u društvu.[53]

Uloga tih lica u društvu je proaktivna i podrazumeva da nije dovoljno da se prilikom donošenja odluka članovi uprave oslanjaju na informacije koje dolaze od zaposlenih u društvu, naročito onih koji imaju visoke pozicije, ali nisu članovi uprave u užem smislu reči.[54] U teoriji se raspravlja u kojoj meri je utemeljen zahtev proaktivne uloge članova uprave u važećim evropskim propisima, ali i u kojoj meri takvo postupanje može da šteti efikasnosti i osnovnom načelu upravljanja u društvima za osiguranje koji podrazumevaju strogu podelu nadležnosti među organima društva.[55] Najzad, za razliku od drugih finansijskih institucija, pravo EU ne zahteva kod društava za osiguranje kriterijume koji se odnose na njihovu ličnu nezavisnost i samostalno odlučivanje, kao ni zahteve u pogledu vremena koje ova lica imaju i mogu da posvete u obavljanju svojih dužnosti.[56]

Zakon o osiguranju definiše standard *fit and proper* kroz zahtev da član uprave mora imati dobru poslovnu reputaciju i odgovarajuće kvalifikacije, znanje i iskustvo koji su potrebni za obavljanje ove funkcije.[57] U teoriji se naglašava značaj

[49] Recital 34 i čl. 26 Direktive Solventnost II.

[50] Detaljno o tome, i sa nedoumicama u preciznom domašaju, vid. Danny Busch, Iris Palm-Steyerberg, „Fit and Proper Requirements in EU Financial Regulation: Towards More Cross-Sectoral Harmonization", *Governance of Financial Institutions* (Eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 190–191.

[51] *Ibid*.

[52] Delegirani akti Evropske komisije 2015/35, čl. 273, st. 2.

[53] Delegirani akti Evropske komisije 2015/35, čl. 273, st. 2.

[54] A. van den Hurk, M. Siri, 49.

[55] *Ibid.*, 50.

[56] Više o tim kriterijumima kod drugih finansijskih institucija D. Busch, I. Palm-Steyerberg, 199–201.

[57] Detaljna pravila o ispunjenosti ovog uslova razradila je Narodna banka Srbije i u tom cilju regulisala ovo pitanje Odlukom o sprovođenju odredaba Zakona o osiguranju koje se odnose na izdavanje dozvole

ovih objektivnih (stručne kvalifikacije i iskustvo) i subjektivnih (poslovno poštenje i integritet) uslova i razmatra mogućnost licenciranja kandidata za članove uprave u društvima za osiguranje.[58]

To je ujedno jedini poseban *pozitivni uslov za imenovanje lica* za obavljanje funkcije člana uprave. Međutim, brojni su negativni uslovi za imenovanje, uključujući i tzv. diskvalifikaciju lica da obavlja funkcije člana uprave. Od negativnih uslova, to su pravnosnažna osuda za krivično delo na bezuslovnu kaznu zatvora ili kazneno delo koje lice čini nepodobnim da obavlja funkciju člana uprave i pravnosnažno izrečena mera zabrane obavljanja delatnosti. Diskvalifikacija da jedno lice bude član uprave postoji ukoliko je to lice bilo ovlašćeno za zastupanje i predstavljanje pravnog lica ili član njegovog organa upravljanja na dan oduzimanja dozvole za rad pravnom licu iz finansijskog sektora na dan ili šest meseci pre toga ili na dan uvođenja prinudne uprave ili pokretanja postupka stečaja ili prinudne likvidacije. Svrha diskvalifikacije pre svega je radi zaštite javnog interesa.[59] Takođe, član uprave ne može biti ni lice kome je u poslednje tri godine oduzeta saglasnost za obavljanje funkcije člana organa upravljanja/druge funkcije, ili je razrešeno dužnosti člana uprave.

Od drugih *smetnji za imenovanje* posebno se naglašava da lice ne može biti povezano sa pravnim licem u kome akcionarsko društvo za osiguranje ima više od 5% učešća u kapitalu ili učešća u pravu glasa. Ne sme biti ni član organa upravljanja ili nadzora ili prokurista u drugom društvu za osiguranje/reosiguranje ili drugom licu iz finansijskog sektora, osim u slučaju kada je reč o članovima uprave koji su članovi uprave ili nadzora kontrolisanog zavisnog društva.

Dodatno se od članova nadzornog i izvršnog odbora zahteva da najmanje jedan član mora aktivno da zna srpski i ima prebivalište u RS, dok ostali članovi

za obavljanje poslova osiguranja/reosiguranja i pojedinih saglasnosti Narodne banke Srbije, *Službeni glasnik RS*, br. 55/2015, ispravka 69/2015, 36/2017, 29/2018 i 44/2024. Predviđeno je da se pod dobrom poslovnom reputacijom misli na lični, profesionalni i moralni integritet koji bi tom licu omogućio da obavlja svoju dužnost pošteno i savesno – s pažnjom dobrog privrednika i u skladu s pravilima sigurnog i dobrog poslovanja. Pored pokazatelja prema kojima se procenjuju ovi kvaliteti, postoji izričito naveden krug okolnosti u slučaju kojih će se smatrati da lice nema dobru poslovnu reputaciju.
U odeljku koji razrađuje bliže uslove za davanje prethodne saglasnosti za obavljanje funkcije člana uprave društva za osiguranje predviđeno je da se kao pokazatelj odgovarajuće stručne kvalifikacije, znanja i iskustva uzima najmanje prvi stepen visokog obrazovanja na osnovnim akademskim studijama u trajanju od najmanje četiri godine, tri godine radnog iskustva na rukovodećem položaju u društvu iz finansijskog sektora ili pet godina radnog iskustva u oblasti osiguranja i finansija ili rukovodećem položaju na poslovima značajnim za poslovanje društva. Među dokumentima koja se dostavljaju radi dokaza ispunjenosti uslova zahteva se i pismo preporuke odgovornog lica ili organa pravnog lica kod koga je predloženi kandidat bio zaposleni ili angažovan – čime se podvlači subjektivni element u proceni reputacije, znanja i iskustva. Najzad, Narodna banka Srbije prilikom utvrđivanja da li kandidat ispunjava uslove za obavljanje funkcije člana uprave procenjuje sposobnost ovog lica uzimanjem u obzir svih uslova i stoga je u okviru diskrecionih ovlašćenja ovog organa. Tačka 25–29.

[58] Nataša Petrović Tomić, *Pravo osiguranja: Sistem*, Knjiga I, *Službeni glasnik*, Beograd, 2019, 197–198.

[59] *Ibid*., 201.

izvršnog odbora moraju imati boravište u RS. Svi članovi izvršnog odbora moraju biti zaposleni sa punim radnim vremenom u akcionarskom društvu za osiguranje u kome vrše funkciju člana tog odbora.

c) Nezavisni članovi nadzornog odbora

Od posebnih pravila koja nameću ozbiljnije standarde korporativnog upravljanja ovde naročito vredi istaći značajniji broj nezavisnih članova nadzornog odbora. Najjednostavnije rečeno, uloga nezavisnih članova odbora ima ulogu podsticanja nezavisnog donošenja odluka nadzornog odbora.[60] U teoriji korporativnog upravljanja se postojanje nezavisnih članova u upravi smatra odlučujućom odredbom kojom se zadire u sastav organa društva.[61] Obaveza postojanja nezavisnih lica leži u potrebi zaštite interesa određenih lica – ovde posebno pored akcionara i interesa korisnika osiguranja – od negativnog uticaja naročito izvršnih, ali i svih drugih direktora čije postupanje ne bi bilo nezavisno.[62]

Opšta pravila kompanijskog prava zahtevaju da javna akcionarska društva moraju imati najmanje jednog nezavisnog direktora u jednodomnom sistemu upravljanja, odnosno najmanje jednog nezavisnog člana nadzornog odbora u sistemu dvodomnog upravljanja.[63] Za razliku od toga, njihov broj je viši u akcionarskim društvima za osiguranje, gde prema odredbama Zakona o osiguranju čine najmanje trećinu članova nadzornog odbora.[64] Ipak, smatra se da je zahtev za postojanjem većeg broja nezavisnih direktora u društvima iz finansijskog sektora daleko manje značajan od njihovog profesionalnog i stručnog znanja i iskustva, izuzev za pitanja sukoba interesa.[65]

Posebno se među smernicama radi uspostavljanja boljeg korporativnog upravljanja preporučuje da društvo za osiguranje utvrdi način izbora i razrešenja nezavisnih članova nadzornog odbora tako da obezbede zaštitu manjinskih akcionara.[66] To društvo može učiniti, na primer, putem pravila o kumulativnom glasanju prilikom imenovanja tih lica. Takođe bi nezavisnim članovima nadzornog odbora trebalo pružiti mogućnost aktivnog učešća u donošenju odluka i lakši pristup informacijama.

d) Spoljni nadzor NBS u pitanjima korporativnog upravljanja

U obavljanju delatnosti osiguranja društva za osiguranje nalaze se pod nadzorom Narodne banke Srbije. Nadzor postoji u brojnim pitanjima osnivanja, zakonitosti poslovanja, postupanja prema korisnicima usluga osiguranja, i uopšte

[60] A. van den Hurk, M. Siri, 46.
[61] K. J. Hopt, 24.
[62] *Ibid*., 25.
[63] ZOPD, čl. 392 i 437.
[64] ZOO, čl. 54, st. 2.
[65] K. J. Hopt, 26.
[66] Odsek III: Ravnopravan tretman akcionara Smernice br. 2.

sprovođenju politika, zahteva radi obezbeđenja i zaštite kapitala, likvidnosti i solventnosti društva za osiguranje. Takođe je moguće i da obuhvati nadzor na drugim pravnim licima koja su povezana sa društvom za osiguranje.[67] U sferi korporativnog upravljanja nadzor se vrši u kontroli ispunjenosti uslova od značaja za ovu oblast, naročito u odnosu na lica koja obavljaju funkciju člana uprave. Nadzor obuhvata i primenu sistema upravljanja u društvu.[68]

Važan segment nadzora Narodne banke Srbije postoji prilikom imenovanja i nadzora nad radom uprave društva za osiguranje. Prilikom imenovanja člana uprave neophodna je prethodna saglasnost Narodne banke Srbije, bez koje je imenovanje ništavo.[69] Posebno je važno ovlašćenje Narodne banke na oduzimanje saglasnosti za obavljanje funkcije člana uprave ne samo u onim slučajevima kada lice ne ispunjava sve predviđene uslove, već i u slučaju kada to lice ne postupa u skladu sa obavezama člana uprave ili ako se oceni da su se stekli uslovi za uvođenje prinudne uprave.[70] Reč je o diskrecionom ovlašćenju koje u pogledu izricanja nadzorne mere ima Narodna banka Srbije.[71]

Radi uvećane kontrole u ispunjenju uslova za obavljanje funkcije člana uprave i radi umanjenja rizika od situacija u kojima bi mogao da postoji sukob interesa, predviđene su za člana uprave posebne dužnosti obaveštavanja Narodne banke Srbije. Naročito se odnose na imenovanje i prestanak funkcije tog lica u organu upravljanja ili nadzora drugih pravnih lica. Takođe je član uprave dužan da Narodnu banku Srbije obavesti i o pravnim poslovima kojima je on ili član njegove porodice stekao neposredno ili posredno akcije ili udele pravnog lica čime je u njemu uvećao ili smanjio svoje ili kvalifikovano učešće člana porodice. Narodna banka Srbije ovlašćena je da prilikom nadzora nad poslovanjem društva za osiguranje naloži razrešenje i suspenziju članova uprave ili uvede prinudnu upravu, a ovlašćena je i da izriče društvu za osiguranje i odgovornim licima novčane kazne.[72]

e) Sistem upravljanja

U osnovi propisa EU koji uređuje upravljanje društava za osiguranje stoji efektivan sistem upravljanja koji omogućava oprezno i savesno vođenje poslova društva. Jedan od najvažnijih aspekata poslovanja kod svih društava u finansijskom sektoru koja su izložena posebnim i značajnijim rizicima ne predstavlja eliminisanje rizika

[67] ZO, čl. 187, st. 1–2.
[68] ZO, čl. 13.
[69] ZO, čl. 61, st. 1.
[70] ZO, čl. 64, st. 1. Ovo su, inače, osnove efektivnog sistema upravljanja koji se na nivou EU smatra ključnim radi ostvarenja ciljeva regulisanja i nadzora u delatnostima osiguranja. Pod uticajem pravila iz Direktive Solventnost II, osnova su sistema upravljanja i u našem pravu.
[71] N. Petrović Tomić, 200–201.
[72] ZO, čl 197, ст. 1, t. 5 i 7, čl. 204 i 206.

u poslovanju, već njihovo poznavanje, razumevanje i naročito upravljanje rizicima.[73] U različitim delatnostima iz oblasti finansijskog poslovanja, iako pojačani, rizici se međusobno razlikuju prema delatnosti koju društva obavljaju. Zbog toga postoje posebni rizici u društvima za osiguranje, među kojima je svakako specifičan onaj koji proizlazi iz prirode njihove delatnosti – rizik osiguranja.[74] Sastoji se u predviđanju, prikupljanju i raspršivanju rizika, naročito sa pojedinca (potrošača ili poslovnog subjekta) na neko drugo lice ili grupu lica.[75] Usled toga mu je izražena socijalna funkcija, ali i odgovornost u prevenciji i podsticanju umanjenja određenih rizika.

Takođe, na društva za osiguranje značajno utiču tržišni, rizik likvidnosti i drugi poslovni rizici.[76] Ti rizici su u bliskoj vezi sa zahtevima za formiranjem i održanjem kapitala koji postavlja Direktiva Solventnost II, a pod njenim uticajem i domaće pravo. Najzad, podsticanjem učešća društava za osiguranje na tržištu kapitala dodatno se uvećavaju rizici sa kojima posluju, te su zajedno sa drugim učesnicima na finansijskom tržištu izloženi i drugim, sistemskim rizicima, posebno u onim situacijama kada su organizovani u grupe u kojima članice obavljaju različite finansijske usluge.[77]

Pravilno uočavanje, procena i upravljanje rizikom leži u osnovi sigurnog poslovanja društava za osiguranje, i time postaje jedna od centralnih tema njihovog dobrog upravljanja. Kako bi obezbedili kvalitetno sagledavanje i upravljanje rizicima i uopšte upravljanje i kontrolu društava za osiguranje ključne odlike efektivnog sistema upravljanja čine adekvatna i transparentna organizaciona struktura sa strogim razgraničenjem i podelom nadležnosti i efikasan sistem prenosa informacija.[78] Ipak, u teoriji se ističe da iako ključne, to ne moraju da budu i jedine odlike sistema upravljanja, tako da je moguće identifikovati pored njih i druge.[79] Sistem upravljanja mora biti srazmeran prirodi, veličini i složenosti delatnosti koje obavljaju društva za osiguranje. Taj zahtev izuzetno je važan, budući da obezbeđuje proporcionalnost i prilagođava zahteve upravljanja kao i adekvatnosti kapitala prema veličini društva i poslovima i delatnostima kojima se bave.[80] To naročito odgovara shvatanju da regulativa mora da bude balansirana i ne sme da optereti društvo detaljima kako će upravljati svojim rizicima.[81] Društvo za osiguranje mora da obezbedi sistem koji je za njega adekvatan, dok uprava mora da obezbedi i nadzire njegovo sprovođenje.

[73] P. Manes, 100.
[74] Više o razlikama između rizika kojima su izložene različite finansijske institucije vid. *Ibid*., 105.
[75] A. van den Hurk, M. Siri, 56.
[76] Više o različitim funkcijama finansijskih organizacija i vezi sa rizicima u njihovom poslovanju vid. G. Ferrarini (2017), 4–6.
[77] P. Manes, 106–107.
[78] Direktiva Solventnost II, čl. 41, st. 1 i 2.
[79] A. van den Hurk, M. Siri, 53.
[80] *Ibid*., 50; P. Manes, 112. Kod nas, ovi zahtevi posebno su uređeni delom zakona koji obezbeđuje sredstva i adekvatnost kapitala u Glavi V Zakona o osiguranju.
[81] G. Ferrarini (2017), 18.

Ipak, insistira se na opštem regulatornom okviru, i ovlašćenju nadzornog tela da periodično kontroliše adekvatnost sistema upravljanjem rizikom.[82]

Svim ključnim odlikama sistema upravljanja je zajedničko da zahtevaju od lica koja su za njih zadužena posebne standarde i uslove za obavljanje delatnosti, nadzorno telo ima uvid u to koja lica obavljaju ove funkcije, i mora biti obavešteno o svim promenama. Najzad, ključne funkcije podležu strogim uslovima da bi mogle da se prenesu ili povere na obavljanje trećim licima.[83]

Prema Zakonu o osiguranju društvo za osiguranje mora da obezbedi efikasni sistem upravljanja, u koji ulaze upravljanje rizikom, sistem internih kontrola, interna revizija i aktuarstvo.[84] Taj sistem takođe je uslovljen veličinom i obimom aktivnosti, i naročito vrstama osiguranja koje društvo obavlja.

Društvo za osiguranje mora da obezbedi *sistem upravljanja rizicima*. Ovo je jedan od najvažnijih savremenih aspekata upravljanja u društvima za osiguranje, i naročito je izražen u evropskim pravilima koja su se razvila nakon ekonomske krize, uključujući i odredbe iz Direktive Solventnost II.[85] Društvo za osiguranje mora da razvije i primeni različite strategije, procese i procedure kako bi efikasno identifikovalo, procenilo i merilo rizike i njima adekvatno upravljalo.[86] Pored toga, dobro korporativno upravljanje zasniva se na efikasnom *sistemu unutrašnje (interne) kontrole*. Ovaj deo sistema upravljanja je, po uzoru na pravila EU, različit od upravljanja rizikom, iako je sa njim svakako povezan, i ogleda se u obezbeđenju poštovanja svih propisa koji se primenjuju na društvo za osiguranje i efikasnom poslovanju radi ostvarivanja njegovih ciljeva.[87] Prema odredbama Zakona o osiguranju, to znači postojanje odgovarajućih administrativnih i drugih procedura, postupaka i radnji koje uprava organizuje i primenjuje shodno prirodi, složenosti i rizičnosti posla.

U društvu za osiguranje nužno je organizovanje samostalne i nezavisne *interne revizije* koja se obavlja u posebno organizovanom delu društva.[88] Društvo za osiguranje angažuje najmanje jedno lice sa punim radnim vremenom radi vršenja interne revizije. Interni revizor ne može biti član uprave, niti je ovlašćen da obavlja druge poslove u društvu za osiguranje koji mogu da budu predmet interne revizije. Interna revizija odgovorna je za svoj rad neposredno nadzornom odboru. Dakle, upravljanje i kontrola višestepeno su i hijerarhijski organizovane.

Najzad, društvo za osiguranje angažuje lice u svojstvu *ovlašćenog aktuara* radi obavljanja aktuarskih poslova.[89] Imenuje ga i razrešava nadzorni odbor društva

[82] *Ibid*.
[83] Navedeno prema A. van den Hurk, M. Siri, 53.
[84] ZO, čl. 147.
[85] Direktiva Solventnost II, čl. 44.
[86] Vid. posebno odeljak 2 Glave VI Zakona o osiguranju.
[87] A. van den Hurk, M. Siri, 63.
[88] ZO, čl. 154.
[89] ZO, čl. 161.

za osiguranje. Za to lice ne sme biti imenovano lice koje je član uprave ili interni revizor. On mora biti nezavisan i samostalan u obavljanju svojih poslova, te je nadzor nad radom ovlašćenog aktuara poveren Narodnoj banci Srbije.

f) Spoljna revizija

Važna provera finansijskih rezultata društva za osiguranje vrši se kroz objektivnu, stručnu i nepristrasnu reviziju.[90] Osnovni cilj uvođenja takve ocene vrši se radi provere rada društva za osiguranje, i naročito njegove uprave. Otud leži i poseban značaj ove kontrole u sistemu razvijenog korporativnog upravljanja.

U društvu za osiguranje reviziju obavljaju licencirani ovlašćeni revizori zaposleni u društvu za reviziju. Osnovni cilj revizije predstavlja mišljenje društva za reviziju da li su finansijski izveštaji društva za osiguranje sastavljeni u skladu sa propisima i da li objektivno i istinito prikazuju finansijsko stanje društva, rezultate poslovanja i poslovne tokove. Izbor društva za reviziju vrši društvo za osiguranje na osnovu prethodne saglasnosti Narodne banke Srbije.

g) Naknade

Naknade članova uprave mogu da dovedu do sukoba interesa između tih lica na jednoj i društva i njegovih akcionara na drugoj strani. Naročito su u centar pažnje korporativnog upravljanja došle nakon ekonomske krize, te je značajan broj odredbi koje poslednjih godina pokušavaju da ih urede.[91] Zakon o osiguranju takođe nije propustio da posebno reguliše naknade. Njegovim odredbama predviđeno je da će najmanje jednom godišnje skupština razmatrati pismene informacije o zaradama, naknadama i drugim primanjima članova uprave (nadzornog i izvršnog odbora) i predlogu nadzornog odbora o zaradama, naknadama i drugim imovinskim koristima za narednu poslovnu godinu.[92] Na ovom mestu takođe je uspostavljena i obaveza da se skupština informiše i razmotri ugovore zaključene između akcionarskog društva za osiguranje i članova uprave ili sa njima povezanih lica ukoliko su na taj način stekli imovinsku korist.

U ovom pitanju naročito su odredbe na nivou EU razrađene pravilima Delegiranog akta Evropske komisije.[93] Među osnovnim načelima stoji da se politika i praksa naknada posebno vezuju za strategiju i praksu upravljanja rizicima, kao

[90] ZO, čl. 182–186.

[91] Naknade nisu posebno regulisane Direktivom Solventnost II iz 2009. godine, iako jesu detaljno u Delegiranom aktu Evropske komisije iz 2015. godine. U teoriji se to objašnjava činjenicom da se interesovanje za problem naknada naročito uvećalo tek nakon ekonomske krize. A. van den Hurk, M. Siri, 56.

[92] ZO, čl. 60.

[93] Delegirani akt Evropske komisije 2015/35, čl. 275.

i dugoročne ciljeve društva i njegove poslovne rezultate. Nužno je da sadrže jasne i transparentne mere kojima se izbegava sukob interesa, otklanja diskriminacija i kojima se insistira na razumnoj politici vođenja poslova društva i preduzimanja rizika. Ohrabruje se formiranje posebne komisije za naknade i posebno se detaljno obrazlaže politika i praksa naknada koje se vezuju za učinak. Najzad, novije izmene su u obzir uzele i integrisanost rizika održivosti u sistem upravljanja rizikom, kako bi se promovisalo održivo i razumno upravljanje u društvima za osiguranje.[94]

4. Dužnosti u društvima za osiguranje

Pravila koja uređuju dužnosti određenih lica prema privrednim društvima uređena su opštim pravilima kompanijskog prava i imaju značajnu primenu i u društvima za osiguranje.[95] Ipak, u teoriji se ističe da klasični sukob interesa koji postoji kod društava van finansijskog sektora ovde ima posebne dimenzije jer je reč o zaštiti mnogo širih interesa nego kod običnih društava.[96] Osim toga, tržište je u ovim delatnostima manje konkurentno, a mnogo više regulisano i pod stalnim i strogim nadzorom. Najzad, krajnji cilj nadzora nad korporativnim upravljanjem društava za osiguranje po pravilu će se odnositi na obezbeđenje pravilnog upravljanja rizikom i obezbeđenje likvidnosti, čime se ostvaruje zaštita interesa lica van društva – korisnika usluga osiguranja.[97] Zbog toga je zanimljivo videti da klasične dužnosti direktora čak i nakon finansijske krize nisu značajno drugačije u finansijskim institucijama od klasičnih društava u drugim delatnostima.[98]

Zakon o osiguranju nije posebno uredio dužnosti u društvima za osiguranje, iako je neka pravila – posebno ona o dužnosti rada u interesu društva detaljnije i preciznije uredio i razradio. Takođe su se među posebnim odredbama našle i neke posebne dužnosti na koje treba obratiti pažnju.

a) Dužnost rada u interesu društva za osiguranje

Pitanje cilja radi koga se obavlja delatnost predstavlja, inače, jedno od centralnih i do sada mnogo puta razmotrenih pitanja korporativnog upravljanja.[99] Na ovom mestu vredi podsetiti na i dalje aktuelnu debatu o cilju privrednog društva i interesu u kome lica sa dužnostima moraju da se vode prilikom donošenja poslovnih

[94] Delegirani akt Evropske komisije 2015/35, čl. 275, st. 4.
[95] ZOPD, čl. 61–80.
[96] J. Abraham Akuffo, 44, 48
[97] *Ibid*., 44, 48
[98] Steven L. Schwarcz, Aleaha Jones, Jiazhen Yan, „Responsibility of directors of financial institutions", *Governance of Financial Institutions* (Eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 166.
[99] „Cilj društva je … centralna tema korporativnog upravljanja…", G. Ferrarini (2024), 121.

odluka.[100] Dok vodeća američka teorija već godinama unazad ističe primarni interes akcionara (*shareholder primacy*),[101] dotle je na drugom kraju tog spektra skup različitih nosilaca interesa iz nemačke pravničke kulture (*stakeholder approach*), a negde između njih se nalazi modernije rešenje iz engleske kompanijskopravne regulative (*englightened shareholder value*).[102]

Društva za osiguranje predstavljaju specifična društva, budući da su usled delatnosti koje obavljaju naročito izraženi potreba zaštite sigurnosti i stabilnosti poslovanja. Osim toga, kod njih je pojačana potreba zaštite ne samo investitora ili poverilaca, već i interesa drugih lica – ovde naročito korisnika usluga osiguranja. Zbog toga se u korporativnom upravljanju društava za osiguranje kao osnovni problem postavlja pitanje usklađenosti različitih ciljeva.

Naime, da li društvo pre svega (ili isključivo) obavlja svoju delatnost radi sticanja dobiti, što je klasični cilj u poslovanju privrednih društava, ili kod društava za osiguranje treba voditi računa i o ostvarenju nekih posebnih ciljeva, kao što su zaštita interesa korisnika usluga osiguranja, i šire, stabilnost finansijskog sistema.[103] Evropska unija u svojim propisima posebno ističe da je najvažniji cilj posebnog regulisanja nad delatnostima osiguranja i reosiguranja zaštita interesa osiguranika i drugih korisnika usluga osiguranja.[104] Osim toga, budući da su društva za osiguranje od izuzetnog značaja za funkcionisanje i stabilnost tržišta finansijskih usluga, to je razlog što u njihovom regulisanju postoji povećana briga i stroži uslovi poslovanja kako bi se zaštitio opšti, javni interes. Ovi specifični ciljevi su uslovili posebno uređenje nadzora nad društvima koja obavljaju delatnost osiguranja. Isti smisao dao je i srpski zakonodavac osnovnim pravilima kojima se uređuju društva za osiguranje, te se uređuje nadzor nad tim subjektima *radi zaštite prava i interesa osiguranika i drugih korisnika osiguranja i radi očuvanja i jačanja stabilnosti finansijskog sistema*.[105]

[100] Literatura je o ovom pitanju vrlo obimna, ali na ovom mestu vredi uputiti na zanimljivu diskusiju nakon što je Evropska komisija objavila Ernst i Jang Studiju o dužnostima direktora i održivom korporativnom upravljanju (EY for the European Commission, Study on directors' duties and sustainable corporate governance: Final report, July 2020, dostupno na adresi: https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en 31. 8. 2024). Nakon njenog objavljivanja usledila je izuzetno žustra rasprava o cilju privrednog društva. Vid. odgovore nekoliko vodećih autora na: https://www.ecgi.global/events/directors-duties-and-sustainable-corporate-governance 31. 8. 2024.

[101] Ipak, čak 33 države u SAD u svom zakonodavstvu pominju i interese drugih lica o kojim direktor vodi računa. Vid. S. L. Schwarcz, A. Jones, J. Yan, 156.

[102] G. Ferrarini (2024), 122–123, i naročito za istorijski i uporedni pregled 127–139; slično: Vuk Radović, „Cilj privrednog društva sa osvrtom na aktuelnu pandemiju", Revija Kopaoničke škole prirodnog prava, br. 2/2021, 34–44; Klaus J. Hopt, „Corporate Purpose and Stakeholder Value – Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems", ECGI Law Working Paper, No. 690/2023, dostupno na adresi: *https://www.ecgi.global/sites/default/files/working_papers/documents/hoptklausjcorporatepurposeandstakeholdervalueecgi.pdf* 31. 8. 2024; K. J. Hopt (2021), 21.

[103] D. Busch, G. Ferrarini, G. van Solinge, 13.

[104] Recital 16 Direktive Solventnost II.

[105] ZO, čl. 13, st. 1.

Zakon o osiguranju sadrži vrlo složenu definiciju kojom predviđa dužnost rada uprave u interesu društva za osiguranje.[106] Članovi uprave su dužni da preduzimaju mere radi sprečavanja nezakonitih ili neprimerenih radnji i uticaja koji su štetni ili nisu u najboljem interesu akcionarskog društva za osiguranje i njegovih akcionara. One se odnose na radnje i uticaje koje vrše lica koja su blisko povezana s tim društvom i krajnji cilj im je zaštita interesa korisnika usluga osiguranja.

Dakle, na prvom mestu treba ukazati na važno pitanje cilja u kome prema našim propisima treba da posluju društva za osiguranje ili, drugačije posmatrano, interes koji se pri tome ostvaruje (i štiti). U ovoj složenoj zakonskoj definiciji istaknuto je više interesa: to su interes akcionarskog društva za osiguranje i interes njegovog akcionara, ali i interes korisnika usluge osiguranja. To je daleko kompleksnija, multi-interesna koncepcija koja zahteva od uprave da pored rada u interesu društva – kako je klasično definisana dužnost njihovog postupanja u opštoj teoriji kompanijskog prava, uzme u obzir i druge interese.[107] Sa jedne strane oni imaju dužnost da spreče nezakonite ili neprimerene štetne ili radnje i uticaje koji nisu u interesu društva i njegovih akcionara. Otuda se pretpostavlja da su ovi interesi jednaki – ili da se oni moraju definisati tako da budu usklađeni.

Pored toga, uprava mora da preduzme mere te naročito spreči radnje i uticaje lica koja su blisko povezana sa društvom kako bi zaštitili korisnike usluga osiguranja – lica koja stoje van društva. Otud se interes ovih lica unapređuje i stavlja u isti rang sa interesom samog društva za osiguranje i njegovih akcionara. To je svakako mnogo šire poimanje interesa privrednog društva od klasičnog.

Definicija rada u interesu društva iz Zakona o osiguranju ne daje dovoljno argumenata koji bi išli u prilog zaključku da je prema njoj interes društva za osiguranje i interes njegovih akcionara jednak drugim interesima (naročito interesu lica van društva). Ipak, ono što ovde vredi istaći jeste poseban položaj korisnika usluga osiguranja u definisanju krajnje svrhe postojanja društava za osiguranje, i otuda njihovo važno mesto u definisanju samog *interesa društva* za osiguranje. Uprava društva mora da postupa u interesu društva za osiguranje, vodeći računa o interesu korisnika usluga osiguranja. To znači da uprava na prvo mesto treba da stavi interes društva za osiguranje – u koji je uključen kao krajnji cilj interes korisnika osiguranja, a tek onda interes akcionara, čime se on jasno nalazi na drugom mestu kada dođe do njihovog međusobnog sukoba.

Sličan stav zauzima i Međunarodno udruženje nadzornih tela u osiguranju, koje u poslednjim revidiranom definisanju Osnovnih principa osiguranja izričito ističe načelo opreznog i savesnog upravljanja i nadzora poslova osiguranja uvažavajući i štiteći interes korisnika usluga osiguranja.[108] Isto čine i OECD Uputstva o

[106] ZO, čl. 59.

[107] Vid. opštu definiciju postupanja u najboljem interesu društva iz čl. 63 ZOPD. U teoriji kod nas vid. i M. S. Vasiljević, 100–116.

[108] International Association of Insurance Supervisors, Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups, Updated, November 2019, dostupno na

upravljanju u društvima za osiguranje koja nalažu da članovi odbora postupaju u najboljem interesu društva, ali da moraju da uzmu u obzir interese korisnika usluga osiguranja, odnosno drugih nosilaca interesa, shodno okolnostima slučaja.[109] Slično se u evropskoj teoriji razmišlja ne samo kod ovih, već i drugih finansijskih institucija, naročito kod banaka.[110] Posledica toga, smatra se, nije samo definisanje krajnjeg cilja (ovde) zaštite interesa korisnika osiguranja, već manji značaj kontrolnog akcionara, institucionalnih investitora, i uopšte pitanja koja se odnose na kontrolu.[111]

Najzad, dužnost uprave da preduzme mere radi sprečavanja radnji i uticaja zahteva od njih pažnju u raznim situacijama sukoba interesa drugih lica sa društvom, i njegovog sprečavanja, što je značajno šira obaveza od klasične dužnosti rada u interesu privrednog društva. Takođe ona postoji pored dužnosti izbegavanja sukoba ličnog (i interesa sa njim povezanog lica) sa interesom društva.[112] Ovde nije reč o dužnosti lojalnosti članova uprave – iako ona svakako postoji na osnovu primene opštih pravila kompanijskog prava, već o dužnosti pažnje i pojačanog nadzora nad drugim licima – koja su blisko povezana sa društvom za osiguranje, i koja mogu da budu u sukobu interesa sa njim. Drugim rečima, u slučaju sukoba interesa blisko povezanog lica sa društvom za osiguranje uprava mora na prvom mestu da štiti interes korisnika usluge osiguranja ispred interesa drugih lica u društvu (uprave, akcionara itd.).

Posebno definisanje dužnosti rada u interesu društva za osiguranje u srpskom pravu nije bilo pod uticajem najvažnijih odredbi prava EU, koje vrlo sumarno ukazuju na obavezu da zakonodavstva zemalja članica EU predvide da organi upravljanja i nadzora društava za osiguranje imaju krajnju odgovornost u poštovanju pravila koja su usvojena radi primene odredbi kojima je regulisana delatnost osiguranja.[113] Sličnu obavezu društva za osiguranje prilikom obavljanja njihove delatnosti predvideo je i Zakon o osiguranju kod načela poslovanja, o čemu je ranije već bilo reči.[114] Osim toga, pravo EU ne sadrži dalja pravila o interesu društva za osiguranje, niti posebno uređuje dužnosti pojedinih lica u tim društvima. Ipak, već je rečeno da se među uvodnim odredbama Direktive Solventnost II *načelno* ističe da je *najvažniji cilj posebnog regulisanja nad delatnostima osiguranja i reosiguranja zaštita interesa osiguranika i drugih korisnika usluga osiguranja*.[115] U teoriji se zbog toga naglašava da to znači da društva za osiguranje moraju da vode računa i o drugim interesima,

adresi: *https://www.iaisweb.org/uploads/2022/01/191115-IAIS-ICPs-and-ComFrame-adopted-in-November-2019.pdf* 31. 8. 2024, Osnovni principi osiguranja, br. 7, 50.

[109] OECD Uputstva o upravljanju u društvima za osiguranje, Preporuka I A 1, 11.

[110] K. J. Hopt (2021), 22.

[111] *Ibid*.

[112] Upord. ZOPD, čl. 69.

[113] Direktiva Solventnost II, čl. 40.

[114] Vid. ZO, čl. 19, kao i prvi odsek trećeg dela ovog rada.

[115] Direktiva Solventnost II, recital 16.

uključujući naročito finansijsku stabilnost i pravično i stabilno tržište, sve dok to nije na štetu korisnika usluge osiguranja.[116]

Kako bi se naglasilo da društva za osiguranje imaju važnu socijalnu ulogu, smernice o korporativnom upravljanju sadrže preporuke radi boljeg informisanja i ostvarivanja zainteresovanih lica koja stoje van društva – osiguranika, korisnika osiguranja itd.[117] Ipak, smernice jasno ističu da se rast i razvoj društva za osiguranje ne može ostvariti na štetu interesa tih lica. Time je jasno da interes tih lica nije jednak interesu društva za osiguranje (niti njegovih akcionara), iako se on mora uzeti u obzir pri razmatranju rada u interesu društva za osiguranje.

b) Dužnosti u vezi sa pravnim poslovima

Među posebnim odredbama koje uređuju dužnosti u društvima za osiguranje našla se i ona koja ovlašćuje nadzorni odbor u društvu za osiguranje da preduzme mere radi otklanjanja sukoba interesa u pravnim poslovima sa ličnim interesom. Naime, nadzorni odbor ima dužnost da obezbedi da pravni poslovi zaključeni sa akcionarima, povezanim licima ili drugim licima koja imaju dužnost prema društvu ne smeju da budu nepovoljniji po to društvo od istih poslova zaključenih po tržišnim uslovima.[118] Ova mera predstavlja razradu opšteg pravila rada u interesu društva za osiguranje i konkretizaciju mere koju članovi uprave imaju dužnost da preduzmu radi sprečavanja štete ili drugih posledica koje su suprotne interesu društva.[119] Ona je po prirodi stroža od opšteg pravila koje ne sprečava zaključenje posla ili preduzimanje radnje ukoliko oni nisu zaključeni ili preduzeti pod tržišnim uslovima, već zahteva prijavljivanje i odobrenje pravnog posla ili radnje, iako postoji mogućnost da se posao ili radnja ponište kada nisu zaključeni ili preduzeti po fer vrednosti.[120]

c) Dužnost čuvanja poverljivih podataka

Među specifičnim odredbama koje regulišu poslovanje društava za osiguranje našla se i obaveza čuvanja poverljivih podataka kao posledica posebno osetljive delatnosti kojom se ova društva bave.[121] Predviđena je obaveza društva za osiguranje da čuva kao poverljive podatke i okolnosti koje sazna u poslovanju sa osiguranikom

[116] A. van den Hurk, M. Siri, 51.
[117] Odsek IV: Uloga zainteresovanih lica Smernice br. 2.
[118] ZO, čl. 55, st. 19.
[119] Opšte pravilo omogućava odobrenje pravnog posla ili radnje u slučaju postojanja ličnog interesa, pri čemu se utvrđivanje tzv. fer vrednosti stvari ili prava koje su predmet pravnog posla ili radnje zahteva u slučaju kada vrednost predmeta pravnog posla prelazi 10% ili više knjigovodstvene vrednosti ukupne imovine društva. Vid. ZOPD čl. 66.
[120] ZOPD čl. 67.
[121] ZO, čl. 175.

ili drugim korisnikom prava iz osiguranja. Međutim, pored društva za osiguranje, posebna dužnost čuvanja ovih podataka tereti i određeni krug lica, među kojima su članovi organa društva za osiguranje, akcionari, zaposleni u društvu za osiguranje i druga lica kojima u vezi sa radom u društvu ili vršenju usluga za društvo postanu dostupni ovi podaci.

Obaveza čuvanja podataka tajnim odnosi se na zabranu saopštavanja ili dostavljanja trećim licima, korišćenje ili omogućavanje korišćenja tih podataka trećim licima. Obaveza čuvanja podataka tajnim postoji i nakon prestanka svojstva na osnovu koga su im ta lica pristupila. Za povredu obaveze predviđena je prekršajna odgovornost.

d) Posebne dužnosti u blizini likvidacije ili stečaja: dužnost obaveštavanja

Posebna delatnost društva za osiguranje uslovila je i strože dužnosti koje članovi uprave imaju u blizini likvidacije ili stečaja.[122] Posebno je uređena dužnost izvršnog odbora da pisanim putem obavesti nadzorni odbor o ugroženoj likvidnosti ili solventnosti. Ista obaveza postoji i ukoliko nastupe razlozi za prestanak važenja dozvole za rad ili oduzimanje dozvole za rad ili zabrane obavljanja određenih delatnosti; ili ako društvo prestane da ispunjava uslove koji se odnose na adekvatnost kapitala. U svakom od ovih slučajeva dalja obaveza informisanja leži na nadzornom odboru prema Narodnoj banci Srbije.

Za propust u obaveštavanju usled nastupanja ovih činjenica predviđena je individualna odgovornost članova uprave za štetu pričinjenu akcionarskom društvu za osiguranje. Takođe je predviđena i prekršajna odgovornost fizičkog lica.

IV Pogled u budućnost: održivo korporativno upravljanje u društvima za osiguranje

Savremeno korporativno upravljanje izmenjeno je prema sadržini i ciljevima u velikoj meri u odnosu na dosadašnja pravila. To važi kako u opštoj teoriji i praksi korporativnog upravljanja, tako i u posebnim (pa i finansijskim) delatnostima, uključujući i društava za osiguranje. Još 2018. godine je Evropska unija promovisala održivu ekonomiju, a Izveštaj visoke grupe stručnjaka za održivo finansiranje već u svom Predgovoru najavljuje da je „Održivost tema našeg doba – a finansijski sistem ima vodeću ulogu u ostvarenju tog cilja".[123] Između ostalog, preporuke iz tog Izveštaja daju poseban značaj u promovisanju održivosti društvima u finansijskom

[122] ZO, čl. 65.

[123] Izveštaj visoke grupe stručnjaka za održivo finansiranje (EU High-Level Expert Group on Sustainable Finance, *Financing a Sustainable European Economy: Final Report 2018 by the High-Level Expert Group on*

sektoru, a društvima za osiguranje daju važnu ulogu u kapitalnom, dugoročnom i infrastrukturnom održivom investiranju.[124] To je i logično, budući da se smatra da su aktivnosti društava za osiguranje po prirodi najbliže ciljevima održivog finansiranja.[125]

Osim toga, ukazuje se i na važne aspekte održivog korporativnog upravljanja. Pre svega, od članova uprave u društvima u finansijskom sektoru zahtevaju se stroži uslovi kako bi ta lica imala dovoljno znanja i veština u proceni i postupanju sa dugoročnim i rizicima u održivom poslovanju.[126] Dalji razvoj ove oblasti (uključujući Akcioni plan Evropske komisije iz 2018. godine i Održivu finansijsku strategiju iz 2021. godine) ostao je privržen održivoj ekonomiji sa snažnim osloncem na društva u finansijskom sektoru, uključujući i društva za osiguranje.[127]

Prva ozbiljna inicijativa regulisanja održivog korporativnog upravljanja pojavila se u okviru Evropske komisije, nakon što je 2020. godine objavljena Ernst i Jang Studija o dužnostima direktora i održivom korporativnom upravljanju. Uprkos brojnim kritikama, Evropska komisija je na osnovu te studije još februara 2022. godine usvojila Predlog direktive o dužnoj pažnji u održivom poslovanju.[128] Direktiva je potvrđena u Savetu EU 24. aprila 2024 i konačno objavljena tokom jula 2024. godine čime je postignut politički dogovor u ovoj važnoj oblasti poslovanja društava i okončan dugačak, buran i u nekoliko trenutaka neizvestan (pa čak i dramatičan) ishod usvajanja ovog dokumenta.[129] Direktiva ima izuzetno vredne ciljeve koji se ogledaju u odgovornijem dugoročnom održivom poslovanju privrednih društava. Harmonizovana je dužnost održivog poslovanja i uspostavljena veza sa standardima postupanja, usled čije povrede Direktiva predviđa raznovrsne upravne i građansko-pravne sankcije. Za društva za osiguranje od izuzetnog je značaja, budući da su i ona (kao i društva za reosiguranje) izričito obuhvaćena njenim odredbama.[130]

Takođe, ESG faktori su već godinama unazad sastavni deo u poslovanju društava za osiguranje, pre svega u njihovom upravljanju rizicima, ali i u njihovom uticaju na korporativno upravljanje. U značajnoj meri ti faktori utiču na odluke koje

Sustainable Finance), 2018, dostupno na adresi: *https://finance.ec.europa.eu/document/download/2e65cb1e-bd47-4441-816a-d89ec61eef45_en?filename=180131-sustainable-finance-final-report_en.pdf* 31. 8. 2024, 3.

[124] *Ibid*., 5, 70–73.

[125] Arthur van den Hurk, „The Role of Prudential Regulation and Supervision of Insurers in Sustainable Finance", *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Eds. Danny Busch, Guido Ferrarini, Seraina Grünewald), Second Edition, Palgrave Macmillan, Cham, 2024, 375.

[126] Izveštaj visoke grupe stručnjaka za održivo finansiranje, 39.

[127] Više o tim inicijativama A. van den Hurk, 379.

[128] Detaljno i kritički o njenim predloženim, a kasnije odbačenim odredbama kojima bi se harmonizovala dužnost pažnje direktora, i sa osvrtom na prethodne inicijative, vid. Milena Mitrović, „Dužnosti direktora u održivom korporativnom upravljanju", Pravo i privreda, br. 3/2023, 847–852, 856–866.

[129] Direktiva o dužnoj pažnji u održivom poslovanju (*Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859)*, *OJ* L 2024/1760, 5. 7. 2024).

[130] Direktiva o dužnoj pažnji u održivom poslovanju, čl. 3 st. 1 tač. a) podtač. iii) alineja 5 i 6.

se donose u društvima za osiguranje i ukazuju na poželjni smer u njihovom upravljanju. Okretanje ka tim ciljevima ključno je za pojedine interesne grupe, uključujući investitore i akcionare svih društava.[131] Sve više postaje i važan element u definisanju ciljeva dugoročnog i održivog poslovanja društava za osiguranje.

U pravu RS se do nedavno posebna pažnja nije obraćala na održivo korporativno upravljanje. Ipak, pod globalnim uticajem principa i standarda održivog poslovanja, naročito pod uticajem prava EU i uporednog prava, ti principi i standardi već uveliko čine deo poslovanja društava za osiguranje u Republici Srbiji. U poslednje vreme upravo su oni najvažniji aspekti korporativnog upravljanja i kod nas.

Do sada je već bilo reči o dužnosti društava za osiguranje da posluju u skladu sa zakonom, opštim aktima, aktima poslovne politike, pravilima struke osiguranja i aktuarske struke, kao i u skladu sa dobrim poslovnim običajima i poslovnom etikom u najboljem interesu društva za osiguranje i njegovih akcionara.[132] Imajući u vidu sve što je ranije rečeno o posebnom cilju i interesa društva za osiguranje, kao i pod uticajem novijih shvatanja o održivom korporativnom upravljanju, iako to izričito nije navedeno, *dužnost rada društva za osiguranje trebalo bi razumeti tako da ona nesporno obuhvati i principe i standarde ekološki i društveno odgovornog poslovanja*.

Danas je više nego ikad naročito izazovna dužnost nadzora članova uprave nad sprovođenjem sve kompleksnijih pravila poslovanja, sistema upravljanja i kontrole nad njegovih sprovođenjem. Sa druge strane, relativizuje se klasično donošenje poslovnih odluka koje je usmereno isključivo na ostvarivanje dobiti i kratkoročni interes akcionara društva. Autori ističu da su direktori, suočeni sa brojnim zahtevima koje nalaže dužnost poštovanja brojnih pravila i standarda u savremenom održivom poslovanju, sve manje zaštićeni pravilom poslovnog odlučivanja.[133] Zbog toga će budućnost ove oblasti biti u razvoju modernih pravila održivog korporativnog upravljanja i njihovo dalje integrisanje u upravljanje društvima za osiguranje.

U uporednom pravu se radi toga ozbiljno govori o problemu kvalifikacije direktora (i uopšte članova uprave). U tom cilju posebno je interesantna diskusija o daljem preciziranju i unapređenju pravila fit and proper. Sve više je upitno kako je moguće da se obezbedi da ta lica pravilno procenjuju i sprečavaju ne samo poslovne, već i brojne druge rizike. Oni se, primera radi, odnose na klimatske promene, zaštitu životne sredine, zaštitu podataka, korišćenje veštačke inteligencije itd. Visoka grupa stručnjaka za održivo finansiranje podstakla je unapređenje zahteva testa *fit and proper* na način da članovi uprave društava u finansijskom sektoru moraju da imaju dovoljno znanja i veština u rizicima održivog poslovanja, naročito razumevanje

[131] Thilo Kuntz, „Introduction to Research Handbook on Environmental, Social and Corporate Governance", *Research Handbook on Environmental, Social and Corporate Governance* (Ed. Thilo Kuntz), Edward Elgar Publishing, Cheltenham, UK – Northampton, MA, USA, 2024, 4.

[132] Načela poslovanja čl. 19 Zakona o osiguranju.

[133] T. Kuntz (2024a), 68–69.

dugoročnih rizika i rizika održivosti, boljeg poznavanja multi-interesnog shvatanja i cilja privrednog društva koji vodi računa o brojnim nosiocima interesa, uključujući i one van društva za osiguranje i, najzad, razumevanje potreba klijenata koje se tiču održivosti.[134] Tu preporuku valjalo bi primeniti i u domaćim društvima za osiguranje, imajući u vidu standard koji Zakon o osiguranju definiše prilikom propisivanja uslova za imenovanje jednog lica za člana uprave u društvu za osiguranje. Naime, uslov da jedno lice ima odgovarajuće kvalifikacije, znanje i iskustvo koji su potrebni za obavljanje ove funkcije trebalo bi da uključi i one koje se odnose na održivost. Ipak, bilo bi poželjno da takvi zahtevi budu dalje precizirani, kako bi se podstaklo i unapredilo održivo poslovanje društava za osiguranje i kod nas.

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[134] Izveštaj visoke grupe stručnjaka za održivo finansiranje, 39.

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UDC 005.21:334.72.021
10.5937/TokOsig2502273J

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CORPORATE GOVERNANCE IN INSURANCE COMPANIES

SCIENTIFIC PAPER

Summary

Corporate governance is the part of company law that governs the management and control of a company. In recent years, especially after the financial crisis, corporate governance has become particularly important in financial institutions, including insurance companies, and special rules of governance and control are increasingly applied to them. Serbian law has developed special rules on corporate governance in insurance companies under the strong influence of European regulations and numerous sources of soft law that recommend responsible and sustainable governance in insurance companies and strive to, in addition to achieving the classic goals of protecting the interests of the company, especially encourage the protection of the interests of users of insurance services and other stakeholders.

One of the most important aspects of corporate governance in insurance companies is the principles by which they conduct their business and act in the interests of the company and its shareholders, in order to protect the interests of users of insurance services. The rules governing the structure and composition of the governing bodies of insurance companies have been specifically regulated and improved in recent years. Under the influence of EU law, a complex management system has been developed in these companies, aimed at careful and conscientious management of the company's affairs. The key features of an effective management system are an adequate and transparent organisational structure with strict demarcation and division of responsibilities and an efficient information transmission system.

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Paper received: 18.3.2025.
Paper accepted:: 10.4.2025.

In recent years, the prevailing view has been that the duty to act in the best interests of the insurer includes principles and standards of environmentally and socially responsible business. This means that, more than ever, the management is faced with the difficult task of implementing increasingly complex business rules and management systems. For this reason, it is necessary to further improve them and to specify the conditions that members of the management of companies in the financial sector must fulfil in order to have sufficient knowledge and skills to understand and manage the risks of sustainable business.

Keywords: Corporate governance – Insurance companies – Duty of diligence – Duty to act in the best interest of the company – Sustainable business

I INTRODUCTION

Corporate governance represents a significant part of company law, focusing specifically on the relationship between a company and its management. It is most commonly defined as the system by which companies are directed and controlled.[2] It is a significant element of the general theory of corporate law, which in recent years has notably influenced the development of more modern, efficient, and sustainable frameworks for corporate regulation and governance, both domestically and in comparative law.

The field of corporate governance is regulated to a considerable extent by statutory provisions, both of a general nature – applicable to all companies, and by specific regulations. These specific rules typically pertain to certain types of companies (e.g. joint-stock companies), companies with particular characteristics (e.g. public companies), or companies engaged in specific activities (such as banking or insurance). The insurance sector is one of those areas within specific company law where the development, modernization, and enhancement of numerous and complex corporate governance rules are especially prominent. As a result, insurance companies, along with other entities within the financial sector, receive significant attention regarding the regulation of their organization, activities, governance, and oversight.

This paper aims to present the fundamental rules and principles of corporate governance in the insurance sector. Primarily, it focuses on current rules and principles applicable in the Republic of Serbia. However, as permitted by the scope

[2] This definition was provided by the Committee chaired by A. Cadbury in the Report on the Financial Aspects of Corporate Governance from 1992, one of the most influential documents regulating corporate governance in business entities. Under its influence, numerous corporate governance codes have been developed around the world. Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance*, December 1992, available at: *https://www.ecgi.global/sites/default/files/codes/documents/cadbury.pdf*, accessed August 31, 2024, par. 2.5. The report is commonly referred to as the *Cadbury Report* or the *Cadbury Committee Report*, 2.5.

and purpose of this paper, these will also be examined within a broader theoretical and regulatory context. In recent years, growing attention has been paid not only to quality and modern governance but, above all, to sustainable management. This provides an appropriate opportunity to examine such aspects within the framework of insurance company governance. It is widely acknowledged that, alongside public joint-stock companies, financial sector entities are among the best positioned to contribute to the advancement and implementation of ESG principles and standards, to support long-term business goals, and to enhance overall corporate governance.[3]

II CORPORATE GOVERNANCE IN BUSINESS ENTITIES

Traditionally, the area of corporate governance encompasses both internal and external aspects of management and oversight within a company.[4] While the internal corporate governance addresses the internal organization of the company and management through its governing bodies, the external corporate governance is defined as the set of influences on the company, especially its management (for example, in the case of acquisitions). External influence is not as prominent in companies engaged in financial activities, therefore, it is less relevant for insurance companies.[5] The most important set of corporate governance issues concerning insurance companies, as well as other companies in the financial sector, revolves around management and oversight by expert and independent bodies. The essence of corporate governance rules, therefore, regulates the role, powers, and responsibilities of the company's bodies, as well as the rights, obligations, and special duties of individuals and the supervision exercised over them.[6]

Among the key issues that are part of the corporate governance rules and principles, the most prominent include decision-making, adherence to established standards, and fulfilling duties toward the company. The rights and obligations of specific individuals to manage the company necessitate regulating their relationship

[3] Michele Siri, Shanshan Zhu, *Integrating Sustainability in EU Corporate Governance Codes, Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets*, (eds. Danny Busch, Guido Ferrarini, Seraina Grünewald), 2nd edn, Palgrave Macmillan, Cham, 2024, 211–212.

[4] Klaus J. Hopt, *Corporate Governance of Banks and Financial Institutions: Economic Theory, Supervisory Practice, Evidence, and Policy, European Business Organization Law Review*, Vol. 22, No. 1/2021, 14. In our literature, see Mirko S. Vasiljević, *Corporate Governance: Selected Topics*, The Association of Business Lawyers of the Republic of Serbia, Belgrade, 2013, 27.

[5] Hopt notes that this is due in part to the lack of a developed European market for acquiring control over companies in the financial sector (K. J. Hopt, 14); however, the existence of strict regulatory requirements and supervisory oversight concerning the acquisition of ownership interests and the conditions for appointing members of the management board in such companies is equally significant.

[6] Arthur van den Hurk, Michele Siri, *Comparative Regulation of Corporate Governance in the Insurance Sector*, Governance of Financial Institutions (eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 44.

with the company, as well as with other stakeholders: its shareholders, creditors, and employees. Among the classic corporate governance issues are the number and types of governing bodies in the company, their composition and authority, and the interrelations between those bodies. There is ongoing debate about the advantages and challenges of centralized versus decentralized governance, enhanced internal oversight, and strengthening the role of independent individuals. Special emphasis is placed on the appointment, dismissal, and supervision of directors and other members of the management body within the company. Modern corporate governance rules and principles pay particular attention to regulating the rights, obligations, and duties of these individuals.

In recent years, an important topic of corporate governance has become gender equality within a company's governing bodies, as well as corporate governance that takes into account managing environmental, climate, social, and other risks. In addition to these, corporate governance also specifically addresses various conflict-of-interest situations among management members and other stakeholders in the company. Among these, legal theory, legislation, and practice devote the greatest attention to the compensation received by management members, as well as to various specific conflict-of-interest situations, such as those within corporate groups, during insolvency, or in the case of acquisitions.

Although, at first glance, corporate governance in all companies faces the same issues, at least in public joint-stock companies, it has become clear over the years that distinct risks exist in the financial sector. Since the financial crisis in the early 2000s, it has been clear that financial services companies face unique challenges. Poor management of these companies can lead to severe systemic consequences, which necessitates particular attention in the careful design of corporate governance that suits the needs of these companies. Therefore, corporate governance has become an integral part of the broader regulatory framework for the financial sector, and complements their supervision.[7] It is widely accepted that corporate governance rules impose standards of conduct on management and its supervisory bodies to help ensure its financial stability.[8]

It has already been pointed out that in recent years, the need for responsible and sustainable business practices has been particularly emphasized, which has significantly influenced the regulation of corporate governance in companies carrying out important activities, including insurance activities. However, it is worth noting that this will remain one of the leading issues for all companies in the future, including insurance companies. Therefore, the advancement and further development

[7] Guido Ferrarini, *Understanding the Role of Corporate Governance in Financial Institutions: A Research Agenda*, ECGI Law Working Paper No. 347/2017, March 2017, available at: *https://ssrn.com/abstract=2925721*, accessed on August 31, 2024, 15.

[8] *Ibid*.

of corporate governance in this area will certainly move toward sustainable, professional, and high-quality corporate governance across all sectors, particularly within companies in the financial sector.

III CORPORATE GOVERNANCE IN INSURANCE COMPANIES

All corporate governance topics that are of general interest to corporate law theory and legislation are also important for the specific area of corporate governance in insurance companies. In Serbian law, these issues are largely regulated by the provisions of the insurance law.[9] In addition, general provisions of company law and corporate governance apply to insurance companies (as well as to reinsurance companies, insurance brokerage firms, insurance representatives, and insurance agents), unless otherwise regulated by specific provisions.[10] Among secondary regulations, the most significant is Guideline No. 2 of the National Bank of Serbia on Corporate Governance in Insurance Companies, adopted to promote more effective corporate governance in insurance companies.[11] However, the aim of the Guideline is to *suggest* a way to organize and conduct management and supervisory activities to improve the operational efficiency of insurance companies. It is a source of soft law, and the application of the rules defined in the Guideline is not binding, but it is recommended for insurance companies.[12]

In order to fulfil the obligation of harmonizing domestic laws with EU regulations, Serbian law aligns with EU law. In the insurance field, and particularly in corporate governance, the most important EU source is Directive 2009/138 on the taking-up and pursuit of the business of insurance and reinsurance – Solvency II.[13] Its provisions are further elaborated in the Commission Delegated Act 2015/35, which outlines a three-pillar structure – the first concerns rules on capital, the second, of the greatest relevance to this paper, elaborates governance rules, while the third addresses increased transparency.[14] The provisions of EU law have significantly influenced a large number of provisions of the Serbian Insurance Law, including

[9] Insurance Law, *Official Gazette of the RS*, No. 139/2014 and 44/2021.

[10] Art. 18 of the Insurance Law.

[11] National Bank of Serbia, Guideline No. 2 on Corporate Governance in Insurance Companies, available at: *https://www.nbs.rs/export/sites/NBS_site/documents/propisi/propisi-osig/smernica_2_korp_upravljanje.pdf*, accessed on August 31, 2024.

[12] Objectives of the Guideline, 1.

[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) (recast), OJ L 335, 17.12.2009; hereinafter: Solvency II Directive.

[14] Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) – Consolidated text, OJ L 12, 17.01.2015.

rules on ownership participation, the structure and functioning of governing bodies, and especially the governance system in insurance companies. To further support the implementation of EU provisions into Serbian law, the National Bank of Serbia adopted the Strategy for the Implementation of Solvency II in the Republic of Serbia in May 2021.[15]

Numerous other sources of "soft" law are particularly important in this area. These have been developed within the EU, such as the 2010 Green Paper on Corporate Governance in Financial Institutions, which applies across the financial sector.[16] Particularly relevant in the insurance domain is the activity of the European Supervisory Authority in the field of insurance and occupational pension schemes (*European Insurance and Occupational Pensions Authority* – EIOPA), which has developed a Guideline on the Governance System in Insurance Companies.[17] At the global level, an important source is the OECD Guidelines on Governance in Insurance Companies, with the latest amendments from 2017.[18] Corporate governance in insurance companies is also addressed by the Insurance Core Principles developed by the International Association of Insurance Supervisors (IAIS).[19]

1. Principles of Operation of Insurance Companies

The Insurance Law prescribes the fundamental principles governing the operations of insurance companies, reinsurance companies, insurance brokers, insurance agents, and insurance representatives.[20] The first principle establishes the *duty to operate lawfully*. According to this principle, *insurance companies are required*

[15] National Bank of Serbia, Strategy for the Implementation of Solvency II in the Republic of Serbia, May 2021, available at: *https://www.nbs.rs/export/sites/NBS_site/documents/osiguranje/strategija_solventnost_II-.pdf*, accessed on August 31, 2024.

[16] European Commission, *Green Paper: Corporate governance in financial institutions and remuneration policies*, COM(2010) 284 final, Brussels, 2 June 2010.

[17] EIOPA, *Guidelines on System of Governance*, EIOPA-BoS-14/253 EN, 1 January 2014, available at: *https://www.eiopa.europa.eu/publications/guidelines-system-governance_en*, accessed on September 31, 2024.

[18] OECD Guidelines on Insurer Governance, 2017 Edition, available at: *https://web-archive.oecd.org/temp/2017-11-16/95651-48071279.pdf*, accessed on August 31, 2024.

[19] International Association of Insurance Supervisors, *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups* (Updated, November 2019), available at: *https://www.iaisweb.org/uploads/2022/01/191115-IAIS-ICPs-and-ComFrame-adopted-in-November-2019.pdf*, accessed on August 31, 2024.

[20] Article 19 of the Insurance Law. This paper will further address the rules applicable to joint-stock insurance companies. Not only is this the most common form of company in Serbia, but provisions regulating corporate governance in joint-stock insurance companies also apply to other forms and types of insurance companies. Mutual insurance companies are rarely discussed in theory and practice. For more on some governance issues in this form under comparative law, see Henry Hansmann, *The ownership and governance of mutual insurance companies*, 9 August 2022, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186367*, accessed on August 31, 2024, 27–32.

to conduct their activities in accordance with the law, general acts, business policies, the rules of the insurance, and the actuarial profession, as well as by good business practices and business ethics. In addition, the principle of *due diligence is defined*. This principle stipulates that *companies must act in accordance with the principle of cautious and conscientious conduct*. It refers to a standard that has been adopted from European regulations. Instead of providing an exhaustive list of permitted or prohibited activities, as was previously the case under EU law, various actions of insurance companies are now covered more generally by the standards of due diligence and of cautious and conscientious conduct.[21] These principles of lawful and diligent conduct complement the strict regulatory rules on capital adequacy (the quantitative regulatory aspect) and the corporate governance systems (the qualitative regulatory aspect), supported by continuous supervisory oversight in these key areas.

This does not refer to any specific duties that would otherwise not bind insurance companies unless explicitly stated. It is clear that companies are always obliged to operate lawfully and with due care, even if not specifically emphasized. The inclusion of general operational principles highlights the particular socio-political importance of providing financial services, including conducting insurance activities. The legislator thus underscores the seriousness expected from entities engaged in this activity and imposes the most stringent operational conditions. This not only requires adherence to imperative regulations but also emphasizes the importance of respecting professional norms, customs, business ethics, and increased caution in decision-making.[22] In this field, perhaps more than in others, it is not only regulatory compliance and conscientious conduct that matters but also corporate culture, the values to which the company aspires, and adherence to ethical principles.[23] Typically, these values will stem from the company's management and those individuals with the greatest responsibility for ensuring the secure and efficient operation of the insurance company. Therefore, their enhancement and compliance with the principles of good governance are essential to achieving the goals expected from insurance companies.

However, the growing number and complexity of rules and principles (particularly those tied to sustainable management in insurance companies) make business decision-making more complex and, as a result, more challenging. Consequently, the duty of insurance companies not to violate any applicable rules or

[21] A. van den Hurk, M. Siri, 65.

[22] In this regard, the purpose of a company is increasingly understood to be based on the primary interest of shareholders, but also to encompass the fundamental principles of business ethics and sustainable operations. Guido Ferrarini, "Corporate Purpose and Sustainability Due Diligence", *Sustainable Finance in Europe: Corporate Governance, Financial Stability, and Financial Markets* (eds. Danny Busch, Guido Ferrarini, Seraina Grünewald), 2nd edn., Palgrave Macmillan, Cham, 2024, 124.

[23] A. van den Hurk, M. Siri, 44.

standards has become a serious burden and a challenge for company leadership.[24] These operational principles set higher standards for conducting business activities, particularly in the decision-making context. They also highlight the interests that the insurance company must consider. This is not simply about profit-making, but a more demanding business approach that requires expert, responsible, and conscientious conduct. EU law similarly emphasizes the obligation to comply with rules established under the Solvency II Directive and establishes the responsibility of management members for adhering to these rules.[25] The Directive's approach to the responsibility of management members is more principle-based, rather than relying on specific rules as previous regulations did. This approach is believed to contribute to strengthening the accountability of management members.[26]

Accordingly, *defining the interests of a company engaged in insurance business implies compliance with these particularly emphasized principles*. The principle of lawful and diligent conduct will be especially important when evaluating whether certain individuals with specific duties acted by the defined interests of the insurance company. This will be further discussed later in the paper.

2. Participation and Control in Insurance Companies

Although the Companies Act[27] regulates in detail the concepts of related parties, significant and majority shareholding, and control, these issues are specifically and often more strictly regulated by the Insurance Law. Specific rules define related parties, general concepts of shareholding in another entity, especially qualified, significant, and controlling shareholding, and the concept of close links.[28] Additionally, they regulate the conditions of cross-shareholding and the consequences of acquiring participation to a certain degree.

The reason for the specific regulation of these issues is multifaceted. Apart from the need for increased oversight over those entities that hold shareholdings or control over insurance companies, and their influence on capital rules, these issues are particularly significant in the domain of corporate governance to avoid

[24] Generally, regarding the impact of ESG on business decision-making and the duty of care, see Thilo Kuntz, *How ESG is Weakening the Business Judgment Rule*, *Research Handbook on Environmental, Social and Corporate Governanc*e (ed. Thilo Kuntz), Edward Elgar Publishing, Cheltenham, UK – Northampton, MA, USA, 2024, 68–69.

[25] Art. 40 of the Solvency II Directive.

[26] Paola Manes, *Corporate Governance, the Approach to Risk, and the Insurance Industry under Solvency II*, *Solvency II: A Dynamic Challenge for the Insurance Market* (eds. Mans Andenas, Renzo G. Avesani, Paola Manes, Francesco Vella, Philip R. Wood), Mulino, Bologna, 2017, 114.

[27] Companies Act (Zakon o privrednim društvima – ZOPD), *Official Gazette of the Republic of Serbia*, Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021.

[28] Articles 28–30 of the Insurance Law.

situations of conflict of interest. Therefore, the definition of shareholding, control, and affiliation with the insurance company is crucial for determining the specific duties of certain persons toward the insurance company.

However, a legitimate question arises as to whether it is necessary to specifically define the rights, obligations, and duties within an insurance company, as the Insurance Law provides, in parallel with existing definitions in general company law.[29] The rules of the Solvency II Directive approach this issue differently and, in our opinion, more effectively, as the directive explicitly defines only those general terms to which it then links specific and well-defined consequences.[30]

a) Concept of Participation and Control

It is considered that an entity has participation in another when it has, directly or indirectly, the ability to exercise effective influence over the management or business policy of that other entity. This is most commonly through voting rights, i.e. participation in capital. However, the possibility of exercising effective influence over management and business policy can also be based on other circumstances, including contractual, business, or other relationships with the entity.

Unlike the general rules of Company Law, the Insurance Law specifically defines the so-called *qualified participation in a legal entity* as a situation where an entity directly or indirectly has the right or the ability to exercise 10% or more of the voting rights or participation in its capital. Moreover, the ability to effectively influence management or business policy also implies the existence of qualified participation.[31] The National Bank of Serbia, in Guideline No. 2, has defined recommendations for good corporate governance, which concern shareholders with qualified participation. These guidelines emphasize secure methods of registering and transferring ownership, timely and regular information transmission, participation in the assembly, and voting, especially when deciding on the election or dismissal of management board members and when distributing profits.[32]

[29] As we will see, the Insurance Law has specifically regulated certain concepts, while some terms or institutions it uses have remained undefined. For example, the concept of "control" is not specifically defined. This can lead to discrepancies between the specially defined and general terms from the Companies Act. The Insurance Law contains only a specific definition of "controlling shareholding" (as shareholding in a company of 50% or more of the voting rights or capital of the company), which does not correspond to the concept of control from Article 62, par. 5 of the Companies Act, and its application extends not only for determining controlling shareholding but also for other purposes (e.g. under general rules regarding duties within a company).

[30] For example, the Solvency II Directive does not define general terms such as control, majority holding, etc., except for the concept of qualified holding, for which it then links specific consequences — for instance, in the supervision over the acquisition of qualified participation. See Arts. 13(20) and 13(21), as well as Art. 24 of the Solvency II Directive.

[31] Here, the distinction between participation and qualified participation is not sufficiently precise, as both are defined as "the ability to effectively influence the management or business policy of another entity".

[32] Section II: Shareholder Rights, Guideline No. 2.

Significant participation is linked to a threshold of 20% or more voting rights or participation in its capital. Significant participation exists through the possibility of effectively exerting significant influence over the management or business policy of the legal entity.

Control participation occurs when an entity holds 50% or more of the voting rights or participation in the ownership of a legal entity. Additionally, control is present when it allows the appointment of more than half of the members of the management or supervisory body of the legal entity, or when it provides the ability to effectively exert controlling influence over the management or business policy of the legal entity. In this context, control is specifically tied to majority participation in the legal entity and the appointment of members of the company's bodies. Other forms of control are included in the general possibility of exerting effective controlling influence over the legal entity, leaving a broad scope for circumstances that may lead to it.[33]

Closely related entities are natural or legal persons when there is a relationship of significant or controlling participation, or permanent affiliation with a third party through controlling participation. The latter case of close affiliation refers to various indirect relationships, especially those within a corporate group.

The legislator had a particular need to define *indirect participation*, which refers to a situation where an entity does not directly hold participation (ownership) in another legal entity, but has the possibility of effectively exercising participation in management or capital by utilizing the direct participation of another entity. The method and establishment of using another entity's participation are not defined, but these are typically cases of indirect participation through control in (multilevel) controlled companies.

b) The Concept of Related Parties

The Insurance Law encompasses a broad range of individuals to highlight the various relationships through which they may influence a joint-stock insurance company and its operations.[34] Therefore, defining related parties is of particular importance for establishing standards and ensuring compliance with the rules and principles of good corporate governance. The definition of this group of individuals is also important for other regulations (capital, supervision, etc.). However, the specific definition of related parties (which is substantively different from the general definition of related parties under the Company Law) is misaligned and inconsistent with other general principles of corporate law.[35]

[33] For the concept of control in general corporate law theory, see Tatjana Jevremović Petrović, *Grupe privrednih društava (Groups of companies)*, Faculty of Law, University of Belgrade, Belgrade, 2014, 80–118.
[34] Art. 30 of the Insurance Law.
[35] For instance, the provisions of the Companies Act regarding special duties toward the entity are applied to insurance companies, although the concept of related parties is also significant for the application of

Related parties are defined as *mutually connected individuals*. Their connection is established through management, capital, or other means. The purpose of the connection among these individuals is to achieve a common goal, while its consequence is mutual influence on the operations or business outcomes of these parties. The list of related parties is open-ended, with the most common types of relationships being specifically enumerated. These include, in particular, relationships that establish participation in a legal entity, the ability to influence the financial position of another party, relationships arising from various contracts (power of attorney, employment contracts, or service contracts), and personal or family relations.

As *related parties to a joint-stock insurance company*, include members of the group of companies in which the company is a part, members of their boards, and individuals who are directly or indirectly related to those individuals, by family ties or participation (ownership) or controlling participation.

c) Shareholder Rights in Insurance Companies

In the guidelines adopted by the National Bank of Serbia in order to improve corporate governance, several important recommendations have been made to encourage insurance companies to ensure the full exercise of shareholder rights while respecting their equal treatment.[36] Special emphasis is placed on the protection of minority shareholders, the publication of dividend policies, remuneration policies, information about institutional investors, control within the insurance company, and shareholder agreements. It is recommended to encourage shareholder participation in the operations of the company, with equal treatment of all shareholders of the same class of shares, domestic and foreign shareholders, controlling and external shareholders.

3. Corporate Bodies of the Insurance Joint-Stock Company

The most important organizational form of a company engaged in the insurance activities is the insurance (or reinsurance) company in the form of a joint-stock company.[37] Its bodies are organized according to the model of two-tier governance,

these provisions. Our authors have noted this inconsistency and emphasized that the need for specific definitions of related parties in specialized entities (including insurance companies) should not be disputed, but that the issue should be approached systematically, with unified definitions. See Jelena Lepetić, *Povezana lica u poslovnom pravu*, *Law and Economy*, No. 10-12/2015, 21–23, 28–29, 38.

[36] Sections II and III: Shareholders' Rights and Equal Treatment of Shareholders, Guideline No. 2.

[37] In addition to this form, the Insurance Law allows an insurance company (but not a reinsurance company) to be established as a mutual insurance company. For the forms of insurance companies and for the performance of insurance activities in general, see Art. 20 of the Insurance Law. The provisions regarding the bodies, management, and members of the management board are specifically regulated

consisting of the assembly, supervisory board, and executive board.[38] The organization and rules of operation of the bodies of an insurance joint-stock company largely rely on the general principles of the company law, and thus, in addition to the Insurance Law, which regulates the general rules regarding the structure and responsibilities of the corporate bodies of a joint-stock insurance company, the Companies Act is also significantly applied. The guidelines issued by the National Bank of Serbia are also important as they encourage insurance companies to improve their corporate governance rules.

However, the traditional corporate governance model cannot be fully applied to insurance companies, considering their specific business activities. Namely, insurance joint-stock companies and other financial service entities play a central role among the participants in the market. Additionally, they play an important role in the stability of the financial system. Finally, they perform a significant social function. Therefore, the conduct of their business is much more focused on achieving broader social goals, especially protecting the interests of insurance policyholders. This is why the legislator pays special attention to ensuring higher-quality and safer management in insurance companies. Special focus is placed on the structure of the corporate bodies and the composition of their members, to ensure independent management and control by qualified individuals.[39] For all companies in the financial sector, the structure and, in particular, the qualifications of the management board members are of special importance. In these companies, there is less competition than in regular companies, although the sector is more strictly regulated, and the business activities are generally more complex than in non-financial sectors.[40]

Finally, in these companies, special importance is attached to the rules regarding the information transmission, especially transparency, not only in the traditional sense of protecting shareholders, creditors, or third parties, but primarily as a mechanism for ensuring effective supervision over the company's activities.[41] Here, transparency primarily serves the function of enabling easier and more efficient supervision of the activities of the insurance company.[42] Furthermore, particularly in insurance companies, the need for risk management and oversight of its

for insurance joint-stock companies but are correspondingly applied to reinsurance joint-stock companies and mutual insurance companies (Art. 80 of the Insurance Law). The further text will not specifically address these two forms but will focus only on the insurance joint-stock company. Furthermore, there will be no specific discussion on insurance brokerage companies or insurance representation companies.

[38] Art. 50 of the Insurance Law.

[39] K. J. Hopt, 13, 18.

[40] Jonas Abraham Akuffo, *Corporate Governance and Accountability of Financial Institutions: The Power and Illusion of Quality Corporate Disclosure*, Palgrave Macmillan, 2020, 40.

[41] For the main functions of disclosure in corporate law, see more Tatjana Jevremović Petrović, *Creditor Protection Through Mandatory Disclosure Rules*, *Law and Economy*, No. 4–6/2011, 187–215.

[42] K. J. Hopt, 24.

implementation is pronounced, and a strict division of responsibilities and internal control systems are essential elements of the corporate governance of insurance companies.[43]

a) Structure of the Governing Bodies and Their Competencies

The general assembly of the insurance joint-stock company consists of all the company's shareholders. Its scope of work covers numerous status-related matters, decisions about the company's capital, its increase and decrease, asset-related issues, and matters related to the company's business results.[44] In relation to other bodies, the most important scope of the general assembly is the appointment and dismissal of members of the company's supervisory board. An imperative rule prohibits transferring specifically prescribed powers of the insurance joint-stock company to other bodies, thus ensuring a strict division of competencies in this type of company.

The supervisory board of the insurance joint-stock company consists of at least three members, who are appointed and dismissed by the general assembly. The scope of the supervisory board includes matters concerning the company's business goals, strategy, and operations. It has significant election-related competencies, as it appoints, supervises the work of, determines remuneration for, and dismisses members of the company's executive board. It also appoints and dismisses the company's actuary, proposes the company's external auditor to the general assembly, and grants and revokes powers of attorney. The supervisory board is responsible for overseeing the business policy, reporting on the company's operations, the internal control system, and the establishment of a risk management system, as well as monitoring it. It also holds significant powers regarding the work of the general assembly, the issuance of shares, and decision-making on matters related to the company's assets and capital. In terms of good corporate governance, their competencies regarding their responsibilities in managing or preventing conflicts of interest among shareholders, related parties, and other entities with duties towards the company are particularly important.

The executive body of the insurance joint-stock company is composed of the *executive board,* composed of at least two members. Apart from the representation duties, which fall under the authority of the president of the executive board, the most important competencies of this body include the management of the company's operations and supervision over the organization and activities of its employees.[45] It has a residual scope of competencies in matters not specifically

[43] In this context, the role of the Board of Directors is considered crucial. See Danny Busch, Guido Ferrarini, Gerard van Solinge, *Governing Financial Institutions: Law and Regulation, Conduct and Culture*, *Governance of Financial Institutions* (eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 13.

[44] Art. 52 of the Insurance Law.

[45] Arts. 57–58 of the Insurance Law.

assigned to the general assembly or the supervisory board. This body bears a special duty to ensure the proper organization of operations, particularly in the need to form committees and other bodies that will improve the work of the board and facilitate communication and the exchange of information and policies within the company.

b) Appointment and Dismissal of Members of the Management Bodies

To simplify the regulation of numerous issues related to the individuals who make up the members of the supervisory and executive boards, the Insurance Law defines that the management of the joint-stock insurance company consists of the supervisory and executive boards. The law also specifically outlines the conditions under which a person may be appointed as a member of these boards.[46]

The conditions for performing the function of a management member are defined through the *fit and proper* rule. This rule originates from EU law and is established to define the minimum conditions and standards for appointing individuals holding certain positions in insurance companies, as well as other entities operating in the financial services sector. In particular, for individuals who effectively manage the company or hold leading positions, it is required that they continuously meet the professional qualifications, knowledge, and experience necessary for prudent and conscientious management (referred to as *fit*). Furthermore, these individuals must also have a good business reputation and integrity (as an element of the *proper* concept).[47] This requirement elaborates on the need to assess the honest and financially reasonable conduct of the individual being appointed based on their characteristics, as well as their private and professional behaviour.[48]

In insurance companies operating in the EU, this condition has a broader scope and applies to all individuals holding key positions within the company. These include, in addition to shareholders, others who effectively manage the company or occupy leading positions from which they manage the team and other individuals within the group.[49] The concept of individuals who effectively manage the company is broader than just board members (members of the management board) and is considered to include those in leading positions outside the board.[50] It also includes those who hold key positions within the company. These key positions are considered

[46] Art. 59, par. 1, and Art. 62 of the Insurance Law.
[47] Art. 42 of the Solvency II Directive.
[48] Art. 273, par. 4 of the Delegated Act of the European Commission 2015/35.
[49] Recital 34 and Art. 26 of the Solvency II Directive.
[50] For a detailed discussion, including ambiguities regarding its precise scope, see Danny Busch, Iris Palm-Steyerberg, *Fit and Proper Requirements in EU Financial Regulation: Towards More Cross-Sectoral Harmonization*, *Governance of Financial Institutions* (eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 190–191.

to include at least those within the management system, such as individuals responsible for risk management, compliance, internal audit, and the actuarial function.[51]

A delegated act by the European Commission further elaborates on the *fit and proper* rule. It emphasizes that, for the evaluation, professional and formal qualifications, knowledge, and experience in the field of insurance or the financial sector, as well as the specific duties the individual has performed in their prior work experience, must be taken into account.[52] It is also necessary to consider the diverse expertise and qualifications of the board members to ensure that they can professionally organize the management and supervision within the company.[53]

The role of these individuals in the company is proactive, and it is understood that it is not enough for the management board members to rely solely on information coming from employees within the company, especially those in high positions who are not formal management board members.[54] In theory, there is a discussion about the extent to which the requirement for a proactive role of the management board members is grounded in the current European regulations, and to what extent such behaviour might harm the efficiency and the fundamental principle of corporate governance in insurance companies, which involves a strict separation of powers among the company's bodies.[55] Finally, unlike other financial institutions, EU law does not require insurance companies to meet criteria regarding their personal independence and autonomous decision-making, nor does it set requirements regarding the time these individuals have available to dedicate to their duties.[56]

The Insurance Law defines the *fit and proper* standard through the requirement that a management board member must have a good business reputation, as well as appropriate qualifications, knowledge, and experience necessary to perform this function.[57] In theory, the importance of these objective (professional qualifications and experience) and subjective (in business conduct and integrity) conditions

[51] *Ibid*.

[52] Art. 273, par. 2 of the Delegated Act of the European Commission 2015/35.

[53] Art. 273, par. 3 of the Delegated Act of the European Commission 2015/35.

[54] A. van den Hurk, M. Siri, 49.

[55] *Ibid*., 50.

[56] For more on these criteria in relation to other financial institutions, see D. Busch, I. Palm-Steyerberg, 199–201.

[57] The detailed rules regarding the fulfilment of this condition have been elaborated by the National Bank of Serbia, which regulated this issue through the Decision on the Implementation of the Provisions of the Insurance Law Relating to the Issuance of Licenses for Insurance/Reinsurance Activities and Certain Approvals of the National Bank of Serbia, *Official Gazette of the RS*, no. 55/2015, correction 69/2015, 36/2017, 29/2018, and 44/2024. It is specified that good business reputation refers to personal, professional, and moral integrity that would allow the individual to perform their duties honestly and diligently – with the care of a prudent businessman and in accordance with the rules of secure and good business practices. In addition to the indicators used to assess these qualities, there is also an explicit set of circumstances under which it will be considered that an individual does not have a good business reputation.

is emphasized, and the possibility of licensing candidates for management board positions in insurance companies is considered.[58]

This is the only specific *positive condition for appointing* an individual to perform the function of a management board member. However, there are numerous negative conditions for appointment, including the so-called disqualification of an individual from holding the position of a management board member. *Negative conditions* include a final conviction for a criminal offense resulting in an unconditional prison sentence, or a criminal offense that makes the individual unfit to perform the function of a management board member, as well as a final measure prohibiting the performance of certain activities. Disqualification from holding the position of a management board member applies if the individual was authorized to represent and act on behalf of a legal entity, or was a member of its governing body on the day the financial sector entity's operating license was revoked, or within six months before that date, or on the day of the introduction of receivership or the initiation of bankruptcy or compulsory liquidation procedures. The purpose of disqualification is primarily to protect the public interest.[59] Furthermore, a management board member cannot be someone whose consent to perform the function of a management board member/other function has been revoked in the past three years, or who has been dismissed from the management board.

Other *obstacles to appointment* include the fact that an individual cannot be connected to a legal entity in which the insurance joint-stock company holds more than 5% of the capital or voting rights. The individual cannot be a member of the management or supervisory board, or a proxy in another insurance/reinsurance company or another entity in the financial sector, except in cases where the individual is a member of the management or supervisory board of a controlled subsidiary.

Additionally, it is required that at least one member of the supervisory and executive boards must have active knowledge of Serbian and have residence in the

In the section detailing the conditions for granting prior approval for the appointment of a management board member in an insurance company, it is stipulated that appropriate professional qualifications, knowledge, and experience are indicated by at least the first degree of higher education from an academic program lasting at least four years, three years of managerial experience in a financial sector company, or five years of experience in insurance and finance or a managerial position in significant business activities of the company. Among the documents required to prove fulfilment of the conditions, a recommendation letter from the responsible person or body of the legal entity where the proposed candidate was employed or engaged is required—highlighting the subjective element in evaluating the reputation, knowledge, and experience. Finally, the National Bank of Serbia, when determining whether the candidate meets the conditions for performing the duties of a management board member, evaluates the individual's ability, considering all the conditions and, therefore, this falls under the discretionary authority of this body. Points 25–29.

[58] Natasa Petrović Tomić, *Pravo osiguranja, Sistem,* Knjiga I (Insurance Law, System, Book I), *Official Gazette*, Belgrade, 2019, 197–198.

[59] *Ibid*., 201.

Republic of Serbia, while other members of the executive board must reside in the Republic of Serbia. All members of the executive board must be employed full-time in the insurance joint-stock company where they hold the position of board member.

c) Independent Members of the Supervisory Board

One of the significant rules that imposes more stringent corporate governance standards is the requirement for a greater number of independent members on the supervisory board. Simply put, the role of independent board members is to encourage independent decision-making within the supervisory board.[60] In corporate governance theory, the existence of independent members in the management is considered a decisive provision that affects the composition of the company's governing body.[61] The obligation to have independent members arises from the need to protect the interests of certain parties, here, especially the interests of insurance policyholders in addition to shareholders, from the negative influence of executive directors, but also any other directors whose actions may not be independent.[62]

General rules of company law require that public joint-stock companies must have at least one independent director in a one-tier management system or at least one independent member of the supervisory board in a two-tier management system.[63] In contrast, the number of independent members is higher in insurance joint-stock companies, where, according to the provisions of the Insurance Law, they must comprise at least one-third of the supervisory board members.[64] However, it is considered that the requirement for a higher number of independent directors in financial sector companies is far less important than their professional knowledge and experience, except in matters related to conflicts of interest.[65]

Among the guidelines for establishing better corporate governance, it is especially recommended that the insurance company establish a process for appointing and dismissing independent members of the supervisory board in a way that ensures the protection of minority shareholders.[66] For example, the company could achieve this by implementing cumulative voting rules when appointing these individuals. Furthermore, independent members of the supervisory board should be provided with opportunities to actively participate in decision-making and have easier access to information.

[60] A. van den Hurk, M. Siri, 46.
[61] K. J. Hopt, 24.
[62] *Ibid*., 25.
[63] Arts. 392 and 437 of the Companies Act.
[64] Art. 54 par. 2 of the Insurance Law.
[65] K. J. Hopt, 26.
[66] Section III: Equal Treatment of Shareholders, Directive No. 2.

d) External Supervision by the NBS on Corporate Governance Issues

Insurance companies are under the supervision of the National Bank of Serbia (NBS) in carrying out their activities. This supervision covers various aspects, including the establishment, legality of operations, treatment of insurance service users, and the overall implementation of policies and requirements aimed at ensuring and protecting the capital, liquidity, and solvency of the insurance company. It is also possible for the supervision to extend to other legal entities that are connected with the insurance company.[67] In the field of corporate governance, supervision is carried out through the control of compliance with conditions relevant to this area, especially in relation to individuals holding executive positions. The supervision also includes the application of the management system within the company.[68]

The important aspect of the NBS's supervision involves the appointment and oversight of the management board of the insurance company. The appointment of a management board member requires prior approval from the NBS, without which the appointment is considered null and void.[69] Particularly important is the NBS's authority to revoke the approval for the exercise of the management role, not only in cases where an individual fails to meet all the prescribed requirements, but also if the individual fails to comply with the duties of a management board member, or if it is determined that conditions for introducing compulsory administration have been met.[70] This is a discretionary power that the NBS holds concerning the imposition of supervisory measures.[71]

In order to enhance control over the fulfilment of the conditions for holding a management position and to reduce the risk of conflict-of-interest situations, specific duties of informing the NBS are prescribed for the management board members. These duties specifically relate to the appointment and termination of the individual's position in the management or supervisory bodies of other legal entities. Furthermore, the management board member is obliged to inform the NBS about legal transactions through which they, or a member of their family, have directly or indirectly acquired shares in a legal entity, thereby increasing or decreasing their own or a family member's qualified participation. The NBS is authorized to order the dismissal and suspension of management board members or introduce compulsory

[67] See Art. 187 paras. 1–2 of the Insurance Law.
[68] Art. 13 of the Insurance Law.
[69] Art. 61 par. 1 of the Insurance Law.
[70] Art. 64, par.1 of the Insurance Law. These are, in fact, the foundations of an effective management system, which is considered crucial at the EU level to achieve the objectives of regulation and supervision in the insurance sector. Influenced by the rules from the Solvency II Directive, these provisions also form the basis of the governance system in our domestic law.
[71] N. Petrović Tomić, 200–201.

administration while also having the authority to impose monetary penalties on the insurance company and the responsible individuals.[72]

e) System of Governance

At the core of EU regulations governing the management of insurance companies lies an effective system of governance that ensures the prudent and conscientious conduct of the company's operations. One of the most important aspects of the operation of all companies in the financial sector, particularly those exposed to special and significant risks, is not the elimination of risks in business, but their recognition, understanding, and particularly the management of these risks.[73] Although enhanced, risks differ depending on the business activities carried out by companies. Therefore, there are specific risks within insurance companies, among which the insurance risk, arising from the very nature of their activity, is especially characteristic.[74] This risk consists of forecasting, collecting, and distributing risks, especially from individuals (consumers or business entities) to other persons or groups of people.[75] As such, it has an expressed social function, but also a responsibility in preventing and encouraging the reduction of certain risks.

Additionally, insurance companies are significantly affected by market risks, liquidity risks, and other business risks.[76] These risks are closely linked to the requirements for the formation and maintenance of capital as prescribed by the Solvency II Directive and, under its influence, domestic law. Finally, by encouraging the participation of insurance companies in the capital market, the risks they face are further increased, and together with other participants in the financial market, they are exposed to additional systemic risks, especially in situations where they are organized into groups whose members perform different financial services.[77]

Proper identification, assessment, and risk management are the core to the secure operation for insurance companies, making it one of the central themes of their good corporate governance. To ensure high-quality risk assessment and management, as well as the overall governance and control of insurance companies, key characteristics of an effective governance system include an adequate and transparent organizational structure with clearly defined responsibilities, as well

[72] Art. 197 par. 1 points 5 and 7, 204, and 206 of the Insurance Law.
[73] P. Manes, 100.
[74] Further information on the differences between the risks faced by different financial institutions see *Ibid.,* 105.
[75] A. van den Hurk, M. Siri, 56.
[76] For more on the different functions of financial organizations and their connection with risks in their operations, see G. Ferrarini (2017), 4–6.
[77] P. Manes, 106–107.

as an efficient information transmission system.[78] However, theory highlights that while these are key aspects, they do not have to be the only characteristics of the governance system, and other features can be identified in addition to them.[79] The governance system must be proportionate to the nature, size, and complexity of the activities carried out by insurance companies. This requirement is particularly important as it ensures proportionality and adapts management requirements and capital adequacy to the size of the company and the scope of its activities[80]. This corresponds to the understanding that regulation must be balanced and should not burden the company with excessive details on how to manage its risks.[81] The insurance company must provide a system that is fit for it, while the management must ensure and supervise its implementation. Still, there is an emphasis on the general regulatory framework, as well as the supervisory body's authorization to periodically assess the adequacy of the risk governance system.[82]

All key characteristics of the governance system have in common that they require special standards and conditions for the individuals responsible for them, and the supervisory body has insight into which individuals are performing these functions and must be informed of any changes. Finally, key functions are subject to strict conditions if they are to be delegated or entrusted to third parties.[83]

According to the Insurance Law, the insurance company must provide an effective governance system, which includes risk management, an internal control system, internal audit, and actuarial functions.[84] This system is also conditioned by the size and scope of activities, particularly the types of insurance the company provides.

The insurance company must ensure a *risk management system*. This is one of the most important modern aspects of management in insurance companies and is particularly emphasized in European regulations developed after the economic crisis, including provisions from the Solvency II Directive.[85] The insurance company must develop and implement various strategies, processes, and procedures to effectively identify, assess, measure, and manage risks.[86] Furthermore, good corporate governance is based on an effective *internal control system*. This part of the management system, modelled on EU rules, differs from risk management, although it is certainly connected, and involves ensuring compliance with all regulations applicable to the

[78] Art. 41 paras. 1 and 2 of the Solvency II Directive.
[79] A. van den Hurk, M. Siri, 53.
[80] *Ibid.*, 50; P. Manes, 112. In our case, these requirements are specifically regulated by the part of the law ensuring resources and capital adequacy in Chapter V of the Insurance Law.
[81] G. Ferrarini (2017), 18.
[82] *Ibid*.
[83] As referenced in: A. van den Hurk, M. Siri, 53.
[84] Art. 147 of the Insurance Law.
[85] Art. 44 of the Solvency II Directive.
[86] Specifically Section 2, Chapter VI of the Insurance Law.

insurance company and the efficient conduct of its operations to achieve its objectives.[87] According to the provisions of the Insurance Law, this means having appropriate administrative procedures, processes, and actions that the management organizes and applies according to the nature, complexity, and risk level of the business.

In the insurance company, it is necessary to organize an independent and autonomous *internal audit*, carried out in a specially organized part of the company.[88] The insurance company must engage at least one full-time employee to carry out internal audit activities. The internal auditor cannot be a member of the management board, nor is he authorized to perform other tasks within the insurance company that may be subject to internal audit. The internal audit is directly accountable to the supervisory board. Thus, governance and control are multi-layered and hierarchically structured.

Finally, the insurance company must engage a person in the role of an authorized actuary to perform actuarial activities.[89] This person is appointed and dismissed by the supervisory board of the insurance company. A person appointed to this role cannot be a member of the management board or an internal auditor. They must be independent and autonomous in performing their activities, and their work is subject to supervision by the National Bank of Serbia.

f) External Audit

An important verification of the financial results of an insurance company is carried out through an objective, professional, and impartial audit. The main goal of introducing such an assessment is to verify the operations of the insurance company, particularly its management. Hence, the significance of this control lies in the system of developed corporate governance.

In an insurance company, audits are conducted by licensed auditors employed by auditing firms.[90] The main objective of the audit is for the auditing company to express its opinion on whether the financial statements of the insurance company are prepared in accordance with regulations and whether they objectively and accurately reflect the company's financial position, business results, and cash flows. The insurance company selects the audit firm with prior consent from the National Bank of Serbia.

g) Remuneration

The remuneration of board members can lead to conflicts of interest between these individuals on one side and the company and its shareholders on the

[87] A. van den Hurk, M. Siri, 63.
[88] Art. 154 of the Insurance Law.
[89] Art. 161 of the Insurance Law.
[90] Arts. 182–186 of the Insurance Law.

other. Remuneration has particularly come under scrutiny in corporate governance following the economic crisis, and a significant number of provisions in recent years have attempted to regulate it.[91] The Insurance Law also provides specific rules on remuneration. According to its provisions, at least once a year, the general assembly must review written information on the salaries, remuneration, and other benefits of the members of the management board (supervisory and executive boards) as well as the supervisory board's proposal regarding salaries, remuneration, and other financial benefits for the following business year.[92] Additionally, this provision also establishes an obligation for the assembly to be informed and to review contracts concluded between the insurance joint-stock company and the members of the management board, or related parties, if they have obtained material benefits through such agreements.

In this regard, the EU-level provisions are particularly detailed in the Delegated Act of the European Commission.[93] The key principles emphasize that the remuneration policy and practices are closely linked to the company's risk management strategy and practices, as well as to its long-term objectives and business outcomes. It is necessary to include clear and transparent measures to avoid conflicts of interest, prevent discrimination, and ensure that the company's business activities and risk-taking are conducted responsibly. The establishment of a separate remuneration committee is encouraged, and the remuneration policy and practices, particularly those linked to performance, are to be thoroughly explained. Finally, recent amendments have considered the integration of sustainability risks into the risk management system to promote sustainable and responsible management within insurance companies.[94]

4. Duties in Insurance Companies

The rules governing the duties of specific individuals towards business companies are regulated by general corporate law principles, and they have significant applicability in insurance companies as well.[95] However, theory emphasizes that the classical conflict of interest that exists in non-financial sector companies has particular dimensions in insurance companies, given that the protection of interests goes far beyond that of ordinary companies.[96] Moreover, the market in these

[91] Remuneration is not specifically regulated by the Solvency II Directive from 2009, although it is detailed in the 2015 Delegated Act of the European Commission. This is explained in theory by the fact that interest in the issue of remuneration increased significantly only after the economic crisis. A. van den Hurk, M. Siri, 56. A. van den Hurk, M. Siri, 56.

[92] Art. 60 of the Insurance Law.

[93] See Art. 275 of the Delegated Act of the European Commission 2015/35.

[94] See especially Art. 275, par. 4 of the Delegated Act of the European Commission 2015/35.

[95] Arts. 61–80 of the Companies Act.

[96] J. Abraham Akuffo, 44, 48.

activities is less competitive and much more regulated, with continuous and strict supervision. Ultimately, the primary goal of oversight over corporate governance in insurance companies will generally be to ensure proper risk management and liquidity protection, thus safeguarding the interests of those outside the company, primarily the insurance policyholders.[97] Therefore, it is interesting to note that the classical duties of directors, even after the financial crisis, have not been significantly changed in financial institutions compared to classical companies in other sectors.[98]

The Insurance Law has not specifically regulated the duties within insurance companies, although some rules, particularly those regarding the duty to act in the interest of the company, are detailed and refined. Special provisions also include certain specific duties that deserve attention.

a) Duty to Act in the Interest of the Insurance Company

The question of the purpose for which an activity is carried out is one of the central and much-discussed issues of corporate governance.[99] It is worth recalling the ongoing debate about the purpose of a company and the interest of which persons with duties must be guided when making business decisions.[100] While leading American theory has emphasized the primary interest of shareholders (*shareholder primacy*) for many years,[101] at the other end of the spectrum is a group of various stakeholders from German legal culture *(stakeholder approach*), and somewhere in between is a more modern solution from English company law regulation (*enlightened shareholder value*).[102]

[97] *Ibid*., 44, 48.

[98] Steven L. Schwarcz, Aleaha Jones, Jiazhen Yan, *Responsibility of directors of financial institution*s, *Governance of Financial Institutions* (Eds. Danny Busch, Guido Ferrarini, Gerard van Solinge), Oxford University Press, Oxford, 2019, 166.

[99] "The purpose of the company is ... a central theme of corporate governance...", G. Ferrarini (2024), 121.

[100] The literature on this issue is vast, but here it is worth pointing to an interesting discussion after the European Commission published the Ernst & Young Study on Directors' Duties and Sustainable Corporate Governance (EY for the European Commission, *Study on Directors' Duties and Sustainable Corporate Governance: Final Report*, July 2020, available at: *https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en*, 31 August 2024). Following its publication, there was an exceptionally lively debate on the goal of the corporate entity. See responses from several leading authors at: *https://www.ecgi.global/events/directors-duties-and-sustainable-corporate-governanc*e, accessed on 31 August 2024.

[101] However, 33 states in the United States mention the interests of other parties that the director must consider in their legislation. See S. L. Schwarcz, A. Jones, J. Yan, 156.

[102] See, for example, G. Ferrarini (2024), 122–123, and especially for a historical and comparative review, 127–139; similarly to that: Vuk Radović, „Cilj privrednog društva sa osvrtom na aktuelnu pandemiju" (*Corporate purpose with a look on COVID-19 pandemic)*, *Revija Kopaničke škole prirodnog prava*, No. 2/2021, 34–44; Klaus J. Hopt, *Corporate Purpose and Stakeholder Value – Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems*, *ECGI Law Working Paper*,

Insurance companies are specific entities because, due to the activities they perform, there is a particularly pronounced need for the protection of security and operational stability. Moreover, there is an increased need not only to protect investors or creditors but also the interests of other parties—particularly insurance policyholders. Therefore, in the corporate governance of insurance companies, the fundamental problem is the alignment of different goals.

Namely, should the company primarily (or exclusively) conduct its activities to generate profit, which is the classical goal of business companies, or should insurance companies also consider achieving specific objectives, such as protecting the interests of insurance service users, and more broadly, the stability of the financial system?[103] The European Union, in its regulations, specifically emphasizes that the most important goal of regulating insurance and reinsurance activities is the protection of the interests of policyholders and other users of insurance services.[104] Furthermore, since insurance companies are of exceptional importance for the functioning and stability of the financial services market, their regulation involves increased concern and stricter operating conditions to protect the public interest. These specific goals have led to the special regulation of oversight over companies performing insurance activities. The Serbian legislator gave the same meaning in the basic rules governing insurance companies, ensuring oversight over these entities *to protect the rights and interests of policyholders and other users of insurance services and to preserve and strengthen the stability of the financial system*.[105]

The Insurance Law contains a very complex definition that outlines the duty of the board to act in the interest of the insurance company.[106] The members of the board are required to take measures to prevent unlawful or inappropriate actions and influences that are harmful or not in the best interest of the joint-stock insurance company and its shareholders. These actions and influences refer to those carried out by persons closely connected to the company, with the ultimate goal to protect the interests of users of insurance services.

Thus, it is important to highlight the critical issue of the goal in which insurance companies, according to our regulations, should operate, or the interest being realized (and protected) in this context. This complex legal definition emphasizes multiple interests: the interest of the insurance company, the interest of its shareholders, and the interest of users of insurance services. This is a much more complex, multi-interest concept that requires the board to consider other interests

No. 690/2023, available at: *https://www.ecgi.global/sites/default/files/working_papers/documents/hopt-klausjcorporatepurposeandstakeholdervalueecgi.pdf*, accessed on 31 August 2024; K. J. Hopt (2021), 21.

[103] D. Busch, G. Ferrarini, G. van Solinge, 13.

[104] Recital 16 of the Solvency II Directive.

[105] Art. 13, par. 1 of the Insurance Law.

[106] Art. 59 of the Insurance Law.

in addition to operating in the interest of the company, as traditionally defined in corporate law theory.[107] On the one hand, they are required to prevent unlawful or inappropriate harmful actions and influences that are not in the interest of the company *and* its shareholders. Hence, these interests are assumed to be equal—or should be defined in a way that aligns them.

Additionally, the board must take measures to prevent actions and influences by persons closely connected to the company in order to protect insurance service users—those outside the company. Therefore, the interests of these persons are enhanced and placed on the same level as the interests of the insurance company and its shareholders. This is certainly a broader understanding of the interest of a business company than the classical one.

The definition of acting in the interest of the company in the Insurance Law does not provide sufficient arguments to support the conclusion that, according to it, the interests of the insurance company and its shareholders are equal to other interests (especially the interests of persons outside the company). However, what is worth noting here is the special position of insurance service users in defining the ultimate purpose of insurance companies' existence, and, therefore, their important place in defining the *interests of the insurance company*. The board of the company must act in the interest of the insurance company, considering the interests of users of insurance services. This means that the board should prioritize the interest of the insurance company, including, as its ultimate goal, the interest of users of insurance services, before the interest of shareholders, which is in conflict situations placed second.

A similar position is taken by the International Association of Insurance Supervisors (IAIS), which, in its recently revised definition of the Insurance Core Principles, explicitly emphasizes the principle of prudent and conscientious management and supervision of insurance activities, considering and protecting the interests of insurance service users.[108] The same is true of the OECD Guidelines on Corporate Governance in Insurance Companies, which require board members to act in the best interest of the company but also to consider the interests of insurance service users, or other stakeholders, as appropriate to the case.[109] Similarly, this thinking is reflected in European theory, not only for insurance companies but also for other financial institutions, particularly banks.[110] The consequence of this, it is believed, is not only the definition of the ultimate goal (here) as the protection of insurance

[107] The general definition of acting in the best interest of the company in Article 63 of the Companies Act (ZOPD). In domestic theory, see also M. S. Vasiljević, 100–116.

[108] International Association of Insurance Supervisors, *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups*, Updated, November 2019, available at: *https://www.iaisweb.org/uploads/2022/01/191115-IAIS-ICPs-and-ComFrame-adopted-in-November-2019.pdf*, accessed on 31 August 2024, Insurance Core Principle No. 7, 50.

[109] OECD Guidelines on Corporate Governance in Insurance Companies, Recommendation I A 1, 11.

[110] K. J. Hopt (2021), 22.

service users' interests, but the lesser significance of controlling shareholders, institutional investors, and generally issues relating to control.[111]

Finally, the duty of the board to take measures to prevent actions and influences requires their attention in various situations involving conflict of interest between other parties and the company, and its prevention, which is a much broader obligation than the classical duty to act in the interest of a business company.[112] This also exists alongside the duty to avoid conflicts of personal interest (and the interests of related persons) with the company's interest. Here, we are not talking about the duty of loyalty of board members—although such a duty certainly exists under general corporate law rules—but about the duty of diligence and increased oversight over other persons closely connected to the insurance company, and who may be in conflict with it. In other words, in the case of a conflict of interest between a related person and the insurance company, the board must prioritize the protection of the insurance service users' interests over the interests of other parties within the company (the board, shareholders, etc.).

The specific definition of the duty to act in the interest of the insurance company under Serbian law was not influenced by the most important provisions of EU law, which generally point out the obligation for the member states' legislation to ensure that the management and supervisory bodies of insurance companies have ultimate responsibility for complying with the rules adopted to regulate the insurance activity.[113] A similar obligation for insurance companies when conducting their activities is also provided in the Insurance Law, under the principles of operation, as previously discussed.[114] Moreover, EU law does not contain further rules on the interests of insurance companies, nor does it specifically regulate the duties of individual persons within these companies. However, as already noted, the recitals of the Solvency II Directive *generally* emphasize that *the main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries*.[115] Therefore, theory emphasizes that this means insurance companies must consider other interests, especially financial stability and a fair and stable market, as long as it does not harm the interests of insurance service users.[116]

To highlight the important social role of insurance companies, corporate governance guidelines contain recommendations for better informing and engaging stakeholders outside the company—policyholders, insurance users, etc.[117] However, the guidelines clearly emphasize that the growth and development of insurance

[111] *Ibid*.
[112] Art. 69 of the Companies Act (ZOPD).
[113] Art. 40 of the Solvency II Directive.
[114] Art. 19 of the Insurance Law, as well as the first section of the third part of this paper.
[115] Recital 16 of the Solvency II Directive.
[116] A. van den Hurk, M. Siri, 51.
[117] Section IV: The Role of Stakeholders, Guideline No. 2.

companies cannot be achieved at the expense of the interests of these parties. This makes it clear that the interest of these parties is not equal to the interest of the insurance company (nor its shareholders), although it must be considered when determining whether the company is being managed in its best interest.

b) Duties Related to Legal Transactions

Among the special provisions regulating the duties in insurance companies is one that authorizes the supervisory board to take measures to eliminate conflicts of interest in legal transactions involving personal interests. Specifically, the supervisory board is required to ensure that legal transactions concluded with shareholders, related parties, or other parties having obligations to the company must not be less favourable for the company than similar transactions concluded under market conditions.[118] This measure elaborates on the general rule of working in the interest of the insurance company and specifies the actions that the members of the management must take to prevent harm or other consequences contrary to the interests of the company.[119] It is, by nature, stricter than the general rule, which does not prevent the conclusion of a deal or transaction if they are not concluded under market conditions. Instead, it requires the reporting and approval of the legal transaction or deal, even though there is a possibility of nullifying the transaction or deal if it was not concluded or undertaken at a fair value.[120]

c) Duty of Confidentiality

Among the specific provisions regulating the operations of insurance companies is the obligation to maintain confidentiality of sensitive data, which arises from the particularly sensitive activity that these companies perform.[121] The insurance company is required to keep confidential the information and circumstances it learns in the course of doing business with an insured party or other beneficiaries of insurance rights. However, in addition to the insurance company, a special duty to keep this information confidential applies to a certain group of persons, including members of the company's governing bodies, shareholders, employees of the insurance company, and others who, in connection with their work for the company or providing services to the company, gain access to this data.

[118] Art. 55, par. 19 of the Insurance Law.

[119] The general rule allows for the approval of a legal transaction or action in the case of a personal interest, with the determination of so-called fair value of the item or right being the subject of the transaction or action required when the value of the transaction exceeds 10% or more of the book value of the company's total assets. See Article 66 of the Companies Act.

[120] Art. 67 of the Companies Act.

[121] Art. 175 of the Insurance Law.

The duty to keep data confidential relates to the prohibition of disclosing or delivering such data to third parties, using, or enabling third parties to use such data. The obligation to keep data confidential persists even after the termination of the relationship under which the persons had access to the data. A violation of this obligation is subject to administrative sanctions.

d) Special Duties in the Vicinity of Liquidation or Bankruptcy: Duty of Notification

The special activity of the insurance company also imposes stricter duties on the management members in the vicinity of liquidation or bankruptcy.[122] Specifically, the executive board is required to notify the supervisory board in writing when the company's liquidity or solvency is at risk. The same obligation exists if there are grounds for the termination of the operational license or for the withdrawal of the license or prohibition of performing certain activities, or if the company fails to meet the conditions regarding capital adequacy. In each of these cases, there is a further obligation for the supervisory board to inform the National Bank of Serbia.

Failure to notify about the occurrence of these events is subject to individual liability of the members of the management board for the damage caused to the insurance company. There is also the possibility of administrative liability for a physical person.

IV A LOOK INTO THE FUTURE: SUSTAINABLE CORPORATE GOVERNANCE IN INSURANCE COMPANIES

Contemporary corporate governance has been significantly altered in terms of its content and objectives compared to previous rules. This applies to both the general theory and practice of corporate governance, as well as to specific (including financial) industries, including insurance companies. As early as 2018, the European Union promoted a sustainable economy, and the Final Report of the High-Level Expert Group on Sustainable Finance announced in its Foreword that "Sustainability is the theme of our time – and the financial system has a key role to play in delivering that set of ambitions".[123] Among other things, the recommendations in that report place special emphasis on promoting sustainability within the financial sector, giving insurance companies an important role in capital, long-term, and infrastructure

[122] Art. 65 of the Insurance Law.

[123] EU High-Level Expert Group on Sustainable Finance, *Financing a Sustainable European Economy: Final Report 2018 by the High-Level Expert Group on Sustainable Finance*, 2018, available at: *https://finance.ec.europa.eu/document/download/2e65cb1e-bd47-4441-816a-d89ec61eef45_en?filename=180131-sustainable-finance-final-report_en.pdf*, accessed on 31 August 2024, 3.

sustainable investments.[124] This is logical, as the activities of insurance companies are considered to be naturally closest to the goals of sustainable finance.[125]

Moreover, significant aspects of sustainable corporate governance are highlighted. Above all, stricter conditions are required of board members in financial sector companies so that these individuals have sufficient knowledge and skills in assessing and dealing with long-term risks in sustainable business practices.[126] Further development of this area (including the European Commission's Action Plan from 2018 and the Sustainable Finance Strategy from 2021) has remained committed to the sustainable economy, with strong reliance on companies in the financial sector, including insurance companies.[127]

The first serious initiative for regulating sustainable corporate governance emerged within the European Commission after the publication of the Ernst & Young Study on Director's Duties and Sustainable Corporate Governance in 2020. Despite numerous criticisms, based on this study, the European Commission adopted the Proposal for a Directive on Corporate Sustainability Due Diligence in February 2022.[128] The directive was confirmed by the EU Council on April 24, 2024, and was finally published in July 2024, achieving a political agreement in this important business area and concluding the lengthy, turbulent, and at times uncertain (even dramatic) process of adopting this document.[129] The directive has extremely valuable objectives reflected in more responsible, long-term, sustainable business practices for corporate entities. It harmonizes the duty of sustainable business conduct and establishes a link with conduct standards, breach of which leads to various administrative and civil penalties. This is of particular importance for insurance companies, as they (like reinsurance companies) are explicitly covered by its provisions.[130]

Furthermore, ESG (Environmental, Social, and Governance) factors have been an integral part of insurance companies' operations for years, primarily in their risk management, but also in their impact on corporate governance. These factors significantly influence decisions made by insurance companies and point to the

[124] *Ibid*., 5, 70–73.

[125] Arthur van den Hurk, *The Role of Prudential Regulation and Supervision of Insurers in Sustainable Finance*, *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (eds. Danny Busch, Guido Ferrarini, Seraina Grünewald), Second Edition, Palgrave Macmillan, Cham, 2024, 375.

[126] EU High-Level Expert Group on Sustainable Finance, 39.

[127] More about these initiatives, see A. van den Hurk, 379.

[128] A detailed and critical examination of its proposed, later rejected provisions aimed at harmonizing the duty of diligence for directors, with a review of previous initiatives, see Milena Mitrović, *Duties of Directors in Sustainable Corporate Governance*, *Law and Economy*, No. 3/2023, 847–852, 856–866.

[129] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, 5 July 2024.

[130] Art. 3, Section 1, Subsection a), Paragraphs 5 and 6 of the Directive on Corporate Sustainability Due Diligence.

desired direction in their governance. Turning towards these objectives is key for specific stakeholder groups, including investors and shareholders of all companies.[131] It is becoming an increasingly important element in defining the goals of long-term and sustainable business for insurance companies.

Until recently, special attention had not been paid to sustainable corporate governance in the legal system of the Republic of Serbia. However, under the global influence of principles and standards for sustainable business, particularly influenced by EU law and comparative law, these principles and standards are now already a significant part of the operations of insurance companies in Serbia. Recently, they have become the most important aspects of corporate governance here as well.

Up to this point, the duties of insurance companies to operate in compliance with the law, general acts, business policy acts, insurance and actuarial standards, as well as with good business practices and business ethics in the best interest of the insurance company and its shareholders, have been discussed.[132] Given all that has been said earlier about the specific goals and interests of insurance companies, and under the influence of modern views on sustainable corporate governance, although not explicitly stated, *the duty of the insurance company should undoubtedly be understood to include principles and standards of environmentally and socially responsible business practices*.

Today, more than ever, the supervisory duty of board members to oversee the implementation of increasingly complex operational rules, governance systems, and controls is more challenging than ever. On the other hand, traditional decision-making focused solely on generating profit and the short-term interests of the company's shareholders is being relativized. Authors point out that directors, faced with numerous demands for adhering to many rules and standards in contemporary sustainable business, are less protected by the traditional rule of business decision-making.[133] Therefore, the future of this area lies in the development of modern rules of sustainable corporate governance and their further integration into the management of insurance companies.

In comparative law, serious discussions have emerged regarding the qualification of directors (and board members in general). In this regard, the discussion on further specifying and improving the *fit and proper* rules is especially interesting. It is increasingly questioned how it is possible to ensure that these individuals properly assess and prevent not only business but also numerous other risks. These, for example, relate to climate change, environmental protection, data protection, the

[131] Thilo Kuntz, *Introduction to Research Handbook on Environmental, Social and Corporate Governance*, *Research Handbook on Environmental, Social and Corporate Governance* (ed. Thilo Kuntz), Edward Elgar Publishing, Cheltenham, UK – Northampton, MA, USA, 2024, 4.

[132] See principles of business in Art. 19 of the Insurance Law.

[133] T. Kuntz (2024a), 68–69.

use of AI, etc. The High-Level Expert Group on Sustainable Finance has promoted the enhancement of the *fit and proper* test to ensure that members of the boards of financial sector companies possess sufficient knowledge and skills in sustainable business risks, particularly understanding long-term risks and sustainability risks, better knowledge of a multi-stakeholder approach, and the objectives of the corporate entity that takes into account numerous stakeholders, including those outside the insurance company, and ultimately, understanding the sustainability-related needs of clients.[134] This recommendation should be applied to domestic insurance companies, considering the standard that the Insurance Law defines when prescribing the conditions for appointing a member of the board of an insurance company. Namely, the requirement that a person has the appropriate qualifications, knowledge, and experience necessary for performing this function should include those related to sustainability. However, it would be desirable for such requirements to be further specified in order to promote and improve sustainable business practices in domestic insurance companies.

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Translated by: ***Tijana Đekić***

UDC 368.032.1(497.11)
10.5937/TokOsig2502337M

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EFFICIENCY OF SERBIAN INSURANCE COMPANIES: AN APPROACH USING DATA ENVELOPMENT ANALYSIS

SCIENTIFIC WORK

Abstract

In accordance with the current situation on the insurance market and predictions for the future, the management of insurance companies must develop and implement sustainable business strategies that correspond to their capacities. This requires insurance company management to closely monitor changes in the market in order to recognize potential risks and opportunities and take appropriate steps. The main focus of insurance companies is meeting the needs of current and future policyholders. In this process, it is crucial to measure the efficiency of their operations. This paper deals with the application of the DEA method to insurance companies operating in Serbia, in order to determine their technical efficiency. Research results indicate good efficiency for some companies, or wrong allocation or inefficient use of resources in the implementation of operating activities for other companies for the observed period from 2018-2022.

Keywords: DEA analysis, insurance companies, efficiency, Republic of Serbia.
JEL classification: C61, G22, M41

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Paper received: 24.3.2025
Paper accepted: 15.4.2025.

I Introduction

Insurance is a financial concept developed to manage potential risks effectively. Its objective is to provide stability for economic progress or to provide protection against unpredictable losses[4]. Although this market has shown significant profitability, the insurance industry faces considerable fragmentation and the sector gets into grip with a variety of challenges[5]. Insurance company management is expected to closely monitor changes in the market in order to recognize potential risks and opportunities and take appropriate steps[6]. The main focus of insurance companies is meeting the needs of current and future policyholders. In accordance with the current situation on the insurance market and predictions for the future, the management of insurance companies needs to develop and implement sustainable operating strategies that correspond to the capacities. In this process, it is crucial to measure the efficiency of their operations. The paper deals with the DEA method application to insurance companies operating in Serbia, in order to determine their technical efficiency.

Insurance companies constitute a vibrant sector that has developed a wide range of products to meet the needs of a wide range of consumers, including investment needs. Through the sale of insurance policies, insurance companies collect funds which they then invest in different financial instruments. It is important to note that the work of insurance companies is characterized by significant costs related to human resources, which additionally affects the complexity of measuring the efficiency of their operations. Although it is important to assess the efficiency of operations, it becomes challenging in the case of insurance companies due to their specific nature.

In its business, every company has its own principles of operation, and one of the key to financially sustainable operations is the principle of efficiency. Analysing productivity, efficiency and profitability includes the following forms of analysis[7]:

- Technical efficiency or productivity obtained as a ratio of produced quantities and production factors (employment, working time, resources);
- Economic efficiency, obtained as a ratio of income and expenses;

[4] Anđelka Aničić, Ana Anufrijev, „Da li je scenario razvoja osiguranja u Srbiji optimističan", *Revizor*, Vol. 29, No. 99/2022, 81-88. *https://doi.org/10.56362/Rev2299081A*

[5] Sepideh Kaffash *et al.*, „A survey of data envelopment analysis applications in the insurance industry 1993–2018", *European journal of operational research*, Vol. 284, No. 3/2020, 801-813. *https://doi.org/10.1016/j.ejor.2019.07.034*

[6] Marko Milašinović, Snežana Knežević, Aleksandra Mitrović, „Upotreba alternativnih mera učinka u proceni finansijskih performansi osiguravajućih društava u Republici Srbiji", *Tokovi osiguranja*, Vol. 39, No. 2/2022, 177-201. *https://doi.org/10.5937/TokOsig2302177M*

[7] Snežana Knežević, Milanka Marković, Andrijana Brown, „Measuring the efficiency of Serbian insurance companies", *Acta oeconomica*, Vol. 5, No. 1/2015, 91-105. *http://dx.doi.org/10.1556/AOecon.65*.2015.1.5

- Financial efficiency, which represents the ratio of profit to the average sum of funds employed.

Productivity, economy and profitability are partial indicators of efficiency of primordial importance. Efficiency refers to the extent to which a company successfully converts available inputs — such as assets, capital and other resources — into desired outputs - such as sales, profit and other performance indicators - reflecting the overall effectiveness of its operations. Furthermore, the partial efficiency of the company represents the ratio of one input to one output[8].

The information contained in financial statements is a central part of market information. Financial reports are of paramount importance for enhancing the functionality of the official capital market. They serve as a communication bridge between the company's management and its stakeholders, including investors and new leaders. These reports facilitate transparency and enable stakeholders to make informed decisions regarding their involvement with the company. The three key financial statements – the balance sheet, the income statement and the cash flow statement – are concerned with answering the following questions: (1) What is the company's accumulated capital at the end of the period? (2) How much profit was generated (or loss - lost capital) by the company for the observed period? and (3) What cash movements (inflows and outflows) occurred during the specified period? Financial statements are a bridge of communication between management and accountants, on the one hand, as well as investors, on the other[9].

The number of insurance companies from year to year is unchanged for the period 2018-2022, it is about 16 insurance companies in Serbia. In addition, the current situation indicates that there are four reinsurance companies. Four insurance companies deal with life insurance, and up to six companies deal with mixed insurance.

The paper relies on a systematic and comparative examination of existing scholarly literature and incorporates findings from the authors' own research. The research methodology entailed a content analysis of both primary and secondary sources, specifically focusing on a selection of 16 companies that operate in Serbia. The financial data used in the analysis were drawn from official reports published by the Business Registers Agency (Agencija za privredne registre – APR). To assess the efficiency of these insurance companies, the authors employed the DEA - CSR model. Since DEA in its current form was first introduced in 1978, researchers in a number of fields quickly recognized it as an excellent and easy-to-use methodology for modelling business processes for performance evaluation[10].

[8] Snežana Knežević, Milanka Marković, Slađana Barjaktarović Rakočević, „Assessing Efficiency in Banking", *Industrija*, Vol. 40, No. 3/2012, 71-92.

[9] Snežana Knežević, *Finansijsko izveštavanje*, izdanje autora, Beograd, 2019.

[10] William W. Cooper, Lawrence M. Seiford, Joe Zhu, „Data Envelopment Analysis: History, Models, and Interpretations. Handbook on Data Envelopment Analysis", *International Series in Operations Research*

The rest of the paper is structured as follows: Section 2 presents a literature review of studies concerning efficiency in insurance companies with DEA model. Section 3 presents the methodology used, variables, and data. Section 4 presents and analyses the findings and discusses the results, while Section 5 concludes the paper.

II Literature review

In the field of insurance and financial literature, the evaluation of performance among insurance institutions stands as a pivotal subject, continually drawing significant research attention and interest.

Performance evaluation is indeed a crucial process in management. It serves as a means to obtain essential information for decision-making and can offer a competitive advantage by informing ongoing actions and strategies. Frequent changes in the environment, including fluctuations in interest rates and markets, variations in risk sensitivity of premium claims and growing instability in the area of currency exchange rates can sometimes show unfair characteristics[11]. The strategic activities require a solid and efficient base to yield successful results. Indeed, the efficiency of insurance companies remains a significant focus of contemporary research[12]. Sine the aim of the paper is to examine the efficiency of insurance companies in the Republic of Serbia using the DEA method, the results of similar studies conducted by researchers observating insurance companies in the Republic of Serbia and neighboring countries are presetend below.

Knežević et al. (2015)[13] used the DEA model to analyze the efficiency of insurance companies in the Republic of Serbia in the period from 2009 to 2011. During the observed period, significant fluctuations in the efficiency of insurance companies were observed, with only three insurance companies showing 100% efficiency in all three years. Using the DEA model, Micajkova (2015)[14] found that the efficiency of 11 insurance companies in North Macedonia tended to increase in the period from 2009 to 2013. Using the DEA model, Lukić et al. (2018)[15] found that only 5 out of 16 insurance companies in Serbia were

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[11] Snežana Knežević, „Faktori kvaliteta finansijskog izveštavanja osiguravajućih društava", *Računovodstvo*, Vol. 3-4, 2011, 411–427.

[12] Carlos Pestana Barros, Nazaré Barroso, Maria Rosa Borges, „Evaluating the efficiency and productivity of insurance companies with a Malmquist index: A case study for Portugal", *The Geneva Papers on Risk and Insurance-Issues and Practice*, Vol. 30, 2005, 244-267.

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[14] Vesna Micajkova, „Efficiency of Macedonian Insurance Companies: A DEA Approach", *Journal of Investment and Management*, Vol. 4, No. 2/2015, 61–67. *http://dx.doi.org/10.11648/j.jim.20150402.11*

[15] Radojko Lukić, Miro Sokić, Dragana Vojteski Kljenak, „Analysis of insurance companies' efficiency in the Republic of Serbia", *Economic and Environmental Studies*, Vol. 18, No. 1/2018, 249-264. *https://doi.org/10.25167/ees.*2018.45.14

operating efficiently in 2016. Đurić et al. (2020)[16] attempted to analyze the efficiency of the insurance sector based on the performance analysis of 9 insurance companies using the DEA window analysis. It was found that the relative average efficiency was below 100% in all years observed, with this being particularly pronounced in the period from 2015 to 2018. The results of research by Medved & Kavčić (2018)[17] show that the Slovenian insurance industry is cost- and technically more efficient, and accordingly, a low efficiency position on the insurance market in Croatia. Fotova Čiković et al. (2024)[18] analyzed the efficiency of insurance companies in North Macedonia in the period 2018-2022. The highest efficiency level of the insurance sector was recorded in 2018, while the lowest efficiency level was recorded in 2020. During the observed period, life insurance companies achieved a higher level of relative efficiency compared to non-life insurance companies. Koprivica et al. (2025)[19] analyzed the technical efficiency of insurance companies in five Western Balkan countries in the period from 2015 to 2022 using DEA methods. It was found that insurance companies in the Republic of Serbia have the highest level of technical efficiency, while on the other hand, the lowest level of technical efficiency was recorded among insurance companies in Albania. It was also found that the level of efficiency is influenced by company size, specialization, growth, solvency and profitability.

III Data and methodology

The data applied in this research is derived from a secondary source, specifically the Annual Report of insurance companies released by The Business Registers Agency[20]. The sample encompasses 16 insurance companies that operate across Serbia. The study pertains to the time frame spanning from 2018 to 2022. In this analysis, each individual insurance company is treated as a Decision-Making Unit (DMU).

Within chapter 2, research from the observed area is presented. The remainder of this paper will present the implementation of the CRS input-oriented DEA method, a non-parametric approach, i.e., model D2 (B) was used for insurance companies operating in Serbia. For the application of the CRS model, data on capital with reserves, salary costs, and insurance operating expenses were used as inputs. As outputs, data on gross operating result and income from insurance and co-insurance premiums were utilized.

[16] Zlata Đurić, Milena Jakšić, Ana Krstić, „DEA WINDOW ANALYSIS OF INSURANCE SECTOR EFFICIENCY IN THE REPUBLIC OF SERBIA", *Economic Themes*, Vol. 58, 1/2020, 291-310.

[17] Darko Medved, Slavka Kavčič, „An empirical study of efficiency in Croatia and Slovenia insurance markets", *Economic research*, Vol. 25, No. 1/2015, 87-98. *https://doi.org/10.1080/1331677X.2012.11517496*

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[20] Business Registers Agency. Available *https://www.apr.gov.rs/ 20.12.2024.*

DEA method is a precisely defined procedure used to assess the efficiency of complex units within a business system that involve various inputs and outputs[21]. A DEA model can be designed to either minimize inputs or maximize outputs, depending on the desired focus[22]. DEA is a highly regarded method for determining the relative efficiency of DMUs[23]. A DMU is the designated term for business entities, such as an insurance company in this context, that undergo analysis to evaluate their efficiency using specified input and output criteria. DEA provides insights into a DMU's efficiency and inefficiency, indicating the adjustments (to reduce a certain input and/or increase a certain output) required to enhance its efficiency. Each DMU strives to optimize its weighting schemes to attain peak efficiency. Consequently, the application of diverse sets of weights leads to numerous efficient Decision-Making Units (DMUs), making it difficult to establish a consistent basis for comparison and ranking[24]. DEA model can be designed to either minimize inputs or maximize outputs[25].

In the first approach, DMU efficiency is calculated as the ratio of output to input, representing the partial efficiency of the DMU. This test is considered parametric. According to DEA conventions, the minimum number of DMUs is greater than three times the number of inputs plus output[2627].

Efficiency is a measure of a company's success and reflects the extent to which companies make optimal use of available inputs (deposits, loans taken, engaged funds, assets and others) to produce goods or provide services and thus achieve the desired output indicators, for example, income, profit (earnings) and the like.

The partial efficiency (PE) of the *i*-th company is determined as follows:

$$PE_i = \frac{output}{input}$$

[21] A. Charnes, W.W. Cooper, E. Rhodes, „Measuring the Efficiency of Decision-Making Units", *European Journal of Operations Research*, Vol. 6, No. 2/1978, 429-444.

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[27] R.G. Dyson *et al*., „Pitfalls and protocols in DEA", *European Journal of operational research*, Vol. 132, No. 2/2001, 245-259. *https://doi.org/10.1016/S0377-2217(00)00149-1*

This concept of efficiency is frequently used by financial analysts to assess key performance dimensions such as productivity, economic efficiency, and profitability. Emphasizing financial efficiency plays a crucial role in evaluating the general well-being and long-term viability of a company or economic entity. This focus on financial efficiency is integral to assessing the overall health and sustainability of a company or economic entity. Ratio coefficients as logically connected items from financial statements are often used as measures of business efficiency but show partial efficiency. This is a parametric approach to efficiency measures.

O'Donnell[28] defines the total efficiency factor (TE) as the ratio of each PE to the maximum PE value of the *n* observed companies.

$$TE_i = \frac{PE_i}{\max PE_i}$$

The second approach is non-parametric, acknowledging that assessing the efficiency of a unit, particularly a non-profit entity, often requires consideration of multiple inputs and outputs of various natures (financial, technical, technological, social, etc.), which are measured in different units. In this non-parametric context, we employ the DEA method for measuring efficiency. The following format is used to apply DEA efficiency:

DEA Efficiency = Weighted Sum of Output / Weighted Sum of Input

CCR-Model was introduced by Charnes et al.[29]. In the CCR model, "the technical efficiency calculated is composed of both pure technical efficiency and scale efficiency"[30]. The CRS models assume constant returns to scale (The Constant Returns to Scale Model). If the condition is added that

$$\sum_{j=1}^{n} \lambda_j = 1$$

then the models are obtained, known as BCC DEA models[31] or VRS (The Variable Returns to Scale Model) models, depending on the literature used.

[28] C.J. O'Donnell, „An aggregate quantity framework for measuring and decomposing productivity change", *Journal of Productivity Analasys*, Vol. 38, 2012, 255–272. https://doi.org/10.1007/s11123-012-0275-1

[29] A. Charnes, W.W. Cooper, E. Rhodes, „Measuring the Efficiency of Decision-Making Units", *European Journal of Operations Research*, Vol. 6, No. 2/1978, 429-444.

[30] Nand Kumar, Archana Singh, „Efficiency analysis of banks using DEA: A review", *International Journal of Advance Research and Innovation*, Vol. 1, 2014, p. 121

[31] R.D. Banker, A. Charnes, A., W.W. Cooper, „Some models for estimating technical and scale inefficiencies in data evelopment analysis", *Management Science*, Vol. 30, No. 9/1984, 1078-1092.

Basic DEA models come in various variants with specific constraints, including those related to weight restrictions or based on the type of input or output variables, among other factors. Inputs could be things like labor, capital, or resources, while outputs could be production, revenue, or services provided. Our focus is on two models.

MODEL D1. Let x_{ij} – be the observed value of input of the *i* –th type for DMU_j ($x_{ij} > 0$, $i = 1,2,...,m$, $j = 1,2,...,n$), and y_{ij} – the observed value of the output of the *r*-th type for DMU_j ($y_{ij} > 0$, $r = 1,2,...,s$, $j = 1,2,...,$ n).

Charnes et al. (1978) proposed (known as the CCR ratio model) that for each DMU_k, $k = 1, 2,...,n$, an optimization problem of the following form should be solved:

$$\max h_k(u,v) = \sum_{r=1}^{s} u_r y_{rk} \Big/ \sum_{i=1}^{m} v_i x_{ik} \ ,$$

subject to conditions

$$\sum_{r=1}^{s} u_r y_{rk} \Big/ \sum_{i=1}^{m} v_i x_{ik} \le 1, u_r \ge 0, v_i \ge 0, \ \mathrm{r} = 1, 2,...,\mathrm{s}, \ \mathrm{j} = 1,2,...,\mathrm{m},$$

where h_k is the relative efficiency of the k-th DMU, n – the number of observed DMU, m is the number of inputs and s is the number of outputs, u_r weighting coefficient for the output *r* and v_i weighting coefficient for the input i. The weighting coefficients u_r and v_i are unknown in the model that are determined by optimization and construct a virtual input and a virtual output.

Based on the provided information, it can be concluded that $0 \le h_k \le 1$.

If h_k equals 1, the k-th DMU is considered relatively efficient, meaning it is no other DMU can achieve a higher output value for a given input.

If h_k is less than 1, the *k*-th DMU is considered relatively inefficient and the value h_k shows by what percentage the *k*-th unit should reduce its inputs.

The weighting coefficients u_r and v_i indicate the relative importance of individual inputs and outputs for each DMU, so that each DMU is as efficient as possible.

This model is non-linear, non-convex with linearly decomposed objective function and constraints.

MODEL D2. Model D1 can be reduced to a linear model as follows

$$\max z = \sum_{r=1}^{s} u_r y_{rk} \ ,$$

(A)

with conditions

$$\sum_{r=1}^{s} u_r y_{rk} \Big/ \sum_{i=1}^{m} v_i x_{ik} \le 1, u_r \ge 0, v_i \ge 0, \ \mathrm{r} = 1, 2,...,\mathrm{s}, \ \mathrm{j} = 1,2,...,\mathrm{m},$$

$u_r \geq \varepsilon$, $v_i \geq \varepsilon$, where ε is a small positive value, i.e. $\varepsilon > 0$, r = 1,2,..., s, j = 1,2,...,m,

In Model D2, the objective is to maximize the virtual output while ensuring that the virtual input is equal to 1.

The dual linear programming problem for model (A) can be described as follows:

(B) $\theta^* = \min \theta$,

under the conditions that

$$\sum_{j=1}^{n} \lambda_j x_{ij} \leq \theta x_{ik}, i = 1,2,...,m, \sum_{j=1}^{n} \lambda_j y_{rj} \geq y_{rk}, r = 1,2,...,s, \lambda_j \geq 0, j = 1,2,...,n.$$

IV Research results and discussions

The overall efficiency of individual insurance companies for each year was computed using Excel Solver by configuring the relevant parameters and constraints in accordance with model D2 (B). The outcomes are presented in Table 1.

In order to interpret the obtained results, it is necessary to point out at the beginning that the efficiency rating, which is expressed relatively, indicates the relative position of insurance companies within the observed sector I for each year. If k-DMU (the insurance company) is relatively efficient, and if C_k is below 100, k-DMU (the insurance company) is relatively inefficient.

Table 1. Efficiency rating of insurance companies for the period from 2018-2022, individual and average

Insurance company	Efficiency rating					Average efficiency
	2018	2019	2020	2021	2022	
AMS insurance	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
DDOR Novi Sad	100.00%	96.33%	100.00%	96.05%	100.00%	98.48%
Dunav Insurance	100.00%	91.49%	95.26%	87.05%	77.75%	90.31%
Generali insurance	100.00%	100.00%	100.00%	98.91%	96.02%	98.99%
Globos insurance	100.00%	47.36%	78.34%	100.00%	100.00%	85.14%
Grawe insurance	100.00%	100.00%	97.69%	94.33%	92.50%	96.90%
Merkur insurance	87.41%	90.02%	94.77%	92.20%	81.95%	89.27%
Milenijum insurance	100.00%	92.15%	100.00%	98.69%	88.00%	95.77%
OTP insurance	88.30%	71.16%	82.29%	86.03%	100.00%	85.56%

Sava non-life insurance	83.40%	67.17%	70.39%	60.38%	78.99%	72.06%
Sava life insurance	53.57%	60.43%	67.64%	71.02%	78.89%	66.31%
Sogaz	91.32%	88.51%	73.15%	79.29%	78.25%	82.10%
Triglav insurance	90.16%	70.40%	74.20%	67.81%	78.15%	76.14%
Uniqa non-life	93.72%	73.96%	68.47%	69.91%	87.16%	78.64%
Uniqa life	82.03%	76.53%	67.01%	70.75%	57.84%	70.83%
Wiener städtische insurance	93.67%	100.00%	100.00%	100.00%	100.00%	98.73%
Average value	91.47%	82.84%	85.58%	85.78%	87.22%	86.58%

Source: authors based on data from insurance companies' financial reports

The results of the DEA analysis of the efficiency of insurance companies in Serbia for the period from 2018 to 2022 show clear differences between the companies observed. AMS Insurance stands out as the only company that maintained the maximum efficiency level (100%) throughout the analyzed period, which indicates a consistent optimal use of available resources in generating production values. In addition, Generali Versicherung, Wiener Stadtische Versicherung and DDOR Novi Sad have high efficiency scores, with slight fluctuations but no significant deterioration in overall performance. On the other hand, several insurance companies show a significant decline. For example, Dunav Insurance, Grave Insurance, Merkur Insurance and Milenijum Insurance record a constant decline in efficiency in 2021 and 2022. As for the average efficiency of insurance companies during the five-year period observed, only AMS Insurance operated with an efficiency of 100%. Generali insurance, with an average efficiency of 98.98%, is at the second place, while at the third place is Wiener städtische insurance (with an average efficiency of 98.73%). The lowest average efficiency in the period from 2018 to 2022 was recorded at the insurance company Sava life insurance and amounted to 66.31%.

In addition to determining the efficiency of insurance companies by individual years of operation, it is also necessary to look at its trend during the observed period. As stated in the third part, chain indices will be used for these purposes in the paper. Table 2 shows the value of the chain indices.

Table 2: Chain indices

Insurance companies	Chain indices			
	2019/2018	2020/2019	2021/2020	2022/2021
AMS insurance	100.00	100.00	100.00	100.00
DDOR Novi Sad	96.33	103.81	96.05	104.11

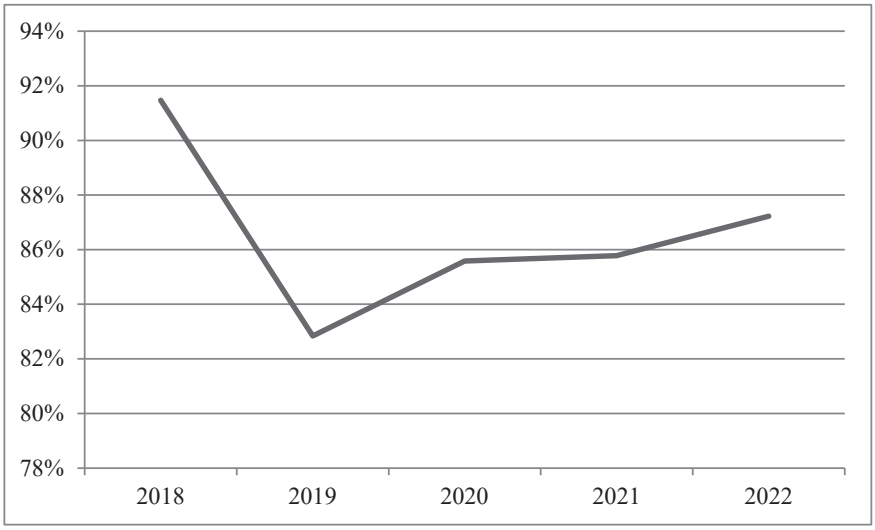
Insurance companies	Chain indices			
	2019/2018	2020/2019	2021/2020	2022/2021
Dunav insurance	91.49	104.12	91.38	89.32
Generali insurance	100.00	100.00	98.91	97.08
Globos insurance	47.36	165.42	127.65	100.00
Grawe insurance	100.00	97.69	96.56	98.06
Merkur insurance	102.98	105.27	97.29	88.89
Milenijum insurance	92.15	108.52	98.69	89.17
OTP insurance	80.58	115.65	104.55	116.23
Sava non-life insurance	80.54	104.80	85.79	130.81
Sava life insurance	112.81	111.92	105.00	111.07
Sogaz	96.91	82.65	108.39	98.69
Triglav insurance	78.08	105.40	91.39	115.25
Uniqa non-life insurance	78.92	92.57	102.10	124.68
Uniqa life insurance	93.29	87.57	105.58	81.75
Wiener städtische insurance	106.76	100.00	100.00	100.00

Source: authors based on data from Table 1

As can be seen from the previous table, the efficiency of most insurance companies varied from year to year. Only at the insurance company AMS insurance is the level of efficiency constant during the observed period, that is, at the insurance company Wiener städtische insurance the level of efficiency is constant during the last 4 years. The greatest decrease and increase in efficiency during the observed five-year period was recorded at the insurance company Globos insurance. Namely, this insurance company recorded a decrease in efficiency of 52.64% in 2019 compared to 2018, and already in the following year (2020) an increase in efficiency of 65.42% was recorded.

As can be seen from Figure 1, the average efficiency of the insurance sector in the Republic of Serbia fluctuated during the period under review. In 2019, there was a significant decline in the average efficiency of the insurance sector, followed by an upward trend. In 2018 and 2019, the efficiency of seven insurance companies was below the average efficiency at sector level. In 2020 and 2022, half of the insurance companies had an efficiency that was below the average efficiency at sector level. In 2021, six insurance companies had an efficiency that was below the sector average. In all five years observed, four insurance companies (Sava non-life Insurance, Sava Life Insurance, Triglav Insurance and Uniqa Life) had an efficiency that was below the average efficiency at sector level.

Figure 1: Average efficiency of the insurance sector in the Republic of Serbia in the period from 2018 to 2022. year



Source: authors based on data from Table 1

The study shows that the efficiency of insurance companies in Serbia can be improved. In order for insurance companies to improve their efficiency in the future, it is necessary to manage assets, employees, capital, but also business income and profits as efficiently as possible, which can be achieved by applying modern cost management concepts[32].

V Conclusion

The paper aims to analyze the efficiency of insurance companies in the Republic of Serbia by applying the DEA method. The investigation revealed that the efficiency of insurance companies varies significantly over the observed period, with only a small number of insurance companies having an efficiency of 100% in each of the observed years. In other words, the majority of them operate at less than 100% efficiency, i.e. inefficiently. This confirms the results of previous studies that the efficiency of insurance companies in the Republic of Serbia can still be significantly improved.

[32] Radojko Lukić, Miro Sokić, Dragana Vojteski Kljenak, „Analysis of insurance companies' efficiency in the Republic of Serbia", *Economic and Environmental Studies*, Vol. 18, No. 1/2018, 249-264. *https://doi.org/10.25167/ees.2018.45.14.*

If a system exhibits significant inefficiency and lacks comprehensive regulation while operating within an outdated framework, there may be a need for adjustments and restructuring activities. These actions can be prompted by the rising competition in the insurance sector, with the goal of enhancing overall system efficiency. The results of the research can usefully serve company managers and other interest groups (investors) who want insight into the efficiency of the observed insurance companies. Based on the received efficiency data, it was identified for which companies and in which periods the efficiency was unsatisfactory, which certainly affected the financial viability of the observed companies. Productivity and efficiency are essential metrics to realize companies' goals and diagnose critical points for performance improvement.

The efficiency of DEA and its suitable applications strongly rely on the quality and suitability of the dataset used as an input for the productivity model. It's important to note that while there are various DEA models available, certain characteristics of data may render them unsuitable for the application of DEA models. Since the paper applies the CCR model of DEA analysis, which assumes that the assumption of constant returns to scale is met, i.e. that all observed companies operate at the optimal volume of activity (which is often not the case in practise), the results of the efficiency assessment should be viewed with a certain degree of caution.

In future research, there is an expectation to include additional input and output variables as measures of efficiency for insurance companies. Furthermore, the possibility of extending the research to include Islamic insurance in various other countries is also being considered. Also, future research should also investigate which factors influence the degree of efficiency.

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OSIGURANJE OD ODGOVORNOSTI ZA POVREDU PRAVA INTELEKTUALNE SVOJINE

STRUČNI RAD

Sažetak

Prava intelektualne svojine predstavljaju prava kojima se štite intelektualna dobra veoma značajna za pojedinca, a još više za privredu i društvo. Osiguranje od odgovornosti za povredu prava intelektualne svojine sve više dobija na važnosti za upravljanje neočekivanim rizicima postavljanja imovinskih zahteva trećih lica, kao i neovlašćene upotrebe prava intelektualne svojine. U ovom radu najpre analiziramo svojstva različitih prava intelektualne svojine i prednosti osiguranja od odgovornosti za povredu tih prava, a zatim šta može da bude predmet osiguranja ako se pođe od prava IS, principa i ugovora o osiguranju s ciljem da se izvrši razgraničenje razmatrane vrste osiguranja od odgovornosti u odnosu na IS. U nastavku se analizira sadržina pokrića u kontekstu specifičnih troškova u situacijama kada se osiguranik nalazi u svojstvu tužene strane, kao i onda kada preduzima mere za zaštitu i ostvarivanje sopstvenog prava IS.

Ključne reči: pravo, intelektualna svojina, osiguranje, troškovi, finansijska šteta

I Uvod

Intelektualna svojina (dalje u tekstu: IS) na različite načine utiče na titulare prava IS i nacionalnu ekonomiju, pogotovo kada se radi o naučno-tehnološkom

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Rad primljen: 13.3.2025.
Rad prihvaćen: 25.4.2025.

razvoju i unapređivanju pojedinačnog i društvenog blagostanja. Stoga ne čudi što su SAD, početkom osamdesetih godina 20. veka, počele da sve informacije koje se dele na računaru putem interneta sistematski tretiraju kao pretnju po nacionalnu bezbednost SAD zbog eventualne povrede prava IS, čime se opravdavao nadzor i kontrola nad internetom i njegovim budućim razvojem.[3] Osim toga, tehnološki napredak u različitim oblastima takođe otvara različita pitanja nacionalne i međunarodne bezbednosti, a pogotovo u vreme sve bržeg razvoja i primene veštačke inteligencije.

U kontekstu tržišnih društvenih odnosa, ekonomska upotrebljivost IS sve više dobija na značaju. Kao proizvod inovativnog ljudskog duha, IS predstavlja osnovu slobodnog stvaralaštva pojedinca, duhovnog i materijalnog napretka društva. S druge strane, nesavesno prisvajanje i korišćenje tuđih zaštićenih intelektualnih dobara radi sticanja finansijske i druge koristi odavno je sankcionisano na različite načine. Stoga se u literaturi ističe sledeće:„Prava intelektualne svojine i zaštita IS obezbeđuju osnovno pravo zaštite novih ideja, novih procedura, novih proizvoda, a zatim i njihovog komercijalnog širenja bez ikakvog straha od gubitka, piraterije i nepotrebnog upuštanja lica ili preduzeća u sudske sporove."[4] Međutim, institucionalna zaštita prava IS u slučaju neovlašćenog korišćenja, nije moguća bez pokretanja odgovarajućeg postupka. Jedna grupa tih postupaka pokreće se i sprovodi po službenoj dužnosti (na primer, upravni postupak inspekcijskog nadzora i carinski postupak), druga, takođe po službenoj dužnosti (krivični postupak), dok se imovinski i neimovinski zahtevi ostvaruju u parničnom postupku na osnovu tužbe oštećenog lica i drugim merama. Najčešće do neovlašćenog korišćenja tuđeg zaštićenog intelektualnog dobra dolazi nesavesnim i voljnim postupcima štetnika, dok titular prava ostvaruje zaštitu na osnovu saznanja o nedozvoljenom ponašanju. Nesavesnost lica koje povređuje tuđe pravo IS upravo se ogleda u njegovom znanju da je ono što ekonomski koristi tuđe zaštićeno intelektualno dobro te da nije na zakonit način steklo pravo ekonomskog iskorišćavanja nematerijalnog dobra koje pripada drugom licu.[5] Ipak, mogući su slučajevi i nesvesne povrede prava IS, kada je ono posledica slučajnog – nenamernog poklapanja. Svesnost ili nehatnost povrede prava IS ne isključuje mogućnost postavljanja imovinskog zahteva protiv odgovornog lica,[6] ali se od tužioca – titulara IS očekuje da dokaže postojanje neovlašćene radnje odgovornog lica i njom prouzrokovanu štetu na osnovu konkretne uzročno-posledične veze. Zato nije bitno da se, u svim slučajevima, manifestuje namera lica u pripremanju i vršenju radnji kojima se krši IS. Ipak, pre ili tokom parnice, u slučajevima predloga za izricanje

[3] Sanja Jelisavac Trošić, *Dinamika razvoja intelektualne svojine u međunarodnim ekonomskim odnosima*, Institut za međunarodnu politiku i privredu, Beograd, 2023, 115.

[4] S. Jelisavac Trošić, 111.

[5] Vidoje Spasić, *Pravo intelektualne svojine*, Pravni fakultet, Centar za publikacije, Niš, 2024, 4–5; Slobodan Marković, Dušan Popović, *Pravo intelektualne svojine*, Pravni fakultet, Centar za publikacije, Beograd, 2023, 21.

[6] S. Marković, D. Popović, 276.

privremene mere, za pribavljanje ili obezbeđenje dokaza dovoljno je da stranka u postupku učini verovatnim da je njegovo pravo povređeno ili da će biti povređeno.[7]

Tužbom kao procesnim sredstvom pokreće se parnični postupak i zahteva sudska zaštita nekog prava IS. To znači da se ta vrsta zaštite pred sudom ostvaruje samo na osnovu volje titulara tog prava da pokrene tužbu i njome zahteva utvrđivanje povrede zakonom priznatog prava, zabranu radnji kojima se povređuje pravo, naknadu imovinske i neimovinske štete, kao i izricanje privremene mere oduzimanja odnosno isključenja iz prometa proizvoda kojima se povređuje pravo, kao i izricanje drugih mera i zabrana.[8] Autorsko delo predstavlja intelektualno dostignuće pojedinca iz kojeg on ostvaruje sva prava na tom delu, dok neki predmeti zaštite u okviru prava industrijske svojine, kao što su proizvodni postupak, nove mašine, industrijski proizvodi, industrijski dizajn i dr. po pravilu donose bitnu komparativnu prednost privrednog društva u pogledu tržišne i dodatne vrednosti. Jedna od najvažnijih posledica povrede prava IS ogleda se i u izgubljenoj dobiti. U autorskom pravu to je dobit privrednog subjekta ili dohodak građana, a u pravu industrijske svojine prihod koji se mogao upotrebiti za finansiranje daljeg istraživanja i razvoja te time podržati rast privrednog društva.

Iz gorenavedenog proizlazi da svako lice koje obavlja privrednu delatnost u formi preduzetnika ili privrednog društva (mikro, mala, srednja i velika društva) ili neku drugu delatnost u formi nedobitnih organizacija (građanskopravna udruženja, zadužbine, ustanove kulture i sl.) mogu da se pojave u svojstvu tužene strane (pasivno legitimisan) ili u svojstvu tužioca (aktivno legitimisan). Moguće su i druge vrste sporova povodom IS: spor povodom kršenja ugovora o prenosu prava ili prava iskorišćavanja (ugovor o licenci), ugovora o zakupu i zalozi. Poseban finansijski teret za titulara prava IS nastaje ako se njegovo pravo poništi, menja ili je predmet privremene zabrane korišćenja, prodaje stvari ili pružanja usluga.

Dobitne i nedobitne organizacije finansijski teret mogu da pokrivaju samostalno, svojim sredstvima, ali se u inostranoj poslovnoj praksi zaključivanje polise osiguranja pokazalo kao mnogo efektnije rešenje. U ovom radu najpre analiziramo svojstva različitih prava IS koja mogu biti predmet osiguranja i prednosti osiguranja od odgovornosti za povredu prava IS, zatim šta može da bude predmet osiguranja i sadržina pokrića, uzimajući u obzir specifične troškove u situacijama kada se osiguranik nalazi u svojstvu tužene strane, kao i onda kada preduzima mere za zaštitu i ostvarivanje sopstvenog prava IS.

[7] V. Spasić, 257–258, 262, 266; S. Marković, D. Popović, 277.
[8] V. Spasić, 256–282, 476–484; S. Marković, D. Popović, 269–278.

II Svojstva različitih prava intelektualne svojine i prednosti osiguranja od odgovornosti za povredu tih prava

Polazeći od podele prava intelektualne svojine na autorsko pravo i srodna prava te prava industrijske svojine, u nastavku ćemo se kratko osvrnuti na glavna svojstva koja ta prava moraju ispunjavati kako bi uživala zaštitu i mogla biti predmet osiguranja.

Tako se pod autorskim pravom podrazumeva pravo na autorskom delu koje predstavlja originalnu duhovnu tvorevinu autora, izraženu u određenoj formi, bez obzira na njegovu umetničku, naučnu ili drugu vrednost, njegovu namenu, veličinu, sadržinu i način ispoljavanja, kao i dopuštenost javnog saopštavanja njegove sadržine. Autorskim pravom štite se moralna i imovinska prava, prava autora prema vlasniku primerka autorskog dela, prava autora na posebnu naknadu i pravo na naknadu za davanje na poslugu u skladu sa Zakonom o autorskom i srodnim pravima.[9] U srodna prava spadaju pravo interpretatora, pravo proizvođača fonograma, pravo filmskog producenta (proizvođača videograma), pravo proizvođača emisije i pravo proizvođača baze podataka. Za svako od srodnih prava su, prethodno pomenutim zakonom, propisani posebni uslovi zaštite.

Kada se radi o pravima industrijske svojine, uslovi koje ona treba da ispunjavaju kako bi bila priznata i uživala zaštitu regulisani su posebnim zakonima. Tako se prava autora na industrijski dizajn priznaju ako je on nov i ako ima individualni karakter, a štite se u skladu sa Zakonom o pravnoj zaštiti industrijskog dizajna.[10] U patentnom pravu predmet zaštite mora ispunjavati uslove inovativnosti, inventivnosti i industrijske primenljivosti. Pravna zaštita pronalazaka uređuje se Zakonom o patentima.[11] Za zaštitu nekog znaka žigom neophodno je da je podoban za razlikovanje u prometu robe odnosno usluga jednog od drugog fizičkog ili pravnog lica te da može biti prikazan u Registru žigova na način koji omogućava nadležnim organima i javnosti jasno i precizno utvrđivanje predmeta zaštite. Žig se štiti u skladu sa Zakonom o žigovima.[12] Kada se radi o imenu porekla, onda će predmet zaštite biti geografski naziv zemlje, regiona, ili lokaliteta porekla proizvoda, čiji su kvalitet i posebna svojstva isključivo ili bitno uslovljeni geografskom sredinom na određenom ograničenom području, uključujući prirodne i ljudske faktore. Geografska oznaka je oznaka koja identifikuje određeni proizvod poreklom sa teritorije određene zemlje, regiona ili lokaliteta sa te teritorije, gde se određeni kvalitet, reputacija ili druge karakteristike proizvoda mogu pripisati njegovom geografskom poreklu, pri čemu se oznaka porekla i geografska

[9] *Službeni glasnik RS*, br. 104/2009, 99/2011, 119/2012, 29/2016 - US, 66/2019.
[10] *Službeni glasnik RS*, br. 104/2009, 45/2015, 44/2018 – dr. zakon.
[11] *Službeni glasnik RS*, br. 99/2011, 113/2017 - dr. zakon, 95/2018, 66/2019, 123/2021.
[12] *Službeni glasnik RS*, br. 6/2020.

oznaka štite u skladu sa Zakonom o oznakama geografskog porekla.[13] Predmet zaštite topografije predstavlja originalni, inovativni rezultat intelektualnog napora stvaraoca koji nije opštepoznat u industriji poluprovodničkih proizvoda, kao i deo zaštićene topografije koji se može samostalno upotrebljavati, kao i uređaj (glavna stvar) što obuhvata poluprovodnički proizvod koji u sebi sadrži zaštićenu topografiju, ako se takav poluprovodnički proizvod ne može odvojiti od glavne stvari bez njenog oštećenja ili uništenja. Predmet i uslovi zaštite ostvaruju se prema Zakonu o zaštiti poluprovodničkih proizvoda.[14] Pravo oplemenjivača biljne sorte dodeljuje se ako je sorta nova, različita, uniformna, stabilna te ako ispunjava uslove za davanje imena sorte, u skladu sa odredbama Zakona o zaštiti prava oplemenjivača biljnih sorti.[15] O poslovnoj tajni kao predmetu osiguranja od odgovornosti za povredu prava IS više reči će biti u narednom poglavlju.

U vezi sa osiguranjem od odgovornosti od povrede prava IS treba imati u vidu autonomiju ugovaranja koja omogućava osiguravaču da svojim uslovima osiguranja odredi obim pokrića. To podrazumeva i njegovo pravo da iz osiguranja potpuno isključi ili ograniči svoju obavezu za odštetne zahteve za pojedina prava IS. Osiguranje od odgovornosti zbog povrede prava IS donosi višestruke prednosti. Po relativno skromnom iznosu premije osiguranja dobija potencijal finansijske zaštite od eventualnih troškova zbog povrede prava IS trećeg lica. Isto tako, osiguranje može da pokriva i troškove pokretanja protivtužbe, ali i tužbe radi zaštite sopstvenog prava IS. Na osiguraniku je da prepozna i razume sastavne delove svoje delatnosti i da, radi svake sigurnosti, osiguranjem finansijski zaštiti svoje interese u vezi s pravima IS. Osim pomenutog, ako se ugovori, osiguranjem se mogu nadoknaditi troškovi pribavljanja stručnog mišljenja o verovatnoći uspešnosti odbrane od odštetnih zahteva zbog povrede prava IS ili tužbe radi zaštite sopstvenog prava IS, troškovi advokatskog i drugog zastupanja, veštaka i odbrane pred sudom ili arbitražom, iznosi po presudama u slučaju izgubljenog spora itd.[16] Osim navedenog, u slučajevima sumnje da predstoji ili postoji verovatnoća da će neko treće lice započeti s povredom njegovog prava IS, titular može preduzeti odgovarajuće mere istrage i analize.[17] Troškove takvih mera mogu se pokriti ovim osiguranjem. Naime, troškove koje je imao titular IS, koji je istovremeno i osiguranik u odnosu osiguranja, osiguravač nadoknađuje u punom iznosu u okviru sume osiguranja. Jedini uslov je da su oni učinjeni razumno i uz saglasnost osiguravača.[18]

[13] *Službeni glasnik RS*, br. 18/2010, 44/2018 - dr. zakon.
[14] *Službeni glasnik RS*, br. 55/2013, 66/2019.
[15] *Službeni glasnik RS*, br. 41/2009, 88/2011.
[16] Marsh Commercial, Protecting your big ideas with intellectual property insurance, 28 August 2024, dostupno na adresi: *https://www.marshcommercial.co.uk/articles/intellectual-property-insurance.html#:~:text=IP%20insurance%20can%20help%20protect,copying%20or%20reproducing%20their%20work,* 12. 2. 2025.
[17] Arch Insurance, A Guide to Intellectual Property Insurance, Arch Capital Group Ltd. October 22, 2024, dostupno na adresi: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/,* 12. 2. 2025.
[18] Slobodan Jovanović, *Pravo osiguranja*, Pravni fakultet za privredu i pravosuđe, Novi Sad, 2016, 167.

III Šta može biti predmet osiguranja?

Predmet osiguranja opredeljuje se u skladu s relevantnim propisima o autorskom pravu i srodnim pravima, patentima, žigovima, pravnoj zaštiti industrijskog dizajna, geografskim oznakama porekla, topografiji poluprovodničkih proizvoda i zaštiti poslovne tajne te odredbama zakona i drugih propisa kojima se uređuje ugovor o osiguranju, a naročito opštim i posebnim uslovima osiguranja.

Pođe li se od jednog od principa ugovornog prava po kojem predmet obaveze mora biti moguć, dopušten, određen ili odrediv (ZOO, čl. 47), predmet obaveze osiguravača mora biti u skladu s javnim poretkom, prinudnim propisima i dobrim običajima. Zbog toga i pravni osnov obaveze osiguravača zavisi od ispunjenosti uslova, obaveza i zahteva propisanih zakonom ili onih što proizlaze iz dobrih običaja. U kontekstu teme ovog rada, zakone i podzakonske propise možemo svrstati u dve grupe: (1) zakone koji regulišu pojedine oblike prava IS i (2) zakone o pravu osiguranja – o ugovoru o osiguranju i o nadzoru nad delatnosti osiguranja.

Uobičajeno je da se predmet osiguranja vezuje za nastanak neke okolnosti, incidenta, događaja, činjenice, problema, radnje, propusta ili stanja stvari koji bi mogao dovesti do pokretanja tužbe ili postavljanja odštetnog zahteva protiv osiguranika ili, obrnuto, u slučaju kada osiguranik preduzima radnje radi zaštite svog prava IS prema trećem licu.

Predmet osiguranja može da bude isključivo odgovornost po osnovu prava IS koja ispunjava uslove propisane zakonom i uživa zakonsku zaštitu. Uslovi koje mora ispunjavati pravo IS zavise od vrste predmeta tog prava. Osim onih pomenutih u prethodnom poglavlju, podrazumeva se da predmeti zaštite prava IS moraju da ispunjavaju i druge zakonom propisane uslove. Takav zaključak proizlazi iz nekoliko pravila specifičnih za ugovor o osiguranju izvedenih iz opštih pravila ugovornog prava. Tako, pravo iz ugovora o osiguranju mogu posedovati samo ona lica koja su u času nastanka štete imala materijalni interes da se osigurani slučaj ne dogodi. To pravilo proizlazi iz činjenice da nije normalno da neko želi da pretrpi gubitak, jer bi u suprotnom to značilo odstupanje od regularnosti osiguranja i najčešće ukazivalo na osiguranikovu prevaru.[19] Dalje, iz gore istaknutog pravila o pravima IS očigledno je da prava kojima zakonom nije priznata pripadnost IS nekom licu, ne može biti predmet osiguranja. Prema opštim pravilima ugovornog prava, da bi se moglo zaključiti punovažno osiguranje, interes mora da bude dozvoljen zakonom, moralom i javnim poretkom društva.[20] Zakonitost prava IS dokazuje se rešenjem nadležnog organa o upisu u odgovarajući registar. To može biti rešenje o registraciji prava IS ili rešenje o upisu raspolaganja postojećim pravom (prenos, licenca, zaloga). U tom smislu treba razumeti i da se osiguranjem pokriva zloupotreba odnosno neovlašćeno iskorišćavanje prava IS osiguranika koje je zakonom priznato.

[19] S. Jovanović, 95.
[20] *Ibid.*, 89.

S druge strane, osiguranjem se ne pokriva nijedan slučaj, stanje, okolnost ili događaj za pokretanje tužbe povodom upotrebe prava IS na osnovu zakonom priznatih ograničenja tih prava.[21]

Predmet osiguranja može da bude samo ono što izričito nije isključeno iz pokrića. Uslovima osiguranja, koji predstavljaju odredbe ugovora o osiguranju, utvrđuje se definicija predmeta osiguranja čiji se gubitak, šteta ili troškovi u vezi s njim nadoknađuju iz osiguranja. U tome leži bitna razliku u odnosu na prava intelektualne svojine koja su šireg obuhvata od obima osiguravajućeg pokrića. Na primer, uslovima osiguranja mogu biti izričito isključeni odštetni zahtevi protiv zaposlenih zbog povrede poslovne tajne i odgovornost poslodavca prema zaposlenima zbog neosnovanog odštetnog zahteva zbog povrede poslovne tajne. S druge strane, osiguranje može pokrivati široku lepezu troškova zbog rizika izvedenih iz povrede prava IS. To mogu biti sporovi povodom povrede prava na privatnost, podataka o ličnosti, zatim troškovi upravljanja javnim odnosima itd. Jedna od karakteristika osiguranja od odgovornosti zbog povrede prava IS je upravo osiguranje finansijske štete u vidu nadoknade specifičnih troškova koji padnu na teret osiguranika.

Pored brojnih isključenih rizika, troškova i naknada, koje u ovom radu nećemo navoditi, lista isključenih rizika obuhvata druge vrste odgovornosti koje su ili mogu biti komplementarne ovom predmetu osiguranja. To su: odgovornost za proizvod („produktna odgovornost") i eventualno druge vrste odgovornosti. Radi se o strogom razdvajanju odgovornosti koje bi mogle nastati iz raznih pravnih osnova, a sve radi toga da osiguravač može što efikasnije da kontroliše i prati pojedinačne tipove osiguranja. Osim toga, takva pravna tehnika sastavljanja uslova osiguranja obezbeđuje bolji pregled izvora opasnosti i potencijalnih obaveza osiguravača.

Predmet osiguranja od odgovornosti za povredu prava IS ne poklapa se sa osiguranjem od opšte odgovornosti iz delatnosti. Osiguranje od odgovornosti za povredu prava IS sprovodi se kao oblik osiguranja od odgovornosti, i to opšte odgovornosti iz delatnosti ili profesionalne odgovornosti. Predmet osiguranja od odgovornosti za povredu prava IS razlikuje se od osiguranja od opšte odgovornosti iz delatnosti u bar dva sledeća svojstva: prvo, u osiguranju od opšte odgovornosti iz delatnosti predmet osiguranja je građansko-pravna odgovornost osiguranika za prouzrokovanu štetu usled smrti, povrede tela ili zdravlja, odnosno oštećenja ili uništenja stvari trećih lica,[22] dok kod, u ovom radu, razmatranog tipa osiguranja to nije slučaj. Osiguranje od odgovornosti za povredu prava IS pokriva isključivo finansijsku štetu u vezi s tim odštetnim zahtevima i relevantnim troškovima. Drugo, osiguranje od opšte odgovornosti ne pokriva profesionalnu odgovornost koja nastane usled grešaka i propusta u obavljanju poslova što spadaju u profesionalnu delatnost (advokati, javni beležnici, posrednici u osiguranju itd.) Osiguranje od odgovornosti

[21] V. Spasić, 68–69, 141, 203–204, 415; S. Marković, D. Popović, 75–78, 140–141, 168, 182–183, 192, 200, 208.
[22] S. Jovanović, 289.

za povredu prava IS može da bude zaključeno kao osiguranje od profesionalne odgovornosti jer je predmet osiguranja vezan isključivo za neskrivljenu grešku ili nemar u obavljanju specifične delatnosti. Radi se o tzv. lakoj (običnoj) nepažnji (*culpa levissima*), jer gruba nepažnja (*culpa lata*) profesionalca u obavljanju svoje delatnosti nije prihvatljiva. Laki oblici nepažnje redovno će biti pokriveni osiguranjem, dok se gruba nepažnja nekada izjednačava s namerom, a nekada to nije slučaj.[23] Jednostavno, u obavljanju profesionalne delatnosti strana u obligacionom odnosu dužna je da u izvršavanju obaveza postupa s povećanom pažnjom, prema pravilima struke i običajima – tj. pažnjom dobrog stručnjaka. Od navedenog pravila, u srpskom pravu postoji, Zakonom o obligacionim odnosima propisan, izuzetak po kojem je osiguravač dužan da naknadi svaku štetu prouzrokovanu od nekog lica za čije postupke osiguranik odgovara po ma kom osnovu, bez obzira na to da li je šteta prouzrokovana nepažnjom ili namerno (ZOO, čl. 929, st. 3).

Standardna praksa osiguranja, koja je usklađena sa zakonskim pravilima, polazi od toga da se samo štetni događaji nastali bez namere osiguranika mogu pripisati njegovom nemaru, propustu, pogrešnoj izjavi volje ili lažnom predstavljanju bitnih činjenica prilikom zaključenja ugovora o osiguranju. Isto pravilo važi i u osiguranju od povrede prava IS. Osiguranjem je pokrivena isključivo nenamerna povreda prava IS i pogotovo ugovora o licenci.

Predmet osiguranja od odgovornosti za povredu **prava IS može biti faktički odnos u vidu poslovne tajne.** Poslovna tajna (*know-how*) u širem smislu odnosi se na bilo koju nejavnu informaciju koju pojedinci ili kompanije steknu u vezi s načinom ili lakšom upotrebom nečega u poslu. (Pojam je izuzetno širok i njegova priroda zavisi od znanja o kome je reč.) Uobičajeno, poslovna tajna opisuje znanje koje povećava koristi ili smanjuje teret korišćenja nečega. Ona može sadržati opis kreiranja proizvoda ili strateške karakteristike privrednog društva kao što je upravljanje poslovanjem.[24], [25] Prema prof. Spasiću, suštinu *know-how* u najvećoj meri čini tehnički aspekt, dok je poslovni sporednog karaktera.[26] Koliko su pronalasci i inovacije

[23] *Ibidem*. 92.

[24] Na primer: (1) Američko društvo za osiguranje *Lincoln National Life Insurance Company* nosilac je patenta naslovljenog kao „Metod i aparat za isplatu penzijskih prihoda", što je potvrđeno presudom Saveznog apelacionog suda SAD juna 2010. godine (Lincoln National Life Insurance Company v. Transamerica Life Insurance Company (2010), United States Court of Appeals, Federal Circuit, Nos. 2009-1403, 2009-1491, Decided: June 23, 2010, dostupno na adresi: https://caselaw.findlaw.com/court/us-federal-circuit/1528628.html, 12. 2. 2025); (2) Skupovi podataka visoke rezolucije o odštetnim zahtevima su intelektualna svojina nemačke delatnosti osiguranja kroz poslovnu tajnu dugi niz godina. Zato ti podaci nisu dostupni besplatno javnosti od strane delatnosti osiguranja, što ne isključuje njihovo davanje u svrhu konkretnih istraživačkih projekata (GDV, *Comment of the German Insurance Association (GDV) on the Consultation on the renewed sustainable finance strategy*, ID-number 6437280268-55, 14/07/2020, 57).

[25] S. Marković, D. Popović, 309–310; Legal Information Institute, *know-how*, Cornell Law School, dostupno na adresi: *https://www.law.cornell.edu/wex/know-how*, 12. 2. 2025.

[26] V. Spasić, 103.

važni, govori i podatak da su SAD i Japan, u godinama stagnacije privrednog rasta, patentima, *know-how*-ima i digitalnom ekonomijom uspele da pokrenu posustali privredni razvoj.[27]

U analiziranim izvorima pravne teorije o pravu IS, poslovna tajna predstavlja faktički odnos u sklopu delatnosti privrednog društva, zbog čega ne spada u pravo IS,[28] dok drugo mišljenje poslovnu tajnu svrstava u pravo srodno patentnom pravu.[29] Prva grupa autora takođe se približava prethodno navedenom drugom mišljenju, jer smatraju da pronalasci treba da se štite patentom, a prateća tehnička znanja koja ne ispunjavaju uslove patentabilnosti, da se štite kao poslovna tajna.[30]

U pravu osiguranja pomenuto razlikovanje je bez značaja jer je na osiguravaču da po principu autonomije volje u obligacionom pravu odluči da li će pružati pokriće i za povredu poslovne tajne – slučaj „nezakonitog pribavljanja, korišćenja i otkrivanja tuđe poslovne tajne", kako je definisano srpskim Zakonom o zaštiti poslovne tajne iz 2021. godine (dalje u tekstu: ZZPT)[31] i Zakonom o privrednim društvima.[32] Ipak, do povrede poslovne tajne može doći kršenjem zakona ili dobrih poslovnih običaja u koje spada i povreda obaveza iz sporazuma o poverljivosti ili drugih ugovora. Praktično podnošenjem odštetnog ili drugog zahteva povodom neovlašćenog korišćenja tuđe poslovne tajne nastaje osigurani slučaj. Ipak, osiguranik ili oštećeno lice koje postavlja imovinski zahtev prema osiguraniku treba da dokaže da se zaista radi o poslovnoj tajni. Pošto poslovna tajna nije predmet registracije u upravnom postupku, njeno postojanje zainteresovano lice – privredni subjekt mora dokazati na način propisan ZZPT i Zakonom o privrednim društvima (čl. 72–74). To može da se učini prezentacijom: internog akta o rukovanju poslovnom tajnom ili dokumenta sa oznakom „poslovna tajna" ili sličnom oznakom. U svakom slučaju, da li će sporno ponašanje predstavljati povredu poslovne tajne, zavisiće od toga da li podatak ispunjava zakonom propisane uslove da bi mogao biti smatran poslovnom tajnom. Sledstveno tome, podatak čije saopštavanje trećem licu ne bi moglo naneti štetu društvu, kao i podatak koji nema ili ne može imati ekonomsku vrednost da bi se njegovim korišćenjem ili saopštavanjem mogla ostvariti ekonomska korist i koji nije od strane privrednog društva zaštićen odgovarajućim merama u cilju čuvanja njegove tajnosti, ne može se smatrati poslovnom tajnom. Tako na primer, kada pronalazak ne ispunjava uslov industrijske (privredne) primenljivosti – patentabilnosti, onda ni poslovna tajna u vezi s njim nije podobna za sticanje bitne ekonomske koristi ili prednosti. Ovo zbog toga što je „korisnost informacije suštinski razlog što ona ima

[27] S. Jelisavac Trošić, 82.
[28] S. Marković, D. Popović, 309.
[29] V. Spasić, 99–107.
[30] S. Marković, D. Popović, 311.
[31] *Službeni glasnik RS*, br. 53/2021.
[32] *Službeni glasnik RS*, br. 36/2011, 99/2011, 83/2014 – dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021, 19/2025.

svojstvo poslovne tajne".[33] Drugim rečima, „uslov korisnosti je zakonski uslov pravne zaštite pronalaska pa se po ekstenzivnoj analogiji proširuje i na know-how".[34] U tom smislu, licu koje se smatra oštećenim nije ni od kakve pomoći što je neki podatak proglasio poslovnom tajnom ako ovaj nije podoban da prouzrokuje štetu ili doprinese ekonomskoj koristi ili prednosti na tržištu. Time se stvara zakonska prezumpcija da su ekonomski bezvredni podaci oni koji nisu zaštićeni poslovnom tajnom. Ipak, treba imati u vidu da se radi o tvrdnji relativnog značaja, jer postoje brojni podaci koji su važni u privrednom društvu, ali oni nisu takve prirode da bi ih trebalo štiti poslovnom tajnom.

IV Šta je pokriveno osiguranjem

Iako se u ovom radu razmatrana vrsta osiguranja, prema opšteprihvaćenoj podeli osiguranja, svrstava u osiguranje imovine, ono prvenstveno pokriva različite troškove nastale usled odgovornosti za povredu nekog od prava IS.[35] Kao što smo ranije naveli, osigurana naknada pokriva isključivo „čisto" finansijsku štetu nastalu iz odštetnih zahteva zbog povrede prava IS i pravne odbrane od njih. S druge strane, ta vrsta osiguranja podrazumeva finansijsku zaštitu u slučajevima povrede IS, konkretnije, moralno-pravnih i imovinskopravnih ovlašćenja titulara prava IS.[36] Tako bismo za čisto finansijsku štetu, koja se pokriva ovom vrstom osiguranja, mogli reći da ona predstavlja materijalni gubitak koji je osiguranik prouzrokovao na teret trećeg lica činjenjem ili propustom, bez ugrožavanja njegovih stvari ili zdravlja. Po tome se ova vrsta osiguranja razlikuje od tradicionalnog osiguranja stvari i osiguranja lica od nezgode. Imajući prethodno rečeno u vidu, razlikujemo sledeće vrste pokrića:

(1) Naknada troškova zbog povrede tuđeg prava IS. Povreda prava IS pruža pokriće za troškove odbrane: advokatske, savetničke honorare, troškove i honorare veštaka ako su angažovani, sudske takse itd. Osim pomenutih troškova, osiguranom naknadom obuhvaćeno je i pokrivanje štete koju osiguranik biva dužan da plati trećem oštećenom licu na osnovu sporazuma o poravnanju, pravosnažne presude suda ili arbitraže. Tu spada i mogućnost nadoknade troškova pokretanja protivtužbe. Međutim, težnja osiguravača je da ima potpun uvid u sopstvene poslovne izloženosti, što obuhvata sve događaje i radnje koje osiguranik planira da preduzme, pa je prethodno pribavljena saglasnost na njih od osiguravača preduslov za isplatu osigurane naknade.[37]

(2) Naknada troškova odbrane sopstvenog prava IS. Nije redak slučaj da osiguraniku neko treće lice osporava vlasništvo nad pravom IS. Treće lice može

[33] S. Marković, D. Popović, 310.
[34] V. Spasić, 103.
[35] S. Jovanović, 291.
[36] V. Spasić, 65; S. Marković, D. Popović, 263.
[37] S. Jovanović, 40.

da bude konkurent na tržištu ili zaposlena lica i saradnici osiguranika. Naknađuju se troškovi usmereni na odbranu od zahteva za poništavanje ili opoziv prava IS zbog ranije registrovanog prava ili zbog toga što postoji prethodno stanje tehnike zbog kojeg postoji njegovo pravo da slobodno prodaje svoje proizvode ili pruža usluge.[38]

(3) Naknada troškova usled pokretanja tužbe radi izvršenja ugovora ili naknade za povredu prava IS. Ovo je obrnuta vrsta pokrića u osiguranju od odgovornosti zbog povrede prava IS, jer se radi o obavezi osiguravača da naknadi troškove ostvarivanja ugovornih prava osiguranika od trećeg lica – osiguranikove ugovorne strane. Ovo pokriće omogućava osiguraniku da pokrene odgovarajući postupak kako bi naterao njegovu ugovornu stranu da ispuni svoje ugovorne obaveze ili da plati naknadu štete zbog povrede ugovora u vezi s pitanjima IS. Pokriće bi se takođe moglo aktivirati zbog neplaćanja tantijema ili viška sume iznad određenog limita koji je trebalo da pripadne osiguraniku, povrede ugovorenih odredbi o teritorijalnim ograničenjima ili tehničkim oblastima primene itd.[39]

(4) Gubici zbog prekida rada nastali povredom prava IS. Prekid poslovanja je oblast odštetnog prava u razvoju u svetu osiguranja od odgovornosti zbog povrede prava IS. Nemogućnost ostvarenja planirane zarade dovodi do smanjenja prihoda i nepovoljnog rezultata poslovanja koje se može znatno sprečiti putem osiguranja od gubitaka zbog prekida rada.[40] Kao i u osiguranju imovine od požarnih rizika, reč je o dopunskom obliku pokrića koje se posebno ugovara i plaća dodatna premija, mada je moguće da ono bude obuhvaćeno već u osnovnom pokriću, što zavisi od ponude na tržištu osiguranja. Štetom usled prekida rada smatra se ona koja je nastala dejstvom osiguranog rizika iz osnovnog osiguranja,[41] tj. vrste osiguranja koje je tema u ovom radu. Ovo pokriće osmišljeno je radi proširenja obima osiguranja kako bi se osiguranik zaštitio od finansijskih gubitaka koje može da pretrpi ako mu se zabrani da prodaje svoje proizvode ili pruža usluge ili ako bi morao prestati da koristi određene proizvodne procese. Osiguranje gubitaka zbog prekida rada bi u ovoj vrsti osiguranja naročito bilo pogodno u slučaju kada protiv privrednog društva – osiguranika bude doneta presuda kojom se utvrđuje da njegovi proizvodi povređuju patente trećeg lica i izrekne zabrana nastavka upotrebe ili prodaje proizvoda koji povređuju pravo IS oštećenog lica.

[38] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. October 22, 2024, dostupno na adresi: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, 12. 2. 2025.
[39] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. October 22, 2024, dostupno na adresi: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, 12. 2. 2025.
[40] S. Jovanović, 271.
[41] *Ibidem*, 277.

V Zaključak

Intelektualna svojina na različite načine utiče na dobitne (privredni subjekti) i nedobitne organizacije (građanskopravna udruženja, zadužbine, ustanove kulture i sl.), a može i da značajno doprinosi unapređenju naučno-tehnološkog razvoja i podizanju materijalnog blagostanja. Svako lice koje iskorišćava neko pravo IS može da se pojavi u svojstvu tužene strane ili u svojstvu tužioca. Finansijski teret nastaje ako se njegovo pravo IS poništi, menja ili je predmet privremene zabrane korišćenja, prodaje stvari ili pružanja usluga.

Svojstva različitih prava intelektualne svojine proizlaze iz njihovih specifičnosti i zakonom propisanih uslova za njihovo priznavanje i zaštitu. Zakonske definicije i uslovi za sva prava IS pružaju institucionalni okvir pravne izvesnosti u pravnom prometu u kojem se ta prava koriste na zakonit način.

Kada se radi o osiguranju od odgovornosti zbog povrede prava IS, treba imati u vidu da je osiguranje, u mnogim slučajevima, adhezione prirode, što znači da osiguravač svojim uslovima osiguranja određuje obim pokrića. Ipak, osiguranje od odgovornosti zbog povrede prava IS donosi višestruke prednosti. To su: mali iznos premije za koju se dobija mnogo veća suma osigurane naknade, mogućnost osiguranja troškova pokretanja protivtužbe i tužbe radi zaštite sopstvenog prava IS, mogućnost osiguranja naknade troškova pribavljanja stručnog mišljenja o verovatnoći uspešnosti odbrane od odštetnih zahteva ili tužbe radi zaštite sopstvenog prava IS, troškovi advokatskog i drugog zastupanja, veštaka i odbrane pred sudom ili abritražom, iznosi po presudama u slučaju izgubljenog spora, troškovi istrage i analize kada postoji sumnja da će treće lice započeti sa povredom prava IS itd.

Osiguravajuće pokriće troškova koje mora da snosi osiguranik na osnovu presude suda ili arbitraže posle postupka koji je pokrenulo oštećeno lice biće obaveza osiguravača, ali ako osiguranik planira da sam napravi troškove u slučaju pokretanja tužbe za zaštitu svog prava IS, protivtužbe ili priznavanja obaveze na osnovu sporazuma o poravnanju, njihova naknada će biti uslovljena prethodnom saglasnošću osiguravača na pomenute pravne radnje.

U osiguranju od odgovornosti zbog povrede prava IS, kao i u drugim vrstama osiguranja, moguće je proširiti pokriće i na neke druge troškove kao što su oni koji su u vezi sa prekidom rada zbog povrede prava IS ili gubitkom spora posle odluke suda konačnog stepena odlučivanja.

Punovažnost ugovora o osiguranju i obaveze osiguravača uslovljene su prethodnom registracijom prava intelektualne svojine. To znači da se iz osiguravajućeg pokrića isključena sva prava IS koja nisu registrovana. Ipak, ovde treba imati u vidu da osiguravači prihvataju u osiguranje i autorska i prava srodna autorskim iako se ona ne registruju. Obaveza osiguravača takođe mora biti određena i/ili odrediva i dopuštena javnim poretkom, prinudnim propisima i dobrim običajima, pa zato

osiguravač ne može punovažno da zaključuje ugovore o osiguranju materijalnih interesa na pravima IS koja nisu zakonom priznata.

Takođe su uočljive i razlike između osiguranja od opšte odgovornosti iz delatnosti i osiguranja od odgovornosti za povredu prava intelektualne svojine. Zbog toga je osiguranje od odgovornosti za povredu prava intelektualne svojine specifično i zahteva specijalizovana znanja u zaključivanju i administriranju takvog ugovora o osiguranju.

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UDC 368.1:347.77/.78

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LIABILITY INSURANCE AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS

PROFESSIONAL PAPER

Abstract

Intellectual property rights are legal rights that protect intellectual assets, which hold significant value for individuals and even greater importance for the economy and society as a whole. Liability insurance against the infringement of intellectual property (IP) rights is becoming increasingly relevant as a mechanism for managing unforeseen risks arising from third-party proprietary claims and from unauthorized use of intellectual property rights. This paper first examines the nature and scope of various intellectual property rights, alongside the advantages of liability insurance in cases of infringement of such rights. It then explores what may constitute the subject-matter of insurance coverage, based on the nature of intellectual property rights, general insurance principles, and contractual frameworks. The aim is to distinguish this specific type of liability insurance within the broader context of IP protection. Finally, the paper examines the scope of insurance coverage in relation to specific costs incurred when the insured appears as a defendant in legal proceedings, as well as when the insured takes actions to protect and enforce their intellectual property rights.

Keywords: *law, intellectual property, insurance, litigation costs, financial loss*

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Paper received: 13.3.2025.
Paper accepted: 25.4.2025.

I Introduction

Intellectual property (hereinafter: IP) impacts the rights holders of IP and national economies in various ways, particularly in the context of scientific and technological development and the advancement of both individual and societal well-being. It is therefore not surprising that, in the early 1980s, the United States began systematically treating all information shared via the internet as a potential threat to national security, justifying such a position by the possibility of IP rights infringement. This rationale served to legitimize oversight and control of the internet and its future development.[3] Moreover, technological progress across different sectors raises various national and international security concerns, especially in the current era of rapid development and implementation of AI.

In the context of market-oriented social relations, the economic utility of IP has become increasingly significant. As a product of the innovative human mind, IP forms the foundation of individual creative freedom and society's spiritual and material progress. Conversely, the unauthorized appropriation and use of another's protected intellectual creations for financial or other gain has long been subject to legal sanctions. As noted in the literature: "Intellectual property rights and the protection of IP secure the fundamental right to safeguard new ideas, new procedures, and new products, as well as their commercial distribution without fear of loss, piracy, or unnecessary involvement of individuals or enterprises in litigation".[4]However, institutional protection of IP rights in cases of unauthorized use is not possible without initiating appropriate legal proceedings. One group of such proceedings is initiated and conducted ex officio (e.g. administrative procedures involving inspection oversight or customs process); another group is also initiated ex officio but falls within the criminal prosecution. Property and non-property claims, however, must be pursued through civil litigation initiated by the injured party and supported by other legal remedies. Unauthorized use of another party's protected intellectual property most often arises from deliberate and bad-faith conduct by the infringer, while the rights holder seeks legal protection upon becoming aware of the infringing behavior. The infringer's bad faith is particularly evident in their awareness that the subject of their economic use is a protected intellectual asset belonging to someone else, and that they have not lawfully acquired the right to profit from another's intangible asset.[5]

Nevertheless, instances of unintentional infringement of intellectual property rights are also possible, particularly when the violation results from accidental

[3] Sanja Jelisavac Trošić, *Dinamika razvoja intelektualne svojine u međunarodnim ekonomskim odnosima*, Institute of International Politics and Economics, Belgrade, 2023, 115.

[4] *Ibid.*, 111.

[5] Vidoje Spasić, *Pravo intelektualne svojine*, Faculty of Law, Center for Publications, Niš, 2024, 4–5; Slobodan Marković, Dušan Popović, *Pravo intelektualne svojine*, Faculty of Law, Center for Publications, Belgrade, 2023, 21.

or coincidental overlap. Whether the infringement was willful or negligent does not exclude the possibility of asserting a financial claim against the responsible party.[6] However, the burden lies with the plaintiff, the intellectual property rights holder, to prove the existence of the unauthorized act committed by the liable party and the damage caused as a direct consequence of that act. Therefore, it is not necessary, in all cases, to demonstrate the infringer's intent when preparing for/or carrying out acts that constitute a violation of IP rights. Nonetheless, before or during litigation, in cases involving motions for provisional measures or the collection or preservation of evidence, it is sufficient for the party to demonstrate that an infringement has likely occurred or is likely to occur.[7] A civil lawsuit serves as the procedural instrument by which litigation is initiated and judicial protection of an IP right is requested. This means that such protection before a court is realized solely on the basis of the rights holder's decision to bring an action, through which they request the court to establish the infringement of a legally recognized right, to prohibit further infringing conduct, to award compensation for economic and non-economic damage, and to issue provisional measures such as the seizure or removal from the market of infringing goods, along with other legal remedies and prohibitions.[8] A copyrighted work constitutes the intellectual creation of an individual, who thereby holds all associated rights, while certain protected subject matter under industrial property law, such as manufacturing processes, new machinery, industrial products, and industrial design, typically provides a significant comparative advantage to a business entity in terms of market competitiveness and added value. One of the most consequential outcomes of IP infringement is lost profit. In the case of copyright, this may reflect the income of a commercial entity or an individual, while under industrial property law, it may concern revenue that could have been allocated to further research and development, thereby supporting the company's growth.

From the above, it follows that any legal entity engaged in economic activity, whether as an entrepreneur or as a business organization (micro, small, medium, or large enterprise), as well as non-profit entities (e.g. civil associations, endowments, cultural institutions, etc.), may appear as either the defendant (passively legitimized) or the plaintiff (actively legitimized) in IP disputes. Other types of disputes may also arise in the IP domain, including breaches of agreements involving the transfer or licensing of rights, lease agreements, or security interests. A particularly burdensome financial consequence for the IP rights holder may occur if their right is revoked, modified, or becomes subject to a temporary ban on its use, the sale of goods, or the provision of services.

Profit and non-profit organizations may bear these financial burdens independently, through internal resources; however, in international commercial practice,

[6] S. Marković, D. Popović, 276.
[7] V. Spasić, 257–258, 262, 266; S. Marković, D. Popović, 277.
[8] V. Spasić, 256–282, 476–484; S. Marković, D. Popović, 269–278.

obtaining an insurance policy has proven to be a significantly more effective solution. This paper first analyzes the characteristics of various IP rights that may be subject to insurance, along with the benefits of liability insurance against IP infringement. It then examines the scope of insurable subject matter and the content of insurance coverage, taking into account specific costs incurred both when the insured acts as the defendant in litigation and when the insured undertakes legal actions to protect and enforce their IP rights.

II CHARACTERISTICS OF DIFFERENT INTELLECTUAL PROPERTY RIGHTS AND THE ADVANTAGES OF LIABILITY INSURANCE AGAINST INFRINGEMENT OF SUCH RIGHTS

Starting from the division of IP rights into copyright and related rights, and industrial property rights, this section will briefly examine the main characteristics these rights must possess to enjoy legal protection and be eligible as the subject of insurance.

Copyright refers to the legal right pertaining to an original intellectual creation of the author, expressed in a specific form, regardless of its artistic, scientific, or other value, purpose, length, content, form of expression, or whether its public communication is permitted. Copyright protection encompasses both moral and economic rights, the author's rights in relation to the owner of a physical copy of the copyrighted work, the right to special remuneration, and the right to compensate for the public lending of works, under the Law on Copyright and Related Rights.[9] Related rights include the rights of performers, phonogram producers, film producers (videogram producers), broadcasting organizations, and database producers. Each of these related rights is governed by specific conditions for protection, as prescribed under the aforementioned legislation.

When it comes to industrial property rights, the conditions they must meet in order to be recognized and enjoy legal protection are regulated by specific legislation. Thus, the rights of the author of an industrial design are recognized if the design is new and possesses individual character, and are protected in accordance with the Law on the Legal Protection of Industrial Design.[10] In patent law, the subject matter of protection must satisfy the requirements of novelty, inventiveness, and industrial applicability. The legal protection of inventions is governed by the Law on Patents.[11] For a sign to be protected as a trademark, it must be capable of distinguishing the goods or services of one natural or legal person from those of

[9] *Official Gazette of the Republic of Serbia*, Nos. 104/2009, 99/2011, 119/2012, 29/2016 – Constitutional Court decision, 66/2019.
[10] *Official Gazette of the Republic of Serbia*, Nos. 104/2009, 45/2015, 44/2018 – other law.
[11] *Official Gazette of the Republic of Serbia*, Nos. 99/2011, 113/2017 – other law, 95/2018, 66/2019, 123/2021.

another, and it must be capable of being represented in the Trademark Register in a manner that enables the competent authorities and the public to clearly and precisely determine the subject matter of protection. A trademark is protected in accordance with the Law on Trademarks.[12] As for designations of origin, the subject of protection includes the geographical name of a country, region, or locality from which a product originates, where the quality and specific characteristics of that product are exclusively or essentially attributable to the geographical environment of a defined area, including both natural and human factors. A geographical indication refers to a sign that identifies a product as originating from the territory of a particular country, region, or locality, where a given quality, reputation, or other characteristic is essentially attributable to its geographical origin. Designations of origin and geographical indications are protected in accordance with the Law on Indications of Geographical Origin.[13] The subject matter of topography protection includes the original, innovative result of the author's intellectual effort, which is not commonly known in the semiconductor industry, as well as any part of the protected topography that may be used independently, and the device (main item) that incorporates a semiconductor product containing the protected topography, provided that the semiconductor product cannot be separated from the main item without damaging or destroying it. The subject matter and conditions for protection are governed by the Law on the Protection of Semiconductor Products.[14] The plant breeder's right is granted if the variety is new, distinct, uniform, and stable, and if it meets the requirements for variety denomination, in accordance with the provisions of the Law on the Protection of Plant Breeders' Rights.[15] The issue of trade secrets as a subject of insurance against liability for infringement of intellectual property rights will be discussed in more detail in the following chapter.

In relation to liability insurance against infringement of IP rights, it is important to bear in mind the principle of contractual freedom, which allows the insurer to define the scope of coverage through its terms and conditions. This includes the insurer's right to completely exclude or limit liability for indemnity claims arising from specific IP rights. Liability insurance against IP infringement offers multiple advantages. For a relatively modest premium, it provides potential financial protection against costs that may arise from infringing a third party's IP rights. Moreover, such insurance may cover the costs of filing a counterclaim, as well as initiating legal proceedings to protect the insured's IP rights. It is the responsibility of the insured to identify and understand the integral elements of their business activity and, for greater certainty, to ensure financial protection through insurance in connection

[12] *Official Gazette of the Republic of Serbia*, No. 6/2020.
[13] *Official Gazette of the Republic of Serbia*, Nos. 18/2010, 44/2018 – other law.
[14] *Official Gazette of the Republic of Serbia*, Nos. 55/2013, 66/2019.
[15] *Official Gazette of the RS*, Nos. 41/2009, 88/2011.

with IP rights. In addition to the above, if agreed upon, insurance coverage may also extend to costs of obtaining expert opinions regarding the likelihood of success in defending against claims for IP infringement in bringing an action to protect one's IP rights. It may also cover legal and other representation costs, expert witness fees, and the cost of defense before courts or arbitration panels, as well as judgment amounts in the event of an unsuccessful dispute, etc.[16] Furthermore, in cases of suspected or likely infringement of an IP right by a third party, the right holder may initiate appropriate investigative and analytical measures.[17] The costs of such measures may also be covered by the insurance. Namely, the costs incurred by the IP right holder, who is also the insured party under the insurance contract, shall be reimbursed by the insurer in full, within the limits of the insured sum. The only condition is that such costs were incurred reasonably and with the consent of the insurer.[18]

III What May Constitute the Subject-Matter of Insurance

The subject-matter of insurance is determined in accordance with the relevant regulations on copyright and related rights, patents, trademarks, legal protection of industrial design, geographical indications of origin, topographies of semiconductor products, and trade secret protection, as well as the provisions of laws and other regulations governing insurance contracts, particularly the general and specific terms and conditions of insurance.

Based on one of the fundamental principles of contract law, according to which the object of an obligation must be possible, lawful, permissible, defined or definable (Law of Obligations, Art. 47), the object of the insurer's obligation must also conform to public order, mandatory legal provisions, and good customs. Hence, the legal basis for the insurer's obligation depends on the performance of conditions, duties, and requirements prescribed by law or derived from good customs. In the context of this paper, the legal and subordinate regulations can be classified into two groups: (1) laws governing specific forms of IP rights, and (2) laws relating to insurance law, namely, the law on insurance contracts and the law on the supervision of insurance activities.

It is common for the subject-matter of insurance to be linked to the occurrence of a particular circumstance, incident, event, fact, issue, action, omission, or

[16] Marsh Commercial, *Protecting your big ideas with intellectual property insurance*, 28 August 2024, available at: *https://www.marshcommercial.co.uk/articles/intellectual-property-insurance.html#:~:text=IP%20insurance%20can%20help%20protect,copying%20or%20reproducing%20their%20work*, accessed on 12 February 2025.

[17] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. 22 October 2024, available at: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, accessed on 12 February 2025.

[18] Jovanović, Slobodan, *Pravo osiguranja*, Faculty of Law for Business and Judiciary, Novi Sad, 2016, 167.

state of affairs that could lead to the initiation of legal proceedings or the submitting of a compensation claim against the insured party, or, conversely, in cases where the insured takes action to protect their own IP right against a third party.

The subject-matter of insurance may exclusively be liability arising from IP rights that meet the conditions prescribed by law and enjoy statutory protection. The requirements that an IP right must meet are determined by the nature of the subject matter to which the right pertains. In addition to those mentioned in the previous chapter, it is understood that the objects of IP rights protection must also satisfy other conditions prescribed by law.

This conclusion follows several specific rules applicable to insurance contracts, which are derived from the general principles of contract law. Thus, only those persons who, at the time the damage occurred, had a material interest in preventing the insured event from happening may hold rights under an insurance contract. This rule arises from the fact that it is not normal for someone to desire to suffer a loss, as such would constitute a deviation from the regularity of insurance and typically indicate fraud on the part of the insured.[19] Furthermore, from the above-mentioned rule concerning IP rights, it is evident that rights not legally recognized as belonging to any person cannot be the subject of insurance. According to the general rules of contract law, for a valid insurance contract to be concluded, the interest must be permitted by law, morality, and the public order of society.[20] The legality of IP rights is demonstrated by a decision of the competent authority regarding registration in the relevant register. This may be a decision on the registration of the IP right or the registration of a disposition of an existing right (such as transfer, license, or pledge). In this sense, insurance coverage extends to misuse or unauthorized exploitation of the insured's legally recognized IP rights. On the other hand, insurance does not cover any case, condition, circumstance, or event leading to litigation due to the use of IP rights based on legally recognized limitations of those rights.[21]

The subject-matter of insurance can only be that which is not explicitly excluded from coverage. The insurance terms, which constitute the provisions of the insurance contract, define the subject of insurance whose loss, damage, or related costs are compensated under the insurance. This represents a significant difference compared to IP rights, which have a broader scope than the extent of the insurance coverage. For example, the insurance terms may explicitly exclude damage claims against employees for breach of trade secrets, as well as the employer's liability towards employees for unjustified damage claims arising from breach of trade secrets. On the other hand, insurance may cover a wide range of costs arising from risks related to IP infringement. These may include disputes concerning violations of

[19] S. Jovanović, 95.
[20] *Ibid.*, 89.
[21] V. Spasić, 68–69, 141, 203–204, 415; S. Marković, D. Popović, 75–78, 140–141, 168, 182–183, 192, 200, 208.

privacy rights, personal data, and costs related to managing public relations, among others. One of the defining features of liability insurance against IP infringement is precisely the coverage of financial losses in the form of compensation for specific costs borne by the insured.

In addition to numerous excluded risks, costs, and indemnities, which will not be detailed in this paper, the list of excluded risks encompasses other types of liabilities that may be complementary to this subject of insurance. These include product liability and potentially other types of liability. This reflects a strict separation of liabilities that may arise from various legal grounds, all aimed at enabling the insurer to control and monitor individual types of insurance more effectively. Furthermore, such a legal drafting technique for insurance terms provides a clearer overview of sources of risk and the insurer's potential obligations.

The subject-matter of liability insurance arising from infringement of IP rights does not coincide with general liability insurance arising from business activities. Liability insurance against infringement of IP rights is conducted as a form of liability insurance, specifically either general business liability or professional liability insurance. The subject-matter of liability insurance against infringement of IP rights differs from general business liability insurance in at least two respects: First, in general business liability insurance, the subject of insurance is the insured's civil liability for damage caused by death, injury to body or health, as well as damage to or destruction of third-party property,[22] whereas in the type of insurance considered here, this is not the case. Liability insurance against infringement of IP rights exclusively covers financial losses related to such claims for compensation and associated costs. Second, general liability insurance does not cover professional liability arising from errors and omissions committed in a professional capacity (such as lawyers, notaries public, insurance brokers, etc.). Liability insurance against infringement of IP rights may be concluded as professional liability insurance because its subject is exclusively tied to non-intentional error or negligence in the conduct of a specific professional activity. This concerns so-called slight (ordinary) negligence *(culpa levissima*), since gross negligence (*culpa lata*) on the part of a professional in the performance of their duties is unacceptable. Minor forms of negligence are regularly covered by insurance, whereas gross negligence is sometimes equated with intent, and sometimes it is not the case.[23] Simply put, when performing professional activities, a party in an obligational relationship is required to act with increased diligence, in accordance with professional standards and customary practices, i.e. with the diligence of a good expert. There is, however, an exception under Serbian law, prescribed by the Law of Obligations, whereby the insurer is obliged to compensate for any damage caused by a person for whose actions the insured is liable on any basis, regardless

[22] S. Jovanović, 289.
[23] *Ibidem*, 92.

of whether the damage was caused negligently or intentionally (Law of Obligations, Article 929, paragraph 3).

The standard insurance practice, which aligns with statutory provisions, is based on the principle that only harmful events occurring without the insured's intent can be attributed to their negligence, omission, misrepresentation of will, or false representation of material facts at the time of concluding the insurance contract. The same rule applies to insurance against infringement of IP rights. The insurance exclusively covers unintentional infringement of IP rights, and particularly breaches of licensing agreements.

The subject-matter of liability insurance against infringement of IP rights may include a factual relationship in the form of a trade secret. Trade secrets (*know-how*), in a broad sense, refer to any non-public information acquired by individuals or companies regarding the method or easier use of something in business. (The concept is quite broad, and its nature depends on the specific knowledge involved.) Generally, a trade secret describes knowledge that increases benefits or reduces the burden of using something. It may include descriptions of product creation or strategic characteristics of a business enterprise, such as business management.[24], [25] According to Professor Spasić, the essence of *know-how* primarily consists of its technical aspect, while the business aspect is secondary.[26] The importance of inventions and innovations is further demonstrated by the fact that the United States and Japan, during years of economic stagnation, succeeded in reviving sluggish economic growth through patents, *know-how*, and the digital economy.[27]

In the analyzed sources of legal theory concerning IP law, trade secrets represent a factual relationship within the business activities of a company and therefore do not fall within the scope of IP law,[28] while another view classifies trade secrets as rights related to patent law.[29] The first group of authors also approaches

[24] For example: (1) The American company *Lincoln National Life Insurance Company* holds a patent titled *Method and Apparatus for the Payment of Pension Benefits*, confirmed by a ruling of the United States Federal Court of Appeals in June 2010 (Lincoln National Life Insurance Company v. Transamerica Life Insurance Company (2010), United States Court of Appeals, Federal Circuit, Nos. 2009-1403, 2009-1491, Decided: June 23, 2010, available at: *https://caselaw.findlaw.com/court/us-federal-circuit/1528628.html*, accessed on 12 February, 2025); (2) High-resolution datasets on claims are intellectual property of the German insurance industry, protected as trade secrets for many years. Therefore, these data are not freely available to the public by the insurance industry, although they may be provided for specific research projects (GDV, *Comment of the German Insurance Association (GDV) on the Consultation on the renewed sustainable finance strategy*, ID-number 6437280268-55, 14/07/2020, 57).

[25] S. Marković, D. Popović, 309–310; Legal Information Institute, *know-how*, Cornell Law School, available at: *https://www.law.cornell.edu/wex/know-how*,accessed on 12 February, 2025.

[26] V. Spasić, 103.

[27] S. Jelisavac Trošić, 82.

[28] S. Marković, D. Popović, 309.

[29] V. Spasić, 99–107.

the latter opinion, as they believe that inventions should be protected by patents, while accompanying technical knowledge that does not meet patentability criteria should be protected as trade secrets.[30]

In insurance law, the aforementioned distinction is irrelevant, as it is ultimately up to the insurer, based on the principle of autonomy of will in law of obligations, to decide whether to provide coverage for infringement of trade secrets - specifically in cases of "illegal acquisition, use, and disclosure of another's trade secret", as defined by the Serbian Trade Secret Protection Act of 2021 (hereinafter: ZZPT)[31] and the Company Law.[32] However, infringement of a trade secret may occur through violation of the law or good business practices, which include breaches of obligations under confidentiality agreements or other contracts. Practically, the filing of a claim for compensation or other form of compensation regarding unauthorized use of another's trade secret constitutes an insured event. Nevertheless, the insured or the injured party asserting a proprietary claim against the insured must demonstrate that the information in question indeed qualifies as a trade secret. Since a trade secret is not subject to registration in an administrative procedure, its existence must be proven by the interested party - a business entity, in accordance with the ZZPT and the Company Law (Articles 72–74). This can be done by presenting: an internal regulation governing trade secret management or a document marked "trade secret" or with a similar designation. In any case, whether the disputed conduct constitutes a trade secret infringement depends on whether the information meets the statutory criteria to be considered a trade secret. Consequently, information whose disclosure to a third party would not cause harm to the company, as well as information that does not or cannot have economic value enabling economic benefit through its use or disclosure, and which is not protected by the company through appropriate confidentiality measures, cannot be regarded as a trade secret.

For example, when an invention does not meet the requirement of industrial (commercial) applicability, i.e., patentability, then the trade secret related to it is not suitable for generating significant economic benefit or competitive advantage. This is because "the usefulness of information is essential reason why it possesses the characteristic of a trade secret".[33] In other words, "the condition of usefulness is a statutory prerequisite for legal protection of an invention and, by extensive analogy, it extends to *know-how*".[34] In this sense, a person claiming to be injured gains no legal advantage from merely designating certain information as a trade secret if that information is not capable of causing harm or generating economic

[30] S. Marković, D. Popović, 311.
[31] *Official Gazette of the Republic of Serbia*, No. 53/2021.
[32] *Official Gazette of the Republic of Serbia*, Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021, 19/2025.
[33] S. Marković, D. Popović, 310.
[34] V. Spasić, 103.

benefit or competitive advantage in the market. This creates a legal presumption that economically worthless information is that which is not protected as a trade secret. Still, it should be borne in mind that this is a claim of relative significance, as numerous data are important to a business entity that are not of a nature to warrant protection as a trade secret.

IV WHAT IS COVERED BY INSURANCE

Although the type of insurance examined in this paper is, according to the widely accepted classification of insurance, categorized as property insurance, it primarily covers various costs arising from liability for infringement of IP rights.[35] As previously noted, the insured compensation exclusively covers the "pure" financial loss resulting from claims for damages due to IP infringement and the legal defense against such claims. On the other hand, this type of insurance entails financial protection in cases of IP infringement, specifically the moral-legal and proprietary rights of the IP rights holder.[36] Thus, the pure financial loss covered by this insurance can be described as a material loss caused by the insured at the expense of a third party through acts or omissions, without endangering their property or health. In this respect, this type of insurance differs from traditional property insurance and accident insurance for individuals. Bearing the above in mind, we distinguish the following types of coverage:

(1) Reimbursement of costs due to infringement of a third party's intellectual IP rights. Infringement of IP rights provides coverage for defense costs: attorney fees, advisory fees, expert witness fees if engaged, court fees, etc. In addition to these costs, the insured compensation also covers damages the insured may be required to pay to a third injured party based on a settlement agreement, a final court judgment, or an arbitration award. This includes the possibility of reimbursing costs related to filing a counterclaim. However, the insurer aims to have full insight into its exposure, which encompasses all events and actions the insured plans to undertake; thus, prior consent from the insurer is a prerequisite for payment of the insured reimbursement.[37]

(2) Reimbursement of costs for defending the insured's IP rights. It is not uncommon for a third party to challenge the insured's ownership of an IP right. The third party may be a market competitor or employees and associates of the insured. Covered are costs related to defending against claims for annulment or revocation of the IP right due to a previously registered right or because of a prior state of the art allows free use of the products or services concerned, are reimbursed.[38]

[35] S. Jovanović, 291.
[36] V. Spasić, 65; S. Marković, D. Popović, 263.
[37] S. Jovanović, 40.
[38] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. 22 October, 2024, available at: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, accessed on 12 February, 2025.

(3) Reimbursement of costs arising from filing a lawsuit to enforce a contract or claim for infringement of IP rights. This is the reverse form of coverage in liability insurance against IP infringement, as it concerns the insurer's obligation to cover the costs of enforcing the insured's contractual rights against a third party - the insured's contractual counterparty. This coverage allows the insured to initiate appropriate proceedings to compel their contractual partner to fulfill their contractual obligations or pay damages for breach of contract related to IP matters. Coverage could also be activated in cases of non-payment of royalties or excess amounts above a specified limit due to the insured, breach of agreed territorial restrictions, technical fields of application, and so forth.[39]

(4) Losses due to business interruption caused by IP rights infringement. Business interruption is an emerging area of liability insurance against IP infringement. The inability to realize planned earnings leads to reduced income and unfavorable business results, which can be significantly mitigated through business interruption loss insurance.[40] Similar to property insurance against fire risks, this is a supplementary form of coverage that is contracted separately and requires an additional premium**.** However, it may sometimes be included in the basic coverage, depending on the insurance market offer. Loss due to business interruption is understood as loss resulting from the insured risk under the basic insurance,[41] i.e. the type of insurance addressed in this paper. This coverage is designed to extend the scope of insurance to protect the insured from financial losses suffered if they are prohibited from selling their products or providing services, or if they must cease using certain production processes. Business interruption insurance would be particularly suitable in this type of insurance if a judgment is rendered against the insured company, determining that its products infringe a third party's patents and imposing a ban on the continued use or sale of products that violate the IP rights of the injured party.

CONCLUSION

Intellectual property (IP) affects both commercial entities (business entities) and non-profit organizations (civil law associations, endowments, cultural institutions, etc.) in various ways, and it can significantly contribute to the advancement of scientific and technological development as well as the improvement of material welfare. Any entity exploiting an IP right may appear either as a defendant or as

[39] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd., 22 October, 2024, available at: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, accessed on 12 February, 2025.
[40] S. Jovanović, 271.
[41] *Ibidem*, 277.

a plaintiff. Financial burdens arise if their IP right is annulled, altered, or subjected to a temporary injunction prohibiting the use or sale of goods, or provision of services.

The characteristics of different IP rights stem from their specific nature and the statutory conditions for their recognition and protection. Legal definitions and requirements for all IP rights provide an institutional framework of legal certainty in legal transactions where these rights are lawfully exercised.

Regarding liability insurance against infringement of IP rights, it must be noted that such insurance is often of an adhesion nature, meaning that the insurer determines the scope of coverage through the insurance terms. Nevertheless, liability insurance against IP infringement offers multiple advantages. These include: a relatively low premium securing a much higher insured sum; coverage for costs associated with initiating counterclaims and lawsuits to protect one's IP rights; coverage for expenses related to obtaining expert opinions on the likelihood of successfully defending against compensation claims or lawsuits; costs of legal representation, expert witnesses, and defense in court or arbitration; amounts awarded in judgments if the dispute is lost; and investigative and analytical costs incurred when there is suspicion that a third party will infringe on IP rights, etc.

The insurer is required to cover costs that the insured must bear following a court or arbitration award after proceedings initiated by the injured party. However, if the insured plans to incur costs independently for filing a lawsuit to protect their IP rights, filing a counterclaim, or acknowledging obligations based on a settlement agreement, reimbursement of such costs will be conditional upon the insurer's prior consent to these legal actions.

In liability insurance against IP infringement, as in other types of insurance, it is possible to extend coverage to include additional costs such as those related to business interruption due to IP infringement or losses resulting from an unfavorable final court decision.

The validity of the insurance contract and the insurer's obligations are conditioned upon the prior registration of the IP rights. This means that coverage excludes any IP rights that are not registered. However, it is important to note that insurers also accept copyright and related rights in insurance coverage, even though these rights are not registered. Furthermore, the insurer's obligation must be definite and/or determinable and permitted by public order, mandatory regulations, and good practice; therefore, insurers cannot validly enter into insurance contracts for material interests in IP rights that are not legally recognized.

Differences are also evident between general liability insurance arising from business activities and liability insurance against infringement of IP rights. For this reason, liability insurance against IP infringement is specific and requires specialized knowledge in drafting and administering such contracts.

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POSLEDICE NEPLAĆANJA PREMIJE OSIGURANJA KOD IMOVINSKIH OSIGURANJA

Iz odredbe člana 897 Zakona o obligacionim odnosima proizlazi da je osnovna i prva obaveza ugovarača osiguranja plaćanje određenog novčanog iznosa odnosno premije osiguranja.[2]

Ugovor o osiguranju se, po pravilu, zaključuje potpisivanjem polise ili lista pokrića, uz nekoliko izuzetaka kao što su, na primer, sledeće situacije: kada osiguravač, u ostavljenom roku, ili zakonskom roku od osam ili trideset dana, odbije pismenu ponudu koja ne odstupa od uslova pod kojima on vrši predloženo osiguranje; kada se smatra da je ugovor zaključen danom prispeća ponude osiguravaču;[3] i kada ugovorni odnos osiguranja nastaje plaćanjem premije.[4] Odstupanja od pismene forme postaju sve zastupljenija jer su u saglasnosti s razvojem modernih tehnologija i potrebom za efikasnošću te pružaju mogućnost onlajn kupovine usluga osiguranja.

Obaveza plaćanja premije osiguranja propisana je odredbom člana 912 Zakona o obligacionim odnosima, te je tako propisano da je ugovarač osiguranja dužan platiti premiju osiguranja, ali je osiguravač dužan primiti isplatu premije od svakog lica koje ima pravni interes da ona bude plaćena (stav 1). Dalje je propisano da se premija plaća u ugovorenim rokovima, a ako treba da se isplati odjednom, plaća se prilikom zaključenja ugovora (stav 2), a takođe važi i da je mesto plaćanja premije mesto u kome ugovarač osiguranja ima svoje sedište odnosno prebivalište – ako ugovorom nije određeno neko drugo mesto (stav 3).

Već sledećim članom propisane su posledice neisplaćivanja premije osiguranja. U zavisnosti od toga da li je ugovor zaključen pa onda dospeva obaveze plaćanja premije, ili se plaćanjem premije zaključuje ugovor, ili je pak plaćanje premije uslov za nastupanje obaveze osiguravača na isplatu naknade ili ugovorene sume, različite su i posledice neplaćanja premije osiguranja.

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[2] Одредбом члана 897 Закона о облигационим односима (ЗОО) прописано је да се уговором о осигурању уговарач осигурања обавезује да плати одређени износ организацији за осигурање (осигуравач), а организација се обавезује да, ако се деси догађај који представља осигурани случај, исплати осигуранику или неком трећем лицу накнаду односно уговорену суму или учини нешто друго.

[3] Видети одредбу члана 901 ст. 1 Закона о облигационим односима.

[4] Видети одредбу члана 903 Закона о облигационим односима.

Naime, odredbom člana 913 st. 1 Zakona o obligacionim odnosima propisano je da obaveza osiguravača da isplati naknadu ili sumu određenu ugovorom, ako je ugovoreno da se premija plaća prilikom zaključenja ugovora, počinje narednog dana od dana uplate premije. Jedinstveni stav je da čin plaćanja premije, ukoliko je ugovoreno da obaveza plaćanja premije dospeva odmah prilikom zaključenja ugovora, predstavlja odložni uslov za nastupanje obaveze osiguravača na isplatu naknade ili ugovorene sume. Ukoliko premija još nije plaćena, a nastupi osigurani slučaj, osiguravač dakle neće imati obavezu isplate čak ni ako je plaćena premije odmah nakon nastupanja osiguranog slučaja.

Tako se u obrazloženju jedne odluke navodi: „Osnovano tuženi u žalbi navodi da je tužilac premiju uplatio dan nakon nastanka štetnog događaja, te da tuženi čak i da je nastupio osigurani slučaj, nije u obavezi da naknadi štetu nastalu u periodu pre 29. 8. 2006. godine. Naime, iz ponude za osiguranje imovine preduzetnika, proizlazi da je ugovorena dinamika plaćanja u mesečnim iznosima, te da prva rata u iznosu od 15.338,40 dinara dospeva za naplatu odmah, a ostalih 11 rata u jednakim iznosima od po 9.586,50 dinara mesečno. Iz predmetne ponude takođe proizlazi da osiguravač nije u obavezi da plati naknadu po osnovu zaključenog ugovora o osiguranju za osigurane slučajeve koji nastupe pre uplate premije osiguranja, odnosno prve rate premije osiguranja, od strane osiguravača osiguranja, ili kog drugog lica koje za to ima opravdani interes... Prema tome, kako je u ovoj pravnoj stvari predviđeno da se prva rata premije osiguranja plaća odmah, a ponuda je data 17. 8. 2006. godine s početkom osiguranja od 22. 8. 2006. godine, te kako prva rata premije osiguranja nije plaćena, odnosno plaćena je tek 29. 8. 2006. godine, nakon nastanka štetnog događaja, to prema odredbi člana 913 Zakona o obligacionim odnosima nije nastala obaveza tuženog kao osiguravača da isplati naknadu odnosno ugovorenu sumu osiguranja, jer ta naknada odnosno suma osiguranja dospeva narednog dana od dana uplate premije."[5]

Međutim, u tim situacijama kada je ugovoreno da osiguravajuće pokriće počinje po uplati premije osiguranja ili njenog ugovorenog dela, a premija ne bude uplaćena, ni osiguravač nema pravo na naplatu premije osiguranja po isteku perioda osiguranja.

Takav stav je izražen u rešenju Privrednog apelacionog suda Pž. 2851/17 od 12. 10. 2018. godine,[6] u kom se navodi: „U konkretnom slučaju, jedna od odredaba zaključenog ugovora je da osiguravajuće pokriće počinje po uplati premije osiguranja ili njenog ugovorenog dela... Ova odredba znači da snošenje rizika od strane tužioca počinje po uplati premije osiguranja ili njenog ugovorenog dela. Tuženi nije platio premiju niti njen ugovoreni deo, što znači da tužilac tokom ugovorenog perioda od 19. 1. 2015. do 19. 1. 2016. godine nije snosio rizik od ostvarenja osiguranog slučaja.

[5] Из решења Привредног апелационог суда, Пж 8822/10 од 3. 3. 2011. године.

[6] Из Билтена судске праксе привредних судова бр. 1/2019.

Ipak, odmah po isteku navedenog perioda, podnosi tužbu sa zahtevom za isplatu premije osiguranja za proteklu godinu, kada nije izvršavao svoju ugovornu obavezu, koju ne može izvršiti naknadno. Ne zahteva isplatu premije odmah nakon dospelosti prve rate premije, kada je po ugovoru mogao proglasiti dospelim ceo iznos premije i kada je sam svoju ugovornu obavezu mogao izvršiti. Zato je nejasno da li prvostepeni sud smatra da je tužilac izvršio svoju ugovornu obavezu, pa stoga tužbeni zahtev usvaja, ili smatra da je tuženi u obavezi bez obzira na izvršenje ugovorne obaveze tužioca. Prvostepena odluka nije razložna u pogledu sadržine ugovora i tumačenja odredaba koje su među strankama sporne, a odnose se na izvršenje ugovornih obaveza, njihovu dospelost i načelo jednake vrednosti uzajamnih davanja."

Odredbom člana 913 st. 2 Zakona o obligacionim odnosima propisano je da obaveza osiguravača da isplati naknadu ili sumu određenu ugovorom, ako je ugovoreno da se premija plaća posle zaključenja ugovora, počinje od dana određenog u ugovoru kao dana početka osiguranja. Kod takvog ugovaranja obaveza osiguravača može dospeti pre dospelosti obaveze plaćanja premije osiguranja i nezavisno od nje, a moguće je i ugovaranje plaćanja premije sa odložnim uslovom, kada obaveza plaćanja premije dospeva na naplatu tek nakon što je ugovoreni uslov ispunjen. Tako je u jednoj odluci navedeno: „Prema konkretnoj polisi, premija osiguranja nije ugovorena pri zaključenju ugovora već je obračun premije predviđen pojedinačno za svako izvođenje vatrometa. Imajući u vidu ugovoreni način pojedinačnog utvrđivanja i plaćanja premije pri svakom izvođenju vatrometa, kao i nespornu činjenicu da tuženi u periodu na koji se osiguranje odnosi nije izveo nijedan vatromet, pravilno je prvostepeni sud našao da zahtev za plaćanje premije nije osnovan jer tužilac u toku postupka nije dostavio dokaze da je među strankama ugovoreno da se deo premije akontaciono plaća bez obzira na izvođenje vatrometa te da je stoga tužilac imao osnov za fakturisanje dela premije 'akontaciono', kako je navedeno u spornoj fakturi."[7]

Odredbama članova 913 st. 3 i st. 4 predviđena je sankcija za neplaćanje dospele premije, pa je tako propisano da ukoliko ugovarač osiguranja premiju koja je dospela posle zaključenja ugovora ne plati do dospelosti, niti to učini neko drugo zainteresovano lice, ugovor o osiguranju prestaje po samom zakonu po isteku roka od trideset dana od dana od kada je ugovaraču osiguranja uručeno preporučeno pismo osiguravača sa obaveštenjem o dospelosti premije, ali s tim da taj rok ne može isteći pre nego što protekne trideset dana od dospelosti premije. Dalje je propisano da u svakom slučaju ugovor o osiguranju prestaje po samom zakonu ako premija ne bude plaćena u roku od godine dana od dospelosti.

To su situacije kada je ugovor o osiguranju zaključen, nastupila su prava i obaveze ugovornih strana, a ugovarač osiguranja ili treće zainteresovano lice nije platilo premiju po dospelosti. Zakonodavac propisuje dva načina prestanka ugovora, oba su po sili zakona, što znači da nije potrebno da osiguravač uputi izjavu o raskidu.

[7] Из пресуде Вишег трговинског суда, Пж. 8693/07 од 15. 11. 2007. године.

U prvoj varijanti, ukoliko ugovarač osiguranja ne plati premiju o dospelosti, osiguravač je u obavezi da mu ostavi dodatni rok od 30 dana za ispunjenje ugovorne obaveze, koji počinje da teče od trenutka uručenja preporučenog pisma sa obaveštenjem o dospelosti premije. Ako ispunjenje izostane i u tom naknadnom roku, koji se ugovorom može produžiti, ali ne i skratiti, ugovor prestaje po sili zakona, a prestanak ima dejstva pro futuro – na strani osiguranika, naime, ostaje obaveza isplate iznosa dospele premije. U svakom slučaju, ako obaveštenje osiguravača izostane, ugovor prestaje po sili zakona protekom roka od godinu dana od dana dospelosti premije i takav prestanak takođe deluje pro futuro.

Povodom toga, sudska praksa je ujednačena: „U našem pravu prihvaćen je sistem raskida ugovora bez prethodne suspenzije. Osiguraniku se ostavlja određeni rok za ispunjenje njegove obaveze plaćanja dospelih premija, tako da tek po proteku ovog roka osiguravač može da raskine ugovor. Sve do raskida osiguranik je pokriven osiguranjem, te je na taj način njegova zaštita potpunija nego u sistemu suspenzije... Prema tome, po isteku ugovorenog roka za plaćanje premije (tzv. skadenca), osiguravač je dužan da ostavi naknadni rok od 30 dana (tzv. počekni rok), ali po isteku toga roka ugovor prestaje po samom zakonu, bez posebne izjave osiguravača da ugovor raskida. Rok od 30 dana može se produžiti ugovorom, ali se ne može skratiti... Kad ugovor prestane na taj način, osiguranik je u obavezi da plati premiju do prestanka ugovora, odnosno ceo iznos premije za tekuću godinu osiguranja, ako je do dana prestanka ugovora nastao osigurani slučaj za koji je osiguravač u obavezi da plati naknadu. Ako, dakle, osigurani slučaj nastane u vreme počeknog roka, osiguravač je u obavezi. Međutim, ako je pre isteka naknadnog roka podneo tužbu radi naplate premije, osiguravač je u obavezi da naknadi štetu prouzrokovanu osiguranim slučajem, pa i onda kada on nastane posle isteka tog roka."[8]

U drugoj odluci se navodi: „Neosnovano tuženi u žalbi ističe da je predmetni ugovor raskinut, odnosno prestao po samom zakonu, te da stoga nije u obavezi da isplati premije. Naime, utuženi iznos se odnosi na period u kome su stranke bile u ugovornom odnosu, te stoga tužilac ima pravo da zahteva da tuženi izvrši svoju ugovornu obavezu iz predmetnih polisa osiguranja. Odredbom čl. 913 st 4 ZOO propisano je da ugovor o osiguranju prestaje po samom zakonu ako premija ne bude plaćena u roku do godinu dana od dana dospelosti. Prema tome, ugovor o osiguranju je na snazi i proizvodi pravno dejstvo jednu godinu od dospele a neplaćene premije. On po sili zakona prestaje godinu dana nakon dospelosti premije i takav prestanak deluje od ispunjenja uslova za prestanak ugovora – neplaćanja premije u roku od godine dana, a ne od trenutka zaključenja ugovora – dospelosti premije za plaćanje. S obzirom na to da su premije osiguranja (predmetnim polisama) dospele na plaćanje, što nije sporno, a nisu plaćene u roku od godine dana od dana dospelosti, to je predmetni ugovor u skladu navedene zakonske odredbe prestao

[8] Из решења Вишег трговинског суда Пж. 9028/05 од 10. 3. 2006. године.

po samom zakonu godinu dana nakon dospelosti plaćanja premije, ali te dospele premije moraju se platiti, kao i svaka druga dospela obaveza."[9]

Prethodno opisan način prestanka ugovora o osiguranju, po sili zakona usled neplaćanja premije, ne treba mešati s prestankom ugovora usled raskida propisanog odredbama člana 922 st. 2 i 3 Zakona o obligacionim odnosima.[10]

Značaj razlikovanja ova dva instituta izražen je u pravnom shvatanju Višeg trgovinskog suda utvrđenog kao odgovor na pitanje na sednici Odeljenja za privredne sporove od 27. 9. 2004. godine, u kom se navodi: „Ugovor o osiguranju, koji je zaključen s rokom trajanja od 10 godina, svaka ugovorna strana može raskinuti pismenom izjavom datom drugoj strani, po proteku roka od pet godina, uz otkazni rok od šest meseci. Na taj način ugovor o osiguranju prestaje istekom otkaznog roka od šest meseci, koji počinje da teče od davanja pismene izjave o raskidu, koja se može uputiti drugoj strani tek po isteku pet godina od zaključenja ugovora. Navedeni način prestanka ugovora o osiguranju propisan je u članu 922 stav 3 ZOO. Taj način prestanka trajanja ugovora o osiguranju ne treba mešati sa institutom prestanka ovog ugovora po sili zakona, na način propisan u članu 913 stav 3 i 4 ZOO. Posledice raskida ugovora o osiguranju ogledaju se u prestanku svih obaveza ugovornih strana, s tim što bi osiguravač imao pravo da traži isplatu do tada dospelih premija u punom iznosu ili pak doplatu manje naplaćenih premija, po osnovu odobrenog popusta od 10% za višegodišnje osiguranje, ako je navedeni popust bio uslovljen trajanjem ugovora od 10 godina."

Vrhovni sud Republike Srbije takođe se izjašnjavao o ovom pitanju i dao mišljenje da za prestanak ugovora o osiguranju u smislu odredbe člana 913 stav 4 Zakona o obligacionim odnosima nije potrebna nikakva izjava osiguravača o prestanku važenja ugovora te da za primenu ovog instituta nije od značaja odredba člana 922 stav 3 Zakona o obligacionim odnosima, kojom su predviđeni uslovi za raskid ugovora o osiguranju. Tako je u obrazloženju odluke navedeno: „Prema tome, za prestanak ugovora o osiguranju u smislu navedene odredbe nije potrebna nikakva posebna izjava osiguravača o prestanku važenja ugovora, jer ugovor o osiguranju prestaje po samom zakonu protekom godinu dana od dana dospelosti premije. U toku prvostepenog postupka tuženi je isticao da je poslednju premiju po ugovorima o osiguranju iz 1993. isplatio tužiocu 1995. godine, dok tužilac nije podneo dokaz da je tuženi plaćanje vršio i kasnije, zbog čega su, po oceni revizijskog suda, zaključeni ugovori između tužioca i tuženog 1993. godine prestali po samom zakonu

[9] Из пресуде Вишег трговинског суда Пж. 9103/07 од 24. 10. 2007. године.

[10] Одредбом члана 922 ст. 2 Закона о облигационим односима прописано је да уколико рок трајања осигурања није одређен уговором, свака страна може раскинути уговор с даном доспелости премије, обавештавајући писменим путем другу страну најкасније три месеца пре доспелости премије. Ставом 3 је прописано следеће: ако је осигурање закључено на рок дужи од пет година, свака страна по протеку овог рока може уз отказни рок од шест месеци писмено изјавити другој страни да раскида уговор.

u 1996. godini, kako su pravilno zaključili privredni sudovi... Budući da osiguravač u primerenom roku od godinu dana od dana dospelosti premije osiguranja nije ostao kod ugovora i pismeno obavestio osiguranika o dospelosti premije preporučenom pošiljkom u smislu člana 913 stav 3 Zakona o obligacionim odnosima, ugovor o osiguranju je prestao, kako je napred navedeno. S obzirom na to da tužilac nije pružio dokaze da se koristio pravom iz člana 913 stav 3 Zakona o obligacionim odnosima i dokaze da je premija osiguranja plaćena i nakon 1995. godine, to su pravilno privredni sudovi odbili tužbeni zahtev tužioca. Za primenu odredbe člana 913 stav 4 Zakona o obligacionim odnosima, nije od značaja odredba iz člana 922 stav 3 Zakona o obligacionim odnosima, kojom su predviđeni uslovi za raskid ugovora o osiguranju."[11]

[11] Из пресуде Врховног суда Србије, Прев. 318/01 од 6. фебруара 2002. године.

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Rad mora da ima sažetak i ključne reči i na engleskom jeziku. Rezime i ključne reči se daju na kraju članka, nakon odeljka Literatura.

Naslov članka se piše na sredini, velikim slovima. Naslovi unutar članka moraju da imaju sledeći format.

1) **Prvi nivo naslova** – na sredini; numeracija: rimski broj (npr. I, II, III, itd.); prvo slovo veliko, a ostala mala.
2) **Drugi nivo naslova** – na sredini; numeracija: arapski broj sa tačkom (npr. 1., 2., 3., itd.); prvo slovo veliko, a ostala mala.
3) **Treći nivo naslova** – na sredini; kurziv (kosa slova, italik); numeracija: malo slovo azbuke sa zatvorenom zagradom (npr. a), b), v), itd.); prvo slovo veliko, a ostala mala.
4) **Četvrti nivo naslova** – na sredini; numeracija: arapski broj sa zatvorenom zagradom (npr. 1), 2), 3), itd.); prvo slovo veliko, a ostala mala.

Primer:

I Pojam
Definicija
Definicija u uporednom pravu
1) Francusko zakonodavstvo

PRAVILA CITIRANJA

Knjige

a) Knjige se citiraju na sledeći način: ime autora, prezime autora, naslov dela naveden kurzivom, eventualno redni broj izdanja, mesto izdanja, godina izdanja, broj strane.

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.

Kada se citira tekst sa više strana koje su tačno određene, one se razdvajaju crtom, posle čega sledi tačka. U slučaju da se citira više strana koje se ne određuju tačno, posle broja koji označava prvu stranu navodi se „i dalje" s tačkom na kraju.

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.

v) Kada se citira knjiga više autora (do tri)njihova imena i prezimena se razdvajaju zarezom.

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.

g) Ako se citira knjiga sa više od tri autora, navodi se samo ime i prezime prvog autora, uz dodavanje skraćenice reči et alia kurzivom.

Primer: Hugh Beale et al., *Contract Law,* 2nd edition, Bloomsbury Publishing, London, 2010, 54.

d) Knjiga koju je neko lice priredilo kao urednik se citira tako što se nakon njegovog imena i prezimena u zagradi navodi oznaka „urednik" ili skraćenica „ur.", odnosno odgovarajuća oznaka na jeziku na kom je knjiga objavljena.

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.

đ) Kada se citira jedna knjiga određenog autora, kod ponovljenog citiranja se navodi prvo slovo imena sa tačkom i prezime, nakon čega se dodaje broj strane.

Primer: N. Grujić, 102.

S. Hodges, 231.

e) Kada se citira više knjiga istog autora, kod ponovljenog citiranja se navodi prvo slovo imena sa tačkom i prezime, potom se u zagradi stavlja godina izdanja, i najzad broj strane.

Primer: M. Vasiljević (2012), 107.

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Primer: *Ibidem*.

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Primer: *Ibid*., 23.

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a) Članci se citiraju na sledeći način: ime autora, prezime autora, otvoreni navodnici, naziv članka, zatvoreni navodnici, naziv časopisa kurzivom, broj i godina izdanja, broj strane.

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.

b) Kada se citira članak više autora, njihova imena i prezimena se razdvajaju zarezom.

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.

Ako se citira članak sa više od tri autora, navodi se samo ime i prezime prvog autora, uz dodavanje skraćenice reči et alia kurzivom.

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.

v) Rad, odnosno članak objavljen u okviru zbornika radova ili knjige, koju je neko drugo lice priredilo kao urednik, se citira na sledeći način: ime autora, prezime autora, otvoreni navodnici, naziv članka, zatvoreni navodnici, naziv zbornika radova, odnosno knjige kurzivom, u zagradi oznaka „urednik" ili „ur." („editor" ili „ed."), „redaktor" i sl., i ime i prezime urednika, eventualno redni broj izdanja, mesto izdanja, godina izdanja, broj strane.

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.

g) Kada se citira jedan članak određenog autora, kod ponovljenog citiranja se navodi prvo slovo imena sa tačkom i prezime, a potom broj strane.

Primer: N. Petrović Tomić, 164.

d) Kada se citira više članaka istog autora, kod ponovljenog citiranja se navodi prvo slovo imena sa tačkom i prezime, potom se u zagradi stavlja godina izdanja, i najzad broj strane.

Primer: N. Petrović Tomić (2014), 122.

đ) U slučaju da u istoj godini autor ima više radova koji se citiraju, uz godinu izdanja se dodaje latinično slovo a, b, c, d, itd. prema redosledu citiranja tih radova, nakon čega sledi broj strane.

Primer: I. Jankovec (1995a), 16.

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a) Propisi se citiraju na sledeći način:

pun naziv propisa, glasilo u kome je propis objavljen kurzivom, broj glasila i godina objavljivanja, skraćenica čl., st., tač., odnosno par. i broj odredbe.

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.

g) Prilikom ponovljenog citiranja određenog propisa navodi se njegov pun naziv, odnosno skraćenica uvedena prilikom prvog citiranja, skraćenica čl., st., tač. ili par. i broj odredbe.

Primer: Zakon o privrednim društvima, čl. 7.

ZPU, čl. 25.

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pun naziv propisa preveden na srpski jezik, godina objavljivanja, odnosno usvajanja, otvorena zagrada, pun naziv propisa na originalnom jeziku kurzivom, eventualno skraćenica pod kojom će se propis dalje pojavljivati, zatvorena zagrada, skraćenica čl., st., tač. ili par. i broj odredbe.

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.

b) Prilikom ponovljenog citiranja izvora sa interneta navodi se prvo slovo imena autora sa tačkom i prezime autora, odnosno naziv organizacije koja je pripremila tekst, naziv teksta i broj strane.

Primer: Elisabeth Pollman, The Making and Meaning of ESG, 5.

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Submitted papers must meet the scientific paper standards in terms of scope and scientific apparatus. **The standard length of the paper** is one author's sheet (16 typed pages), with a maximum of 1.5 author's sheets (24 typed pages).

Articles should be written in **Times New Roman, 12 pt font, with 1.5 line spacing**. The article in Serbian should be written in Latin script, except for foreign words and words in Latin, which should be written in Latin script and italicized.

The article must begin with the title, the full name and surname (of all) authors, the full (official) name and address (including the country) of the institution where the author is employed. The note at the bottom of the first page should include the email addresses (of all) authors, as well as their ORCID numbers.

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The article must also include an abstract and key words in English. The abstract and key words should be provided at the end of the article, after the References section.

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First-level heading – centered; numbering: Roman numerals (e.g., I, II, III, etc.); first letter capitalized, the rest lowercase.

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Example:
I Concept
Definition
a) *Definition in Comparative Law*
) French Legislation

REFERENCE STYLE

1. BOOKS

a) Books should be cited as follows: author's first name, author's last name, title of the work in italics, edition number if applicable, place of publication, year of publication, page number.

Example: Susan Hodges, *Cases and Materials on Marine Insurance Law*, Cavendish Publishing Limited, London, 2002, 74.

b) When citing a text from multiple pages that are specifically determined, separate the page numbers with a dash, followed by a period. If more than one page is cited from a text, but they are not specifically stated, after the number which notes the first page "etc." is added with a period at the end.

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.

h) If the same page of the same source was cited in the previous footnote, the abbreviation for *Ibidem* should be used, in italics, followed by a period (without quoting the name of the author). (without repeating the author's last name and first name).

Example: *Ibidem*.

If the same source (but not the same page) was cited in the previous footnote, the abbreviation for Ibidem should be used, in italics, followed by the page number and a period.

Example: *Ibid.*, 23.

2. ARTICLES

a) Articles should be cited as follows:

Author's name, author's last name, title of the article in roman with quotation marks, name of the journal in italics, volume and year of publication, page number

(same rule as in the book citation). If the name of a journal is longer than usual, an abbreviation should be offered in brackets when it is first mentioned and used later on.

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.

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Example: I. Jankovec (1995a), 16.

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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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TOKOVI osiguranja : časopis za teoriju i praksu osiguranja = Insurance trends : journal of Insurance theory and practice / glavni i odgovorni urednik Nataša Petrović Tomić. – God. 16, br. 1 (okt. 2002)– . – Beograd : Udruženje osiguravača Srbije : Institut za uporedno pravo, 2002– (Beograd : Službeni glasnik). – 24 cm

Tromesečno. – Tekst na srp. i engl. jeziku. – Je nastavak: Осигурање у теорији и пракси = ISSN 0353-7242
ISSN 1451-3757 = Tokovi osiguranja
COBISS.SR-ID 112095244