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OSVRT NA DVA PITANJA U VEZI SA INVESTICIONIM USLUGAMA OSIGURANJA

STRUČNI RAD

Apstrakt

Predmet ovog članka su investicione usluge osiguranja, tačnije dva ključna (pravna) pitanja koja se mogu postaviti u vezi s ovom vrstom osiguranja. Prvo pitanje je o pravnoj prirodi takvih osiguranja koja su rešena u praksi Evropskog suda pravde, dok je drugo pitanje o regulatornim zahtevima što se odnose na distribuciju ovakvih usluga u zavisnosti od njihove pravne forme i kvalifikacije. Drugo pitanje utoliko je važnije što je upravo razlika u regulatornim zahtevima bila jedan od glavnih podsticaja i razloga za sveobuhvatnu reformu pravila tržišnog ponašanja u oblasti osiguranja i usvajanje Direktive 2016/97(EU) o distribuciji osiguranja.

Ključne reči: *investicione usluge osiguranja, direktiva o distribuciji osiguranja, osiguranje života*

I. Uvod: pojam investicionih usluga osiguranja

Investicione usluge osiguranja (*Investment Based Insurance Products*) novi je naziv za stare usluge osiguranja. Posredi su osiguranja koja potpadaju pod klasu III životnih osiguranja još od 1979. godine i usvajanja Direktive 79/267/EEZ² (tzv. Prva direktiva o životnom osiguranju). Prema Zakonu o osiguranju (*Sl. glasnik RS* br. 139/2014), posredi su životna osiguranja iz člana 8, stav 5 (osiguranje života za slučaj doživljenja, osiguranje života za slučaj smrti, osiguranje života za slučaj smrti i doživljenja) kada su ova osiguranja *vezana* za jedinice investicionih fondova.³ U pitanju

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

³ S. Olević, *Perspektive razvoja životnog osiguranja u Srbiji, Tokovi osiguranja 4 / 2016*, str. 67–68.

su dakle hibridne finansijske usluge koje su po svojoj prirodi delom tradicionalno osiguranje a delom investiciona usluga. Međutim, ta veza između osiguranja i investicione usluge može biti različitog intenziteta.

Studija naručena za potrebe Generalnog direktorata Evropske komisije za unutrašnje tržište i usluge⁴ identifikovala je četiri vrste hibridnih usluga koje su delom osiguranja a delom investicione usluge:

- Osiguranje života preko kojeg ugovarač osiguranja „kupuje“⁵ jedinice investicionog fonda. Suma osiguranja koja će biti isplaćena zavisi od rasta i vrednosti fonda u trenutku dospeća obaveze, a načelno ne postoje garancije u pogledu visine sume osiguranja.⁶ Suštinski investicioni rizik u takvim uslugama snosi ugovarač osiguranja. Tržište kapitala direktno utiče na visinu sume osiguranja (*unit-linked life insurance*);
- Osiguranje života na osnovu kojeg suma osiguranja zavisi od kretanja određenog finansijskog indeksa (*index linked life insurance*);
- Usluge osiguranja u kojima je suma osiguranja delom garantovana a delom vezana za učinak imovine u koju je premija uložena (*assets*), a koje je izabrao ugovarač osiguranja. Osiguravajuće društvo u ovom slučaju jedan deo premije ulaže u imovinu koja garantuje povraćaj, a drugi deo investira u imovinu po izboru ugovarača osiguranja (na njegov rizik). Ovde su najčešće u pitanju subjekti za zajednička ulaganja u prenosive hartije od vrednosti;⁷
- Usluge osiguranja u kojima ugovarač osiguranja ostvaruje pravo učešća u dobiti osiguravajućeg društva kao dodatak određenom garantovanom povraćaju (*with profit life insurance*).

„Novi“ naziv uveden Uredbom EU br. 1286/2014,⁸ kao i Direktivom o distribuciji osiguranja,⁹ jeste „investicione usluge osiguranja“, te se stoga čini da je najpraktičnije

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

⁵ Vlasnik imovine odnosno jedinice investicionog fonda u koju je premija uložena nije ugovarač osiguranja već osiguravajuće društvo. Videti: Rokas, 'Distribution by Banks & Other Distributors of Investment Policies a Focus on the Distributed Product', *Evropska revija za pravo osiguranja* 1 / 2011, str. 30.

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

⁷ Definisani članom 1, stav 2 Direktive 2009/65/EZ kao subjekti čiji je jedini cilj zajedničko ulaganje sredstava prikupljenih od javnosti u prenosive hartije od vrednosti ili u drugu likvidnu finansijsku imovinu, navedenu u članu 50 iste Direktive, a koji posluju prema načelu deljenja rizika.

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

⁹ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26 (Direktiva o distribuciji osiguranja)

da se u budućnosti za sve četiri vrste usluga koristi ovaj termin. Investicione usluge osiguranja definisane su kao usluge kod kojih je vrednost ili otkupna vrednost „u potpunosti ili delimično, direktno ili indirektno izložena fluktuacijama na tržištu“.¹⁰

II. Razlike između klasičnog osiguranja i investicione usluge osiguranja

U čemu su ključne razlike između klasičnog životnog osiguranja i investicionih usluga osiguranja? U životnom osiguranju, obaveza osiguravača sastoji se od isplate ugovorene sume osiguranja u slučaju smrti, odnosno doživljenja. Ugovor o osiguranju stoga po svojoj ekonomskoj prirodi (čak i kada ne postoji veza s jedinicama investicionog fonda) kombinuje elemente štednje i elemente zaštite od rizika.¹¹

Kod klasičnog osiguranja života, premije isplaćene po osnovu zaključenog ugovora osiguravajuće društvo investira na sopstvenu odgovornost, to jest snosi investicioni rizik. Iz aspekta ugovarača osiguranja, povraćaj sredstava uložених u životno osiguranje relativno je mali. Investiciona strategija donosi se na nivou osiguravajućeg društva, predmet je stroge regulacije i nadzora uzimajući u obzir stroga pravila o izloženosti riziku i solventnosti. Većina tradicionalnih osiguranja ima zajamčenu sumu osiguranja, uz neke izuzetke koji ugovaraču osiguranja daju pravo na učešće u dobiti osiguravajućeg društva.

Životno osiguranje je na ovim principima funkcionisalo uspešno sve do osamdesetih godina prošlog veka, kada je kombinacija ekonomske situacije i promene pravnog okvira omogućila promenu u modelu poslovanja.¹² S ekonomske strane, osiguravajuća društva suočila su se s rastom i zamahom berzanskih tržišta, i s padom kamatnih stopa, što im je otežalo isplaćivanje obaveza po osnovu životnih osiguranja primenom opreznih strategija ulaganja. U takvim uslovima klijente su privukle druge finansijske usluge i investicije koje su im omogućavale povraćaj uložених sredstava u većem obimu.

Kao odgovor i prilagođavanje novonastaloj situaciji, osiguravajuća društva počela su masovno da nude hibridne usluge osiguranja, odnosno osiguranje koje stoji u vezi s određenim finansijskim instrumentima na tržištu kapitala. Takve usluge davale su mogućnost ugovaraču osiguranja da izabere kako će se njegove

¹⁰ Član 2, stav 17 Direktive o distribuciji osiguranja.

¹¹ Prema shvatanju nekih autora, naročito onih sa engleskog govornog područja, životno osiguranje ima više sličnosti sa investicionom uslugom nego sa osiguranjem imovine, pored ostalog i zato što se osnovni principi osiguranja imovine, poput principa obeštećenja u osiguranju života, ne primenjuju. Drugim rečima, prema tom shvatanju, skoro sva životna osiguranja suštinski imaju investicioni karakter, nezavisno od toga kako se utvrđuje visina osigurane sume. Vidi: R. Merkin, *Insurance Law – an Introduction*, Routledge, 2007, str. 5–6.

¹² Nesumnjivo, ovakva osiguranja postojala su i ranije, ali su tek s promenom pravnog okvira i ekonomske situacije osamdesetih i devedesetih godina doživela ekspanziju na tržištima zapadne Evrope.

premije investirati, ali s tim pravom došlo je i do prebacivanja investicionog rizika na samog ugovarača osiguranja. Za klijente, takve usluge bile su primamljive zato što su im omogućile da participiraju na tržištima kapitala u potrazi za većim povraćajem investicija nego što su mogli da postignu kupovinom tradicionalnog životnog osiguranja.¹³ Za osiguravajuća društva prednost prelaska na poslovne modele zasnovane na takvim vrstama osiguranja bila je, pored ostalog, u tome što su investicione usluge osiguranja bile manje opterećujuće za osiguravajuća društva iz aspekta (tadašnjih) zahteva solventnosti.¹⁴ Po svemu sudeći, strategija prelaska na investicione usluge osiguranja bila je uspešna. U periodu između 1995. i 2000. premije prikupljene prodajom investicionih polisa osiguranja porasle su za 24%, dok su u istom vremenskom rasponu tradicionalna životna osiguranja beležila rast od svega 5%.¹⁵

Masovna prodaja takvih usluga osiguranja označila je početak fundamentalne transformacije osiguravajuće oblasti. Neki autori smatraju da je to doprinelo revitalizaciji oblasti životnog osiguranja,¹⁶ dok su drugi skloni da u zanemarivanju osnovne zaštitne funkcije osiguranja vide prve uzroke krize i naznake kraha koji je došao 2008. godine.¹⁷ Kako god se posmatrala ta transformacija, Rubikon je pređen i to je bilo sasvim logično, ako ne i očekivano. Osiguravajuća društva su najveći institucionalni investitori, i nije imalo nikakvog smisla sprečavati najveće institucionalne investitore da posredno ili neposredno pružaju investicione usluge, tako što bi im bilo zabranjeno da prodaju osiguranje kombinovano s investicionim uslugama. Međutim, upravo hibridna priroda tih usluga činila ih je posebno problematičnim iz pravnog aspekta i naročito rizičnim za ugovarače osiguranja. Suma osiguranja stajala je u direktnoj vezi s vrednošću jedinice investicionog fonda koja s vremenom može da poraste, ali isto tako i da opadne usled promena na tržištu.

¹³ Ekonomska situacija i rast tržišta kapitala osnovni su preduslovi da bi ovakve usluge postale interesantne klijentima; Vidi: S. Olević, *Perspektive razvoja životnog osiguranja u Srbiji, Tokovi osiguranja 4 / 2016*, str. 79–80.

¹⁴ Neki autori smatraju da je prelazak na režim Solventnosti II znatnim delom uzrokovan i agresivnom prodajom unit-linked osiguranja na evropskim tržištima i pratećim rizicima u vezi sa unit-linked uslugama osiguranja. N. Moloney, *How to Protect Investors Lessons from the EC and the UK*, 2010, Cambridge University Press, str.195.; Unit-linked osiguranja bila su zahvalna za osiguravajuća društva iz aspekta zahteva kapitala. Zahtevi solventnosti za tradicionalna životna osiguranja propisivali su za osiguravajuća društva rezervisanje 4% matematičke rezerve plus 0,3% sume osiguranja izložene riziku, dok su za unit-linked osiguranja zahtevi bili 1% vrednosti fonda plus 0,3% sume izložene riziku; Swiss Re, *Unit-linked life insurance in western Europe: regaining momentum?*, Sigma Study No. 3/2003, str. 7. available at: <http://www.asefi.it/portale/approfondimenti/vita/1119.pdf>

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

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

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

Stoga, tri ključne razlike između klasičnog osiguranja života i investicionih usluga osiguranja možemo sumirati kao razlike u pogledu:

- ulaganja premije (investiciona strategija): kod tradicionalnog osiguranja investiciona strategija donosi se na nivou osiguravajućeg društva, dok kod investicionih usluga osiguranja sam ugovarač ima pravo izbora gde i kako će se njegova premija investirati;
- investicionog rizika: kod tradicionalnog životnog osiguranja, investicioni rizik snosi osiguravajuće društvo, dok kod investicionih usluga osiguranja ugovarač preuzima na sebe investicioni rizik;
- Vrednosti sume osiguranja: kod tradicionalnog životnog osiguranja suma osiguranja / otkupna vrednost unapred je određena ugovorom o osiguranju, dok kod investicionih usluga osiguranja vrednost sume osiguranja / otkupne vrednosti osiguranja zavisi od vrednosti jedinice investicionog fonda ili drugog finansijskog instrumenta u koji je ugovarač osiguranja odabrao da investira svoju premiju.

III. Da li su investicione usluge osiguranja uopšte osiguranje po pravnoj prirodi?

S porastom udela investicionih osiguranja na tržištu životnih osiguranja, bilo je samo pitanje trenutka kada će se pred nacionalnim i evropskim sudovima naći ovo pitanje. Upravo prethodno navedene odlike, dakle primarno pitanje preuzimanja investicionog rizika od strane ugovarača osiguranja biće kontroverzno pitanje prilikom pravne kvalifikacije ovih osiguranja. Transfer rizika je tradicionalno jedna od osnovnih odlika osiguranja.¹⁸ Osiguravajuće društvo preuzima na sebe određen rizik kojem je osiguranik izložen, dok osiguranik zauzvrat plaća premiju osiguranja. Kod klasičnog osiguranja osiguravajuće društvo snosi kako aktuarski tako i investicioni rizik. Kod investicionih polisa osiguranja, investicioni rizik snosi ugovarač osiguranja, dok osiguravajuće društvo snosi samo aktuarske rizike.¹⁹ Obaveza osiguravajućeg društva po osnovu takvih ugovora o osiguranju je „samo“ isplata vrednosti koja je sadržana u jedinici investicionog fonda za koji se ugovarač opredelio prilikom zaključenja ugovora, a u koji su premije po osnovu ugovora investirane.²⁰ Stoga se opravdano može postaviti pitanje da li se ugovor u kojem nema transfera finansijskog rizika i dalje može smatrati ugovorom o osiguranju.

Da bi se odgovorilo na ovo pitanje, neophodno je razmotriti međusobne obaveze ugovornih strana po osnovu ugovora o osiguranju. Ugovorom o osiguranju

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

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

²⁰ Koju osiguravajuće društvo mora postići uz primenu sopstvenih investicionih strategija.

ugovarač osiguranja se obavezuje da plati određen iznos osiguravaču, a osiguravač se obavezuje da, ako se desi događaj koji predstavlja osiguranu slučaj, osiguraniku ili nekom trećem licu isplati naknadu, to jest ugovorenu svotu novca, ili učini nešto drugo.²¹

Iz ovoga prozili da je osnovna obaveza iz ugovora o osiguranju za ugovarača osiguranja plaćanje premije, a za osiguravajuće društvo isplata naknade odnosno ugovorene sume u slučaju realizacije rizika.²² Ključna razlika između investicionih i standardnih životnih osiguranja nije *drugačija obaveza* osiguravajućeg društva (u pitanju je isplata određene sume), već način na koji se utvrđuje *visina obaveze (sume)* iz ugovora. Investiciona polisa osiguranja i dalje pokriva biometrijski rizik (smrt), pravo na isplatu osigurane sume i dalje postoji u slučaju realizacije rizika, odnosno doživljenja godina, a jedina razlika je u tome *kako* se obračunava suma osiguranja. Kod tradicionalnog osiguranja suma je predeterminisana i manje-više fiksirana momentom zaključenja ugovora. Kod investicionih usluga osiguranja suma je izložena fluktuacijama na tržištu, odnosno izražena je ne kroz apsolutni novčani iznos već kroz vrednost jedinice investicionog fonda.²³ Činjenica da investicioni rizik snosi ugovarač osiguranja ne menja prirodu pravnog posla između ugovarača osiguranja i osiguravajućeg društva, zato što (kako je to francuski kasacioni sud konstatovao) činjenica da osiguravajuće društvo i dalje snosi aktuarski rizik, to jest susreće se s neizvesnošću u pogledu trenutka dospelosti obaveze, ovaj ugovor i dalje čini po njegovoj pravnoj prirodi dovoljno aleatornim da se kvalifikuje kao ugovor o osiguranju.²⁴

Bilo kakve eventualne nedoumice (barem iz aspekta evropskog prava) rešio je Evropski sud pravde svojim stavom u predmetu C-166/11, Ángel Lorenzo González Alonso. Sud je zaključio da se ugovorima o osiguranju takođe smatraju i ugovori u kojima rizik investicije premija u potpunosti ili delimično snosi ugovarač osiguranja.

Taj slučaj bio je u vezi s pravom osiguranika na odustanak od ugovora na osnovu Direktive 85/577/EEZ o zaštiti potrošača prilikom zaključenja ugovora van

²¹ Član 897 ZOO. Dok je veoma teško definisati osiguranje kao ekonomske aktivnosti, većina evropskih zakona sadrži sličnu definiciju ugovora o osiguranju, npr. član 1288 Austrijskog građanskog zakonika, član 1 Nemačkog zakona o ugovoru o osiguranju, pa čak i u pravnim sistemima u kojima ne postoji zakonska (doktrinarna) definicija ugovora o osiguranju (poput npr. zemalja *common law* tradicije) sudska praksa je tokom vekova utvrdila osnovne elemente i principe osiguranja koji su po svojoj suštini veoma slični izloženim definicijama. Vidi: K. Noussia, *Definition: different common law and civil law approaches the definition of insurance*, Edward Elgar, 2011, str. 38.

²² Za detaljnije o obavezama po osnovu ugovora o osiguranju vidi: P. Šulejić, *Pravo osiguranja*, Beograd, 2006, str. 213–244.

²³ Ugovarač osiguranja nije vlasnik jedinice investicionog fonda u koju je investirao premiju, vlasnik jedinice investicionog fonda je osiguravajuće društvo. Funkcionalni pristup pitanju investicionih usluga osiguranja bio bi taj kad bismo smatrali da su ovakve usluge po svojoj prirodi osiguranja zato što ih nude osiguravajuća društva; Rokas, 'Distribution by Banks & Other Distributors of Investment Policies a Focus on the Distributed Product', *Evropska revija za pravo osiguranja* 1 / 2011, str. 29–30.

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

poslovnih prostorija,²⁵ odnosno domenom primene ovih pravila. Naime, član 3, stav 2 ove direktive izuzimao je iz domena primene ugovore o osiguranju. Gospodina Alonsa je na poslu posetio zaposleni osiguravajućeg društva „Nacional Nederlanden“, i ponudio mu vrstu ugovora o osiguranju života. Specifičnost tog osiguranja bila je u tome što su korisnici osiguranja po osnovu ugovora sticali pravo na naknadu koja po svojim osobenostima nije bila klasična suma osiguranja, već je imala karakteristike naknada koje se dobijaju iz investicione usluge, što je, po mišljenju španskog suda, ovaj ugovor činilo mešovitim ugovorom, a ne ugovorom o osiguranju.²⁶ Pitanje španskog suda upućeno Evropskom sudu stoga je bilo da li se izuzetak od primene pravila Direktive odnosi i na ovakve „mešovite“ ugovore, za koje je sud smatrao da su samo delom ugovori o osiguranju? Evropski sud pravde je pitanje kvalifikovao suštinski, kao pitanje toga da li se „mešoviti“ ugovori odnosno ugovori o osiguranju života u kojima suma osiguranja zavisi od vrednosti investicionog fonda smatraju ugovorom o osiguranju u smislu propisa EU, i na to pitanje nedvosmisleno odgovorio potvrdno, budući da su, prema stavu suda, takvi ugovori dozvoljeni tačkom III Aneksa I Treće direktive o životnom osiguranju.²⁷

IV. Razlike u prodajnom režimu investicionih usluga i investicionih polisa osiguranja

Stav Evropskog suda pravde stvorio je neobičnu situaciju. Ako su usluge klase III po svojoj pravnoj prirodi usluge osiguranja, a ne investicione usluge, onda se na njih sasvim logično odnosi pravni režim prodaje predviđen direktivama o osiguranju, a ne direktivama o investicionim uslugama.²⁸ Drugim rečima, ova mešovita usluga stvorila je situaciju u kojoj se suštinski iste usluge prodaju pod različitim uslovima zavisno od toga u kojoj pravnoj formi se nude i ko ih nudi na tržištu (osiguravajuće društvo ili investicione firme). Tri ključna elementa – pravila tržišnog ponašanja, informisanje, savetovanje i profesionalne kompetencije – *kvalitativno* su se razlikovala u ove dve oblasti, odnosno pravo EU je sa različitim intenzitetom regulisalo ove obaveze u različitim finansijskim oblastima.

1. Informisanje

Treća generacija direktiva životnog osiguranja²⁹ regulisala je obavezu informisanja osiguravajućih društava, pa je tako pomenuta direktiva propisala obavezu

²⁵ Ova prava danas se nalaze u Direktivi 2011/83/EU o pravima potrošača.

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

²⁷ Case C-166/11. Ángel Lorenzo González Alonso, Para 28-29.

²⁸ N. Filipović, Presuda evropskog suda pravde od 31. 5. 2018. U Predmetu C-542/16 länsförsäkringar Sak Försäkringsaktiebolag V Dödsboet Efter Ingvar Mattsson, *Tokovi osiguranja 3/2019*, str. 108–115.

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

osiguravača da informiše ugovarača osiguranja u pismenoj formi, na zvaničnom jeziku države članice, na jasan i tačan način.³⁰

Direktiva o posredovanju u osiguranju³¹ propisivala je obavezu informisanja na papiru ili drugom trajnom mediju, na jasan i tačan način *razumljiv potrošaču* (dodatak u odnosu na direktnu prodaju – prim. aut), na službenom jeziku države članice u kojoj je nastala obaveza ili na drugom jeziku ukoliko je tako ugovoreno između stranaka.³²

Nasuprot obavezama informisanja kada se investiciona usluga prodaje kao osiguranje, pogledajmo sada propisane obaveze informisanja koje bi se primenjivale kada bi se ista usluga prodavala kao investiciona usluga. U tom slučaju primenjivao bi se režim tržišnog ponašanja uspostavljen Direktivom o tržištima finansijskih instrumenata.³³

Zahtev postavljen pred investiciona društva i portfolio menadžere jeste da klijentima informacije moraju pružiti na razumljiv način, tako da se u razumnoj meri može očekivati da klijent shvati vrstu i rizike investicionih usluga i specifičnih vrsta finansijskih instrumenata koji im se nude. Informacije moraju biti tako saopštene da klijent bude u mogućnosti da donesu informisanu odluku o ulaganju.³⁴ Informacije koje im se dostavljaju moraju biti tačne, a naročito ne smeju naglašavati potencijalnu korist od finansijske usluge odnosno finansijskog instrumenta, a da istovremeno nepristrasno ističu i ukažu na sve relevantne rizike. Informacije moraju biti prikazane na takav način da će ih verovatno razumeti prosečan član grupe kojoj su upućene, kao i da će ih verovatno primiti.³⁵ I na kraju, informacije ne smeju skrivati, umanjivati niti prikrivati važne pojedinosti, izjave ili upozorenja. Bila kakvo upoređivanja (usluge) moraju biti smisljena i prikazana na jasan i razumljiv način, na trajnom mediju ili putem veb-sajta,³⁶ na jeziku kojim klijent komunicira s investicionom firmom.³⁷

2. Savetovanje

U pogledu savetovanja, pravila tržišnog ponašanja predviđena za osiguravajuća društva nisu zahtevala savet niti procenu potreba i želja osiguranika. Drugim rečima, kako osiguravajuća društva *nisu bila u obavezi* da testiraju potrebe i zahteve klijenata

³⁰ Član 36 i Aneks III Direktive 2002/83/EC.

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

³² Član 13, stav 1 Direktive 2002/92/EC.

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

³⁴ Član 19, stav 3 Direktive 2004/39/EC.

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

³⁶ Član 29, stav 4 Direktive 2006/73/EC.

³⁷ Član 30 Direktive 2006/73/EC.

niti da savetuju klijenta u vezi s bilo kojom uslugom osiguranja, samim tim nije postojala takva obaveza ni za investicione usluge osiguranja.³⁸

Direktiva o posredovanju u osiguranju imala je jednu opštu odredbu u vezi sa savetovanjem – da su posrednici dužni „da na osnovu informacija koje im je dao sam klijent utvrde barem zahteve i potrebe tog klijenta, a posebno razloge za svaki od saveta datih klijentu o određenoj usluzi osiguranja; pojedinosti ove obaveze menjaju se u skladu sa složenosti ugovora o osiguranju koji se nudi.“³⁹

Zahtev iz Direktive o tržištima finansijskih instrumenata bio je da se pružanja investicionog saveta i davanja preporuke o investicionim uslugama i finansijskim instrumentima prikladnim za klijenta zasnivaju na informacijama koje se prikupе od klijenta o njegovom znanju i iskustvu u oblasti investicija u pogledu određenih vrsta usluga, njegovoj finansijskoj situaciji i njegovim investicionim ciljevima,⁴⁰ odnosno da se od klijenta zatraže podaci o njegovom znanju i iskustvu na području investicija u pogledu određenih vrsta ponuđenih ili zatraženih usluga, kako bi investiciona firma mogla proceniti jesu li određene investicione usluge prikladne za klijenta,⁴¹ te da ako klijent ili potencijalni klijent ne želi dati ove podatke, ili ako nije dao dovoljno podataka o svom znanju i iskustvu, investiciona firma mora upozoriti klijenta da nije u mogućnosti da utvrdi jesu li određene usluge za njega prikladne.

3. Profesionalne kvalifikacije zaposlenih

Na kraju, važno je razmotriti i pitanje profesionalnih kvalifikacija osoba koje suštinski ispunjavaju obaveze informisanja i savetovanja – zaposlenih u osiguravajućim društvima i društvima za posredovanje. Profesionalne kvalifikacije i kompetencije važan su preduslov za efikasnu zaštitu korisnika svih finansijskih usluga. U pogledu profesionalnih zahteva, pravo osiguranja EU nije nametalo stroge zahteve obuke, a naročito je bilo upadljivo odsustvo na nivou EU bilo kakvih *dodatnih* zahteva u pogledu obuka i kompetencija za one osobe što se bave distribucijom i prodajom investicionih usluga osiguranja.⁴² To znači da je čak i kada su posebne obaveze informisanja i savetovanja nametnute na nacionalnom nivou, kvalitet informacija (neophodnih za informisanu odluku) i saveta (odnosno preporuke u pogledu adekvatnosti) zavisio u velikoj meri od nivoa znanja koje je individualni prodavac imao o finansijskim instrumentima što stoje u vezi sa uslugom osiguranja koju nudi.

³⁸ Case E-11/12, Koch, Hummel and Müller para 69.

³⁹ Član 12, stav 3 Direktive 2002/92/EC.

⁴⁰ Član 19, stav 4 Direktive 2004/39/EC.

⁴¹ Član 19, stav 5 Direktive 2004/39/EC.

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

Prema režimu predviđenom direktivama o osiguranju života, zaposleni u osiguravajućim društvima nisu imali obavezu kontinuiranog usavršavanja niti obuke u pogledu investicionih usluga i finansijskih instrumenata za koje su osiguranja bila vezana. Postojala je opšta zakonska obaveza za članove uprave osiguravajućeg društva, ali je načelno obuka zaposlenih u neposrednom kontaktu s klijentima bila delegirana samim osiguravajućim društvima. Istraživanja CEIOPS-a⁴³ iz 2009. ukazuje na to da su samo tri države članice imale posebne zahteve usmerene na zaposlene u osiguravajućim društvima koji su nudili investicione usluge osiguranja.⁴⁴

Posrednici u osiguranju, prema Direktivi o posredovanju u osiguranju, imali su određene obaveze kontinuiranog usavršavanja, ali one su retko kada bile fokusirane na pitanja usluge za koju su osiguranja bila vezana. Obuka posrednika u osiguranju prvenstveno je bila usmerena na teme iz oblasti osiguranja, a ne na teme u vezi s tržišnim rizicima, fluktuacijama na tržištu i mogućim uticajima na osiguranika. Iz pomenutog istraživanja proizlazi da su u pogledu posrednika osiguranja samo tri države članice imale posebne zahteve što se tiče znanja i sposobnosti, a samo četiri države članice imale su posebne zahteve u pogledu obrazovanja i profesionalnog iskustva posrednika pre nego što počnu da se bave posredovanjem investicionih usluga osiguranja.⁴⁵

Kao posledica toga, investicione usluge osiguranja nuđene su od strane zaposlenih u osiguravajućim društvima, zastupnika i posrednika koji nisu bili pod bilo kakvim eksplicitnim zakonskim obavezama da stiču znanja u oblasti finansijskih instrumenata koja su u vezi s uslugom osiguranja koju su nudili.

V. Završna razmatranja

U pogledu prvog pitanja, da li investicione usluge osiguranja po svojoj pravnoj prirodi predstavljaju osiguranja, Evropski sud pravde je dao potvrđan odgovor. Kao posledica stava suda u predmetima C-166/11 – *González Alonso*, i C-542/16 – *Länsförsäkringar Sak Försäkringsaktiebolag and Others* jasno je da se na ovakve usluge primenjuje pravni režim distribucije predviđen direktivama iz oblasti osiguranja. To je otvorilo dva nova problema:

1. Iz aspekta pravila tržišnog ponašanja i zaštite korisnika osiguranika, regulatorni režim predviđen direktivama iz oblasti osiguranja nije bio podešen niti

⁴³ CEIOPS, Committee of Insurance and Occupational Pensions Regulators tj. Komitet regulatora za osiguranja i penzione fondove, pravni prethodnika EIOPA – European Insurance and Occupational Pension Supervisory Authority, tj. Evropske agencije za nadzor osiguranja i penzionih fondova.

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

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

dizajniran da zaštiti ugovarače osiguranja i osiguranika od finansijskih rizika i tržišnih promena kojima su osiguranici kupovinom ovakvih usluga bili izloženi. Obaveze informisanja (i savetovanja) u oblasti osiguranja bile su usmerene na prirodu *ugovora o osiguranju* i *status pružaoca usluge osiguranja odnosno posredovanja u osiguranju*, a ne na rizike skopčane s prirodom finansijskog instrumenta za koji je osiguranje vezano. Prvo i pre svega, propisi iz oblasti osiguranja nisu zahtevali da se ugovarač obavesti o hibridnom karakteru usluga i rizicima koje ugovarač preuzima na sebe. Jedina obaveza osiguravajućeg društva bila je da informiše osiguranika o *prirodi* imovine u koju je premija investirana.⁴⁶ „Investicione usluge osiguranja nisu uopšte bile *sigurne*“⁴⁷ kako su to ugovarači intuitivno pretpostavljali imajući u vidu funkciju tradicionalnog osiguranja.

2. Iz aspekta vertikalne harmonizacije propisa, investicione usluge osiguranja prodavane su pod drugačijim regulatornim zahtevima od onih što su bili predviđeni za investicione usluge, bez obzira na to što su suštinski predstavljale istu uslugu u različitom pakovanju, odnosno pravnoj formi. Dok je zaštita malih investitora bila detaljno razrađena na nivou EU, slična (detaljna) pravila nisu postojala u oblasti zaštite osiguranika.⁴⁸ To je stvorilo priliku za izbegavanje propisa iz oblasti zaštite malih investitora tako što su se investicione usluge nudile u pravnoj formi osiguranja. To je podstaklo EU da referentna tačka za nova pravila bude pravni režim zaštite malih investitora.

Stoga jedan od osnovnih ciljeva novog regulatornog okvira EU, prvenstveno usvajanje Direktive o distribuciji osiguranja jeste da se nivo zaštite korisnika usluga podigne na sličan nivo zaštite koji uživaju mali investitori.⁴⁹ Kao posledicu toga, novi režim pravila tržišnog ponašanja postavlja pred osiguravajuća društva potpuno nove i kompleksne pravne izazove koji iz aspekta prava osiguranja mogu delovati neobično, delom i zato što nova pravila ne potiču iz prava osiguranja već sa tržišta kapitala. Zbog svega navedenog, čini se da se sasvim opravdano može postaviti i pitanja da li je svim osiguranicima neophodan isti nivo zaštite kao i malim investitorima, odnosno da li je izmena kompletnog regulatornog okvira prikladan odgovor na rizike uočene u jednom segmentu tržišta.

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⁴⁶ Aneks III 12a, Direktive 2002/83/EC

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

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

⁴⁹ Preambula broj 10 Direktive o distribuciji osiguranja.

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TWO ISSUES CONCERNING INSURANCE-BASED INVESTMENT PRODUCTS, IN RETROSPECT

PROFESSIONAL PAPER

Abstract

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

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

I. Introduction: Definition of Insurance-Based Investment Products

Insurance-based investment product is a new name for old insurance services. These include life assurance lines classified as class III since 1979 and the adoption of Directive 79/267 / EEC² (so-called First Life Insurance Directive). According to the Insurance Law (*Official Gazette of RS* no. 139/2014), it is about life assurance policies

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

stipulated in Article 8 paragraph 5 (life insurance on survival to a stipulated age, life insurance on death, life insurance on survival to a stipulated age or on death) when these policies are linked to the investment fund units.³ These are, therefore, hybrid financial services, which, by their nature partly include traditional insurance and partly involve investment products. However, this link between insurance and investment products can vary in its intensity. A Study commissioned by DG Internal Market and Services of the European Union⁴ has identified four types of hybrid services that partly stem from insurance and partly from investment products:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ Article 2 paragraph 17 of Insurance Distribution Directive.

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

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

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

Hard sale of such insurance services marked the beginning of a fundamental transformation in the insurance industry. Some authors consider that this helped the revival of life assurance,¹⁶ while the others tend to see the neglect of the main protective function of insurance as one of the first causes of the crisis and indications of the collapse that occurred in 2008.¹⁷ Whichever way that transformation was perceived, the Rubicon was crossed and that was quite logical, if not expected. Insurance companies are the largest institutional investors, and there was no point to prevent the largest institutional investors from providing investment products directly or indirectly by prohibiting them to sell insurance combined with investment products. However, it was the hybrid nature of these services that made them particularly problematic from a legal point of view and particularly risky for policyholders. The policy value was directly linked to the value of the investment fund unit, with the possibility to increase over time, but also decrease due to changes in the market.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Information

The third generation life assurance Directive²⁹ regulated the obligation of insurance companies to inform and thus, the said directive stipulated the obligation of the insurer to communicate the information to the policyholder in writing, in a clear and accurate manner, and in an official language of the Member State.³⁰

Directive on insurance mediation³¹ stipulated the obligation to communicate information on paper or on any other durable medium, in a clear and accurate manner, *comprehensible to the customer* (supplement to direct selling – author's comment), in an official language of the Member State of the commitment or in any other language agreed by the parties.³²

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

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

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

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

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

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

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

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

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

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

2. Advice

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

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

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

3. Professional Qualifications of Employees

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

³⁶ Article 29 paragraph 4 Directive 2006/73/EC.

³⁷ Article 30 Directive 2006/73/EC.

³⁸ Case E-11/12, Koch, Hummel and Müller para 69.

³⁹ Article 12 paragraph 3 of Directive 2002/92/EC.

⁴⁰ Article 19 paragraph 4 of Directive 2004/39/EC.

⁴¹ Article 19 paragraph 5 of Directive 2004/39/EC.

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

Under the regime provided for in the life insurance directives, employees in insurance companies were not obliged to undergo continuous professional development or training in terms of insurance-based investment products and financial instruments to which the policies were linked. There was a general legal obligation for *members of the management* of an insurance company, but in general, the training of employees in direct contact with clients was delegated to the insurance companies themselves. A 2009 CEIOPS survey⁴³ indicates that only three Member States had specific requirements directed to employees of insurance companies that offered insurance-based investment products.⁴⁴

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

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

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

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

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

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

V. Final Considerations

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

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

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

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

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

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

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

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

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

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