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NEKA PITANJA POVERAVANJA POSLOVA TREĆIM LICIMA U DRUŠTVIMA ZA OSIGURANJE

PREGLEDNI NAUČNI RAD

Apstrakt

Ovaj rad se bavi pitanjem poveravanja poslova trećim licima u društvima za osiguranje, s posebnim osvrtom na regulatorni okvir Evropske unije i Republike Srbije. Polazeći od rastuće potrebe osiguravajućih društava da deo svojih aktivnosti poveravaju trećim licima, naročito usled tehnoloških inovacija i digitalizacije, rad analizira načine na koje je ovaj proces pravno uređen i ograničen. Posebna pažnja posvećena je primeni načela proporcionalnosti, kao i uticaju kogentnih normi na ugovorne odnose između društava za osiguranje i pružalaca usluga. Analizira se u kojoj meri su ograničenja autonomije volje opravdana, imajući u vidu osnovni cilj regulative – zaštitu korisnika usluge osiguranja. Rad ukazuje na napetost između potrebe za efikasnim poslovanjem i zahteva regulatorne sigurnosti, te razmatra da li je postojeći nivo imperativnih pravila u oblasti poveravanja poslova u potpunosti u funkciji tog cilja.

Ključne reči: poveravanje poslova, načelo proporcionalnosti, autonomija volje, zaštita korisnika usluge osiguranja.

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I Uopšte o poveravanju poslova trećim licima u društvima za osiguranje

Generalno govoreći o poveravanju poslova trećim licima (engl. *outsourcing*), poveravanje poslova postalo je uobičajen model poslovanja privrednih društava u toj meri da se nailazi na mišljenja da živimo u vreme poveravanja poslova trećim licima.² O značaju poveravanja poslova govori i činjenica da neki autori smatraju da je upravljanje poverenim poslovima postalo osnovna delatnost za sebe (engl. *core business*).³ Iako su se razlozi za poveravanje poslova trećim licima u prošlosti obično vezivali za smanjenje troškova poslovanja ili za pružanje valjane usluge,⁴ poveravanje poslova danas se smatra osnovom za razlikovanje poslovnih modela⁵ među učesnicima na relevantnim tržištima.

Jasno je da privredna društva imaju jak poslovni interes da poveravaju poslove trećim licima, što nije zaobišlo ni delatnost osiguranja. Potreba društava za osiguranje da se oslanjaju na pružaoce usluga u mnogim slučajevima predstavlja ključ za uspešno ostvarivanje njihovih strateških ciljeva.⁶ Međutim, ono što razlikuje delatnost osiguranja od ostalih delatnosti jeste zakonska obaveza društava za osiguranje da postupaju u najboljem interesu korisnika usluge osiguranja odnosno u skladu s načelom zaštite korisnika usluge osiguranja. Stoga, jasno je da poveravanje poslova u društvima za osiguranje ne sme preći granicu te zaštite, to jest da poveravanje poslova u društvima za osiguranje mora biti uvek usmereno zaštitom korisnika usluge osiguranja i da je crvena linija poveravanja poslova kompromitovanje zaštite korisnika usluge osiguranja.⁷

U savremeno doba, tehnološke inovacije odnosno digitalizacija u dobroj meri podstiču društva za osiguranje da češće posežu za poveravanjem poslova trećim licima.⁸ Kada uzmemo u obzir da i digitalna transformacija društava za osiguranje mora

² Gene M. Grossman, Elhanan Helpman, „Outsourcing in a Global economy”, *NBER Working Paper*, No. 8728, 2002, 1.

³ Andrew Kakabadse, Nada Kakabadse, „Outsourcing: Current and Future Trends”, *Thunderbird International Business Review*, No. 2/2005, 187.

⁴ *Ibid.*, 193.

⁵ Financial Conduct Authority, Delegated authority: Outsourcing in the general insurance market, 2015, dostupno na adresi: <https://www.fca.org.uk/publication/thematic-reviews/tr15-07.pdf>, 17. 4. 2026, 2.

⁶ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 2018, dostupno na adresi: <https://www.centralbank.ie/docs/default-source/publications/discussion-papers/discussion-paper-8/discussion-paper-8---outsourcing-findings-and-issues-for-discussion.pdf>, 17. 4. 2026, 14.

⁷ Organ za nadzor ponašanja na finansijskom tržištu Ujedinjenog Kraljevstva (engl. *Financial Conduct Authority*) u svojoj analizi poveravanja poslova na tržištu osiguranja kao ključan problem istakao je propust društava za osiguranje da posvete dovoljnu pažnju interesima i pravičnom tretmanu korisnika usluga osiguranja, kao i tome kako poveravanje poslova može na njih uticati. Videti: Financial Conduct Authority, Delegated authority: Outsourcing in the general insurance market, 3-4.

⁸ Tako i: EIOPA, Peer review on outsourcing, 2022, dostupno na adresi: https://www.eiopa.europa.eu/system/files/2022-07/final_report_on_peer_review_on_outsourcing.pdf, 17. 4. 2026, 7.

biti vođena najboljim interesom korisnika usluge osiguranja,⁹ postavlja se pitanje kako regulatori tržišta osiguranja, pa i sami zakonodavci, obezbeđuju da društva za osiguranje pomire svoja dva interesa – da određene poslove povere trećim licima a da istovremeno očuvaju zadovoljavajući nivo zaštite korisnika usluge osiguranja. U ovom radu analiziraćemo dva instrumenta kojim se društva za osiguranje usmeravaju ka adekvatnom poveravanju poslova trećim licima – primena načela proporcionalnosti i ograničavanje autonomije volje prilikom poveravanja poslova trećim licima.

II Poveravanje poslova iz ugla načela proporcionalnosti

Načelo proporcionalnosti je osnovno načelo kojim se usmeravaju obaveze društava za osiguranje u vezi s poveravanjem poslova trećim licima.¹⁰ Posmatrajući izvor primene tog načela, načelo proporcionalnosti je osnovno načelo koje se primenjuje na celokupan sistem upravljanja u društvu za osiguranje,¹¹ te posledično i na poveravanje poslova trećim licima koje je deo sistema upravljanja društva za osiguranje. Šta podrazumeva načelo proporcionalnosti u domenu poveravanja poslova trećim licima?

Načelo proporcionalnosti koje se primenjuje prilikom postupka poveravanja poslova trećim licima podrazumeva primenu propisanih radnji i mera proporcionalno prirodi, obimu i složenosti poslova koji su predmet poveravanja trećem licu. Konkretno, načelo proporcionalnosti omogućava (pa i obavezuje) subjekte na koje se primenjuje da svoje obaveze u toku celog životnog veka poveravanja posla trećem licu preduzimaju srazmerno inherentnom riziku poveravanja određenog posla konkretnom pružaocu usluga. S obzirom na složenost regulative koja se odnosi na

⁹ *Ibid.*, 8.

¹⁰ U Direktivi 2009/138/EZ Evropskog parlamenta i Saveta o početku i obavljanju delatnosti osiguranja i reosiguranja (Solventnost II) iz 2009. godine (*The Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)*), (Direktiva Solventnost II) načelo proporcionalnosti se uopšteno posmatra iz perspektive nadzornih organa, te se jednim od opštih načela vršenja nadzorne funkcije smatra načelo proporcionalnosti (kako se u direktivi navodi, „načelom proporcionalnosti obezbeđuje se proporcionalna primena ove direktive“). Videti: Direktiva Solventnost II, čl. 29 st. 4. Načelo proporcionalnosti sadržano je i u Uredbi (EU) 2022/2554 Evropskog parlamenta i Saveta o digitalnoj operativnoj efikasnosti za finansijski sektor iz 2022. godine (*Regulation (EU) 2022/2554 of the European parliament and of the Council on digital operational resilience for the financial sector*, DORA Regulativa). Videti: DORA Regulativu, čl. 28. st. 1. tač. a). Načelo proporcionalnosti sadržano je i u Odluci o sistemu upravljanja u društvu za osiguranje/reosiguranje – Odluka o sistemu upravljanja, *Službeni glasnik RS*, br. 51/2015, 29/2018, 84/2020, 94/2022 i 82/2024. Videti: Odluka o sistemu upravljanja, tač. 4.

¹¹ Načelo proporcionalnosti ustanovljeno Direktivom Solventnost II primenjuje se na celokupan sistem upravljanja u društvu za osiguranje. Takođe, smatra se jednim od opštih načela vršenja nadzorne funkcije od strane nadzornih organa (kako se u direktivi navodi, „načelom proporcionalnosti obezbeđuje se proporcionalna primena ove direktive“). Direktiva Solventnost II, čl. 29. st. 4.

poveravanje poslova trećim licima, primena načela proporcionalnosti može i treba da se smatra uzornim i promišljenim rešenjem zakonopisca u ovoj materiji. Naime, jasno je da ne bi bilo svrsishodno očekivati od društava za osiguranje da bez obzira na kritičnost, obim, vrstu, prirodu i druge okolnosti poveravanja poslova uvek primenjuju isti nivo odnosno broj mera i radnji kojima se upravlja poveravanjem poslova. Primera radi, poveravanje poslova procene i likvidacije odštetnih zahteva daleko je složenije i rizičnije od poveravanje poslova naplate potraživanja društva. Stoga, procena rizika treba da bude daleko analitičnija i opsežnija u prvom nego drugom primeru. Konačno, važno je naglasiti da regulativa Evropske unije ne obavezuje samo društva za osiguranje da postupaju u skladu s načelom proporcionalnosti u oblasti poveravanje poslova trećim licima, već se ovo načelo primenjuje i na nadzorne organe prilikom vršenja nadzora.¹²

Kao što smo prethodno naglasili, poveravanje poslova trećim licima generalno, pa tako i poveravanje poslova trećim licima u društvima za osiguranje pojava je čiji je značaj u praksi sve veći. Stoga se načelo proporcionalnosti u domenu poveravanja poslova može posmatrati i kao regulatorno prepoznavanje potrebe prakse da društva za osiguranje posluju efikasnije. Podsetimo, delatnost osiguranja je visoko regulisana delatnost¹³ (čemu u prilog govori i regulativa koja uređuje poveravanje poslova trećim licima), što znači da ona moraju postupati u skladu s nizom zakonskih odnosno regulatornih zahteva u svom poslovanju, daleko više u odnosu na prosečne tržišne učesnike. Načelo proporcionalnosti upravo uvažavajući potrebu konkurentnosti usluga osiguranja sa uporedivim uslugama, omogućava društvima za osiguranje da održavaju potreban nivo zakonske regulisanosti, što ih oslobađa obaveza koje nisu srazmerne njihovom opštem poslovanju ili konkretnom poslu.

Na ovom mestu istaći ćemo dva interesantna praktična primera primene načela proporcionalnosti, te ćemo analizu ovog načela zaključiti isticanjem jednog važnog aspekta poveravanja poslova trećim licima na koje se načelo proporcionalnosti ne primenjuje.

Prva interesantna praktična primena načela proporcionalnosti odnosi se na vrstu poslova o čijem poveravanju trećim licima su društva za osiguranje dužna da obaveste regulatora tržišta osiguranja. Naime, društva za osiguranje obavezna su da prethodno, u određenom roku pre formalnog početka poveravanja posla,¹⁴ obaveste

¹² Videti fusnotu broj 10.

¹³ O izvorima prava koji se primenjuju u delatnosti osiguranja videti: Nataša Petrović Tomić, *Pravo osiguranja: sistem. Knjiga 1*, Beograd, 2019, 78 i dalje.

¹⁴ U pravu Evropske unije, društva za osiguranje su dužna da prethodno, blagovremeno (engl. *in timely manner*) obaveste nadzorni organ o poveravanju poslova odnosno o bitnoj promeni u pružanju poverenog posla. Videti: Direktiva Solventnost II, čl. 49. st. 3. DORA regulativa, čl. 28 st. 3, tač. 5. Države članice Evropske unije na različite načine su protumačile pravni standard blagovremenog obaveštavanja, te se vremenski okvir blagovremenog obaveštavanja u njima kreće u rasponu od 5 do 60 dana. Videti: EIOPA, *Peer review on outsourcing*, 57. Iako su, čini se, upravo u duhu primene načela proporcionalnosti, Direktiva Solventnost II

nadzorni organ o nameri da povere poslove trećem licu. Međutim, u zavisnosti od regulatornih rešenja u određenom pravu, društva za osiguranje obaveštavaju nadzorni organ o nameri poveravanja samo određene vrste poslova. Tako su pravo Evropske unije i srpsko pravo zauzeli različite pristupe prilikom određivanja vrste poslova o kojima je društvo za osiguranje dužno da prethodno obavesti nadzorni organ tržišta osiguranja. U pravu Evropske unije, društva za osiguranje obavezna su da prethodno obaveste nadzorni organ o nameri da povere poslove trećem licu, samo ako trećem licu poveravaju kritične ili važne poslove,¹⁵ dok se s poveravanjem poslova koji nisu kritični odnosno važni, nadzorni organi upoznaju kroz mere nadzora koje sprovode nad društvima za osiguranje.¹⁶ S druge strane, u srpskom pravu, društva za osiguranje dužna su da prethodno blagovremeno obaveste Narodnu banku Srbije o poveravanju poslova trećem licu bez obzira na to da li se trećem licu poveravaju kritični ili važni poslovi ili oni koji nisu tako klasifikovani od strane društva za osiguranje.¹⁷ Koje su posledice primene tih različitih pristupa?

Jasno da je rešenje prava Evropske unije bliže primeni načela proporcionalnosti. S druge strane, rešenje koje je primenjeno u našem pravu udaljava se od načela proporcionalnosti. Međutim, to ga ne čini nesvrishodnim iz bar dva razloga. Prvo, obavezom da društva za osiguranje obaveštavaju Narodnu banku Srbije o svakom¹⁸

i DORA Regulativa ostavile prostor državama članicama da same odrede koji period pre poveravanja posla trećem licu (odnosno pre materijalne promene poverenog posla) smatraju blagovremenim, EIOPA smatra da se za blagovremeno obaveštenje uzima obaveštenje koje je upućeno nadzornom organu najmanje šest nedelja pre efektivnog početka poveravanja posla. Videti: EIOPA, Final Report on Public Consultation No. 14/017 on Guidelines on system of governance, 2015, https://register.eiopa.europa.eu/Publications/Consultations/EIOPA_EIOPA-BoS-14-253-Final%20report_Governance.pdf, 19. 4. 2026, 103–104. U srpskom pravu, kada društvo za osiguranje poverava aktivnosti u vezi sa informacionim sistemom, društvo za osiguranje dužno je da obavesti Narodnu banku Srbije o nameri poveravanja aktivnosti, odnosno o bitnoj izmeni ugovora o poveravanju aktivnosti (dodavanju/ukidanju poverenih aktivnosti) i promeni pružaoca usluga, najkasnije 30 dana pre zaključenja ugovora odnosno aneksa ugovora o poveravanju aktivnosti. Dodatno, društvo za osiguranje dužno je da obavesti Narodnu banku Srbije o nameri da promeni trajanje ugovora o poveravanju aktivnosti, da promeni finansijske uslove (cenu usluge) pružanja poverene aktivnosti odnosno o nameri da promeni odredbe koje ne utiču na obavljanje poverenih aktivnosti, najkasnije 15 dana pre zaključenja aneksa ugovora kojim se menja trajanje, cena odnosno odredbe koje ne utiču na obavljanje poverene aktivnosti. Videti: Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 20. U slučaju kada društvo za osiguranje poverava poslove koji su predmet Odluke o sistemu upravljanja, društvo za osiguranje dužno je da obavesti Narodnu banku Srbije o poslovima koje namerava da poveri pružaocu usluga 30 dana pre zaključenja ugovora o njihovom poveravanju, odnosno 15 dana pre svake promene poverenih poslova. Videti: Odluka o sistemu upravljanja, tač. 37.

¹⁵ Direktiva Solventnost II, čl. 49, st. 3. DORA Regulativa, čl. 28, st. 3, tačka 5.

¹⁶ Da je u pravu Evropske unije ovo regulatorno rešenje izraz načela proporcionalnosti, videti u: EIOPA, Peer review on outsourcing, 94.

¹⁷ Odluka o sistemu upravljanja, tač. 37. Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 20.

¹⁸ Kada se kaže da su društva za osiguranje obavezna da o svakom poveravanju posla obaveste Narodnu banku Srbije, govorimo o svim slučajevima u kojima se na osnovu odredaba odluka Narodne banke Srbije konkretan ugovor s pružaocem usluga smatra ugovorom kojim se poveravaju poslovi trećem licu. Za

poveravanju posla trećim licima stvara se disciplina u ispunjavanju regulatornih obaveza. Naime, društva za osiguranje u takvom regulatornom okruženju nemaju mogućnost da usled svojih poslovnih potreba zanemare regulatorne obaveze kada poveravaju poslove koji se ne smatraju kritičnim ili važnim. U suprotnom, rizikuju da Narodna banka Srbije iskoristi svoja regulatorna i zakonska ovlašćenja i da merama nadzora taj postupak uspori do ispunjenja regulatornih zahteva. Posledično, društva za osiguranje osim obezbeđivanja saglasnosti Narodne banke Srbije, kroz postupak komunikacije sa svojim regulatorom,¹⁹ mogu doći do korisnih saznanja kako da unaprede interni postupak poveravanja poslova, te da ga sprovede i regulatorno ispravno i efikasno.

Drugo, takva opšta obaveza društava za osiguranje da obaveštavaju Narodnu banku Srbije o svim poslovima koje nameravaju da povere trećim licima omogućava Narodnoj banci Srbije da kontinuirano i holistički nadzire proces poveravanja poslova trećim licima. Kada regulator tržišta ima uvid u ceo spektar poslova poverenih trećim licima (bez rizika da postoje cele grupe poslova o čijem poveravanju regulator nema svest bez pokretanja postupka posredne ili neposredne kontrole), u prilici je da prati tokove na tržištu osiguranja u ovom segmentu poslovanja društava za osiguranje, te da preventivno, kroz kontinuiran nadzor, usmerava tržište ka najboljim praksama.²⁰

Konačno, na ovom mestu, prakse radi, naglašavamo da obaveza društava za osiguranje da prethodno blagovremeno obaveste regulatora tržišta o svakom poveravanju poslova trećem licu, u pojedinim slučajevima može ograničiti efikasnost poslovanja u društvima za osiguranje, a sve u duhu načela proporcionalnosti.

Druga interesantna praktična primena načela proporcionalnosti odnosi se na poveravanje poslova unutar grupe društava za osiguranje (engl. *intra-group outsourcing*). Naime, poveravanje poslova trećim licima u praksi društava za osiguranje koja posluju unutar grupe često podrazumeva poveravanje poslova društvu koje je deo iste grupe kojoj pripada i osiguravajuće društvo koje posao poverava. Kao ilustrativan primer domašaja ove pojave izdvojićemo nalaz Centralne banke Irske (regulator tržišta osiguranja u Republici Irskoj) iz istraživanja koje je objavljeno 2018. Prema tom istraživanju, subjekti koji su pod nadzorom Narodne banke Irske (društva

definicije poveravanja poslova videti: Odluka o sistemu upravljanja, tač. 32, st. 1. Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 4.

¹⁹ EIOPA smatra komunikaciju regulatora s tržištem osiguranja o regulatornom okviru poveravanja poslova trećim licima dobrom praksom. Videti: EIOPA, Peer review on outsourcing, 14.

²⁰ EIOPA je kao dobru praksu kontinuiranog nadzora nad poveravanjem poslova trećim licima u društvima za osiguranje istakla tematsku analizu koju je sproveo nadzorni organ tržišta osiguranja u Poljskoj. Naime, u periodu od 2016. do 2017. poljski regulator tržišta osiguranja ciljano je analizirao politike poveravanja poslova trećim licima u svim društvima za osiguranje koja su u tom trenutku poverila bar neki posao trećim licima. Konačni cilj te tematske analize bio je da poljski regulator podeli svoje nalaze s tržištem, kao i da naloži društvima za osiguranje da svoje politike usklade s nalazima regulatora. Detaljnije o ovoj tematskoj analizi videti u: EIOPA, Peer review on outsourcing, 144–146.

za osiguranje, banke, investicioni fondovi, platne institucije itd. koji posluju na teritoriji Republike Irske) 50% ugovora o poveravanju poslova zaključili su s pružaocima usluga unutar grupe.²¹ Što se Evropske unije tiče, nalaz EIOPA-e iz 2022. jeste da je više od 40% kritičnih ili važnih funkcija u društvima za osiguranje povereno unutar grupe.²² Stoga, jasan je veliki praktični domašaj pitanja poveravanja poslova unutar grupe.

Što se regulatornog okvira tiče, nesporno je da se pravila koja se odnose na poveravanje poslova trećim licima primenjuju i na slučajeve kada se poslovi poveravaju društvima unutar grupe. Takav regulatorni stav jasan je kako u pravu Evropske unije²³ tako i u pravu Republike Srbije.²⁴ Međutim, isto tako je nesporno da će društva za osiguranje prirodno težiti pojednostavljenju procesa poveravanja poslova kada poslove poveravaju unutar grupe. Naime, iako su, pravno posmatrano, pružaoci usluga iz grupe treća lica, oni su i povezana pravna lica s društvom za osiguranje kojem pružaju usluge. Ekonomski posmatrano, ta bliskost je još veća jer je poslovanje društva za osiguranje kao naručioca usluga i pravnog lica grupe kao pružaoca usluga, iz ugla poslovanja uopšte, uvek usmereno ka ostvarivanju ciljeva koji su u najboljem interesu grupe kojoj pripadaju. Konačno, iz aspekta zaštite korisnika usluge osiguranja u širem smislu, korisnici usluge osiguranja mogu se smatrati i klijentima društva unutar grupe, jer oba lica posluju u okviru iste grupe.

Stoga, jasno je da društva za osiguranje prirodno teže liberalizaciji primene opštih pravila o poveravanju poslova trećim licima, odnosno primeni načela proporcionalnosti prilikom poveravanja poslova društvu unutar grupe. Takođe je jasno da regulatori nisu inicijalno prepoznali specifičnost poveravanja poslova licima unutar grupe. Ipak, Evropska unija je napravila iskorak ka prepoznavanju te prakse. Konkretno, Evropska unija je pet godina nakon donošenja Direktive Solventnost II izričito afirmisala primenu načela proporcionalnosti prilikom poveravanja poslova unutar grupe. Naime, Delegiranom uredbom komisije (EU) 2015/35 o dopuni Direktiva 2009/138/EZ Evropskog parlamenta i Saveta o početku i obavljanju delatnosti osiguranja i reosiguranja (Solventnost II) iz 2014. godine (*Commission Delegated Regulation (EU) 2015/35 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)*), Delegirana uredba Direktive Solventnost II), propisano je da ako su društvo za osiguranje i pružalac usluga članovi iste grupe, pri poveravanju kritičnih ili važnih operativnih funkcija ili delatnosti, društvo uzima u obzir meru

²¹ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 15.

²² EIOPA, Peer review on outsourcing, 8.

²³ Primera radi, Direktiva Solventnost II ne pravi razliku između poveravanja posla pravnom licu u grupi i poveravanja trećem licu. Videti definiciju poveravanja poslova trećim licima: Direktiva Solventnost II, čl. 13. st. 1. tač. 28. I EIOPA, čini se, radi prakse koju je uočila na tržištu osiguranja Evropske unije, naglašava da se odredbe Direktive Solventnost II o poveravanju poslova trećim licima primenjuju i na poveravanje poslova unutar grupe. Videti: EIOPA, Peer review on outsourcing, 24.

²⁴ Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 5, st. 2.

u kojoj kontroliše pružaoca usluga ili može uticati na njegove aktivnosti.²⁵ Šta zaključujemo iz te odredbe? Načelo proporcionalnosti koje je uvedeno tom odredbom je vrednosno neutralno. Konkretno, primena načela proporcionalnosti nije usmerena isključivo ka liberalizaciji opštih pravila koja se odnose na poveravanje poslova trećim licima, već može biti usmerena i ka njihovom pooštavanju. Sve zavisi od toga koliko društvo za osiguranje može da utiče na pružaoca usluga. Ipak, EIOPA podvlači i da poveravanje poslova unutar grupe može biti „jedinствена tačka kvara“ (engl. *single point of failure*), tako da EIOPA preporučuje nadzornim organima država članica Evropske unije da kontrola poveravanja poslova unutar grupe bude visoko na listi prioriteta nadzornih organa u Evropskoj uniji.²⁶

Što se tiče liberalizacije opštih pravila koja se odnose na poveravanje poslova u slučajevima kada društva za osiguranje poveravaju poslove licima unutar grupe, EIOPA je istakla primenu „unapređenog“ načela proporcionalnosti pri poveravanju poslova unutar grupe kao prepoznavanje „izvesnog nivoa fleksibilnosti“.²⁷ Međutim, EIOPA je izričita i da „fleksibilnost može da varira“.²⁸ Konkretni aspekt poveravanja poslova u kojem je EIOPA prepoznala prostor za liberalizaciju jeste analiza pružaoca usluga s obzirom na to da je pružalac usluga poznat organima upravljanja društva za osiguranje i s obzirom na to da osiguravajuće društvo može da izvrši uticaj na pružaoca usluga unutar grupe.²⁹

Centralna banka Irske došla je do sličnih zaključaka.³⁰ Što se tiče konkretnih razloga za liberalizaciju poveravanja poslova licu unutar grupe, Centralna banka Irske prepoznala je veću mogućnost prilagođavanja ugovora o poveravanju poslova trećim licima promenljivim potrebama društva za osiguranje.³¹

Iz drugog primera zaključujemo da praktična primena načela proporcionalnosti može da varira u zavisnosti od konkretnih okolnosti u kojima se poveravaju poslovi trećem licu.

Kao što smo naveli, veća mogućnost izmene ugovora o poveravanju poslova licima unutar grupe u odnosu na situacije kada se posao poverava licima izvan grupe, prepoznata je kao povod za liberalizaciju poveravanja poslova licu unutar grupe u duhu primene načela proporcionalnosti. Međutim, upravo su ugovori o poveravanju poslova trećim licima redak aspekt poveravanja poslova trećim licima koji je apsolutno izvan domašaja primene načela proporcionalnosti u smislu liberalizacije obaveza društva za osiguranje (ne i u smislu pooštavanja ovog načela).³²

²⁵ Delegirana uredba Direktive Solventnost II, čl. 274. st. 2.

²⁶ EIOPA, Peer review on outsourcing, 8.

²⁷ *Ibid.*, 49.

²⁸ EIOPA, Final Report on Public Consultation No. 14/017 on Guidelines on system of governance, smernica 62, tač. 2. 296.

²⁹ *Ibid.*, smernica 62, tač. 2. 298.

³⁰ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 15.

³¹ *Ibidem*.

³² Primera radi, kada se poveravaju aktivnosti korišćenjem klauzula usluga, Narodna banka Srbije zahteva od društava za osiguranje da ugovorima o poveravanju poslova obuhvate dodatne odredbe. Videti: Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tačka 30.

Kada bismo konstataciju da su ugovori o poveravanju poslova apsolutno izvan domašaja načela proporcionalnosti posmatrali isključivo iz aspekta ugovornog prava (bez bilo kakvog prethodnog znanja o specifičnostima poveravanja poslova ili delatnosti osiguranja), logično bi se postavilo pitanje zašto je uopšte potrebno primenjivati načelo proporcionalnosti na ugovor kao pravni posao. Ugovorno pravo odlikuje načelo autonomije volje,³³ što znači da proporcionalnost ugovora uređuju same ugovorne strane. Međutim, načelo autonomije volje kod ugovora o poveravanju poslova znatno je ograničeno. U toj meri je ograničeno da čak ni načelo proporcionalnosti u svom pozitivnom aspektu (ublažavanju obaveza ugovornih strana srazmerno konkretnim okolnostima, a u granicama prinudnih propisa) koje bi ostavilo izvestan prostor za autonomiju volje, nije stupilo na mesto načela slobode ugovaranja.³⁴ Sasvim suprotno, načelo autonomije volje je u svim svojim aspektima zamenjeno načelom stroge formalnosti u svim aspektima ugovaranja.

III Načelo stroge formalnosti ugovora o poveravanju poslova

Vraćajući se na načelo autonomije volje kao jedno od osnovnih načela ugovornog prava, razmotrićemo kako su prinudna pravila koja se odnose na poveravanje poslova trećim licima u društvima za osiguranje drastično suzila primenu načela autonomije volje ugovornih strana – društva za osiguranje i trećeg lica kojem društvo za osiguranje poverava poslove.³⁵

Načelo autonomije volje predstavlja zakonsko prepoznavanje slobode svakog lica da u pravnom prometu (daleko izvan ugovornog prava, sve do granica do kojih doseže građansko pravo uopšte) istupa u skladu sa svojom voljom. Upravo u domenu ugovornog prava, načelo autonomije volje doseže svoj najveći značaj.³⁶ Šta konkretno podrazumeva načelo autonomije volje u ugovornom pravu? Konkretno, načelo autonomije u ugovornom pravu u sebi sadrži dva uža načela – načelo konsensualizma (načelna sloboda izbora forme ugovora) i načelo slobode ugovaranja (sloboda da se odluči da se ugovor zaključi ili ne, sloboda izbora saugovarača

³³ Načelo autonomije volje obezbeđuje suverenost volja ugovornih strana. O načelu autonomije volje videti: Mihailo Konstantinović, *Obligaciono pravo. Beleške sa predavanja*, Beograd, 1969, 17–18.

³⁴ I EIOPA je izričito izdvojila ugovor o poveravanju poslova iz domena primene načela proporcionalnosti. Videti: EIOPA, Peer review on outsourcing, 94.

³⁵ Iako je, suštinski posmatrano, odredbama koje se primenjuju na društva za osiguranje u domenu poveravanja poslova trećim licima, ograničena autonomija volje obe ugovorne strane, pravno posmatrano, autonomija volje ograničena je samo društvima za osiguranje, ne i pružaocima usluga (čak i onda kada su pružaoci usluga subjekti nadzora istog nadzornog organa, s obzirom na to da se u toj situaciji ne nalaze u ulozi lica koje poverava poslove). U praksi, tako drastično ograničenje autonomije volje ugovornih strana dovodi do velikih problema prilikom pregovora o zaključenju ugovora, budući da pružaoci usluga nisu obavezni da ih ugovaraju, a nametnut im je veliki broj obaveza koje su nestandardne u poslovanju uopšte.

³⁶ Marija Karanikić Mirić, *Obligaciono pravo*, Beograd, 2024, 77.

i sloboda određivanja sadržine ugovora).³⁷ Te slobode, u skladu sa zakonom, mogu biti ograničene samo prinudnim propisima, javnim poretkom i dobrim običajima.³⁸

Zaključujemo, ograničenje načela autonomije volje prinudnim propisima jeste samo zakonski već i praktični izuzetak. Naime, uopšteno posmatrano, imperativnost je retka u ugovornom pravu. Ugovorno pravo obiluje dispozitivnim normama koje ugovornim stranama služe kao svojevrsne dopune njihovoj volji u situacijama kada propuste da ugovore drugačije. Cilj ugovornog prava nije da nameće ugovornim stranama na koji način da regulišu svoje odnose već da im pruži okviru koji će ih usmeravati kada je saugovaračima to potrebno.

Međutim, deo ugovornog prava kojim se uređuje poveravanje trećim licima u društvima za osiguranje, upravo suprotno, obiluje imperativnim normama, zbog čega možemo reći da u ovoj oblasti vlada načelo stroge formalnosti ugovora. Imperativne norme koje su konvertovale načelo autonomije volje u načelo stroge formalnosti ugovora, analiziraćemo upravo kroz odstupanje od primene načela konsensualizma i načela slobode ugovaranja, kao užih načela slobode autonomije volje.

1. Derogiranje načela konsensualizma

Kao što smo naveli, načelo konsensualizma podrazumeva načelnu slobodu ugovornih strana da izaberu formu u kojoj će zaključiti ugovor. Kako je to ZOO definisao, opšte je pravilo da zaključenje ugovora ne podleže nikakvoj formi, osim ako je zakonom drukčije određeno.³⁹ Međutim, u oblasti poveravanja poslova trećim licima, podzakonskim aktima (odlukama Narodne banke Srbije) slobodu izbora forme ugovora zamenila je obaveza sačinjavanja ugovora u pisanoj formi,⁴⁰ što je rešenje koje postoji i u pravu Evropske unije.⁴¹

Na ovom mestu, zadržaćemo se na pitanju načina na koji je u srpskom pravu u oblasti poveravanja poslova trećim licima u društvima za osiguranje delegirano

³⁷ *Ibidem*.

³⁸ Zakon o obligacionim odnosima – ZOO, *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Sl. list SRJ*, br. 31/93, *Sl. list SCG*, br. 1/2003 – Ustavna povelja i *Sl. glasnik RS*, br. 18/2020, čl. 10.

³⁹ ZOO, čl. 67, st. 1. Tu odredbu ZOO ne treba tumačiti tako da ugovori po pravilu nemaju formu. Naprotiv, svaki ugovor ima neku formu, a načelo konsensualizma samo utvrđuje da su ugovorne strane slobodne da tu formu izaberu (takozvani neformalni ugovori). S druge strane, zakon može obavezati ugovorne strane da u određenim slučajevima zaključuju ugovore u određenoj formi (formalni ugovori). O podeli ugovora na formalne i neformalne detaljnije videti: M. Karanikić Mirić, 178 i dalje.

⁴⁰ Odluka o sistemu upravljanja, tač. 35, st. 2. Dok prethodno navedena odluka izričito propisuje obavezu društva za osiguranje da ugovor o poveravanju poslova s pružaocem usluga mora biti u pisanoj formi, Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom ovu obavezu propisuje na posredan način, obavezujući društvo za osiguranje da prilikom obaveštavanja Narodne banke Srbije o nameravanom zaključenju ugovora o poveravanju poslova trećem licu, Narodnoj banci dostavi nacrt tog ugovora. Videti: Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 20, st. 2, tač. 25, st. 2.

⁴¹ DORA Regulativa, čl. 30, st. 1. Delegirana uredba Direktive Solventnost II, čl. 274, st. 3, tač. c).

načelo konsensualizma. Naime, kao što smo naveli, ZOO dozvoljava odstupanje od načela konsensualizma samo ako je *zakonom* drugačije određeno. Međutim, odluke Narodne banke Srbije su podzakonska akta. Stoga, postavlja se pitanje zakonitosti odredaba kojima je propisana obavezna pisana forma ugovora o poveravanju poslova trećim licima u društvima za osiguranje odredaba. Konkretno, da li te odredbe odluka Narodne banke Srbije imaju uporište u nekom zakonu koji se primenjuje na ugovore koje zaključuju društva za osiguranje.⁴² Pre svega, krenućemo od ZOO. Što se tiče ugovora koje zaključuju društva za osiguranje, ZOO reguliše jedino ugovore o osiguranju,⁴³ tako da se ove odredbe ZOO ne mogu primeniti na ugovore o poveravanju poslova trećim licima. Dalje, u zakonima koji uređuju položaj privrednih društava⁴⁴ odnosno uslove i načine za obavljanje trgovine,⁴⁵ ne nailazimo na normu kojom se privredna društva odnosno trgovci obavezuju da u pisanoj formi zaključuju ugovore pod koje se mogu podvesti ugovori o poveravanju poslova trećem licu. Što se tiče Zakona o osiguranju Republike Srbije,⁴⁶ kojim se uređuje obavljanje delatnosti osiguranja, imperativnom odredbom regulisana je obaveza društva za osiguranje da ugovore sačinjava na srpskom jeziku.⁴⁷ Međutim, postavlja se pitanje kako tumačiti ovu odredbu. Da li je tumačiti tako da se na taj način implicitno uvodi obaveza društva za osiguranje da zaključuju sve ugovore u pisanoj formi i to na srpskom jeziku (pa tako i ugovore o poveravanju poslova trećim licima) ili se društva za osiguranje obavezuju da kada odluče da zaključuju ugovore u pisanoj formi, te pisane ugovore zaključuju na srpskom jeziku? Kako, čini se, ne postoji alternativni zakonski osnov za uvođenje obaveze društva za osiguranje da ugovore o poveravanju poslova trećem licu zaključe u pisanoj formi, reklo bi se da zakonitost odredaba odluka Narodne banke Srbije kojim se društva za osiguranje obavezuju

⁴² Na ovom mestu naglašavamo da se, za razliku od Odluke o sistemu upravljanja, koja se isključivo primenjuje na društva za osiguranje (i društva za reosiguranje), odredbe Odluke o poveravanju aktivnosti u vezi sa informacionim sistemom primenjuju i na banke, davaoce finansijskog lizinga, društva za upravljanje dobrovoljnim penzijskim fondovima, platne institucije, institucije elektronskog novca i javne poštanske operatore u delu njihovog poslovanja koje se odnosi na pružanje platnih usluga i/ili izdavanje elektronskog novca (u daljem tekstu zajedno: finansijske institucije). Autorka, pre svega u ovom delu rada, ali i u ovom radu uopšte ne pretenduje da primeni izvedene zaključke na ostale finansijske institucije, osim na društva za osiguranje.

⁴³ ZOO, čl. 897–965.

⁴⁴ Položaj privrednih društava u srpskom pravu regulisan je Zakonom o privrednim društvima – ZPD, *Sl. glasnik RS*, br. 36/2011, 99/2011, 83/2014 – dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021 i 19/2025. ZPD za pojedine ugovore (primera radi, ugovor o statusnim promenama, ugovor o prenosu udela ili akcija, ugovor o kontroli i upravljanju) predviđa obavezu privrednih društava da ih zaključe u pisanoj formi, međutim, ne postoji opšta imperativna odredba da privredna društva zaključuju ugovore u pisanoj formi (iako su u praksi privrednih društava češći formalni od neformalnih ugovora).

⁴⁵ Uslovi i načini za obavljanje trgovine u srpskom pravu regulisani su Zakonom o trgovini, *Sl. glasnik RS*, br. 52/2019. Taj zakon ne obavezuje trgovca imperativnim odredbama da zaključuje ugovore u pisanoj formi.

⁴⁶ Zakon o osiguranju – ZO, *Sl. glasnik RS*, br. 139/2014 i 44/2021.

⁴⁷ ZO, čl. 67, st. 3.

da u pisanoj formi zaključuju te ugovore zavisi upravo od tumačenja (šireg ili užeg) pomenute odredbe ZO.

Autorka nije pronašla tumačenje ove odredbe ZO iz ugla nedoumice da li ZO ovom odredbom derogira načelo konsensualizma kod ugovora koje zaključuju društva za osiguranje. Stav autorke jeste da odredbu ZO da su društva za osiguranje obavezna da ugovore sačinjavaju na srpskom jeziku treba tumačiti na uži način – kao obavezu društava za osiguranje da kada odluče da zaključuju ugovore u pisanoj formi, te pisane ugovore zaključuju i na srpskom jeziku, a ne da su društva za osiguranje uvek obavezna da zaključuju ugovore u pisanoj formi. Autorka ovaj stav zauzima vodeći se opštim pravilom tumačenja prava – da izuzetke od opštih pravila u pravu treba usko tumačiti.⁴⁸ U našem slučaju, odredba ZO kojom je predviđena obaveza društva za osiguranje da zaključuje ugovore na srpskom jeziku jeste izuzetak u odnosu na odredbu ZO o neformalnosti ugovora. Stoga, domen primene ove odredbe ZO, po autorkinom stavu, ne bi trebalo proširivati tako da se smatra da su društva za osiguranje obavezna da zaključuju sve ugovore u pisanoj formi (na srpskom jeziku).

2. Derogiranje načela slobode ugovaranja

Što se tiče načela slobode ugovaranja, podsećamo da ono u sebi sadrži sledeće slobode ugovornih strana: (i) slobodu ugovornih strana da odluče hoće li ugovor zaključiti ili ne; (ii) slobodu izbora saugovarača; (iii) slobodu ugovornih strana da odrede sadržinu ugovora. Za potrebe analize slobode ugovaranja kod ugovora o poveravanju poslova trećim licima u društvima za osiguranje, iz poslednje slobode (slobode ugovornih strana da odrede sadržinu ugovora) kao posebnu slobodu izdvojimo slobodu ugovornih strana da odrede uslove pod kojima imaju pravo da jednostrano raskinu ugovor.⁴⁹ Svaka od tih sloboda ograničena je prilikom zaključenja ugovora o poveravanju poslova trećim licima gde je društvo za osiguranje jedna od ugovornih strana. Ovde ćemo analizirati kako je svaka od tih sloboda ograničena.

Prvo, ograničavanje slobode ugovornih strana da odluče hoće li ugovor zaključiti ili ne zavisi od toga ima li nadzorni organ tržišta osiguranja pravo da u periodu od prijema obaveštenja društva za osiguranje o nameri da poveri posao trećem licu do isteka primerenog roka za obaveštavanje (u daljem tekstu: period prethodnog obaveštavanja) izjavi prigovor na zaključenje ugovora o poveravanju poslova i time spreči osiguravajuće društvo i pružaoca usluga da zaključe ovaj ugovor. Ako se period prethodnog obaveštavanja posmatra iz perspektive društava za osiguranje, i u pravu Evropske unije i u srpskom pravu, kao što smo prethodno

⁴⁸ Detaljnije o uskom tumačenju izuzetaka u pravu, Radomir Lukić (preradili Jasminka Hasanbegović i Marko Božić), *Uvod u pravo*, Beograd, 2020, 337-339.

⁴⁹ Pravo na jednostrani raskid ugovora u slučajevima koje su ugovorne strane ugovorile prilikom zaključenja ugovora smatra se vrstom sporazumnog raskida ugovora. M. Karanikić Mirić, 449.

naveli, društva za osiguranje dužna su da prethodno obaveste⁵⁰ nadzorni organ o nameri da povere poslove trećem licu. Ta obaveza društava za osiguranje, jezički, očigledno podrazumeva samo čin obaveštavanja nadzornog organa o nameravanom poveravanju poslova, bez potrebe da društvo za osiguranje očekuje bilo kakav odgovor od strane nadzornog organa, kako bi, nakon proteka perioda prethodnog obaveštavanja, zaključilo ugovor o poveravanju poslova s pružaocem usluga.

S druge strane, ako se period prethodnog obaveštavanja posmatra iz perspektive prava nadzornog organa da izjavi prigovor na zaključenje ugovora o poveravanju poslova, posmatrani pravni sistemi ne uvode eksplicitno ovo pravo nadzornih organa. Pravo Evropske unije generalno ne govori ništa o pravima nadzornih organa u periodu prethodnog obaveštavanja, dok pravo Republike Srbije jednom odlukom Narodne banke Srbije predviđa da se rok za obaveštavanje Narodne banke Srbije računa od dana dostavljanja uredne dokumentacije⁵¹ (čiji je spisak određen ovom odlukom).⁵² Dodatno, Narodna banka Srbije ima pravo da od društva za osiguranje, ako nije moguće utvrditi sve činjenice značajne za postupanje po tom obaveštenju, zahteva drugu dokumentaciju za koju oceni da joj je potrebna.⁵³

Šta regulatorni okviri u pravu Evropske unije i pravu Republike Srbije konkretno podrazumevaju u praksi? U pravu Evropske unije, nadzorni organi imaju pravo da budu strogo pasivni. Stoga su države članice Evropske unije koje su želele da učine svoje nadzorne organe aktivnijim morale svojim nacionalnim zakonodavstvima da snabdeju svoje nadzorne organe konkretnim pravima u periodu prethodnog obaveštavanja.⁵⁴ U pravu Republike Srbije, Narodna banka Srbije ima pravo da zahteva od društva za osiguranje da dostavi urednu dokumentaciju dok god društvo za osiguranje to ne učini. Međutim, u periodu prethodnog obaveštavanja, Narodna banka Srbije nema pravo da izjavi prigovor na zaključenje ugovora o poveravanju poslova. Ipak, u praksi, pravo koje Narodna banka Srbije ima, suštinski dovodi do istog efekta kao i pravo prigovora. Naime, osiguravajuće društvo nema pravo da zaključuje

⁵⁰ U relevantnim propisima Evropske unije, u verzijama na engleskom jeziku, koriste se glagoli *to notify* odnosno *to inform*, kada se govori o načinu na koji se društva za osiguranje obraćaju nadzornim organima u vezi s temom poveravanja poslova trećim licima: Videti: Direktiva Solventnost II, čl. 49, st. 3. DORA Regulativa, čl. 28, st. 3, tač. 5. U podzakonskim aktima Narodne banke Srbije koristi se glagol obavestiti. Videti: Odluka o sistemu upravljanja, tač. 37. Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 20, st. 1 i 4 i tač. 25, st. 1. I EIOPA je zauzela stav da proces obaveštavanja koji je uveden Direktivom Solventnost II nije proces davanja saglasnosti. Videti: EIOPA, Peer review on outsourcing, 57.

⁵¹ Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 20, st. 5 i tač. 25, st. 3.

⁵² *Ibid.*, tač. 20, st. 2 i tač. 25, st. 2.

⁵³ *Ibid.*, tač. 20, st. 3.

⁵⁴ Mnoge države članice Evropske unije su upravo tako i učinile, te se među pravima država članica nalaze različiti modaliteti prava nadzornih organa – od prava nadzornog organa da da saglasnost da se posao poveri, preko prava nadzornog organa da uvek odgovori na obaveštenje društva za osiguranje, do prava nadzornog organa da odgovorom na obaveštenje zahteva dodatne informacije. EIOPA, Peer review on outsourcing, 58.

ugovor o poveravanju poslova sve dok ne dostavi Narodnoj banci Srbije urednu dokumentaciju, a tumačeći citirane odredbe, Narodna banka Srbije ima pravo da beskonačan broj puta zahteva dodatnu dokumentaciju od društva za osiguranje.

I među pravima država članica Evropske unije, nailazimo na slično rešenje koje poznaje pravo Republike Srbije. Naime, u pravu Francuske, Rumunije i Švedske, nadzorni organi su slično, kroz dijalog s društvima za osiguranje, rešavali svoje nedoumice u vezi s konkretnim poveravanjem poslova, bez formalnog prava njihovih nadzornih organa da izjave prigovor na zaključenje ugovora o poveravanju poslova.⁵⁵ Međutim, EIOPA je prilikom svog istraživanja procesa poveravanja poslova u državama članicama Evropske unije uočila potrebu da se nadzornim organima u državama članicama eksplicitno prizna pravo prigovora na zaključenje ugovora o poveravanju poslova, i to u slučajevima kada nadzorni organi imaju „ozbiljne i obrazložene zabrinutosti u pogledu usklađenosti planiranog poveravanja poslova s važećim regulatornim zahtevima”.⁵⁶ Štaviše, nadzornim organima Francuske, Rumunije i Švedske preporučeno je da u svojim zakonodavstvima urede pravo prigovora nadzornog organa na zaključenje ugovora o poveravanju poslova trećim licima.⁵⁷

Zaključujemo, pravo nadzornih organa na prigovor na zaključenje ugovora o poveravanju poslova smatra se neophodnim mehanizmom sprečavanja da društva za osiguranje neadekvatno povere poslove pružaocu usluga. Cilj obaveštavanja nadzornog organa o nameri da se zaključi ugovor o poveravanju poslova jeste da nadzorni organ proveri da li je poveravanje poslova trećem licu usklađeno s regulatornim zahtevima,⁵⁸ dok je pravo na prigovor na zaključenje ugovora o poveravanju *ultima ratio* nadzornih organa, kada se efekat ne može postići dijalogom sa društvom za osiguranje. Međutim, da bi nadzorni organ zakonito koristio to pravo prigovora, neophodno je da mu je merodavnim pravnim aktom ovo pravo eksplicitno priznato. U kontekstu ograničavanja prava saugovarača na slobodno ugovaranje, jasno je da se pravo ugovornih strana da zaključe ugovor ne može implicitno ograničiti. Nadzorni organi tu slobodu mogu ograničavati samo ako su na to izričito ovlašćeni. Drugačije postupanje bilo bi suprotno primeni načela slobode ugovaranja koje, kao i svako drugo načelo, važi uvek kada nije eksplicitno derogirano.

Analizirajući slobodu izbora saugovarača, kao drugi vid slobode ugovaranja, u posmatranim pravnim sistemima, nailazimo na situacije u kojima se društvima za osiguranje ograničava sloboda da izaberu pružaoca usluga koji će im pružati poverene usluge. Primera radi, u pravu Republike Srbije, Narodna banka Srbije ima pravo da, kako u postupku obaveštavanja o nameri da se aktivnost poveri određenom pružaocu usluga, tako i nakon što je aktivnost već poverena, obavesti društvo za osiguranje

⁵⁵ EIOPA, Peer review on outsourcing, 57–58.

⁵⁶ *Ibid.*, 58.

⁵⁷ *Ibid.*, 120–121.

⁵⁸ *Ibid.*, 11.

da ne može poveriti posao tom pružaocu usluga, te da osiguravajuće društvo mora raskinuti ugovor o poveravanju poslova ako oceni da poveravanje aktivnosti pružaocu usluga može dovesti do koncentracije učesnika na tržištu usluga informacionih tehnologija koje se pružaju finansijskim institucijama ili do dominantnog položaja pružaoca usluga na tom tržištu, koji bi se mogao negativno odraziti na ovo tržište ili na stabilnost finansijskog sistema.⁵⁹ I pravni sistemi država članica Evropske unije poznaju mehanizme kojima se društvima za osiguranje ograničava pravo slobode ugovaranja tako što im se nalaže da promene pružaoca usluga. Pojedini nadzorni organi država članica su i koristili to svoje pravo već u fazi obaveštavanja o nameri da se posao poveri trećem licu, te su od društva za osiguranje zahtevali da promene svog saugovarača (pružaoca usluga),⁶⁰ čime su ti nadzorni organi i efektivno koristili svoje pravo da društvima za osiguranje ograniče slobodu ugovaranja kroz aspekt prava na izbor saugovarača.

Konačno, sloboda ugovornih strana da odrede sadržinu ugovora jeste sloboda čije ograničavanje društva za osiguranje u praksi najviše osećaju. Naime, sloboda izbora forme je već ograničena slobodom određivanja sadržine (jer kako će društvo za osiguranje dokazati da je ugovorilo traženu sadržinu ako ugovor nije zaključilo u pisanoj formi), dok se sloboda izbora saugovarača odnosno sloboda da se ugovor uopšte zaključi može ispoljiti tek nakon što društvo obavesti nadzorni organ o nameri poveravanja poslova. Međutim, društva za osiguranje već u fazi pregovora s pružaocem usluga moraju da ispregovaraju o primeni niza ugovornih odredaba⁶¹ na koje pružaoci usluga neće lako pristati. Društva za osiguranje su naročito pred teškim zadatkom, s obzirom na to da su te odredbe prvenstveno usmerene na zaštitu društva za osiguranje odnosno na njegova prava, pa čak i na prava nadzornih organa i drugih lica koja analiziraju poslovanje društava za osiguranje, poput eksternih revizora društava za osiguranje.⁶² Konačno, ako će pružalac usluga dalje potpoveravati pružanje usluga potpružaocu usluga, društva za osiguranje su dužna da obezbede da i svaki ugovor s potpružaocem usluga sadrži određene odredbe,⁶³

⁵⁹ Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 23, st. 1.

⁶⁰ Sledeće države članice Evropske unije, odnosno njihovi nadzorni organi su u periodu do 2022. koristili svoje pravo da nalože društvima za osiguranje da promene pružaoca usluga: Belgija, Španija, Irska, Island, Lihtenštajn i Malta. EIOPA, Peer review on outsourcing, 68.

⁶¹ Za tačan spisak odredaba koje su društva za osiguranje dužna da ugovore s pružiocima usluga videti: Direktiva Solventnost II, čl. 49, st. 3. DORA Regulativa, čl. 30. Delegirana uredba Direktive Solventnost II, čl. 274, st. 4. Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 18 i 30.

⁶² EIOPA je transparentno otvorila pitanje realne mogućnosti primene odredaba koje se odnose na različita prava nadzora nad pružaocem usluga, čak i kada su odredbe kojima se uvodi pravo nadzora nad pružaocem usluga ugovorene. EIOPA, Peer review on outsourcing, 67.

⁶³ Delegirana uredba komisije (EU) 2025/532 o dopuni Uredbe (EU) 2022/2554 Evropskog parlamenta i Saveta u pogledu regulatornih tehničkih standarda kojima se utvrđuju elementi koje finansijski subjekat mora utvrditi i proceniti prilikom potpoveravanja IKT usluga kojima se podržavaju ključne ili važne funkcije iz 2025. godine (Commission Delegated Regulation (EU) 2025/532 supplementing

što se u praksi pokazalo kao naročit izazov.⁶⁴ Dodatno, osim što su društva za osiguranje samom regulativom obavezna da obezbede određenu sadržinu ugovora, dona su svesna da je prilikom poveravanja poslova, analiza ugovornih odredaba ugovora o poveravanju poslova u fokusu nadzornih organa,⁶⁵ te da će svaki propust u ugovaranju propisanih odredaba biti primećen, što posledično može dovesti do dodatnih zahteva nadzornog organa.

Naime, iako su društva za osiguranje dužna da izvrše niz analiza i procena rizika povezanih s poveravanjem poslova i pružaoce usluga i da ove analize i procene dostave nadzornom organu, čini se da su nadzorni organi prilikom analize namere društva za osiguranje da poveri posao trećem licu usredsređeni na analizu ugovornih odredaba koje čine obaveznu sadržinu ugovora o poveravanju poslova.⁶⁶ Zaključujemo da je to posledica nekoliko faktora.

Prvo, za razliku od dokumentovanih analiza i procena koje društva za osiguranje dostavljaju nadzornim organima koje su jednostrani akti društava za osiguranje, ugovori su dvostrano obavezujući pravni poslovi, te obavezuju kako društvo za osiguranje, tako i pružaoca usluga. Stoga, osim što ugovor obezbeđuje određeno postupanje društva za osiguranje, još važnije, on obezbeđuje određeno postupanje pružaoca usluga. Ne umanjujući značaj aktivnosti koja su društva za osiguranje dužna da preduzimaju prilikom upravljanja rizikom poveravanja poslova, ključni izvor rizika poveravanja poslova su pružalac usluga i njegovo postupanje prilikom obavljanja poverenih poslova. Na taj način, ugovor jeste najbolji mehanizam kontrole pružaoca usluga.

Drugo, i suštinski najvažnije, jeste domino efekat ugovora na ostale zahteve koji se tiču prethodne analize poveravanja poslova. Naime, ako ugovor ne zadovoljava potrebne standarde, odnosno ako pružalac usluga nije obavezan da postupa na određeni način, bilo kakve akcije koje osiguravajuće društvo namerava

Regulation (EU) 2022/2554 of the European Parliament and of the Council with regard to regulatory technical standards specifying the elements that a financial entity has to determine and assess when subcontracting ICT services supporting critical or important functions), čl. 4. Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 24.

⁶⁴ Prema nalazu istraživanja Centralne banke Irske koje je objavljeno 2018, čak 78% društava za osiguranje u ugovorima o poveravanju poslova nije imala odredbe koje se odnose na upravljanje potpoveravanjem poslova. Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 27.

⁶⁵ Prilikom analize načina vršenja nadzora od strane nadzornih organa društava u periodu prethodnog obaveštavanja, EIOPA je došla do zaključka da nadzorni organi zauzimaju jedan od dva pristupa vršenja nadzora – sveobuhvatni ili administrativni nadzor. Sveobuhvatni nadzor je opisan kao nadzor usmeren na preispitivanje onoga što su društva za osiguranje prijavila, kako bi se obezbedilo da su svi materijalni rizici ublaženi. S druge strane, administrativni nadzor podrazumeva proveru formalne usklađenosti obaveštenja sa zakonskim zahtevima. Bez obzira na pristup, analiza ugovora odnosno ugovornih odredaba uočena je kao jedna od najznačajnijih tačaka nadzora prilikom obaveštavanja nadzornog organa o nameri da se posao poveri trećem licu. EIOPA, Peer review on outsourcing, 63–65.

⁶⁶ Tako i: *Ibid.*, 67.

da preduzima u slučaju da poveravanje poslova ne bude vršeno na adekvatan način, ne mogu sprečiti nastupanje negativnih posledica. Primera radi, sve i da je društvo za osiguranje pripremlilo odličnu izlaznu strategiju koju će sprovesti kada donese odluku da prekine poveravanje određenih poslova, ako ugovorom uopšte nije ugovoren otkazni rok u slučaju jednostranog otkaza ugovora odnosno ako je ovaj rok nedovoljno dug, ili ako nije obezbeđena obaveza pružaoca usluga da u prelaznom periodu (otkaznom roku) nastavi da pruža usluge društvu za osiguranje, izlazna strategija će biti praktično neprimenljiva.

Treće, ako posmatramo tehniku sačinjavanja akata regulatora, ali i regulative Evropske unije, zahtevi ugovornog tipa su daleko preciznije definisani – podzakonska akta i regulativa Evropske unije sadrže tačan spisak odredaba koje ugovori treba da sadrže, dok za analize koje su društva dužna da sprovedu ne postoje tako jasne smernice.⁶⁷ Stoga, nadzornim organima je daleko jednostavnije da utvrđuju usklađenost ugovora sa svojim zahtevima nego usklađenost ostale dokumentacije.

Naglašavamo da, iako će se nadzorni organi prvenstveno posvetiti analizi ugovora o poveravanju poslova, nadzorni organi susreću se s nizom izazova prilikom analize ugovora o poveravanju poslova, koji se pak najčešće tiču tehnike sačinjavanja ugovora (primera radi, okvirni ugovori o pružanju usluga sa nizom aneksa) i kompleksnosti ugovora koji se teško mogu menjati jer su ih globalni pružaoci usluga standardizovali.⁶⁸

Konačno, treba pomenuti da je autonomija volje ugovornih strana ograničena i ograničavanjem slobode ugovornih strana da odrede uslove pod kojima imaju pravo da jednostrano raskinu ugovor. Naime, nadzorni organi u pojedinim slučajevima imaju pravo da nalože društvima za osiguranje da raskinu ugovor o poveravanju poslova.⁶⁹ Osim tih pojedinih slučajeva u kojima nadzorni organi imaju *ex lege* pravo da od društava za osiguranje zahtevaju raskid ugovora o poveravanju poslova, društvima za osiguranje i pružiocima usluga nametnuto je i da ugovore odredbe kojima se uopšteno ostavlja mogućnost da društva za osiguranje jednostrano raskinu ugovor o poveravanju poslova ako im to naloži nadzorni organ.⁷⁰

Kao što smo videli, analiza adekvatnosti poveravanja poslova se dobrim delom oslanja na sadržinu ugovora s pružaocem usluga. Stoga, postavlja se pitanje

⁶⁷ Neki nadzorni organi država članica Evropske unije (organi nadzora tržišta osiguranja u Belgiji, Nemačkoj, Irskoj i Holandiji) pružili su društvima za osiguranje dodatne specifikacije i/ili smernice kako bi razjasnili svoja očekivanja koja se odnose na analize rizika i dubinske analize (engl. *due diligence*). EIOPA, Peer review on outsourcing, 54.

⁶⁸ O izazovima sa kojima se susreću nadzorni organi u državama članicama Evropske unije prilikom analize predloga ugovora o poveravanju poslova videti: EIOPA, Peer review on outsourcing, 66–67.

⁶⁹ Primera radi videti: Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 31, st. 3.

⁷⁰ DORA Regulativa, čl. 30. st. 2. tačka h). Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 18, st. 3.

da li se te odredbe u praksi zaista mogu i primenjivati ili ostaju mrtvo slovo na papiru? Konačno, zašto se slobode ugovornih strana da odrede sadržinu ugovora na taj način delegira kod ugovora o poveravanju poslova?

Čini se da regulativa poveravanja poslova u društvima za osiguranje ne postoji dovoljno dugo da bi se doneo zaključak koliko su odredbe kojima se ograničava sloboda ugovornih strana da odrede sadržinu ugovora primenljive u praksi. Ono što je izvesno jeste da i donosioci akata, ali i nadzorni organi, ispoljavaju strah što se tiče realnog domašaja tih odredaba. Primera radi, u DORA Regulativi, donosioci ovog teksta, u uvodnim odredbama regulative, jasno prepoznaju da društva za osiguranje nailaze na poteškoće prilikom ugovaranja obaveznih ugovornih odredaba, izdvajajući naročito prava pristupa odnosno revizije kao polje u kojem postoje izazovi za primenu ovih prava, čak i kada su ona ugovorena.⁷¹ Dodatno, već smo istakli da su ugovori o poveravanju poslova s globalnim pružaocima usluga obično složeni i standardizovani,⁷² što izuzetno otežava pregovaračku poziciju društava za osiguranje prilikom poveravanja poslova ovim pružaocima usluga. Pristup dokumentaciji u vezi s poverenim poslovima takođe može biti otežan, odnosno može se desiti da ovaj pristup ne bude blagovremen.⁷³ Sprovođenje izlazne strategije onako kako je ugovoreno i kako je određeno sprovedenim analizama može se razlikovati.⁷⁴ U nekim analizama, pominje se čak i neadekvatno ugovaranje zaštite poverljivih informacija, pa i ličnih podataka korisnika usluge osiguranja, kao i praćenje kvalitativnih i kvantitativnih ciljeva postavljenih pružaocima usluga.⁷⁵

Stoga, logično se nameće pitanje zašto je uopšte sloboda ugovornih strana da urede sadržinu ugovora (i autonomija volje uopšte) u ovoj meri ograničena kod ugovora o poveravanju poslova u društvima za osiguranje. Smatramo da bi razlog uvođenja tih odredaba u dobroj meri mogao da pruži odgovor na pitanje da li se u ovoj materiji radi o preregulisanosti ili je zaista neophodno u ovoj meri ograničiti autonomiju volje društava za osiguranje i pružaoca usluga.

IV Zaštita korisnika usluge osiguranja kao svrha ograničavanja autonomije volje

Ako uzmemo u obzir da je poslovanje društava za osiguranje prvenstveno usmereno na pružanje usluge korisnicima usluge osiguranja, te da je zaštita korisnika usluge osiguranja prepoznata kao vrhunsko načelo u domenu prava osiguranja,⁷⁶

⁷¹ DORA Regulativa, 7.

⁷² EIOPA, Peer review on outsourcing, 66.

⁷³ *Ibidem*.

⁷⁴ *Ibidem*.

⁷⁵ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 26.

⁷⁶ ZO, čl. 15.

i odredbe koje se odnose na poveravanje poslova trećim licima u osiguravajućim društvima treba posmatrati iz ugla zaštite korisnika usluge osiguranja.⁷⁷

Zaštitu korisnika usluga osiguranja stoga treba posmatrati kako kroz obavezu pružanja usluge osiguranja tako i kroz kvalitetno pružanje ovih usluga i zaštitu interesa korisnika usluge osiguranja. To znači da svi zahtevi koji su usmereni na obaveze društava za osiguranje, pa i zahtevi kojima je ograničena autonomija volje osiguravajućih društava prilikom poveravanja poslova trećim licima, treba neposredno da budu usmereni na zaštitu korisnika usluga osiguranja.⁷⁸ Naravno, to ne znači da svi drugi interesi koje društvo za osiguranje mora da očuva (poput kontinuiteta poslovanja) ne treba da budu uzeti u obzir, ali zakonska ograničavanja slobode ugovaranja treba da budu propisana onda kada su neposredno u interesu korisnika usluge osiguranja.

To treba naročito uzeti u obzir ako se podsetimo da je jedan od interesa korisnika usluge osiguranja da se osiguravajuće usluge pod što povoljnijim uslovima stavljaju na raspolaganje njihovim korisnicima, a što društva za osiguranje u savremenim tržišnim uslovima često ne mogu da postignu na drugi način osim poveravanjem poslova. U suprotnom, društva za osiguranje bi bila prinuđena da podignu interne troškove kreiranja i pružanja usluge osiguranja, u koje spadaju i poslovi osiguravajućih društava koja su posredno povezana s pružanjem usluge osiguranja (npr. pribavljanje određenih aplikativnih ili bezbednosnih rešenja). To bi konačno dovelo do podizanja premija osiguranja usled prevladavanja troškova kreiranja i pružanja usluge na one kojima se ta usluga pruža.

Dodatno, mnoge usluge koje su predmet poveravanja daleko kvalitetnije mogu pružiti treća lica koja su specijalizovana za određene poslove nego što to mogu društva za osiguranje, te se i iz aspekta zaštite korisnika usluge osiguranje poveravanje poslova u tim slučajevima može smatrati adekvatnijim rešenjem. Stoga, čini se, regulatorne zahteve, pre svega, treba postaviti u skladu s primenom načela proporcionalnosti iz ugla zaštite korisnika usluge osiguranja.⁷⁹ Na taj način, postigao bi se cilj zaštite korisnika usluge osiguranja, a s druge strane, izbeglo bi se ograničavanje autonomije volje ugovornih strana koje u određenoj meri, čini se, više opterećuje poslovanje osiguravajućih društava i nadzornu funkciju nadzornih organa nego što efektivno doprinosi stabilnosti i sigurnosti tržišta osiguranja.⁸⁰

⁷⁷ Zaštita korisnika usluge osiguranja ne ostvaruje se samo odredbama ugovornog prava osiguranja već i odredbama izvan ugovornog prava osiguranja. O tome: Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja: Analiza i predlog unapređenja regulatornog okvira*. Beograd, 2015, 86–87.

⁷⁸ U analizi koju je sproveo britansko nacionalno nadzorno telo za tržište osiguranja, poveravanje poslova je prepoznato kao potencijalni mehanizam za povećanje rizika od nepružanja usluga korisnicima osiguranja. Financial Conduct Authority, *Delegated authority: Outsourcing in the general insurance market*, 2.

⁷⁹ Primenom načela proporcionalnosti iz ugla zaštite korisnika usluge osiguranja može se smatrati rešenje nadzornog organa za osiguranje u Italijanskoj Republici (IVASS) koji ne dozvoljava poveravanje poslova preuzimanja rizika kao aktivnosti društava za osiguranje, ako će pružalac usluga obavljati ovu aktivnost potpuno autonomno. Peer review on outsourcing, 36.

⁸⁰ Čini se da se upravo usled primene načela proporcionalnosti u kontekstu zaštite korisnika usluge osiguranja primećuje veliki značaj koji se na nivou Evropske unije pridaje poveravanju poslova u vezi sa

Ako kao primer uzmemo srpsko pravo, odredba kojom se društvo za osiguranje i pružalac usluga obavezuju da pri poveravanju i tokom obavljanja poveravanih aktivnosti postupaju u skladu sa zakonom kojim se uređuje zaštita podataka o ličnosti,⁸¹ bez dileme je odredba koja jeste motivisana zaštitom korisnika usluge osiguranja. S druge strane, odredba kojom se pružaocu usluga nameće da pri pružanju usluga u potpunosti postupi u skladu s propisima Republike Srbije⁸² može se smatrati preširoko postavljenim regulatornim zahtevom. Prvo jer je praktično nemoguće informisati pružaoca usluga o svim propisima Republike Srbije (što zahteva njegovo postupanje *u potpunosti*) u skladu s kojim je dužan da postupi. Drugo, jer se postavlja pitanje realnog domašaja te odredbe ako merodavno pravo u skladu s kojim se tumači ugovor o poveravanju poslova nije pravo Republike Srbije. Treće, u praksi nije dovoljno jasno koji cilj se teži postići tom odredbom, pa je ovu odredbu teško opravdati pružaocu usluga. Konačno, nedovoljno je jasna povezanost tog regulatornog zahteva kako sa zaštitom korisnika usluge osiguranja, tako i sa bilo kojim konkretnim interesom osiguravajućeg društva ili tržišta osiguranja uopšte koji je potrebno zaštititi.

Tražeci primere dobre prakse adekvatno postavljenog balansa autonomije volje i njenog ograničavanja, navodimo ugovorno pravo osiguranja. Ugovorno pravo osiguranja obiluje imeprativnim i poluiimperativnim normama i to upravo u meri koja se u praksi pokazala kao izvodljiva i efikasna.⁸³ Stoga, smatramo da sličnim putem treba da se razvija i ugovorno pravo u oblasti poveravanja poslova trećim licima u društvima za osiguranje – uvažavanjem mere u kojoj norme u ovoj oblasti obezbeđuju zaštitu korisnika usluge osiguranja.

V Zaključak

Poveravanje poslova trećim licima predstavlja neizbežan i sve značajniji segment poslovanja društava za osiguranje, uslovljen potrebom za većom efikasnošću, specijalizacijom i prilagođavanjem savremenim tehnološkim tokovima. Ipak, za

preuzimanjem rizika i rešavanjem zahteva za naknadu iz osiguranja. To i ne čudi budući da se preuzimanju rizika pridaje značaj najvažnije aktivnosti u društvu za osiguranje, dok se rešavanje zahteva za naknadu iz osiguranja smatra jednom od najkritičnijih (ili čak najkritičnijom) aktivnošću društava za osiguranje. Čini se da je taj pristup u potpunosti ispravan, ako uzmemo u obzir da poveravanje poslova ne sme kompromitovati zaštitu interesa korisnika osiguranja. Zaštita korisnika usluge osiguranja najvidljivija je i najizloženija upravo prilikom preuzimanja rizika i rešavanja odštetnih zahteva, te je način na koji se poveravaju upravo ovi poslovi ono što i treba da bude u žiži nadzornih organa, kao polje kod kog je rizik poveravanja poslova najveći. EIOPA, Final Report on Public Consultation No. 14/017 on Guidelines on system of governance, smernica 60 – preuzimanje rizika. Peer review on outsourcing, 42.

⁸¹ Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 18, st. 2, u vezi sa tač. 19, st. 4.

⁸² Odluka o poveravanju aktivnosti u vezi sa informacionim sistemom, tač. 18, st. 13.

⁸³ O ograničavanju slobode ugovaranja u ugovornom pravu osiguranja videti: Nataša Petrović Tomić, „O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja: fenomen ‘pokoravanja’ ugovora o osiguranju“, *Analiza Pravnog fakulteta u Beogradu*, br. 1/2020, 100–125.

razliku od drugih privrednih delatnosti, poveravanje poslova u osiguranju odvija se u izraženo regulatornom okruženju, čiji je centralni cilj zaštita korisnika usluge osiguranja. Upravo stoga, institut poveravanja poslova ne može se posmatrati isključivo kao pitanje poslovne strategije već i kao pitanje pravne ravnoteže između tržišne fleksibilnosti i regulatorne sigurnosti.

Analiza relevantne regulative Evropske unije i Republike Srbije pokazuje da se taj balans postiže prvenstveno kroz dva instrumenta: primenu načela proporcionalnosti i znatno ograničavanje autonomije volje prilikom ugovaranja s pružaocima usluga. Načelo proporcionalnosti ima važnu ulogu u prilagođavanju regulatornih zahteva prirodi, obimu i rizičnosti poverenih poslova, čime se omogućava fleksibilnije poslovanje bez ugrožavanja stabilnosti poslovanja osiguravajućih društava.

Istovremeno, to načelo ne nalazi primenu u domenu ugovornih odnosa u užem smislu, koji su gotovo u potpunosti uređeni imperativnim pravilima. Takvo zakonsko rešenje dovelo je do snažnog potiskivanja načela autonomije volje i afirmacije načela stroge formalnosti ugovora o poveravanju poslova. Ugovorne strane se suočavaju sa obavezom ugovaranja detaljno propisane forme ugovora, sadržine ugovora, ograničenom slobodom izbora saugovarača i mogućnošću intervencije nadzornih organa u različitim fazama ugovornog odnosa. Iako su ta ograničenja u normativnom smislu opravdana zaštitom korisnika usluge osiguranja, praksa pokazuje da njihova primena često dovodi do složenih pregovaračkih procesa, naročito u odnosima s velikim i globalnim pružaocima usluga.

Rad ukazuje na to da se nameće potreba za preispitivanjem da li svi postojeći imperativni zahtevi zaista neposredno doprinose zaštiti korisnika usluge osiguranja. U tom smislu, ugovorno pravo osiguranja može poslužiti kao primer uspešnog balansiranja između prinudnih normi i autonomije volje, jer pokazuje da imperativnost može biti efikasna kada je jasno usmerena i proporcionalna.

Zaključno, održiv razvoj regulatornog okvira poveravanja poslova u društvima za osiguranje zahteva kontinuirano usklađivanje između interesa korisnika usluge osiguranja i potrebe društava za osiguranje da posluju efikasno i konkurentno. Samo takav pristup može obezbediti da poveravanje poslova ostane instrument unapređenja kvaliteta pružanja usluga korisnicima usluge osiguranja.

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CERTAIN ISSUES CONCERNING OUTSOURCING IN INSURANCE COMPANIES

REVIEW SCIENTIFIC PAPER

Abstract

This paper examines the issue of outsourcing in insurance companies, with particular attention to the regulatory framework of the European Union and the Republic of Serbia. Starting from the growing need for insurance companies to outsource certain activities to third parties, particularly as a consequence of technological innovation and digitalization, the paper analyzes the manner in which this process is legally regulated and restricted. Particular attention is given to the application of the principle of proportionality and to the impact of mandatory legal rules on the contractual relationships between insurance companies and service providers. The paper further examines the extent to which restrictions on the autonomy of will are justified, taking into account the primary objective of the regulatory framework – the protection of insurance service users. The paper highlights the tension between the need for efficient business operations and the requirements of regulatory certainty, and examines whether the current level of mandatory rules governing outsourcing fully serves that objective.

Keywords: outsourcing, principle of proportionality, autonomy of will, protection of insurance service users.

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I General Overview on Outsourcing in Insurance Companies

Speaking generally about the delegation of activities to third parties, *outsourcing* has become such a standard business model for companies to such an extent that views may be encountered suggesting that we live in an age of outsourcing.² The significance of outsourcing is further underscored by the view held by some authors that the management of outsourced activities has itself become a *core business* in its own right.³ While, in the past, the reasons for outsourcing were commonly associated with reducing operating costs or providing adequate services,⁴ outsourcing is today regarded as a key differentiator of business models⁵ among participants in relevant markets.

It is clear that companies have strong business interests in outsourcing activities to third parties, and the insurance sector is no exception. The need for insurance companies to rely on service providers often represents the key to successfully achieving their strategic objectives.⁶ However, what distinguishes the insurance sector from other industries is the statutory obligation of insurance companies to act in the best interests of insurance service users, that is, in accordance with the principle of protection of insurance service users. Therefore, it is clear that outsourcing in insurance companies must not exceed the limits imposed by such protection; in other words, outsourcing by insurance companies must always be guided by the goal of protecting insurance service users, and the red line of outsourcing is any compromise of such protection.⁷

In the modern era, technological innovation and digitalization have greatly encouraged insurance companies to rely on outsourcing more frequently.⁸ Given that the digital transformation of insurance companies must likewise be guided by

² Gene M. Grossman, Elhanan Helpman, „Outsourcing in a Global economy“, *NBER Working Paper*, No. 8728, 2002, 1.

³ Andrew Kakabadse, Nada Kakabadse, „Outsourcing: Current and Future Trends“, *Thunderbird International Business Review*, No. 2/2005, 187.

⁴ *Ibid.*, 193.

⁵ Financial Conduct Authority, Delegated authority: Outsourcing in the general insurance market, 2015, <https://www.fca.org.uk/publication/thematic-reviews/tr15-07.pdf>, accessed on 17 April 2026, 2.

⁶ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 2018, <https://www.centralbank.ie/docs/default-source/publications/discussion-papers/discussion-paper-8/discussion-paper-8---outsourcing-findings-and-issues-for-discussion.pdf>, 17 accessed on 17 April 2026, 14.

⁷ The financial market conduct supervisory authority of the United Kingdom (*Financial Conduct Authority*), in its analysis of outsourcing practices in the insurance market, identified as a key concern the failure of insurance companies to give sufficient consideration to the interests and fair treatment of insurance service users, as well as to the manner in which outsourcing arrangements may affect them. See: Financial Conduct Authority, Delegated Authority: Outsourcing in the General Insurance Market, 3–4.

⁸ Likewise, see: EIOPA, Peer review on outsourcing, 2022, https://www.eiopa.europa.eu/system/files/2022-07/final_report_on_peer_review_on_outsourcing.pdf, accessed on 17 April 2026, 7.

the best interests of insurance service users,⁹ the question arises as to how insurance market regulators, as well as legislators themselves, ensure that insurance companies reconcile these two interests – outsourcing certain activities to third parties while simultaneously maintaining a satisfactory level of protection of insurance service users. This paper analyzes two instruments through which insurance companies are directed towards appropriate outsourcing – the application of the principle of proportionality and the limitation of autonomy of will in the process of outsourcing activities to third parties.

II Outsourcing from the Perspective of the Principle of Proportionality

The principle of proportionality is the fundamental principle governing the obligations of insurance companies in relation to outsourcing to third parties.¹⁰ Considering the source of its application, the principle of proportionality is a fundamental principle applicable to the entire system of governance within an insurance company,¹¹ and consequently, also to outsourcing to third parties as a component of that system of governance. What does the principle of proportionality entail in the context of outsourcing?

The principle of proportionality as applied in the outsourcing process requires that the prescribed actions and measures be taken in proportion to the nature, scale, and complexity of the activities being outsourced to a third party. Specifically, the principle of proportionality enables, and indeed obliges, the entities to which it applies to perform their obligations throughout the entire life cycle of an outsourcing

⁹ *Ibid.*, 8.

¹⁰ In The Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 (*The Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)*), (the Solvency II Directive) the principle of proportionality is generally viewed from the perspective of supervisory authorities, and one of the general principles governing the exercise of supervisory functions is considered to be the principle of proportionality (as stated in the Directive, “the principle of proportionality ensures that this Directive is applied in a proportionate manner”). Solvency II Directive, Art. 29, para. 4. The principle of proportionality is also incorporated into *Regulation (EU) 2022/2554 of the European Parliament and of the Council on digital operational resilience for the financial sector*, DORA Regulation). DORA Regulation, Art. 28, para.1, point a. The principle of proportionality is also in the Decision on the System of Governance in Insurance/Reinsurance Companies – the Decision on the System of Governance, *Official Gazette of the Republic of Serbia*, Nos. 51/2015, 29/2018, 84/2020, 94/2022, and 82/2024. Decision on the System of Governance, Item 4.

¹¹ The principle of proportionality established under the Solvency II Directive applies to the entire system of governance within an insurance company. It is also considered one of the general principles governing the exercise of supervisory functions by supervisory authorities (as stated in the Directive, “the principle of proportionality ensures that this Directive is applied in a proportionate manner”). The Solvency II Directive, Art. 29, para. 4.

arrangement in a manner proportionate to the inherent risk associated with outsourcing a specific activity to a particular service provider. Given the complexity of the regulatory framework governing outsourcing to third parties, the application of the principle of proportionality can and should be regarded as a considered and commendable legislative solution in this area. Namely, it is clear that it would be impractical to expect insurance companies, irrespective of the criticality, scope, type, nature, and other circumstances of an outsourcing arrangement, always to apply the same level or number of measures and actions for managing outsourcing. For example, outsourcing the claims assessment and settlement of insurance claims is far more complex and carries greater risk than outsourcing the collection of receivables. Accordingly, the risk assessment should be far more analytical and comprehensive in the former case than in the latter. Finally, it is important to emphasize that EU regulatory framework does not merely require insurance companies to act in accordance with the principle of proportionality in the area of outsourcing, this principle also applies to supervisory authorities in the exercise of their supervisory functions.¹²

As previously emphasized, outsourcing to third parties generally, and in particular outsourcing in insurance companies, is a phenomenon of growing practical significance. The principle of proportionality in the field of outsourcing may also be viewed as regulatory recognition of the practical need for insurance companies to operate more efficiently. It should be recalled that the insurance sector is a highly regulated industry¹³ (as evidenced by the regulatory framework governing outsourcing to third parties), which means that insurance companies must comply with numerous statutory and regulatory requirements in their operations, far more so than average market participants. The principle of proportionality, by acknowledging the need for insurance services to remain competitive with comparable services, enables insurance companies to maintain the requisite level of legal compliance, thereby relieving them of obligations disproportionate to their overall business operations or to any specific activity.

At this point, two interesting practical examples of the application of the principle of proportionality will be highlighted, after which the analysis of this principle will conclude by emphasizing one important aspect of outsourcing to which the principle of proportionality does not apply.

The first interesting practical application of the principle of proportionality concerns the types of activities in respect of which insurance companies are required to notify the insurance market regulator. Namely, insurance companies are required to provide prior notification to the supervisory authority, within a specified period before the formal commencement of the outsourcing arrangement,¹⁴ of

¹² See footnote 10.

¹³ For sources of law applicable in the insurance sector, see: Nataša Petrović Tomić, *Pravo osiguranja: sistem. Knjiga 1*, Belgrade, 2019, 78 *et seq.*

¹⁴ Under EU law, insurance companies are required to notify the supervisory authority in advance, in a timely manner, of the outsourcing of activities or of any material change in the provision of outsourced

their intention to outsource activities to a third party. However, depending on the regulatory approach adopted in a given legal system, insurance companies notify the supervisory authority only in respect of certain categories of activities. In this regard, European Union law and Serbian law have taken different approaches to determining which activities an insurance company is required to notify the insurance market supervisory authority about in advance. Under European Union law, insurance companies are required to notify the supervisory authority in advance only where they are outsourcing critical or important activities to a third party,¹⁵ while outsourcing of activities that are not critical or important comes to the attention of supervisory authorities through the supervisory measures they conduct over insurance companies.¹⁶ On the other hand, under Serbian law, insurance companies are required to notify the National Bank of Serbia in advance and in a timely manner of any outsourcing to a third party, regardless of whether the outsourced activities are classified by the insurance undertaking as critical or important.¹⁷ What are the consequences of these different approaches?

activities. Solvency II Directive, Art. 49, para. 3; DORA Regulation, Art. 28, para. 3, point 5. Member States of the EU have interpreted the legal standard of notification in a timely manner differently, with the relevant notification period ranging from 5 to 60 days. EIOPA, Peer Review on Outsourcing, 57. Although, seemingly in the spirit of applying the principle of proportionality, both the Solvency II Directive and the DORA Regulation leave room for Member States to determine independently what period prior to outsourcing an activity to a third party (or prior to a material change in outsourced activities) should be considered timely, EIOPA takes the position that a notification should be regarded as timely if it is submitted to the supervisory authority at least six weeks before the effective commencement of the outsourcing arrangement. EIOPA – Final Report on Public Consultation No. 14/017 on Guidelines on System of Governance (2015), accessed on 19 April 2026, 103–104. Under Serbian law, insurance companies are required to notify the National Bank of Serbia of the outsourcing of activities and the conclusion of an outsourcing agreement, as well as of any material amendment to an outsourcing agreement (through the addition or removal of outsourced activities), a change of service provider, or the selection of a new service provider, no later than 30 days prior to the conclusion of the outsourcing agreement or an amendment thereto. Furthermore, insurance companies are required to provide notification 15 days prior to the conclusion of an amendment concerning the duration of the agreement, financial terms (service fees), or amendments to provisions that do not affect the performance of outsourced activities, where the insurance company outsources activities governed by the Decision on Conditions and the Manner of Outsourcing Activities Related to the Information System of a Financial Institution to Third Parties – the Decision on Outsourcing Activities Related to the Information System), *Official Gazette of the Republic of Serbia*, No. 100/23. Decision on Outsourcing Activities Related to the Information System, para. 20. Where an insurance company outsources activities governed by the Decision on the System of Governance, it is required to notify the National Bank of Serbia of the activities intended to be outsourced to a service provider 30 days prior to the conclusion of the outsourcing agreement, or 15 days before any modification of the outsourced activities. Decision on the System of Governance, Item 37.

¹⁵ Solvency II Directive, Art. 49(3); DORA Regulation, Art. 28, para. 3, point 5.

¹⁶ For the view that this regulatory approach under European Union law reflects the principle of proportionality, EIOPA, Peer Review on Outsourcing, 94.

¹⁷ Decision on the System of Governance, Item 37; Decision on Outsourcing Activities Related to the Information System, para. 20.

It is evident that the European Union approach more closely reflects the application of the principle of proportionality, while the Serbian approach departs from it. Nevertheless, this does not render it unjustified, for at least two reasons. First, the obligation on insurance companies to notify the National Bank of Serbia of every¹⁸ outsourcing arrangement creates a discipline in the fulfilment of regulatory obligations. In such a regulatory environment, insurance companies cannot disregard regulatory requirements when outsourcing activities that are not classified as critical or important. Otherwise, they risk the National Bank of Serbia exercising its regulatory and statutory powers and using legal measures to delay the process until regulatory requirements have been fulfilled. Consequently, in addition to securing the approval of the National Bank of Serbia, insurance companies may, through the process of communication with their regulator,¹⁹ gain useful insights into how to improve and streamline their internal outsourcing process in a manner that is both regulatorily compliant and operationally efficient.

Second, the general obligation on insurance companies to notify the National Bank of Serbia of all activities they intend to outsource to third parties enables the National Bank of Serbia to continuously and holistically oversee the outsourcing process. When a market regulator has insight into the full spectrum of outsourced activities (without the risk that entire categories of outsourced activities remain outside the regulator's awareness unless indirect or direct supervisory procedures are initiated), it is well-placed to monitor market trends in this segment of insurance companies' operations and to proactively guide the market towards best practices through continuous supervision.²⁰

Finally, for practical purposes, it should be noted that the obligation on insurance companies to provide timely prior notification to the market regulator of

¹⁸ When it is stated that insurance companies are required to notify the National Bank of Serbia of every outsourcing activity, this refers to all situations in which, pursuant to the provisions of the decisions adopted by the National Bank of Serbia, a particular agreement with a service provider is deemed to constitute an agreement for outsourcing activities to a third party. For definitions of outsourcing, Decision on the System of Governance, Item 32(1); Decision on Outsourcing Activities Related to the Information System, Item 4.

¹⁹ EIOPA considers communication between the regulator and the insurance market regarding the regulatory framework governing outsourcing to constitute good practice. EIOPA, Peer Review on Outsourcing, 14.

²⁰ EIOPA identified as an example of good practice in the context of continuous supervision over outsourcing in insurance companies the thematic review conducted by the insurance market supervisory authority in Poland. Specifically, during the period from 2016 to 2017, the Polish insurance market regulator carried out a targeted review of outsourcing policies in all insurance companies that had, at that time, outsourced at least some of their activities to third parties. The ultimate objective of this thematic review was for the Polish regulator to share its findings with the market and to require insurance companies to align their policies with the regulator's findings. For a more detailed discussion of this thematic review, EIOPA, Peer Review on Outsourcing, 144–146.

every outsourcing arrangement may, in certain cases, limit operational efficiency, this being entirely consistent with the spirit of the principle of proportionality.

The second interesting practical application of the principle of proportionality concerns *intra-group outsourcing*. Specifically, in the practice of insurance companies operating within a corporate group, intra-group outsourcing often involves outsourcing activities to an entity that forms part of the same group to which the insurance company engaging in the outsourcing arrangement also belongs. To illustrate the practical scale of this phenomenon, one may refer to the Central Bank of Ireland's findings (the insurance market regulator in the Republic of Ireland) from a study published in 2018. According to that study, entities supervised by the Central Bank of Ireland (insurance companies, banks, investment funds, payment institutions, and other entities operating in Ireland) concluded 50% of their outsourcing agreements with service providers within the same group.²¹ As regards the European Union, EIOPA's 2022 findings indicate that more than 40% of critical or important functions in insurance companies are outsourced intra-group.²² The practical significance of intra-group outsourcing is therefore considerable.

From the perspective of the regulatory framework, it is undisputed that the rules governing outsourcing to third parties apply equally to cases where activities are outsourced to entities within the group. Such a regulatory position is clear under both European Union law²³ and the law of the Republic of Serbia.²⁴ However, it is equally uncontested that insurance companies will naturally seek to simplify the outsourcing process in intra-group arrangements. Although, from a legal perspective, intra-group service providers are still third parties, they are also related legal entities to the insurance company to which they provide services. From an economic perspective, this relationship is even closer, since the operations of the insurance company as the recipient of services and those of the group entity as the service provider are, from a broader business perspective, always directed toward achieving objectives that are in the best interests of the group to which they both belong. Finally, from the perspective of the protection of insurance service users in a broader sense, insurance service users may also be regarded as clients of the group entity, since both entities operate within the same group.

²¹ Central Bank of Ireland, *Outsourcing – Findings and Issues for Discussion*, 15.

²² EIOPA, *Peer Review on Outsourcing*, 8.

²³ For example, the Solvency II Directive does not make difference between the outsourcing of activities to a legal entity within the same group and outsourcing to a third party. See the definition of outsourcing in the Solvency II Directive, Art.13, para. 1, point 28. Moreover, EIOPA, apparently in response to practices identified within the European Union insurance market, emphasizes that the provisions of the Solvency II Directive governing outsourcing also apply to intra-group outsourcing. EIOPA, *Peer Review on Outsourcing*, 24.

²⁴ *Decision on Outsourcing Activities Related to the Information System*, para. 5, point 2.

It is therefore clear that insurance companies naturally tend towards a more flexible application of the general rules on outsourcing to third parties, that is, towards the application of the principle of proportionality in the context of intra-group outsourcing. It is equally clear that regulators did not initially recognize the distinctive nature of intra-group outsourcing. Nevertheless, the European Union took a step toward recognizing this practice. Specifically, five years after the adoption of the Solvency II Directive, the European Union expressly affirmed the application of the principle of proportionality in the context of intra-group outsourcing. More specifically, *Commission Delegated Regulation (EU) 2015/35 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)* (the Delegated Regulation under the Solvency II Directive as of 20214.), provides that where the insurance company and the service provider are members of the same group, in the case of outsourcing critical or important operational functions or activities, the company shall take into account the extent to which it controls the service provider or can influence its activities.²⁵ What follows from this provision? The principle of proportionality introduced by this provision is value-neutral. In particular, its application is not directed solely towards liberalization of general rules governing outsourcing, it may equally operate to tighten them. Everything depends on the extent to which the insurance company is able to influence the service provider. Nevertheless, EIOPA further underlines that intra-group outsourcing may represent a “*single point of failure*”, and accordingly EIOPA recommends that supervisory authorities in EU Member States treat the supervision of intra-group outsourcing as a high priority.²⁶

As regards the liberalization of the general rules on outsourcing in cases where insurance companies outsource activities to intra-group entities, EIOPA has highlighted the application of an “enhanced” principle of proportionality in the context of intra-group outsourcing as recognition of “a certain level of flexibility”.²⁷ Nonetheless, EIOPA is explicit that “flexibility may vary”.²⁸ The specific aspect of outsourcing in which EIOPA has identified scope for liberalization is the analysis of the service provider, given that the service provider is known to the management bodies of the insurance company and that the insurance company is able to impose influence over the intra-group service provider.²⁹

The Central Bank of Ireland has reached similar conclusions.³⁰ In terms of the specific reasons for liberalizing intra-group outsourcing, it has identified the

²⁵ Delegated Regulation under the Solvency II Directive, Art. 274, para. 2.

²⁶ EIOPA, Peer review on outsourcing, 8.

²⁷ *Ibid.*, 49.

²⁸ EIOPA, Final Report on Public Consultation No. 14/017 on Guidelines on System of Governance, Guideline 62, Item. 2, 296.

²⁹ *Ibid.*, Guideline 62, Item. 2, 298.

³⁰ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 15.

greater possibility to adapt outsourcing agreements to the evolving needs of the insurance company.³¹

From this second example it follows that the practical application of the principle of proportionality may vary depending on the specific circumstances in which activities are outsourced to a third party.

As noted above, the greater flexibility to amend intra-group outsourcing agreements compared to situations in which activities are outsourced to entities outside the group structure, has been recognized as a justification for a more flexible approach to intra-group outsourcing in the spirit of applying the principle of proportionality. However, it is precisely outsourcing agreements that represent a rare aspect of outsourcing falling entirely outside the scope of application of the principle of proportionality in its liberalizing sense (though not similarly excluded from its restrictive application).³²

If the observation that outsourcing agreements are entirely outside the scope of the principle of proportionality were considered solely from the perspective of contract law (without any prior knowledge of the specificities of outsourcing or the insurance sector), the logical question would arise as to why it is necessary to apply the principle of proportionality to a contract as a legal transaction at all. Contract law is characterized by the principle of autonomy of will,³³ meaning that the proportionality of contractual arrangements is left to the contracting parties themselves to determine. However, the principle of autonomy of will in outsourcing agreements is substantially limited. So substantially, in fact, that even the principle of proportionality in its positive aspect (the mitigation of the parties' obligations in proportion to the specific circumstances, within the limits of mandatory rules), which would otherwise leave some room for autonomy of will, has not replaced the principle of freedom of contract.³⁴ Quite the contrary, the principle of autonomy of will has been replaced in all its aspects by the principle of strict formality in throughout the contracting process.

III The Principle of Strict Formality in Outsourcing Agreements

Returning to the principle of autonomy of will as one of the fundamental principles of contract law, we shall examine how the mandatory rules applicable

³¹ *Ibidem*.

³² For example, where activities are outsourced through the use of cloud services, the National Bank of Serbia requires insurance companies to include additional provisions in outsourcing agreements. See: Decision on Outsourcing Activities Related to the Information System, Item 30.

³³ The principle of autonomy of will ensures the sovereignty of the contracting parties' intentions. For a discussion of the principle of autonomy of will, Mihailo Konstantinović, *Obligaciono pravo. Beleške sa predavanja*, Belgrade, 1969, 17–18.

³⁴ EIOPA has likewise expressly excluded outsourcing agreements from the scope of application of the principle of proportionality. EIOPA, Peer Review on Outsourcing, 94.

to outsourcing to third parties in insurance companies have drastically limited the application of the principle of autonomy of will of the contracting parties – the insurance company and the third party to which it outsources activities.³⁵

The principle of autonomy of will represents statutory recognition of every person's freedom, in the conduct of legal affairs (extending far beyond contract law to the full reach of civil law generally), to act in accordance with their own will. It is in the domain of contract law that the principle of autonomy of will attains its greatest significance.³⁶ What does the principle of autonomy of will concretely entail in the context of contract law? More specifically, it encompasses two subsidiary principles: the principle of consensualism (the general freedom of choice as to the form of a contract) and the principle of freedom of contract (the freedom to decide whether or not to enter into a contract, the freedom to choose a contracting party, and the freedom to determine the content of the contract).³⁷ These freedoms may, in accordance with the law, be restricted only by mandatory rules, public policy, and good customs.³⁸

It follows that limitation on the principle of autonomy of will by mandatory rules are both a legal and a practical exception. Speaking generally, mandatory rules are uncommon in contract law. Contract law abounds is characterized by a large number of default rules that serve as a supplement to the parties' intentions in situations where they fail to regulate their relationship differently. The purpose of contract law is not to dictate to contracting parties how they should regulate their relationships, but rather to provide a framework that guides them when they require it.

However, the part of contract law governing outsourcing in insurance companies, is characterized by the opposite approach, namely by an abundance of mandatory legal rules, which allows us to conclude that the principle of strict formality of outsourcing agreements prevails in this field. The mandatory rules that have effectively displaced the principle of autonomy of will with the principle of strict

³⁵ Although, from a substantive perspective, the provisions applicable to insurance companies in the field of outsourcing limit the autonomy of will of both contracting parties, from a legal perspective the autonomy of will is restricted only with respect to insurance companies and not with respect to service providers (even where service providers themselves are entities supervised by the same supervisory authority, since in such circumstances they are not acting in the capacity of the entity outsourcing activities). In practice, such a substantial restriction of the autonomy of will of the contracting parties gives rise to significant difficulties during contract negotiations, given that service providers are under no obligation to agree to such terms, while at the same time being expected to accept a considerable number of obligations that are atypical in ordinary commercial practice.

³⁶ Marija Karanikić Mirić, *Obligaciono pravo*, Belgrade, 2024, 77.

³⁷ *Ibidem*.

³⁸ Law of Contracts and Torts (LCT), *Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia, and 57/89; *Official Gazette of the FRY*, No. 31/93; *Official Gazette of Serbia and Montenegro*, No. 1/2003 – Constitutional Charter; and *Official Gazette of the Republic of Serbia*, No. 18/2020, Art.10.

contractual formality will be analyzed through the lens of the deviation from each of the two subsidiary principles: the principle of consensualism and the principle of freedom of contract.

1. Derogation of the Principle of Consensualism

As noted above, the principle of consensualism implies the general freedom of the contracting parties to choose the form in which they will conclude a contract. As the LCT defines it, the general rule is that the conclusion of a contract is not subject to any specific form, unless otherwise stipulated by law.³⁹ However, in the area of outsourcing, bylaws (decisions of the National Bank of Serbia) have replaced the freedom of choice as to contractual form with an obligation to conclude the agreement in written form,⁴⁰ a solution that also exists under European Union law.⁴¹

At this point, attention will be given to the manner in which the principle of consensualism has been derogated under Serbian law in the area of outsourcing by insurance companies. As noted above, the LCT permits derogation from the principle of consensualism only where stipulated by *law*. However, the decisions of the National Bank of Serbia are subordinate legislation. The question therefore arises as to the lawfulness of the provisions mandating the written form for outsourcing agreements concluded by insurance companies. Specifically, whether those provisions of the National Bank of Serbia's decisions find their legal basis in any applicable statute governing contracts concluded by insurance companies.⁴² First, it is worth

³⁹ LCT, Art. 67, para. 1. This provision of the LCT should not be interpreted as meaning that contracts, as a rule, lack a form. On the contrary, every contract has a particular form, while the principle of consensualism merely establishes that the contracting parties are free to choose that form (so-called informal contracts). On the other hand, the law may require contracting parties, in certain circumstances, to conclude contracts in a prescribed form (formal contracts). For a more detailed discussion of the distinction between formal and informal contracts, see: Marija Karanikić Mirić, 178 *et seq.*

⁴⁰ Decision on the System of Governance, Item 35(2). While the aforementioned Decision expressly prescribes that an outsourcing agreement concluded between an insurance company and a service provider must be in written form, the Decision on Outsourcing Activities Related to the Information System establishes this requirement indirectly by obliging insurance companies, when notifying the National Bank of Serbia of the intended conclusion of an outsourcing agreement with a third party, to submit a draft of that agreement to the National Bank of Serbia. Decision on Outsourcing Activities Related to the Information System, Item 20(2); Item 25(2).

⁴¹ DORA Regulation, Art.30, para.1; Delegated Regulation under the Solvency II Directive, Art. 274, para. 3, point c).

⁴² At this point, it should be emphasized that, unlike the Decision on the System of Governance, which applies exclusively to insurance companies (and reinsurance companies), the provisions of the Decision on Outsourcing Activities Related to the Information System also apply to banks, financial leasing providers, voluntary pension fund management companies, payment institutions, electronic money institutions, and public postal operators in the part of their business relating to the provision of payment services and/or the issuance of electronic money (hereinafter collectively: financial institutions). The author does

considering the LCT. As the LCT regulates only insurance contracts,⁴³ its provisions cannot be applied to outsourcing agreements. Furthermore, neither the legislation governing the legal status of companies⁴⁴ nor that regulating conditions and means of conducting trade activities⁴⁵ contains a provision requiring companies or traders to conclude in writing contracts under which outsourcing agreements might be classified. As for the Insurance Law of the Republic of Serbia,⁴⁶ which governs the conduct of insurance activities, a mandatory provision requires insurance companies to draft contracts in the Serbian language.⁴⁷ The question arises, however, as to how this provision should be interpreted. Should it be interpreted as implicitly requiring insurance companies to conclude all contracts in written form and in Serbian (including outsourcing agreements), or does it merely require that when insurance companies choose to conclude contracts in written form, those contracts must be drafted in Serbian? Since there appears to be no alternative statutory basis for introducing an obligation on insurance companies to conclude outsourcing agreements in writing, it would seem that the lawfulness of the National Bank of Serbia's provisions requiring insurance companies to conclude such agreements in written form depends precisely on the interpretation (broad or narrow) of the aforementioned IL provision.

The author has not found any interpretation of this IL provision that addresses the question of whether it derogates from the principle of consensualism in respect of contracts concluded by insurance companies. The author's position is that the IL provision requiring insurance companies to draft contracts in Serbian should be interpreted narrowly – as an obligation on insurance companies that, where they decide to conclude contracts in written form, such written contracts must also be concluded in the Serbian language, rather than as a general obligation always to conclude contracts in written form. The author takes this position guided by the general interpretive principle that exceptions to general legal rules in law should

not intend, either in this part of the paper or in the paper as a whole, to extend the conclusions derived herein to financial institutions other than insurance companies.

⁴³ LCT, Arts. 897–965.

⁴⁴ The legal status of companies under Serbian law is governed by the Company Law - CL, *Official Gazette of the Republic of Serbia*, Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021, and 19/2025. The CL prescribes, for certain types of agreements (for example, agreements on status changes, agreements on the transfer of shares or stocks, and control and management agreements), an obligation for companies to conclude such agreements in written form. However, there is no general mandatory provision requiring companies to conclude contracts in writing (although, in commercial practice, formal contracts are more common than informal contracts).

⁴⁵ The conditions and manner of carrying out trade activities under Serbian law are governed by the Trade Law, *Official Gazette of the Republic of Serbia*, No. 52/2019. This law does not impose a mandatory obligation on traders to conclude contracts in written form.

⁴⁶ Insurance Law – IL, *Official Gazette of the Republic of Serbia*, Nos. 139/2014 and 44/2021.

⁴⁷ IL, Art. 67, para. 3.

be interpreted narrowly.⁴⁸ In the present context, the IL provision stipulating that insurance companies must conclude contracts in Serbian constitutes an exception to the general provision of informality under the LCT. Accordingly, in the author's view, the scope of this IL provision should not be extended so as to imply that insurance companies are obliged to conclude all contracts in written form (in Serbian).

2. Derogation of the Principle of Freedom of Contract

As regards the principle of freedom of contract, it should be recalled that it encompasses the following freedoms of the contracting parties: (i) the freedom of the contracting parties to decide whether or not to conclude a contract; (ii) the freedom to choose a contracting party; and (iii) the freedom of the contracting parties to determine the content of the contract. For the purposes of this analysis, the freedom to determine the conditions under which the contracting parties are entitled to terminate the contract unilaterally will be identified as a distinct freedom, separate from the freedom to determine contractual content.⁴⁹ Each of these freedoms is restricted in the context of outsourcing agreements where an insurance company is one of the contracting parties. The following analysis will examine the manner in which each of these freedoms is limited.

First, the restriction on the contracting parties' freedom to decide whether or not to conclude a contract depends on whether the insurance market supervisory authority has the right, during the period from receipt of the insurance company's notification of its intention to outsource activities to the expiry of the prescribed notification period (hereinafter: the prior notification period), to raise an objection to the conclusion of the outsourcing agreement and thereby prevent the insurance company and the service provider from concluding it. If the prior notification period is viewed from the perspective of the insurance companies, both European Union law and Serbian law, as noted above, require insurance companies *to notify*⁵⁰ the supervisory authority in advance of their intention to outsource activities to a third

⁴⁸ For a more detailed discussion of the narrow interpretation of exceptions in law, Radomir Lukić (revised by Jasminka Hasanbegović and Marko Božić), *Uvod u pravo*, Belgrade, 2020, 337–339.

⁴⁹ The right to unilateral termination of a contract in circumstances agreed upon by the contracting parties at the time of concluding the contract is considered a form of consensual termination of a contract. Marija Karanikić Mirić, 449.

⁵⁰ In the relevant European Union legislation, in their English-language versions, the verbs *to notify* and *to inform*, are used when referring to the manner in which insurance companies communicate with supervisory authorities regarding outsourcing activities to third parties. Solvency II Directive, Art. 49, para. 3; DORA Regulation, Art. 28, para. 3, point 5. In the subordinate legislation adopted by the National Bank of Serbia, the verb *to notify* is used. See: Decision on the System of Governance, Item 37; Decision on Outsourcing Activities Related to the Information System, Item 20(1) and (4), and Item 25(1). EIOPA has likewise taken the position that the notification process introduced under the Solvency II Directive does not constitute an approval process. EIOPA, Peer Review on Outsourcing, 57.

party. This obligation, as a matter of linguistic construction, clearly implies only the act of notifying the supervisory authority of the intended outsourcing, without the insurance company needing to await any response from the supervisory authority before concluding an outsourcing agreement with the service provider after the expiration of the prior notification period.

If, on the other hand, the prior notification period is viewed from the perspective of the supervisory authority's right to object to the conclusion of an outsourcing agreement, the legal systems examined do not explicitly introduce this right for supervisory authorities. European Union law says nothing in general terms about the rights of supervisory authorities during the prior notification period, while Serbian law provides in one National Bank of Serbia decision that the notification period runs from the date of submission of the complete documentation⁵¹ (the list of which is prescribed by that decision).⁵² Additionally, the National Bank of Serbia has the right to request additional documentation from the insurance company, where it is not possible to establish all the facts material to the processing of the notification, and where it considers such documentation necessary.⁵³

What do these regulatory frameworks under European Union law and Serbian law concretely imply in practice? Under European Union law, supervisory authorities have the right to remain strictly passive. Member States wishing to make their supervisory authorities more active have therefore had to provide them with specific powers during the prior notification period through national legislation.⁵⁴ Under Serbian law, the National Bank of Serbia has the right to require the insurance companies to submit complete documentation for as long as the insurance company fails to do so. During the prior notification period, however, the National Bank of Serbia has no formal right to object to the conclusion of an outsourcing agreement. In practice, nevertheless, the right vested in the National Bank of Serbia essentially produces the same effect as a right of objection. The insurance company is not entitled to conclude the outsourcing agreement until it has submitted complete documentation to the National Bank of Serbia, and according to an interpretation of the cited provisions, the National Bank of Serbia has the right to request additional documentation from the insurance company an unlimited number of times.

⁵¹ Decision on Outsourcing Activities Related to the Information System, Item 20, para. 5, and Item 25, para. 3.

⁵² *Ibid.*, Item 20, para. 2 and Item 25, para 2.

⁵³ *Ibid.*, Item 20, para. 3.

⁵⁴ Many European Union Member States have adopted precisely such an approach, resulting in various forms of supervisory authority powers across Member States – ranging from the authority of the supervisory body to grant approval for an outsourcing arrangement, through the authority to respond in all cases to notifications submitted by insurance companies, to the authority to request additional information in response to such notifications. See: EIOPA, Peer Review on Outsourcing, 58.

Among the laws of EU Member States, a solution similar to that found in Serbian law exists in France, Romania, and Sweden, where supervisory authorities have similarly addressed their concerns regarding specific outsourcing arrangements through dialogue with insurance companies, without a formal right of objection to the conclusion of outsourcing agreements.⁵⁵ However, EIOPA, in the course of its examination of outsourcing processes in EU Member States, identified the need for supervisory authorities in Member States to be expressly recognized as having the right to object to the conclusion of outsourcing agreements in cases where supervisory authorities hold “serious and justified concerns regarding the compliance of the planned outsourcing with applicable regulatory requirements”.⁵⁶ Moreover, the supervisory authorities of France, Romania, and Sweden were each required to regulate within their respective legal systems the authorities’ right to object to the conclusion of outsourcing agreements.⁵⁷

It follows that the right of supervisory authorities to object to the conclusion of outsourcing agreements is considered a necessary mechanism for preventing insurance companies from outsourcing activities to service providers in an inappropriate manner. The purpose of notifying the supervisory authority of the intention to conclude an outsourcing agreement is to enable the supervisory authority to verify that the outsourcing complies with applicable regulatory requirements,⁵⁸ while the right to object to the conclusion of an outsourcing agreement serves as the *ultima ratio* of supervisory authorities where the same effect cannot be achieved through dialogue with the insurance company. However, for a supervisory authority to exercise such a right lawfully, it must be explicitly granted by the applicable legal act. In the context of restricting the contracting parties’ right to freely conclude a contract, it is clear that this right cannot be restricted implicitly. Supervisory authorities may restrict that freedom only where they are explicitly authorized to do so. Any other course of action would be inconsistent with the application of the principle of freedom of contract, which, like any other principle, applies whenever it has not been explicitly derogated.

Examining the freedom to choose a contracting party as the second aspect of freedom of contract, the legal systems under consideration contain instances where insurance companies are restricted in their freedom to choose a service provider. For example, under Serbian law, the National Bank of Serbia is authorized, both during the notification procedure relating to the intended outsourcing of activities to a particular service provider and after such activities have already been outsourced, to notify the insurance company that those activities may not be

⁵⁵ EIOPA, Peer review on outsourcing, 57–58.

⁵⁶ *Ibid.*, 58.

⁵⁷ *Ibid.*, 120–121.

⁵⁸ *Ibid.*, 11.

outsourced to that service provider. Furthermore, the NBS has the right to require the insurance company to terminate the outsourcing agreement where it concludes that the outsourcing is likely to result in market concentration among providers of information technology services to financial institutions, or in the service provider attaining a dominant position in that market in a manner that could adversely affect that market or the stability of the financial system.⁵⁹ The legal systems of EU Member States also recognize mechanisms restricting the freedom of contract of insurance companies through a requirement to change their service provider. Certain supervisory authorities of Member States have exercised this right already at the prior notification stage, requiring insurance companies to change their contracting party (service provider),⁶⁰ thereby effectively exercising their right to restrict the freedom of contract of insurance companies through the aspect of the right to choose a contracting party.

Finally, the freedom of the contracting parties to determine the content of the contract is the freedom whose restriction is most strongly felt by insurance companies in practice. The freedom to choose the form of the contract has already been restricted by the freedom to determine its content (since the insurance company would struggle to prove that it agreed the required content if the contract was not concluded in written form), while the freedom to choose a contracting party and the freedom to conclude a contract at all can only be exercised after the insurance company has notified the supervisory authority of its intention to outsource. However, already at the negotiation stage with a service provider, insurance companies are required to negotiate the inclusion of a number of contractual provisions⁶¹ to which service providers may not readily agree. Insurance companies face a particularly demanding task in this regard, given that these provisions are primarily directed toward protecting the interests and rights of the insurance company and, indeed, the rights of supervisory authorities and other entities which analyze the operations of insurance companies, such as external auditors of insurance companies.⁶² Furthermore, where the service provider intends to subcontract the provision of

⁵⁹ Decision on Outsourcing Activities Related to the Information System, Item 23, para. 1.

⁶⁰ Up to 2022, the following European Union Member States, through their respective supervisory authorities, had exercised their powers to require insurance companies to change service providers: Belgium, Spain, Ireland, Iceland, Liechtenstein, and Malta. EIOPA, Peer Review on Outsourcing, 68.

⁶¹ For a detailed list of the provisions that insurance companies are required to include in agreements with service providers, the Solvency II Directive, Art. 49, para. 3; DORA Regulation, Art. 30; Delegated Regulation under the Solvency II Directive, Art. 274, para. 4; and the Decision on Outsourcing Activities Related to the Information System, Items 18 and 30.

⁶² EIOPA has transparently raised the issue of the feasibility of implementing provisions relating to various supervisory and oversight rights over service providers, even where contractual provisions establishing such rights of oversight over the service provider have been agreed upon. EIOPA, Peer Review on Outsourcing, 67.

services to a subcontractor, insurance companies are required to ensure that each agreement concluded with the subcontractor also contains certain prescribed provisions,⁶³ which has proved particularly challenging in practice.⁶⁴ Additionally, apart from the obligation imposed by the regulatory framework to ensure certain contractual content, insurance companies are aware that the review of contractual clauses in outsourcing agreements is crucial for supervisory authorities,⁶⁵ and that any failure to include the required provisions will be noted, potentially resulting in additional supervisory requirements.

Although insurance companies are required to carry out a range of analyses and risk assessments relating to outsourcing and the service provider and to submit these to the supervisory authority, supervisory authorities appear, in reviewing the insurance company's intention to outsource, to focus primarily on the contractual provisions forming the mandatory content of the outsourcing agreement.⁶⁶ This would appear to result from several factors.

First, unlike the documented analyses and assessments submitted by insurance companies to supervisory authorities, which are unilateral acts of the insurance company, contracts are bilaterally binding legal transactions that bind both the insurance company and the service provider. Accordingly, the contract not only secures certain conduct on the part of the insurance company but, more importantly, secures certain conduct on the part of the service provider. Without diminishing the importance of the activities, insurance companies are required to undertake in managing outsourcing risk, the principal source of outsourcing risk is the service provider and its conduct in performing the outsourced activities. In this way, the contract is the most effective mechanism for controlling the service provider.

⁶³ Commission Delegated Regulation (EU) 2025/532 supplementing Regulation (EU) 2022/2554 of the European Parliament and of the Council with regard to regulatory technical standards specifying the elements that a financial entity has to determine and assess when subcontracting ICT services supporting critical or important functions, Art. 4; Decision on Outsourcing Activities Related to the Information System, Item 24.

⁶⁴ According to the findings of a study published by Central Bank of Ireland in 2018, as many as 78% of insurance companies did not include provisions relating to the management of subcontracting arrangements in their outsourcing agreements. Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 27.

⁶⁵ In analyzing the manner in which supervisory authorities exercise oversight during the prior notification period, EIOPA concluded that supervisory authorities generally adopt one of two supervisory approaches – a comprehensive supervisory approach or an administrative supervisory approach. Comprehensive supervision is described as supervision aimed at reviewing matters reported by insurance companies in order to ensure that all material risks have been adequately mitigated. By contrast, administrative supervision involves verifying the formal compliance of the notification with legal requirements. Regardless of the supervisory approach adopted, the review of contracts and contractual provisions was identified as one of the most significant focal points of supervision in the process of notifying supervisory authorities of an intended outsourcing arrangement. EIOPA, Peer Review on Outsourcing, 63–65.

⁶⁶ *Ibid.*, 67.

Second, and most fundamentally, is the domino effect of the contract on the other requirements relating to the prior assessment of outsourcing. Specifically, where the contract fails to meet the requisite standards, that is, where the service provider is not contractually required to act in a certain manner, any actions the insurance company intends to undertake in the event that outsourcing is not carried out appropriately cannot prevent adverse consequences from arising. For example, even if an insurance company has prepared an excellent exit strategy to be implemented upon deciding to discontinue certain outsourced activities, that strategy will be practically unworkable if no notice period for unilateral termination has been contractually agreed, if the agreed notice period is insufficiently long, or if the service provider's obligation to continue providing services during the transition period has not been secured.

Third, examining the drafting practice of national regulatory authorities and European Union legislation, requirements of a contractual nature are defined with far greater precision – bylaws and European Union legislation contain an exact list of provisions that outsourcing agreements are required to include, whereas no equally clear guidance exists for the analyses companies are required to conduct.⁶⁷ It is therefore far easier for supervisory authorities to assess the compliance of contracts with their regulatory requirements than the compliance of other documentation.

It should be noted that, while supervisory authorities will primarily focus on the review of outsourcing agreements, they encounter a range of challenges in assessing such agreements, which most commonly concern the drafting techniques (for example, framework service agreements accompanied by multiple annexes) and the complexity of contracts that are difficult to amend because they have been standardized by global service providers.⁶⁸

Finally, it should be mentioned that the autonomy of will of the contracting parties is further limited by restrictions on the freedom to determine the conditions under which they may terminate a contract unilaterally. In certain cases, supervisory authorities have the right to direct insurance companies to terminate an outsourcing agreement.⁶⁹ In addition to these specific cases in which supervisory authorities have the *ex lege* right to require termination of outsourcing agreements, insurance companies and service providers are also required to include contractual provisions generally preserving the insurance company's right to terminate the outsourcing agreement unilaterally upon the direction of the supervisory authority.⁷⁰

⁶⁷ Certain supervisory authorities of European Union Member States (insurance market supervisory authorities in Belgium, Germany, Ireland, and Netherlands) have provided insurance companies with additional specifications and/or guidance in order to clarify their expectations concerning risk assessments and *due diligence* procedures. EIOPA, Peer Review on Outsourcing, 54.

⁶⁸ For a discussion of the challenges encountered by supervisory authorities in European Union Member States when reviewing draft outsourcing agreements, EIOPA, Peer Review on Outsourcing, 66–67.

⁶⁹ For example, Decision on Outsourcing Activities Related to the Information System, Item 31, para. 3.

⁷⁰ DORA Regulation, Art. 30, para. 2, point h; Decision on Outsourcing Activities Related to the Information System, Item 18, para. 3.

As it has been shown, the assessment of the adequacy of outsourcing relies significantly on the content of the agreement concluded with the service provider. The question therefore arises whether these provisions can, in practice, be effectively enforced, or whether they remain a dead letter. Finally, why is the freedom of the contracting parties to determine the content of a contract restricted to such an extent in outsourcing agreements?

It appears that the regulatory framework governing outsourcing in insurance companies has not yet been in place long enough to permit definitive conclusions as to the extent to which provisions restricting the freedom of the contracting parties to determine contractual content are capable of effective implementation in practice. What is certain is that both regulators and supervisory authorities have expressed concern about the practical reach of these provisions. In the DORA Regulation, for instance, the drafters clearly acknowledge in the recitals that insurance companies encounter difficulties in negotiating mandatory contractual provisions, highlighting in particular access and audit rights as a field in which challenges in exercising these rights have been observed, even where they have been contractually agreed.⁷¹ As already noted, outsourcing agreements concluded with global service providers are typically complex and standardized,⁷² which greatly weakens the negotiating position of insurance companies when outsourcing activities to such providers. Access to documentation relating to outsourced activities may also be impeded or fail to be provided in a timely manner.⁷³ The implementation of exit strategies in practice may differ from the manner in which they were agreed contractually and envisaged by prior analyses.⁷⁴ Some analyses even mention inadequate contractual protection of confidential information, including the personal data of insurance service users, as well as difficulties in monitoring qualitative and quantitative targets set for service providers.⁷⁵

The question therefore logically arises as to why the freedom of the contracting parties to regulate the content of their agreement (and autonomy of will more broadly) is restricted to such an extent in the context of outsourcing agreements in insurance companies. It is our view that the reason for introducing these provisions may provide important insight into whether this area reflects overregulation or whether such a degree of restriction on the autonomy of will of insurance companies and service providers is genuinely necessary.

⁷¹ DORA Regulation, 7.

⁷² EIOPA, Peer review on outsourcing, 66.

⁷³ *Ibidem*.

⁷⁴ *Ibidem*.

⁷⁵ Central Bank of Ireland, Outsourcing – Findings and Issues for Discussion, 26.

IV Protection of Insurance Service Users as the Purpose of Restricting Autonomy of Will

If one considers that the operations of insurance companies are primarily directed towards providing services to insurance service users, and that the protection of insurance service users is recognized as the paramount principle in insurance law,⁷⁶ the provisions governing outsourcing by insurance companies should equally be considered from the perspective of the protection of insurance service users.⁷⁷

The protection of insurance service users should accordingly be considered both in terms of the obligation to provide insurance services and in terms of the quality of those services and the safeguarding the interests of insurance service users. This means that all requirements imposed upon insurance companies, including those restricting the autonomy of will of insurance companies in outsourcing to third parties, should be directly aimed at ensuring the protection of insurance service users.⁷⁸ Of course, this does not mean that all other interests that insurance companies are required to preserve (such as business continuity) are to be disregarded. However, statutory restrictions on freedom of contract should be prescribed only where they directly serve the interests of insurance service users.

This should be taken into account particularly in light of the fact that one of the interests of insurance service users is for insurance services to be made available to them on the most favourable terms possible, an objective that, under modern market conditions, insurance companies are often unable to achieve other than through outsourcing. Otherwise, insurance companies would be compelled to increase their internal costs of developing and delivering insurance services, which include activities indirectly connected with the provision of insurance services (such as procuring certain application or security solutions). This would ultimately lead to an increase in insurance premiums through the transfer of the costs of creating and providing insurance services to the users of those services.

Furthermore, many services that are the subject of outsourcing can be provided far more competently by third parties specializing in specific activities than by insurance companies themselves, and from the perspective of the protection of insurance service users, outsourcing in such cases may be considered a more appropriate solution. It would therefore seem that regulatory requirements should, first

⁷⁶ IL, Art. 15.

⁷⁷ The protection of insurance service users is not achieved solely through the provisions of insurance contract law, but also through provisions falling outside the sphere of insurance contract law. On this issue, Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja: Analiza i predlog unapređenja regulatornog okvira*, Belgrade, 2015, 86–87.

⁷⁸ In an analysis conducted by the Financial Conduct Authority, outsourcing was identified as a potential mechanism for increasing the risk of a failure to provide services to insurance service users. Financial Conduct Authority, *Delegated Authority: Outsourcing in the General Insurance Market*, 2.

and foremost, be formulated in accordance with the application of the principle of proportionality, viewed from the standpoint of the protection of insurance service users.⁷⁹ In this way, the objective of protecting insurance service users would be achieved, while avoiding restrictions on the autonomy of will of the contracting parties that appear, to some extent, to impose greater burden on the operations of insurance companies and on the supervisory function of supervisory authorities than they effectively contribute to the stability and soundness of the insurance market.⁸⁰

Taking Serbian law as an example, the provision requiring both the insurance companies and the service providers, in the context of outsourcing and during the performance of outsourced activities, to comply with the legislation governing the protection of personal data,⁸¹ is without question a provision motivated by the protection of insurance service users. On the other hand, the provision requiring the service provider to comply *in full* with all regulations of the Republic of Serbia in providing its services⁸² may be regarded as an excessively broad regulatory requirement. First, because it is practically impossible to inform a service provider of all the regulations of the Republic of Serbia with which full compliance is expected. Second, because the question arises as to the practical reach of that provision where the law governing the interpretation of the outsourcing agreement is not the law of the Republic of Serbia. Third, in practice it is insufficiently clear what objective that provision seeks to achieve, making it difficult to justify the requirement to a service provider. Finally, the connection between that regulatory requirement and the protection of insurance service users, as well as any concrete interest of the

⁷⁹ The solution adopted by the insurance supervisory authority of the Italy, IVASS, may be regarded as an example of the application of the principle of proportionality from the perspective of the protection of insurance service users, as it does not permit the outsourcing of risk underwriting activities where the service provider would perform such activities entirely autonomously. EIOPA, Peer Review on Outsourcing, 36.

⁸⁰ It appears that, precisely as a consequence of applying the principle of proportionality in the context of the protection of insurance service users, particular significance at the European Union level is attached to the outsourcing of activities relating to risk underwriting and the handling of insurance claims. This is unsurprising, given that risk underwriting is regarded as one of the most important activities of an insurance company, while the handling of insurance claims is considered one of the most critical, if not the single most critical, activities performed by insurance companies.

This approach appears entirely justified when account is taken of the fact that outsourcing must not compromise the protection of the interests of insurance service users. The protection of insurance service users is most visible and most directly exposed in the context of risk underwriting and the handling of insurance claims. Consequently, the manner in which these particular activities are outsourced is precisely what should remain at the center of supervisory attention, as these are the areas in which the risks associated with outsourcing are greatest. See: EIOPA, Final Report on Public Consultation No. 14/017 on Guidelines on System of Governance, Guideline 60 – risk underwriting; EIOPA, Peer Review on Outsourcing, 42.

⁸¹ Decision on Outsourcing Activities Related to the Information System, Item 18, para. 2, in conjunction with Item 19, para. 4.

⁸² Decision on Outsourcing Activities Related to the Information System, Item 18, para. 13.

insurance company or the insurance market generally requiring protection, remains insufficiently clear.

In seeking examples of good practice for an appropriately balanced treatment of autonomy of will and its restriction, reference may be made to insurance contract law. Insurance contract law contains a considerable number of mandatory and semi-mandatory rules, precisely to the extent that has proven to be both feasible and effective in practice.⁸³ Hence, it is our view that the development of contract law in the area of outsourcing by insurance companies to third parties should follow a similar path – by taking due consideration of the extent to which legal rules in this field genuinely secure the protection of insurance service users.

V Conclusion

Outsourcing to third parties represents an inevitable and increasingly significant component of the operations of insurance companies, driven by the need for greater efficiency, specialization, and adaptation to contemporary technological developments. However, unlike in other business activities, outsourcing in the insurance industry takes place within a highly regulatory environment, the central aim of which is the protection of insurance service users. Precisely for this reason, outsourcing cannot be viewed solely as a matter of business strategy, it must also be considered as a question of legal balance between market flexibility and regulatory certainty.

An analysis of the relevant regulatory frameworks of the European Union and the Republic of Serbia demonstrates that this balance is achieved principally through two instruments: the application of the principle of proportionality and significant restrictions of the autonomy of will in contracting with service providers. The principle of proportionality plays an important role in calibrating regulatory requirements to the nature, scope, and risk profile of outsourced activities, thereby enabling more flexible operations without jeopardizing the stability of insurance companies.

At the same time, the principle of proportionality finds no application in the domain of contractual relations in the strict sense, which are governed almost entirely by mandatory rules. This legal solution has resulted in a significant displacement of the principle of autonomy of will and the affirmation of the principle of strict contractual formality in outsourcing agreements. The contracting parties are subject to obligations regarding the precisely prescribed form and content of the contract, restrictions on the freedom to choose a contracting party, and the possi-

⁸³ For a discussion of restrictions on freedom of contract in insurance contract law, Nataša Petrović Tomić, „O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja: fenomen ‘pokoravanja’ ugovora o osiguranju“, *Annals of the Faculty of Law in Belgrade*, No. 1/2020, 100–125.

bility of supervisory intervention at various stages of the contractual relationship. While these restrictions are normatively justified by the protection of insurance service users, practice shows that their application frequently results in complex negotiation processes, particularly in relationships with large and global service providers.

This paper suggests the need for a reconsideration of whether all existing mandatory requirements genuinely and directly contribute to the protection of insurance service users. In this respect, insurance contract law may serve as a model for successfully balancing mandatory rules and autonomy of will, demonstrating that mandatory norms can be effective when they are clearly targeted and proportionate.

In conclusion, the sustainable development of the regulatory framework governing outsourcing in insurance companies requires ongoing alignment between the interests of insurance service users and the need for insurance companies to operate efficiently and competitively. Only such an approach can ensure that outsourcing continues to serve as an instrument for enhancing the quality of services provided to insurance service users.

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