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RESTRICTIVE AGREEMENTS IN INSURANCE – IMPACT OF EUROPEAN UNION LAW AND CURRENT TRENDS

REVIEW SCIENTIFIC PAPER

Abstract

Insurance, by its very nature, is a specific and highly regulated activity and, as such, enjoys special treatment under competition rules. Thus, the exemption of restrictive agreements has traditionally been applied within the insurance sector under EU law. The paper examines the concept of restrictive agreements in order to highlight the need to consider both the arguments for and against their exclusion from the general regime of competition protection. It is concluded that the protection of competition in the field of insurance is a delicate societal task, for the execution of which precise and clear regulations are the most important.

Keywords: *insurance industry, coinsurance and reinsurance, restrictive agreements, competition law*

I Introduction

The subject of research is restrictive agreements in insurance as an issue that brings insurance law and competition law closer together, *demonstrates* their points of intersection, and provides an opportunity for more comprehensive statutory regulation. The lack of research on this issue represents an incentive to offer a theoretical-legal and comparative-legal analysis in the paper, which will also have practical applicability. Therefore, during the writing of the paper, both case law

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and the practice of the authority responsible for the protection of competition (the Commission for Protection of Competition) were analyzed.

Following the introductory remarks, the paper proceeds from the special character of the insurance industry, which is governed by special regulations that manifest state interventionism. This refers to the regulation of status, supervisory, and contractual issues, that is, a *lex specialis* approach. The focus of the research is on restrictive agreements, which represent a modality of violation of free competition characteristic of the insurance sector. Protection of competition as a necessary precondition for the market mechanism can be called into question in insurance most often through various forms of "collusion" among market participants. Therefore, all legislation explicitly mentions specific modalities of restrictive agreements that fall within the remit of the Commission for the Protection of Competition.

In fact, based on insight into the sequence of steps taken by European legislative bodies, a tendency toward gradual return to general rules in this area can be observed. After decades of special treatment of restrictive agreements in the field of insurance, under statutorily prescribed conditions and with the clear intention of the European Commission to grant special status to these agreements, a gradual shift back to the general regulatory framework can be observed, placing all restrictive agreements, including those in insurance, into the same legal regime. The extent to which this approach is justified from the standpoint of the interests of the insurance market is one of the questions to which this paper devotes particular attention.

After addressing all of the aforementioned issues, the conclusion presents the position that the regulatory framework in the field of competition should be improved, with recommendations for its enhancement. It is argued that Serbian competition protection regulations, although inspired by EU regulation, are quite unclear and imprecise. In practice, it has already been demonstrated that they can generate problematic situations, ultimately causing the greatest harm to the interests of insurance service consumers. Accordingly, it is emphasized that, when applying such regulations, the Commission for Protection of Competition must closely acquaint itself with the positions adopted by European counterparts regarding the implementation of competition protection in the field of insurance. Within the EU, there is awareness that the nature of the insurance industry requires insurers to conclude agreements that are not tolerated by other commercial companies. These agreements are justified and socially desirable precisely because, without them, it would be impossible to provide coverage for so-called large risks or emerging risks, and because they enable the establishment of an actuarial basis for more accurate premium assessment.

II Insurance as a Sui Generis Activity

If the insurance activity were to be described in a single sentence, it would read as follows: Insurance is a heavily regulated activity, subject to close regulatory oversight and dedicated to protecting of insurance service users. The specificity of insurance companies' operations arises from the fundamental nature of their business and the risks inherent therein.[2] The insurance industry and the activities of insurance companies play a significant role in the development of financial institutions operating in many countries.[3] Given that we have emphasized detailed regulation as the first characteristic, it should be emphasized that insurance differs from other commercial activities in many characteristics (from establishment, through the entire course of business, to the grounds and procedures for termination) that justify a distinct statutory framework governing this industry. The laws that recognize the specificity of insurance are numerous, and through them, even persons who are not experts in this field clearly understand that insurance is "special" and benefits from a legislative approach that distinguishes it from the rest of the economy.[4] The question arises whether this special character is also expressed when it comes to the principle of free competition in insurance.

Let us begin with the status regulation of insurance. Insurance status law relates to all issues of the existence of insurance companies and is governed by the Law on Insurance.[5] In Serbian law, as is the case in comparative legal systems, insurance business is conducted exclusively by insurance undertakings established in the form of joint-stock companies or mutual insurance companies.[6] An insurance undertaking is a legal entity with its registered office in the Republic, entered in the register of the competent authority based on a license issued by the National Bank of Serbia to carry out insurance activities. Thus, insurance undertakings are: 1) legal persons (natural persons cannot conduct insurance activities if they are not registered as an insurance company); 2) have their registered office within the territory of the Republic (namely, the place from which the company's activities are managed and which is designated as such by the founding act or by a resolution of the general

[2] Snežana Knežević, „Faktori kvaliteta finansijskog izveštavanja osiguravajućih društava", *Referat na XLII Simpozijumu Saveza računovođa i revizora Srbije,* Zlatibor, 2011, 411–427.

[3] Snežana Knežević, Aleksandra Mitrović, Dušan Sretić, „Specifics of reporting on cash flows in insurance companies", *Menadžment u hotelijerstvu i turizmu*, 2/2018, 21–33.

[4] In this regard, legal theory refers to the fragmentation of contract law in the context of the special legal regime governing insurance contracts. See Nataša Petrović Tomić, „Povodom 60 godina od odbrane doktorske disertacije profesora Šulejića: 'Osiguranje od građanske odgovornosti' – pogled u budućnost – šta bi bilo da osiguranje nije došlo da nas spasi od odgovornosti?", in Marija Karanikić Mirić and Miloš Živković (eds.), *Građansko pravo u pokretu – transformacija pre kodifikacije*, Faculty of Law, Belgrade, 2024, 219–251.

[5] Insurance Law, *Official Gazette of the Republic of Serbia*, Nos. 139/2014 and 44/2021 (hereinafter: IL).

[6] Given that there are currently no registered mutual insurance companies in Serbia, joint-stock insurance companies may be said to predominate.

meeting); and 3) are entered into the register on the basis of a license granted by the National Bank of Serbia authorizing them to conduct insurance activities.

Insurance undertakings share several common features.[7]

First, across legal systems, insurance undertakings are excluded from the status *lex generalis* law and regulated by a special law. The very exclusion of the mentioned commercial entities from the law governing the establishment, operation, and dissolution of commercial companies indicates the peculiarities of insurance companies.[8] The specificity of insurance undertakings, on the one hand, and the existence of public interest in regulating the manner in which the insurance industry will be conducted, as well as the use of the funds managed by these key participants in economic life, on the other hand, have prompted the legislature to grant insurance undertakings special treatment.

Second, insurance activities are primarily conducted by insurance undertakings organized as joint-stock companies. Although mutual insurance companies can also assume part of the risk portfolio threatening an economy, joint-stock insurance companies, due to their greater financial capacity, are more prevalent organizational form for covering large (commercial) risks.

Third, insurance activities may be conducted only by insurance undertakings that have obtained permission from the competent authority. The licensing system governing the establishment of insurance undertakings certainly represents one of the most significant differences between insurance companies and other commercial companies. The state's interest in ensuring oversight, and then continued growth of these significant economic branches has resulted in the competent public authority being entrusted not only with the power to grant and revoke operating licenses, but also with ongoing supervisory authority. In other words, the field of insurance status law is marked by state interventionism dictated by the peculiarities of the activity concerned.

Fourth, under EU law and, to a limited extent, domestic law, the rule has been adopted that a single insurance undertaking cannot simultaneously conduct both life and non-life insurance business.[9]

[7] Nataša Petrović Tomić, *Pravo osiguranja*, Sistem, Knjiga prva, *Official Gazette*, 2019, 188–192.

[8] Mirko Vasiljević, „Zakon o privrednim društvima i akcionarska društva za osiguranje/reosiguranje", T*okovi osiguranja*, No. 3/2024, 485-509.

[9] This rule reflects an effort to institutionalize the principle of specialization among insurance undertakings. Specialization in particular lines of business constitutes one of the means of enhancing insurers' competitiveness in the context of increasing competition in the insurance market. It is also in the interest of insurance service users. Thus, in Germany, for example, an insurer providing legal expenses insurance, in addition to other classes of insurance that overlap with it (such as liability insurance), must include in its general policy conditions provisions aimed at preventing conflicts between different lines of insurance. See: Slavko Đorđević and Darko Samardžić, *Nemačko ugovorno pravo osiguranja sa prevodom zakona* (VVG), IRZ, Belgrade, 2014, 42.

Fifth, the *lex specialis* regulation establishes the framework for corporate governance in insurance undertakings. When it comes to management bodies, they are determined in the IL in such a way that they constitute a two-tier management system.[10] The mandatory management bodies in an insurance undertaking are: the general meeting, the executive board, and the supervisory board. However, the IL is limited to listing the types and competencies of management bodies, while numerous issues related to management in these companies have remain beyond its scope.[11]

Sixth, the peculiarity of insurance undertakings compared to commercial companies operating under the general company-law regime is also reflected in bankruptcy regulation. Namely, the bankruptcy of insurance undertakings is not regulated by the general bankruptcy regime (in our case, the Bankruptcy Law),[12] but rather by a special sector-specific bankruptcy regime.

III Competition Law and the Insurance Industry

One of the principles that characterizes competition law is undoubtedly the principle of free competition. Does the principle of free competition also apply in a specific field, such as insurance? The principle of free competition in the market applies to insurance undertakings as well, but the peculiarity of this sector is also reflected in certain departures from the application of the competition protection principle in its original form. From a comparative law perspective, European Union law (hereinafter: EU) reflects a tradition of exempting restrictive agreements in insurance from the application of general competition rules.[13] This raises the question of why this is so. Generally speaking, although they disrupt competition, some of these agreements also have positive effects on economic efficiency, which is why they are assessed as socially desirable.[14]

[10] Tatjana Jevremović Petrović, „Korporativno upravljanje u društvima za osiguranje", *Tokovi osiguranja,* No. 2/2025, 273–303.

[11] These include numerous matters such as the procedures for appointment to management bodies, terms of office, conflicts of interest, non-compete clauses, and liability for damage arising from the performance of corporate functions, among others. Where such matters are not governed by the articles of association of the insurance undertaking, they are resolved through the application of the provisions of the Company Law. See also Predrag Šulejić, „Korporativno upravljanje u organizacijima za osiguranje", in Mirko Vasiljević and Vuk Radović (eds.), *Korporativno upravljanje*, Faculty of Law, University of Belgrade, Belgrade, 2008, 322.

[12] Bankruptcy Law, *Official Gazette of the Republic of Serbia*, Nos. 104/2009, 99/2011 – other law, 71/2012 – Constitutional Court decision, 83/2014, 113/2017, and 44/2018 (hereinafter: BL). Article 14(2) expressly provides that the provisions of this Law do not apply to bankruptcy proceedings involving banks and insurance undertakings, except for those provisions governing matters not regulated by a special statute.

[13] For a detailed discussion of competition issues in the insurance sector, see Z. Tomić and N. Petrović Tomić, „Narušavanja konkurencije u osiguranju restriktivnim sporazumima", *Pravo i privreda*, Nos. 7–9/2013, 13–51.

[14] Meinrad Dreher, „Das Versicherungskartellrecht nach der Sektoruntersuchung der EG-Kommission zu den Unternehmensversicherungen", *VersicherungsRecht*, No. 1/2008, 16.

The question that arises is what constitutes a reasonable measure of deviation from general competition rules in order to accommodate the specificity of the insurance sector, and is this in the interest of social welfare and progress? If we assume that market competition is necessary because it creates competitive pressure on market participants, forcing them to increase economic efficiency, we can ask what goals are achieved by deviating from it. Moreover, how significant are these goals if achieving them could upset the market balance? These questions can be answered by taking into account the characteristics of the insurance sector, which are demonstrably different from those of other sectors of the economy, on the one hand, and, on the other, the tradition of EU institutions in treating agreements among insurers differently.

In order to understand the need to protect the specificity of insurance within the framework of free competition, we must start with the key characteristic of the insurance contract, which is its aleatory nature. This contract differs from other contracts in that the performance of one party's obligation (the insurer) depends on the occurrence of an uncertain circumstance (the insured risk).[15] In other words, the insurer sells a promise that, at the time of the occurrence of an event, usually unpleasant, it will have sufficient funds to guarantee the fulfillment of contractual obligations. In addition, the insurance industry is one of the few that do not know how much a new insurance service will cost at the moment a new insurance service is offered. Uncertainty about the occurrence and consequences of insured risk, especially in the sphere of providing coverage for commercial risks, complicates the accurate assessment of premiums and reserves necessary for the insurer to meet its obligations. Therefore, in such types of insurance, from the standpoint of economic logic, cooperation among insurers is much more beneficial than free competition. The effects of insurer cooperation also benefit policyholders, given that the risk of insurer insolvency is lower when premiums are determined based on the exchange of information and experience across multiple insurers. Insurance activities could not be realized at all without the cooperation of insurers. Therefore, a higher level of tolerance regarding forms of cooperation among insurers is justified. The essence of competition law is to protect the market from those forms of violation of free competition that, in the long term, disrupt social progress. The goal of competition policy is to contribute to economic progress and the welfare of society, and particularly consumer welfare.[16] Accordingly, there are forms of violation of competition whose long-term effects are compatible with the objectives of competition protection and

[15] The policyholder allocates funds to purchase insurance coverage and, in return, receives the insurer's promise to pay compensation, i.e. the sum insured, should the event defined as the insured occurrence materialize in the future. The strict regulatory framework governing insurance activities seeks, to the greatest extent possible, to ensure that the insurer will indeed be capable of fulfilling that promise. For more details: John Birds, *Birds' Modern Insurance Law*, Seventh Edition, Sweet & Maxwell, London, 2007, 22.

[16] Hans-Wolfgang Micklitz, Jules Stuyck, Evelyne Terryn (eds), *Cases, Materials and Text on Consumer Law,* Hart Publishing, Portland 2010, 3–6.

are therefore subject to a special legal regime. When the interest of an extremely sensitive category of stakeholders, such as consumers, is added to this, it becomes clear why insurance justifiably enjoys special treatment. Finally, the special treatment of insurance is also supported by the fact that insurance is a highly regulated activity, in which all issues are governed by law or by-laws, and therefore it is logical that the issue of competition is also approached differently.

IV Restrictive Agreements under Positive Law

Serbian law, following the example of European Union law, prohibits violations of competition, more precisely, actions of market participants that have as their object or effect, or may have, a significant restriction, distortion, or prevention of competition.[17] Violations of competition law can take the form of restrictive agreements or the abuse of dominant market positions by market participants. In addition, the Law on Protection of Competition prescribes the obligation to control those concentrations of market participants that may significantly restrict, distort, or prevent competition in the market of the Republic of Serbia or its part, especially if that restriction, distortion, or prevention would be the result of the creation or strengthening of a dominant position.[18] In the field of insurance, restrictive agreements are most prevalent. These are agreements between market participants that, as their object or effect, impose a significant restriction, distortion, or prevention of competition within the territory of the Republic of Serbia.[19]

The legislator lists some forms of restrictive agreements: contracts, specific contractual provisions, explicit or tacit agreements, concerted practices, as well as decisions adopted by associations of market participants.[20] The listed forms of restrictive agreements are prohibited and null and void, particularly agreements that directly or indirectly fix purchase or selling prices or other trading conditions; restrict or control production, the market, technical development, or investments; divide markets or sources of supply, and the like. Agreements between competitors (association decisions) that fix purchase or selling prices or other trading conditions, limit or control production, the market, technical development, or investments, or divide markets or sources of supply are agreements that are particularly prohibited pursuant to Article 7 paragraphs 1 and 2 of the Law on Protection of Competition, as they always significantly restrict competition. The most problematic part of the regulation of restrictive agreements is precisely the provision that *concerted practices and decisions of associations*

[17] Law on the Protection of Competition, *Official Gazette of the Republic of Serbia*, Nos. 51/2009 and 95/2013 (hereinafter: LPC), Art. 9.
[18] LPC, Art. 19 and 61.
[19] LPC, Art. 10 para. 1.
[20] LPC, Art. 10 para. 2.

of market participants are also considered restrictive agreements. The existence of concerted practice is difficult to prove; market participants always have the option to justify their actions by market parameters. Another form of restrictive agreements is decisions adopted by associations of market participants. Decisions made within a professional associations can serve as a cover for achieving a restrictive agreement, which is therefore more difficult to prove and potentially more effective in practice.

How does the Commission for Protection of Competition (hereinafter: the Commission) manage in the application and interpretation of unclear legal standards and imprecise legal provisions? Norms such as the one cited create uncertainty regarding actions by public authorities.[21] If positive legislation promotes imprecise norms or unclear legal standards, regulatory risk arises for economic entities.[22] This is the risk of the uncertain application of the same legal provisions and legal standards from case to case. Through its regulatory framework, the state should protect economic entities from regulatory risk and create a business environment conducive to commercial activities.

From a legal aspect, when the term restrictive agreement is mentioned, *cartels* are usually thought of. Cartels are horizontal agreements between market participants that operate at the same level of the supply chain.[23] Through such agreements, competitors agree, explicitly or tacitly, that they will no longer compete with each other, that is, that they will eliminate free competition in the market.[24] Since such agreements eliminate competition, it is clear why the prohibition applies primarily to this category of restrictive agreements.[25] In addition to cartels, *cooperation agreements between competitors* are also significant. These agreements can have different treatment, depending on whether they have a negative effect on competition. Namely, it is possible for competitors to conclude a cooperation agreement that is not aimed at preventing mutual competition (e.g. agreements concerning the exchange of independent research and development results). Moreover, even if there is a distortion of competition, it is limited only to a certain segment of business (e.g. research and development), so it does not exclude competition in other segments of business and in relation to other market participants. In other words, non-cartel agreements may improve market competition, which is why only such agreements can be subject to the privilege of exemption.

[21] See also: Boris Begović, Vladimir Pavić, „Jasna i neposredna opasnost: prikaz novog Zakona o zaštiti konkurencije", *Anali*, No. 2/2009, 73.

[22] *Ibid*, 74.

[23] Boris Begović, Vladimir Pavić, Uvod, 44.

[24] These arrangements usually concern prices of goods or services, quantities to be offered on the market, or the geographic allocation of markets.

[25] In some jurisdictions, cartels are treated as *per se* prohibited. Therefore, every cartel agreement is void without the need to establish its effects.

Domestic legislator does differentiate cartels and other restrictive agreements. The same applies to their legal fate. As a rule, such agreements are null and void, unless they "contribute to the improvement of production and trade, or to the promotion of technical or economic progress, and provide consumers with a fair share of the benefits, provided that they do not impose restrictions on market participants that are not necessary for achieving the goal of the agreement, or that they do not exclude competition in the relevant market or a substantial part thereof".[26] In our country, therefore, restrictive agreements are not null and void *per se*. The so-called "effects test" is applied, allowing agreements, particularly those that do not constitute cartels, to avoid nullity where their potential positive effects on competition and economic progress are taken into account.

The Commission's task is to analyze the consequences that a horizontal agreement can cause and, based on its assessment, decide whether the agreement may remain in force. If it is assessed that the restrictive agreement is not contrary to the objectives of competition protection, it can be exempted from the prohibition of competition and the sanction of nullity. It is necessary to distinguish between block exemptions and individual exemptions. Under Serbian law, a block exemption can be obtained by applying the *Regulation on specialization agreements between market participants operating at the same level of production or distribution, which are exempted from the prohibition*.[27] Exemptions based on block exemption regulations are "automatic", i.e. it is not necessary to submit a request for exemption to the competent authority. Participants in a restrictive agreement should determine their market share and verify that it falls below the threshold prescribed by the corresponding regulation. For horizontal specialization agreements, the market share must not exceed 20%; for horizontal research and development agreements 25%; while for vertical agreements the market share must not exceed 25%. Even if the market share falls below the prescribed thresholds, the agreement will not be exempted if it contains any of the so-called hardcore restrictions, such as market-sharing clauses.

[26] LPC, Art. 11.

[27] Regulation on specialization agreements between market participants operating at the same Level of production or distribution is exempted from prohibition, *Official Gazette of the Republic of Serbia*, No. 11/2010 (hereinafter: the Regulation). These include: 1) unilateral specialization agreements, whereby one party undertakes to cease or refrain from producing the relevant products and to purchase them from another party to the agreement, while the other party undertakes to manufacture and sell those products; 2) reciprocal specialization agreements, whereby two or more parties undertake to cease or refrain from producing certain, but different, products and to purchase them from other parties to the agreement that undertake to sell them; 3) joint production agreements, whereby two or more parties undertake to produce certain products jointly. The exemption from the prohibition applicable to the agreements referred to in paragraph 1 of this Article also extends to specific provisions contained in such agreements that do not constitute the primary object of those agreements, but are directly related to and necessary for their implementation, such as provisions assigning or licensing intellectual property rights.

The fact that it is an agreement that is included in the list for block exemption does not guarantee that it will actually be exempt. It is possible that it is unlawful if an overall assessment demonstrates that its negative effects (distortion of competition) outweigh the positive effects (economic progress). It follows from the Regulation that even horizontal specialization agreements falling within the scope of the block exemption will not qualify for exemption where multiple specialization agreements exist in the relevant market and their cumulative effect prevents the agreement from satisfying the general conditions for exemption set out in Article 11.[28] When it comes to agreements that cannot be subsumed under the privilege of block exemption, our law gives market participants the option to approach the Commission for Protection of Competition (hereinafter: the Commission) with a request to exempt the restrictive agreement from the prohibition.

A request for individual exemption from the prohibition can be submitted to the Commission for Protection of Competition, where it must be proven that four legally prescribed conditions for exemption are met: (i) the agreement contributes to the improvement of production and trade, or to promoting technical or economic progress; (ii) the agreement provides consumers with a fair share of the benefits; (iii) the agreement does not impose restrictions, on market participants, that are not necessary for achieving the goal of the agreement; and (iv) the agreement does not exclude competition in the relevant market or a substantial part thereof.[29] The period to which the individual exemption applies cannot be longer than eight years.[30]

[28] Regulation, Art. 5, para. 3.

[29] LPC, Art. 11.

[30] "In the practice of the Commission for Protection of Competition (CPC), for example, the exemption of agreements concerning joint participation in public procurement procedures may also be found. As a rule, such agreements lead to the distortion of competition where competitors enter into arrangements for the submission of cover bids (a bid higher than that of a pre-selected bidder), bid suppression (one or more bidders agree to refrain from submitting a bid or to withdraw an already submitted bid), bid rotation (market participants continue to participate in calls for tenders but agree to alternate as winners, i.e. to submit the lowest bid), or market allocation (bidders divide the market by agreeing not to compete for certain contracting authorities or within specific geographic areas). However, cooperation between competitors may sometimes be necessary, as none of them would independently satisfy the conditions for participation in a tender. Thus, the insurers "Uniqa osiguranje" and "Wiener Städtische" applied for an individual exemption for an agreement between a group of bidders concerning joint participation in a public procurement procedure conducted by the General Hospital in Kikinda. The procurement concerned property and employee insurance services, and the exemption was sought for a period of one year. The relevant market was defined as the market for the provision of non-life insurance services within the territory of Serbia, in which fifteen competitors were active at the time. Additional eligibility requirements for participation in the procurement included: (i) minimum share capital exceeding one billion dinars; (ii) possession of ISO 9001:2008 certification; and (iii) the condition that the bidder had not operated at a loss during the preceding three years. Neither party to the agreement satisfied the first requirement; moreover, "Uniqa" lacked ISO certification and had operated at a loss. After reviewing the application, the CPC granted the exemption, noting that, in the absence of the agreement, each participant would

V Regulation of Restrictive Agreements in European Union Insurance Law

In principle, under European Union law, there are the same forms of violation of free competition by insurance undertakings as in our law.[31] For the insurance sector, agreements that distort free competition in the insurance market were most characteristic.[32] Unlike the law of the European Union, *in the Republic of Serbia, there has never been a special regime for exempting insurance agreements; rather, they have always been subject to the general exemption regime*.

1. Development of legal regulation of restrictive agreements in the insurance sector: from special treatment to general regime

Restrictive agreements in insurance are currently subject to the general legal regime of competition, that is, to the application of Article 101 of the Treaty on the Functioning of the European Union. This provision prohibits agreements, decisions of associations of undertakings, and concerted practices that can significantly restrict, distort, or prevent competition within the EU internal market. This includes: cartels (for example, agreements that fix premium levels or allocate the market or clients); agreements on insurance conditions (which can eliminate competition or innovation); exchange of sensitive information between insurers; and agreements

have been eliminated from the tender due to deficiencies in their bids. The CPC concluded that the agreement contained no restrictive clauses; on the contrary, it enabled competition, since without it the two undertakings would not have been able to compete in the tender at all." See: Dušan Popović, „Zaštita konkurencije u oblasti osiguranja", in Nataša Petrović Tomić (ed.), *Novi proizvodi osiguranja, tehnološke inovacije i zaštita korisnika u osiguranju, Faculty of Law*, University of Belgrade, Belgrade, 2025, 118–119.

[31] The issue of competition in the insurance sector has evolved in parallel with the evolving understanding of competition within the EU single market. The principle of optimal resource allocation, as a central value, has led to greater emphasis on economic rather than purely legal criteria when assessing agreements entered into by insurance undertakings. Accordingly, the European Commission has been empowered to exempt certain agreements from the general regime, taking into account the specific features of individual sectors.

[32] For a long time, they were the only known mechanism relied upon by insurance undertakings; later, concentrations also emerged in this specific sector. Concentrations in the insurance industry have not been a novelty in recent decades, rather, they are closely associated with the phenomenon of European group structures and bancassurance as a model for the provision of financial services. Within the EU, the question arose as to the criteria on the basis of which a concentration is classified as European or national. The assessment is based on the value of gross written premiums, encompassing both amounts already received and those to be received under insurance contracts concluded by insurance undertakings or on their behalf, including premiums relating to policies that have been reinsured. The inclusion of premiums corresponding to the reinsured portion of risk is logical, since only the aggregate volume of concluded insurance enables an accurate assessment of an insurer's market position. For more details, see: Jean-Luc Bellando *et al*., *Entreprises et Organismes d'Assurances*, L.G.D.J., 3e édition 2011, 607.

that restrict the entry of new competitors into the market. All such agreements are prohibited unless they meet the conditions of Article 101(3), which provides for exemption from the prohibition.

If the European Commission or national competition protection bodies establish the existence of a restrictive agreement, the following legal consequences occur. First, the agreement is considered null and void. Second, companies can be fined up to 10% of their total annual revenue. Third, national legislations also provide for actions for damages that may be brought by consumers or competitors.[33] From the practice of the Court of Justice of the EU, it follows that this court balances between preserving free competition and recognizing the specificity of the insurance sector in matters concerning restrictive agreements in insurance. The Court has shown awareness that measures and agreements aimed at improving market conditions should not become an excuse for distorting competition. This is a guideline that should also be followed by our Commission for the Protection of Competition, as well as by case law.

In order to understand how insurance competition protection policy has changed, it is necessary to briefly outline the sequence of regulations that list agreements between insurance undertakings that have the effect of a cartel law exemption.[34] The common denominator of the mentioned agreements and the reason for their exemption from the general regime is their pro-competitive character.[35] They are, namely, concluded in order to encourage demand for insurance services by strengthening the supply of insurance, thereby contributing to long term economic efficiency and rendering them acceptable from the perspective of achieving public order in the field of competition.

However, after a decade of competition protection policy in insurance based on fairly liberal criteria, practice has shown that even with regard to insurance undertakings, a more restrictive stance should be taken.[36] By Regulation 267/2010,

[33] In *Courage Ltd v. Crehan* (C-453/99), the Court of Justice of the European Union (CJEU) confirmed the right of individuals to claim damages for harm resulting from restrictive agreements, emphasizing the importance of sanctioning such conduct.

[34] The first regulation exempted the following agreements: the joint establishment of premium tariffs based on common statistics or the joint determination of the number of insured events; the adoption of standard policy conditions; the joint coverage of certain risks; claims settlement arrangements; the specification and acceptance of safety equipment; and registers relating to aggravated risks, together with the exchange of related information, provided that such registers and data remained confidential. See: *Règlement CEE n. 1534-91 du Conseil, du 31 mai 1991, concernant l'application du l'article 85 paragraphe 3 du traité à certaines catégories d'accords, de décisions et de pratiques concertées dans le domaine des assurances*, JO n. L. 143 du 07/06/1991.

[35] The adoption of such regulations eliminates the need to assess individual cases that would otherwise be impermissible from a cartel-law perspective. Block exemption regulations, moreover, apply only for a limited period, after which their compatibility with competition law is reassessed.

[36] Accordingly, in the subsequent (second) regulation, the Commission limited the scope of protected agreements to the following: agreements on the establishment and joint calculation of premiums, tables,

only two groups of agreements were exempted from the general competition protection regime: 1) agreements related to the collection and distribution of data, compilation of tables and studies, and 2) agreements on joint assumption of certain risks.[37] All other agreements remain outside the exemption and thus subject to the general rules of competition law. This is followed by the so-called Insurance Block Exemption Regulation (IBER), which was in force until March 31, 2022. According to IBER, certain types of agreements between insurers were permitted, provided they benefited consumers and the market. These are the following agreements: 1) exchange of statistical data for risk assessment; 2) joint development of models and mortality tables; and 3) joint coverage (reinsurance and coinsurance) of large risks. Since the European Commission did not extend IBER after 2022, such agreements are now subject to the general regime (Article 101 of the Treaty on the Establishment of the EU).

From this, it should not be concluded that all agreements between insurers are currently prohibited under EU law. Insurance undertakings can, in accordance with EU rules, exchange information related to the compilation of tables and studies, provided that exchange is transparent and non-distortive, aimed at strengthening the insurance market, and contributes to consumer welfare.

2. Agreements related to the collection and distribution of data, compilation of tables and studies

These are agreements that have the broadest application in the field of insurance law.[38] The idea that emerged early in the field of insurance is the need to distinguish lawful cooperation in compiling tables and calculating premiums from unlawful cooperation, i.e. fixing commercial premiums. This therefore, constitutes a form of cooperation among insurance undertakings in the shape of joint research and development agreements, manifested in a specific manner within the insurance industry. Cooperation between insurance undertakings or within associations of insurers regarding the compilation and exchange of information is intended to facilitate the calculation of the average premium for a risk coverage that occurred

and studies; the adoption of model and standard policy conditions; the joint coverage of certain risks; and the development of rules on safety equipment. See: *Règlement CE n. 358/2003 de la Commission du 27 février 2003, concernant l'application du l'article 85 paragraphe 3 du traité à certaine categorie d'accords, de decisions et de pratiques concertées dans le domaine des assurances, JO n. L. 53/8 du 28/02/2003*.

[37] *Règlement CE n. 267 de la Commission du 24 mars 2010, concernant l'application de l'article 85, paragraphe 3, du traité à certaines catégories d'accords, de décisions et de pratiques concertées dans le domaine des assurances*, JO n. L. 83/1 du 30/03/2010.

[38] Darko Samardžić, „Kartelno-pravni izuzeci u sektoru osiguranja po novoj uredbi o grupnim izuzećima Evropske unije od 2010. godine", *Promene u pravu osiguranja Srbije u okviru evropskog (EU) razvoja prava osiguranja* (zbornik radova), Palić 2011, 76.

in the past, or, when it comes to life insurance, determining mortality tables, the assessment of the probability of illness, disability, or accident.[39] As a result of such cooperation, the risk is better understood and its assessment by individual insurance undertakings is simplified.[40] The same applies to studies examining the likely impact of external factors on the occurrence or severity of the insured event, as well as on the profitability of particular investments. These forms of cooperation enjoy the privilege of exemption only to the extent that they do not achieve the fixing of commercial premiums.[41]

These agreements distinguish the insurance industry in relation to other branches of the economy. Joint data collection should expand the so-called *calculation base*. The larger it is, the more reliable the risk assessment and the costs necessary for its coverage will be. Unlike other commercial undertakings, insurance companies cannot determine the price of their services solely based on costs and margins. In fact, the price of insurance is not completely known at the time the contract is concluded. It depends on the probability of the occurrence of the insured event and the manner in which it materializes. The insurance industry differs from other sectors precisely because, at the time a new insurance product is launched, it cannot be determined with certainty what its actual cost will be. This is particularly unfavorable for insurers who are just entering the market without the backing of international groups. The risk is, therefore, assessed based on the analysis of previous insured risks, which makes access to statistical data on the occurrence of insured events especially valuable. Therefore, it is important to recognize the right of insurance undertakings to cooperate for the purpose of accurate risk assessment and the establishment of adequate premiums.[42]

[39] The privilege of exemption from competition rules encompasses compilations and exchanges of information that: a) are based on data covering multiple insurance years as the observation period; b) relate to identical or comparable risks; c) are derived from data sufficient for statistically reliable processing; and d) enable, in particular, the determination of: the number of insured events during the observation period, the number of individual risks insured in each insurance year within that period, the aggregate amount of claims paid or payable as a result of insured events, and the insured capital for each insurance year within the observation period. Compilations and tables benefit from the exemption provided that they: 1) contain anonymous data (identifying neither insurers nor policyholders); 2) clearly state that they are non-binding; 3) contain no indication of commercial premium levels; 4) are made available under reasonable and non-discriminatory conditions to any insurance undertaking requesting a copy, including those not operating in the relevant geographic or product market; and 5) subject to considerations of public security, are accessible under reasonable and non-discriminatory conditions to consumer organizations requesting access.

[40] Thomas. Oster, „Droit de la concurrence et assurance: cartographie des risques au lendemain de l'enquête sectorielle de la Commission européenne et de l'adoption du nouveau règlement d'exemption catégorielle", *Revue Générale du Droit des Assurances,* No. 4/2012, 966.

[41] Jean-Luc Bellando *et al*., 610.

[42] Torsten Körber, Jens Ole Rauh, „Kartellrechtlicher Zugang der Kunden- und Verbraucherverbände zu den gemeinsamen Statistiken der Versicherungswirtschaft", *VersicherungsRecht,* 16/2012, 670–678.

Thus, agreements on joint research and exchange of information, as well as joint implementation of studies, are not restrictive in the sense of free competition as long as they are based on anonymous data, are not binding on insurance undertakings, and contain data of a purely indicative nature.[43] In this sense, the Verband der Sachversicherer decision is indicative, concerning German fire risk insurance.[44] The subject of the dispute concerned the decision by the German association of insurers to increase the insurance premium for industrial fire-risk insurance, which was automatically accepted by all insurance undertakings. The European Court of Justice held that this is a form of distortion of free competition in the EU insurance market. However, the reasoning of the judgment reveals the Court's awareness that insurers' agreements must be assessed under the so-called effects test. Comparing the arguments that German insurers put forward in their defense, the Court tried to determine whether there is greater benefit or harm from concluding such agreements. Regarding the positive effects of insurer agreements in the field of insurance, the following were particularly emphasized: establishment of stable conditions in the insurance market; elimination of uncertainty; greater availability of reinsurance; the ability of insurance undertakings to apply tariffs aligned with the risks assumed, etc.[45]

"In such agreements, neither insurance companies or policyholders could be identified in the tables/studies. Once data were collected and distributed, a disclaimer had to state that they were non-binding. Agreements related to the collection and distribution of data, compilation of tables and studies could not contain information on gross premium volumes. Data, tables, or studies had to be made available, under reasonable, accessible, and non-discriminatory conditions to any insurance undertaking that requested it, even if it did not operate in the same geographic or product market. For an agreement to be exempted from the prohibition, consumer associations and user organizations had to be granted access to data/tables/studies under reasonable, accessible, and non-discriminatory conditions, if they precisely justified their request, except if refusal of access would be justified by reasons of public security protection. Such agreements must not contain so-called hardcore restrictions, for example, by obliging the parties or third parties not to use data/tables that are not covered by the scope of the agreement, or by preventing them from deviating from the results of the studies covered by the agreement."[46]

Joint compilations and exchanges of information can have a dual pro-competitive effect, and as such, can be acceptable. First, they enable even the smallest and least competitive insurance undertakings to become familiar with risks. Second,

[43] Information exchanges carried out for purposes other than those described do not qualify for the benefit of exemption.

[44] Judgment of the Court of 27 January 1987, Verband der Sachversicherer e.V. v, Case 45/85.

[45] Jean-Luc Bellando *et al*., 610.

[46] Commission Regulation (EU) on block exemptions in the insurance sector, Articles 2–4.

they favor the entry of new companies into the insurance market. Companies that are just to position themselves in the insurance market benefit significantly from the data of other companies operating in that market. They will be able to assess their chances in such an insurance market with a greater probability of accuracy. Likewise, study results and information exchanges can also be useful to consumer organizations. Based on insight into such data, consumers become familiar with the conditions under which insurance protection is available. In order to achieve these positive effects, it is necessary that all insurance companies have access to the agreement's results, even if they are not members of the association that concluded it.[47] In addition, it is necessary that the information be available under reasonable and non-discriminatory conditions to companies that do not operate in the same market as well. Refusal to disclose such data is, therefore, legitimate only if required by public-security considerations.

"That the treatment of restrictive agreements in the field of insurance has not drastically changed even after the abolition of the special exemption regime in the EU law is confirmed by the European Commission's recent decision in the proceedings against the association "Insurance Ireland".[48] Namely, the association "Insurance Ireland" offered its members access to the "Insurance Link Information Exchange System" database, which contained data facilitating the detection of fraud in the motor vehicle insurance market. The European Commission conducted an unannounced inspection in 2017 and initiated proceedings against the association in 2019, during which it published a Statement of Objections in 2021. Responding to the Statement, the Association offered a proposal of commitments that would be adhered to in order to eliminate the danger of distortion of competition. The European Commission accepted the proposal of commitments and terminated the proceedings. Some of the commitments meant that access to the database must not be conditioned on membership in the association, that the access price must be determined in a non-discriminatory manner and on a cost basis, that there must be a possibility of appeal to an independent body if access to the database is denied, and that the membership criteria in the association must be non-discriminatory and transparent. Commitments must be respected for 10 years, and the penalty for their non-compliance amounts to up to 10% of the association's world-wide turnover or up to 1% of the total annual turnover generated by its members in the relevant market."[49]

[47] *Ibid.*

[48] European Commission, Case No. AT.40511, 29 July 2022. Available at: *https://competition-cases.ec.europa.eu/cases/AT.40511,* accessed on 12 August 2024. For a more detailed analysis of horizontal cooperation agreements in European Union competition law, see Nicolas Petit, *Droit européen de la concurrence*, Paris, 2013, 537–548.

[49] Dušan Popović, 117.

VI Conclusion

The insurance industry is distinct from other economic activities and has enormous economic potential in the contemporary environment. However, this does not entail that competition protection rules do not apply to insurance undertakings. On the contrary, the insurance sector is particularly interesting from the perspective of competition law, given that numerous practices have developed (and are still developing) in this sector for which it is not always certain whether they lead to the distortion of free competition in the insurance market. These range from agreements on premiums, market allocation, boycotts, for which there is no dispute that they are contrary to free competition, to agreements on exchange of information on research and development, for which there is no dispute that they are pro-competitive. Between these two extremes are agreements and practices that are most problematic, such as the adoption of standard terms, data exchanges aimed at improving risk assessment, and joint coverage of so-called mature risks. These practices can distort competition in the insurance market and may be classified as restrictive. However, it is not excluded that these agreements contribute to strengthening competition, at least between undertakings covered by the agreement and other insurance undertakings, as well as to improving the supply of insurance and protecting users of insurance services. Thus, every contact between competitors does not have to constitute a restrictive agreement, rather its scope must be assessed based on the so-called effects test. If the positive effects of such an agreement (in terms of encouraging competition, creating benefits for insurance consumers, etc.) outweigh the negative effects (creating restrictions in the insurance market), then exempting such an agreement from the application of general competition rules is justified.

The paper argues that domestic competition protection regulations, although inspired by EU regulation, remain unclear and imprecise. In practice, it has already been shown that they can cause problematic situations that ultimately harm the interests of insurance consumers most. Therefore, we believe that when applying such regulations, the Commission must become well acquainted with the position of European models on the enforcement of competition law in the field of insurance. It is sufficient to take into account the fact that in the EU there is a tradition of different treatment of insurer agreements, whether based on specific regulations or based on the practice of the Court of Justice of the EU. In the EU, therefore, there is awareness that the nature of the insurance industry requires insurers to conclude agreements that are not tolerated by other commercial companies. These agreements are justified and socially desirable precisely because, without them, it would not be possible to provide coverage for so-called large or emerging risks, or because they establish the calculation basis necessary for a more adequate assessment of insurance premiums.

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