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Procenitelji šteta: da li razlike u propisima u EU treba ukloniti?

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Apstrakt

Po sistemu solventnost II, procena šteta je postala važan aspekt u funkcionisanju društva za osiguranje. Posle donošenja Direktive o solventnosti II (dalje u tekstu: DS II) otpočela je diskusija o tome da li usluge procene šteta treba regulisati kroz izmene Direktive o posredovanju u osiguranju (dalje u tekstu: DPO 2). U tom smislu, ovaj rad je posvećen proceniteljima šteta i kontroverznom pitanju regulisanja njihovih standarda prakse u sklopu jednoobraznog pravnog sistema EU. U radu je prvo data definicija procenitelja šteta kao specijalista koji se angažuju radi istrage okolnosti povodom odštetnog zahteva osiguranja shodno polisi osiguranja, i koji daju savete o visini iznosa koji treba platiti ugovaraču osiguranja radi likvidacije tog odštetnog zahteva. Zatim se opisuju poslovi koji se redovno obavljaju u sklopu delatnosti procenitelja. Nakon toga, dat je pregled pravnog okvira za usluge procene šteta u Evropi u DS II i izneti su argumenti predloga Evropske Komisije za njihovo uključivanje u proširenu definiciju posrednika u osiguranju, što bi bilo uneseno u izmenjenu DPO. Autor je pažnju usmerio i na izražene sumnje u vezi sa tim da li je DPO 2 adekvatan instrument za regulisanje profesije procene šteta.

Ključne reči: procenitelji šteta, usluge procene šteta, štete osiguranja, solventnost II, Smernice EIOPA, DPO 1, DPO 2 (izmene)

1. UVOD

Prema režimu iz Direktive o solventnosti II, osiguravači moraju da povećaju poslovnu efikasnost svojih procedura rešavanja odštetnih zahteva bilo da se radi

o poslovima koje obavlja neka njihova direkcija ili procenitelji šteta van kompanije. Zato je procena šteta postala jedno od najvažnijih aspekata za funkcionisanje društava za osiguranje. Međutim, donošenje jednoobraznih pravila EU o profesionalnim kvalifikacijama procenitelja šteta i dalje je kontroverzno pitanje.

2. DEFINICIJA I ULOGA PROCENITELJA ŠTETA

2.1 Definicija i kategorije procenitelja šteta

Ne postoji zakonska definicija zanimanja procenitelja šteta i usluga koje oni pružaju. Procenitelj šteta se može opisati kao specijalista koji je angažovan radi istrage o okolnostima odštetnog zahteva shodno polisi osiguranja, i koji daje savete o iznosu koji treba platiti ugovaraču osiguranja radi likvidacije odštetnog zahteva. U statutu Instituta procenitelja šteta (*Chartered Institute of Loss Adjusters – CILA*)¹, procenitelj štete se definiše kao „lice čija je pretežna delatnost istraga, upravljanje, kvantifikacija, vrednovanje i rešavanje, uključujući i izveštavanje o štetama na imovini, licima kao i svim drugim vrstama šteta bez obzira da li su osigurane, a koje nastanu u nekom neočekivanom događaju.”²

Odštetni zahtevi osiguranja koje istražuju procenitelji šteta odnose se na imovinske štete (na primer, požarne štete, štete na objektima itd.) i štete iz osnova odgovornosti (na primer, za telesne povrede ili štete na imovini trećih lica po osnovu odgovornosti, kao što su saobraćajne nezgode, nepažljivo ponašanje itd.). U zavisnosti od odštetnog zahteva koji rešavaju, procenitelji mogu da budu specijalizovani za štete u više vrsta osi-

¹ Osnovan u Velikoj Britaniji Kraljevskom poveljom iz 1961. godine, Institut procenitelja šteta je organizacija pojedinačnih članova. Institut utvrđuje profesionalne i etičke standarde za one koji rade na rešavanju šteta.

² Statut CILA, čl. 1, dostupno na: <http://www.cila.co.uk/about-us/charter-and-by-laws/charter>, 30. 10. 2013.

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guranja ili u svim vrstama osiguranja. Procenitelji koji rešavaju štete u više vrsta osiguranja mogu rešavati štete u osiguranju imovine i odgovornosti, dok procenitelji šteta za sve vrste osiguranja mogu rešavati sve vrste šteta (na primer, profesionalna odgovornosti, višak štete iz odgovornosti, lekarske greške, kasko osiguranje i osiguranje mašina, pomorsko osiguranje itd.).

U nekim evropskim državama postoje proceniteljska privredna društva koja pružaju usluge upravljanja odštetnim zahtevima prema instrukcijama društava za osiguranje,³ dok u drugim evropskim zemljama, usluge procenitelja šteta su sastavni deo delatnosti društva za osiguranje (sopstveni procenitelji). Kombinacija oba sistema takođe je zastupljena, jer društva za osiguranje imaju direkciju za procenu šteta, ali istragu i likvidaciju složenih odštetnih zahteva poveravaju spoljnim specijalizovanim stručnjacima. Ugovarači osiguranja, takođe, angažuju svoje procenitelje šteta radi pregovaranja o šteti. Takvi procenitelji se često nazivaju savetnicima šteta. Za pružanje svojih usluga, procenitelji šteta naplaćuju naknadu u skladu sa složenošću datog predmeta.

2.2. Uloga procenitelja šteta

Od procenitelja šteta se očekuje da imaju pošten i objektivni pristup odštetnom zahtevu osiguranja koji omogućava društvima za osiguranje da bez odlaganja obrade odštetni zahtev. Obim usluga koje pružaju zavisi od punomoćja koje im je dato i može da se odnosi na:

(a) Izlazak na mesto gde je nastala šteta radi istrage okolnosti pod kojim je šteta nastala;

(b) Razgovor sa klijentima o šteti radi dokaza o mogućim uzrocima;

(c) Prikupljanje dokaza kao što su snimci bezbednosnih kamera i policijski izveštaji;

(d) Zahtevanje detaljnih izveštaja od veštaka, na poseban zahtev;

(e) Popunjavanje neophodne dokumentacije;

(f) Procenu obima materijalne štete / gubitka;

(g) Proveru da li je gubitak ili šteta pokrivena prema uslovima osiguranja, da li su sume osiguranja iz polise adekvatne i da li je iznos koji zahteva ugovarač osiguranja pošten i razuman;

(h) Pregovaranje o dinamici isplata;

(i) Ukazivanje na aspekte štete koje je ugovarač možda prevideo, savetovanje o načinu popravke i organizacija poslova raščišćavanja i spasavanja;

(j) Sprovedenje dodatnih istraga u slučaju sumnje na prevaru;

³ Na primer u Velikoj Britaniji, posebno pogledati: <http://www.insurance-directories.com/productdetails.aspx?id=69&name=Loss+Adjusting.>, 20. 10. 2013.

(k) Sačinjavanje izveštaja o nalazima i preporukama za društvo za osiguranje;

(l) Savetovanje oštećenih kako se bezbednost i sigurnost može unaprediti radi izbegavanja novih šteta ili incidenata.

3. EVROPSKA REGULATIVA O PROCENITELJIMA ŠTETA

Opšti je stav da se usluge procenitelja šteta moraju zasnivati na profesionalizmu i nezavisnosti radi obezbeđivanja nepristrasne i precizne procene šteta. Zbog toga, procenitelji šteta treba da ispunjavaju izvesne profesionalne kvalifikacije i standarde profesionalnosti. Međutim, danas ne postoji evropska jednoobrazna regulativa stručnjaka – procenitelja šteta. Pružanje usluga procenitelja šteta u Evropi zavisi od lokalne prakse, strukture i razvijenosti relevantnog nacionalnog tržišta osiguranja.⁴ Pored toga, standardi profesionalnog ponašanja procenitelja šteta su uglavnom samoregulisani putem etičkih kodeksa reprezentativnih udruženja, dok se nacionalni propisi o profesionalnim kvalifikacijama ne mogu tako često pronaći u svim državama članicama EU. Društva za osiguranje takođe donose pravila o pružanju usluga procenitelja šteta i profesionalnim kvalifikacijama koje mora da ispunjava stručnjak kojeg oni angažuju. Ova pravila nemaju obavezujuću snagu, ali nameću profesionalne standarde koje delatnost osiguranja očekuje. Stupanjem na snagu Direktive o solventnosti II može se, sa druge strane, posredno regulisati obavljanje poslova procenitelja šteta, kao što je objašnjeno u narednim izlaganjima.

3.1. Samoregulacija

Uzimajući u obzir ozbiljne poremećaje konkurencije koji prete stabilnosti njihove delatnosti u celoj Evropi, evropska udruženja procenitelja šteta osnovala su Evropski savez procenitelja šteta (*European Federation of Loss Adjusting Experts – FUEDI*, dalje u tekstu: ESPŠ). ESPŠ koji trenutno ima četrnaest udruženja i tri privremena člana,⁵ priznaje Evropska Komisija za

⁴ Pismo FUEDI od 13. februara 2013. upućeno Odboru za ekonomske i monetarne poslove Skupštine Evrope, dostupno na: <http://www.expert-cea.com/c/lettre-fuedi-fevrier-2013>, 20. 10. 2013.

⁵ Udruženja: Austrija (AFILA), Belgija (GEBCAI), Danska (DALAX), Francuska (CEA), Nemačka (BTE), Italija (AIPAI), Luksemburg (CEL), Holandija (NIVRE), Poljska (SNELS), Portugalija (CNPR), Rusija (NAIA), Španija (AESPER), Švedska (SOPŠ), Velika Britanija I Irska (CILA) – *Privremeni članovi*: Češka (CKSLPU), Grčka (HALA), Rumunija (ROLAA), dostupno na: <http://www.fuedi.eu/members.htm>, 23. 10. 2013.

reprezentativan organ svih profesionalnih procenitelja štete u Evropi. Glavni ciljevi ESPŠ su promocija nepri- strasne i nezavisne profesije procene štete, primena vi- sokih standarda profesionalnog ponašanja i kompeten- tnosti i ujednačavanje standarda edukacije i stručnosti u njenim državama članicama.⁶ ESPŠ insistira da svi njeni članovi obezbede da se ostvaruje minimalni nivo edukacije. U tom smislu radi jednoobrazne profesio- nalne obuke svojih članova, Savez promovira obrazov- ne programe u državama članicama.⁷ Učešće članova nacionalnih udruženja na ovim programima predstavl- ja dobru polaznu osnovu. Međutim, iz nadzornog ugla gledano, obavezno učešće u tim programima ili uslovi za članstvo za sprovođenje procene šteta moglo bi da obezbedi jednoobrazni nivo profesionalizma u celoj Evropi. Samoregulacija je posebno zastupljena na vi- sokokonkurentnim tržištima, dok u zemljama gde ne postoji konkurentno tržište jednostavno je nejasno da li uopšte postoji motiv za visokim obrazovanjem proceni- telja šteta. Zbog toga, jednoobrazni nivo EU u pogledu profesionalizma ne može da se postigne samo putem samoregulacije. Sa druge strane, da li je poželjno dono- šenje takvog propisa na nivou EU za usluge procenitelja šteta predstavlja sporno pitanje, kako je objašnjeno u nastavku teksta.

3.2 Primena Direktive o solventnosti II na usluge procenitelja šteta

Na usluge procenitelja šteta koje pružaju društva za osiguranje, u sklopu njihove glavne delatnosti, prime- njuje se Direktiva o solventnosti II.⁸ Direktiva o solven- tnosti II sadrži usaglašena pravila o nadzoru društava za osiguranje, sa ciljem podsticanja zaštite ugovarača osiguranja. Prema preambuli 17 Direktive o solven- tnosti II, zahteva se „da države članice organizuju nad- zorne organe svim resursima za ispunjavanje njihovih obaveza propisanih (ovom) Direktivom. To se poseb- no odnosi na sva neophodna ovlašćenja, uključujući finansijske i kadrovske resurse.” Posle odlaganja njene primene, rok za sprovođenje Direktive o solventnosti II u državama članicama je 30. jun 2013. godine, a njena primena od strane društava za osiguranje treba da poč- ne 1. januara 2014. Međutim, početkom oktobra 2013.

⁶ Dostupno na: <http://www.fuedi.eu/>, 23. 10. 2013.

⁷ Dostupno na: <http://www.fuedi.eu/education.htm>, <http://www.fuedi.eu/adjusted.htm>, 23. 10. 2013.

⁸ Directive 2009/138/EC of the European Parliament and of the Council, of 25 November 2009, on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), str. 1–155.

godine, Evropska Komisija je predložila produženje datuma njene prve primene na 1. januar 2016. godine.⁹

3.2.1. Opšti zahtevi usklađenosti

Usluge procene šteta koje obavljaju društva za osigu- ranje obuhvaćene su pojmom „opšti uslovi upravljanja” u članu 41 Direktive o solventnosti II, kojim je propisa- no da: „sva društva za osiguranje i reosiguranje moraju upostaviti efikasan sistem upravljanja koji omogućava sveobuhvatno i pažljivo upravljanje poslovanjem.” Ovaj sistem, koji podleže redovnim internim revizijama „po- drazumeva postojanje adekvatne, transparentne orga- nizacije sa jasnom podelom odgovornosti i efikasnim sistemom protoka informacija. Sistem upravljanja treba da bude srazmeran prirodi, obimu i složenosti poslo- va društva za osiguranje ili reosiguranje.” Naravno da Direktiva o solventnosti II propisuje osnovne principe, ali precizan efekat tih zahteva o proceni šteta se jedino može uočiti preko mera 2. nivoa.

3.2.2. Pravila o poveravanju koja se primenjuju na procenitelje šteta koje angažuju društva za osiguranje

Usluge procene šteta koje društva za osiguranje poveravaju trećim licima obuhvaćene su odredbama Direktive o solventnosti II o poveravanju.¹⁰ Direktiva posebno predviđa sledeća nadzorna pravila koja se pri- menjuju na usluge trećih lica u vezi sa procenom šteta (Direktiva o solventnosti II, čl. 38):

Treća lica koja vrše procenu šteta moraju saradivati sa nadzornim organima društva za osiguranje u vezi sa uslugom procene štete;

Društva za osiguranje, njihovi revizori i nadzorni organi moraju imati efektivan pristup podacima u vezi sa uslugama trećih lica u vezi sa procenom šteta;

Nadzorni organi moraju imati efektivan pristup po- slovnom prostoru pružaoca usluga i moraju da budu u mogućnosti da ostvare svoja prava pristupa.

Pored navedenog, kao što je propisano članom 49, st. 3 Direktive o solventnosti II, društva za osiguranje moraju „obavestiti nadzorne organe pre poveravanja

⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

¹⁰ Direktiva o solventnosti II, čl. 13, st. 28, čl. 38, 41, 49 i 50. Prema čl. 13, st. 28 „poveravanje” se definiše kao „sporazum zaključen u bilo kojoj formi između društva za osiguranje ili reosiguranje i pružaoca usluge, bez obzira da li pružalac usluge potpada pod nadzor, na osnovu kojeg pružalac usluge sprovodi postupak, pruža uslugu ili obavlja neku aktivnost bilo direktno ili preko trećeg lica, a koju bi inače izvršavalo društvo za osiguranje ili reosiguranje.”

značajnih ili važnih funkcija ili poslova, kao i o svim bitnim događajima u vezi sa tim funkcijama ili poslovima.”

3.2.3 Smernice EIOPA

Pored ostalih, na osnovu članova 40 do 49 Direktive o solventnosti II, EIOPA¹¹ je objavila Smernice o sistemu upravljanja 31. oktobra 2013.¹² Nadzorni organi moraju ove smernice primeniti počev od 1. januara 2014. godine kako bi društva za osiguranje mogla da preduzmu odgovarajuće korake radi potpune primene Direktive o solventnosti II.¹³ Smernica 13 propisuje da „nadležni nacionalni organi treba da obezbede da društva za osiguranje primenjuju politiku u skladu sa uslovima adekvatnosti i kompetentnosti”, uključujući „opis procedura za utvrđivanje adekvatnosti i kompetentnosti prema internim standardima prilikom ocene drugog bitnog osoblja na koje se ne primenjuju uslovi iz člana 42 Direktive o solventnosti II, kako prilikom ocene za obavljanje određenih poslova, tako i na trajnoj osnovi.” Kada se radi o ključnim funkcijama, Smernica 14 propisuje da nacionalni nadležni organi treba da obezbede da: (a) „društva primenjuju procedure ocene adekvatnosti i kompetentnosti lica koje treba da zaposli pružalac usluga ili podugovarač pružaoca usluga u izvršenju poverene ključne funkcije”; (b) „društvo određuje neko lice iz društva koje snosi punu odgovornost za poverenu ključnu funkciju, a koje je adekvatno i kompetentno i poseduje dovoljno znanje i iskustvo u vezi sa poverenom ključnom funkcijom da bi moglo da kontroliše izvršavanje i rezultate pružaoca usluge.”

Očigledno je da se okvir koji donosi Direktiva o solventnosti II oslanja na to da delatnost osiguranja uspostavi procedure koje će ispunjavati prehodno navedene kriterijume ocene standarda profesionalnosti koji se očekuju od lica koja izvršavaju poverene ključne funkcije, kao što su procenitelji šteta.

¹¹ EIOPA (*European Insurance and Occupational Pensions Authority – EIOPA*) je Evropska agencija za nadzor osiguranja i penzijskih fondova, jedna od tri Evropske nadzorne agencije. EIOPA je deo Evropskog sistema finansijskog nadzora koji se sastoji od tri Evropske nadzorne agencije i Evropskog odbora za sistemske rizike. Radi se o nezavisnom nadzornom organu Skupštine Evrope, Saveta EU i Evropske Komisije. Dostupno na: <https://eiopa.europa.eu/>, 29. 10. 2013.

¹² Dostupno na: https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/guidelines/System_of_Governance/Final_EN_SoG_Clean.pdf, 29. 10. 2013.

¹³ Guidelines on System of Governance, paragraph 1.6.

4. PREDLOG ZA PRIMENU DIREKTIVE O POSREDOVANJU U OSIGURANJU 2 NA NEZAVISNE PROCENITELJE ŠTETA

Kao što je već pomenuto, nezavisni procenitelji šteta nisu direktno predmet regulisanja Direktive o solventnosti II. Zbog toga je posle stupanja na snagu ove direktive otpočeo dijalog oko toga da li usluge procene šteta treba da budu regulisane izmenama Direktive o posredovanju u osiguranju 2 (dalje u tekstu: DPO 2).

Direktiva o posredovanju u osiguranju 1 predvidela je zahteve u pogledu kvalifikacija i registracije i utvrdila pravila o obaveštavanju koja moraju da primenjuju posrednici u osiguranju.¹⁴ Važeća DPO 1 izričito isključuje sopstvenu primenu u pogledu upravljanja odštetnim zahtevima osiguranja u vidu profesionalnog zanimanja, procene šteta i nalaza veštaka, pod uslovom da se ti poslovi ne smatraju posredovanjem u osiguranju (DPO 1, čl. 2, st. 3). Posredovanje u osiguranju, u skladu sa DPO 1, čl. 2, st. 3, obuhvata „poslove dovođenja u vezu, predlaganja ili obavljanja drugog pripremnog posla pre zaključenja ugovora o osiguranju ili samo zaključenje tih ugovora ili pomaganje u administraciji i izvršavanju tih ugovora, posebno u slučaju nastanka odštetnog zahteva.” Pored toga, ovi poslovi, kada ih obavlja društvo za osiguranje ili njegov zaposleni koji istupa u sklopu odgovornosti društva za osiguranje, ne smatraju se posredovanjem u osiguranju i na njih se ne primenjuje DPO 1, već Direktiva o solventnosti II.

U skladu sa odredbama Direktive o solventnosti II, Evropska Komisija je početkom 2010. godine sačinila nacrt predloga izmene DPO 1, uzimajući u obzir posledice sistema solventnosti II po ugovarače osiguranja. Tokom pripremnog rada na DPO 2, procenitelji šteta su se zalagali za uspostavljanje sistema uzajamnog priznavanja (sektorski pasoši) radi povećanja njihove prekogranične delatnosti.¹⁵ Pored toga, nekoliko potrošačkih organizacija je predložilo da konzistentnost transparentnosti i nadzora treba da se primenjuje na sve učesnike na tržištu.¹⁶ Pošto je studija o proceni uticaja završena, Evropska Komisija je 2012. godine obja-

¹⁴ Directive 2002/92/EC of the European Parliament and of the Council of 9.12.2002 „on insurance mediation” (IMD), str. 3–10.

¹⁵ Pisma FUEDI-ja Evropskoj komisiji, dostupno na: www.fuedi.eu, 30. 10. 2013.

¹⁶ Aneksi o oceni uticaja zajedno sa predlogom za izmenom Direktive o posredovanju u osiguranju, dostupno na: http://ec.europa.eu/internal_market/insurance/docs/consumers/mediation/20120703-impact-assessment_annex_en.pdf, 30.10.2013.

vila svoj predlog izmene DPO 2.¹⁷ Uopšteno govoreći, projekat DPO 2 „ima za cilj da proširi domen primene DPO na sve kanale prodaje (na primer, direktni preuzimači rizika, agencije za iznajmljivanje automobila, itd.); identifikuje, upravlja i smanji sukobe interesa; podigne nivo ujednačenosti upravnih sankcija i mera za kršenje ključnih odredbi DPO; poveća adekvatnost i objektivnost saveta; obezbedi da profesionalne kvalifikacije prodavaca odgovaraju složenosti proizvoda koje prodaju; pojednostavi i uopšti proceduru za prekogranični pristup tržištima osiguranja u celoj EU.”¹⁸ U svetlu rečenog, predlog predviđa da se DPO 2 primenjuje na pomoćne prodavce i servise, uključujući i procenitelje i administratore šteta. Aktivnost profesionalne uprave odštetnim zahtevima i procene šteta obuhvaćeno je u definiciji posredovanja u osiguranju.¹⁹

4.1. Pojednostavljena procedura registracije – objava delatnosti

Član 4, st. 2 i 3 predloga predviđa da su procenitelji šteta izuzeti od obaveze registracije iz čl. 3 ako ne obavljaju nijednu drugu delatnost, a da po pojednostavljenoj proceduri moraju da dostave izjavu nadležnom organu njihove države članice kojom će ga obavestiti o svom identitetu, adresi i profesionalnoj delatnosti. Društva za osiguranje moraju jedino da koriste usluge procenitelja šteta koji su prošli kroz ovu proceduru (DPO 2, čl. 14).

4.2. Profesionalne kvalifikacije

Prema preambuli 22 Predloga DPO 2 „profesionalno znanje lica koja obavljaju delatnost upravljanja štetama ili procenama šteta treba da odgovara složenosti tih poslova. Mora se obezbediti trajna edukacija.” U tom smislu, čl. 8, st. 1 Predloga DPO 2 predviđa da procenitelji šteta moraju „posedovati odgovarajuće znanje i sposobnost” u skladu sa propisima domicilne države članice „radi obavljanja svojih poslova i adekvatno izvršavanje sopstvenih obaveza, na osnovu odgovarajućeg profesionalnog iskustva bitnog za složenost proizvoda za koji posreduju.” Pored toga, države članice treba da obezbede da procenitelji šteta „moraju da inoviraju svoje znanje i umešnost putem trajnog profesionalnog razvoja radi održavanja adekvatnog nivoa usluge.”

¹⁷ Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3. 7. 2012, COM (2012) 360 final, 2012/0175 (COD).

¹⁸ Obrazloženje (*Explanatory Memorandum*), čl. 1.1, Predloga Direktive Skupštine Evrope i Saveta o posredovanju u osiguranju (izmene).

¹⁹ Obrazloženje, čl. 3.1. Predloga Direktive Skupštine Evrope i Saveta o posredovanju u osiguranju (izmene).

Komisija je ovlašćena da donese delegirane akte u skladu sa čl. 8, st. 8 i 33. Delegirani akti moraju da sadrže:

(a) Definiciju adekvatnog znanja i veštine procenitelja šteta;

(b) Odgovarajuće kriterijume za određivanje nivoa profesionalnih kvalifikacija, iskustva i veština neophodnih za pružanje usluga procene šteta;

(c) Korake za koje se od posrednika u osiguranju i društava za osiguranje može razumno očekivati da se preduzimaju radi inoviranja njihovog znanja i veštine putem trajnog profesionalnog razvoja radi očuvanja adekvatnog nivoa usluge.

Države članice moraju objaviti pravila o zaštiti interesa javnog poretka za procenitelje šteta, a EIOPA ima obavezu da prikupi i objavi ta pravila (DPO 2, čl. 9).

4.3. Prigovori na primenu DPO na procenitelje šteta

Odbor za ekonomska i socijalna pitanja Skupštine Evrope (dalje u tekstu: OESP), u svom stavu o „Predlogu Direktive Skupštine Evrope i Saveta o posredovanju u osiguranju (izmene)” od 13. decembra 2012. godine, istakao je da je neophodno dalje razmotriti neke predloge pre njihove primene. Ovo zbog toga što, prema njihovom stavu, čini se „čudnim” uključivanje profesionalnog upravljanja štetama sa procenom šteta u definiciji usluga posredovanja.²⁰ U istom smeru, u njihovom nacrtu izveštaja od 14. decembra 2012. godine²¹ OESP je predložio nekoliko amandmana na predlog DPO 2. Kako OESP objašnjava u obrazloženju u Nacrtu izveštaja, upravljanje štetama koje obavljaju društva za osiguranje ili treća lica na osnovu ugovora spada u domen Direktive o solventnosti II. Zbog toga, OESP smatra da se samo na poslove koji nisu regulisani ugovorom o poveravanju ovih poslova trećim licima ne primenjuje Direktiva o solventnosti II. Prema OESP ovo samo po sebi nije opravdan razlog za uključivanje upravljanja štetama u DPO 2. Stav OESP je, sa druge strane, veoma formalan, jer se zaštita interesa ugovarača osiguranja mora ostvarivati nezavisno od toga da li stručnjak pruža usluge u ime društva za osiguranje ili da li ga je

²⁰ Opinion of the European Economic and Social Committee on the „Proposal for a Directive of the European Parliament and of the Council on insurance mediation” (recast), str. 95–98.

²¹ Draft Report on the proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) (COM(2012)0360 – C7-0180/2012 – 2012/0175(COD)), Committee on Economic and Monetary Affairs, Rapporteur: Werner Langen, (Recast – Rule 87 of the Rules of Procedure), dated 14.12.2012, dostupno na: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-502.060+01+DOC+PDF+V0//EN&language=EN>, 20. 10. 2013.

angažovao ugovarač osiguranja. Jasno je da se Direktiva o solventnosti II ne odnosi na drugi slučaj.

Drugi argument koji je istakao Odbor za pravna pitanja, u svom stavu upućenom Odboru za ekonomska i monetarna pitanja od 21. marta 2013. godine²² sastoji se u tome da je delatnost procene šteta već dovoljno regulisana nacionalnim pravima u kojima se ona ne odnosi na prodaju i upravljanje proizvodima osiguranja. U istom smeru, Odbor za unutrašnje tržište i zaštitu potrošača, u svom stavu datom Odboru za ekonomska i monetarna pitanja o predlogu DPO 2 od 30. aprila 2013. Godine,²³ izrazio je zabrinutost zbog regulisanja novih zanimanja, kao što je procenitelj šteta, što je nebitno za delatnosti regulisane DPO. U skladu sa odborima Skupštine, *Insurance Europe*²⁴ je u oktobru 2012. godine, uložilo prigovor na proširenje domena primene DPO 2 na usluge procene šteta zbog tehničke prirode tih poslova i njihovog regulisanja po sistemu solventnosti II.²⁵

Očigledno da ovi argumenti bude zabrinutost u pogledu toga da li je direktiva, čija je prvenstvena svrha bila da reguliše prodaju proizvoda osiguranja, adekvatan zakonski instrument za uvođenje ujednačenog skupa pravila na delatnost koja je u velikoj meri različita u državama članicama. Drugim rečima, sporno je da li

je DPO 2 odgovarajuće sredstvo za regulisanje procene šteta, kao i da li te poslove treba odvojeno regulisati na nivou EU.²⁶ Ovaj argument možda može dovesti do izuzimanja DPO 2 od primene na procene šteta.

5. ZAKLJUČAK

Regulativa EU o proceni šteta putem DPO 2 je sporna. Ipak, namera Komisije EU da uključi procenitelje šteta u proširenu definiciju posrednika u osiguranju probudila je pažnju u celoj delatnosti osiguranja, a je što je dugo zanemarivano na nivou EU. U suštini, sporno je da li je DPO 2 adekvatan instrument za regulisanje zanimanja procene šteta i da li bi poseban propis bio bolje rešenje za specifičnosti ovih poslova. Na primer, procenitelji šteta specijalizovani za velike rizike, za razliku od osiguravača, usmeravaju svoje usluge na globalno tržište i njegove klijente koji nisu tipični ugovarači osiguranja čije je interese potrebno štiti standardima zaštite iz DPO.

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²² Opinion dated 21.3.2013 of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) (COM(2012)0360 – C7-0180/2012 – 2012/0175(COD)), dostupno na: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARTL&reference=PE-504.065&format=PDF&language=EN&secondRef=02>, 30. 10. 2013.

²³ Dostupno na: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGML%2BCOMPARTL%2BPE-502.077%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>, 30. 10. 2013.

²⁴ *Insurance Europe* je Evropska federacija osiguranja i reosiguranja. Preko njenih 34 člana – nacionalnih udruženja osiguravača – *Insurance Europe* predstavlja sve vrste društava za osiguranje i reosiguranje, na primer, panevropske kompanije, društva koja se bave samo jednom vrstom osiguranja, društva za uzajamno osiguranje i mala i srednja društva. Dostupno na: <http://www.insuranceeurope.eu/about-us>, 30. 10. 2013.

²⁵ Pismo *Insurance Europe* od 4. 10. 2012. godine, dostupno na: <http://www.insuranceeurope.eu/uploads/Modules/Publications/insurance-europe-key-messages-on-imd2.pdf>.

²⁶ Francusko udruženje procenitelja šteta je preko FUEDI u njegovom pismu od 12. 7. 2013. godine, koje je upućeno na Odbor Skupštine Evrope ECON, insistiralo da se odredbe u vezi sa izveštajima procenitelja šteta ne smeju povlačiti iz predloga DPI 2, uprkos suprotnim preporukama Odbora Skupštine Evrope ECON, međutim takođe ima u vidu da DPO možda nije odgovarajući instrument za to. Dostupno na: <http://www.expert-cea.com/c/lettre-cea-juillet-2013>, 30. 10. 2013.

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Loss adjusters: should divergence across EU member states be dealt with?

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SUMMARY

Loss adjusters should meet certain professional requirements and standards of professionalism. The profession of loss adjusters, which has been overlooked at EU level till recently, is mainly self-regulated or regulated according to guidelines set out by insurance companies; national regulation of professional requirements is rather uncommon in EU member states. Under the Solvency II regime insurers must enhance the operational efficiency of their claim handling procedures, whether performed by in-house departments or outsourced to loss adjusters. Following the introduction of the Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 1 (IMD 2). Despite the European Commission's proposal to include loss adjusters in the expanded definition of insurance mediators and, therefore, within the scope of the revised IMD 2, serious arguments have been raised whether IMD is the appropriate legal instrument for the introduction of a coordinated set or rules to an industry that is largely divergent across EU member states.

Key Words: Loss adjusters, loss adjusting services, insurance claims, Solvency II, EIOPA Guidelines, IMD 1, IMD 2 (recast)

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Loss adjusters: should divergence across EU member states be dealt with?

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Abstract

Under the Solvency II regime, loss adjustment has become an important aspect in the functioning of insurance companies. Following the Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 1 (IMD 2). In this context, the present article touches on loss adjusters and the controversial issue of the regulation of their standards of professionalism under a uniform EU regulatory framework. It begins with defining loss adjusters as the specialists who are appointed to investigate the circumstances of an insurance claim made under an insurance policy and to advise on the amount that should be payable to the policyholder for settling such claim and continues with describing the activities which are included in their scope of business. The article further provides an overview of the regulatory framework of loss adjusting services in Europe through the Solvency II Directive and describes the European Commission's proposal to include loss adjusters in the expanded definition of insurance mediators and, therefore, within the scope of the revised Insurance Mediation Directive 1 (IMD 2). The article focuses on the serious concerns raised as to whether IMD 2 is the proper vehicle for the regulation of the loss adjusting profession.

Key Words: Loss adjusters, loss adjusting services, insurance claims, Solvency II, EIOPA Guidelines, IMD 1, IMD 2 (recast)

1. INTRODUCTION

Under the Solvency II regime insurers must enhance the operational efficiency of their claim handling procedures (whether performed by in-house departments or outsourced to loss adjusters). Consequently, loss adjustment has become one of the most important aspects in the functioning of insurance companies. However, the introduction of EU uniform rules on the professional requirements of loss adjusters remains a controversial matter.

2. DEFINITION AND ROLE OF LOSS ADJUSTERS

2.1. Definition and categories of Loss Adjusters

There is no statutory legal definition of the profession of loss adjusters and the services they provide. An insurance claims adjuster can be described as a specialist who is appointed to investigate the circumstances of an insurance claim made under an insurance policy and to advise on the amount that is payable to the policyholder in order to settle that claim. In the Charter of the Chartered Institute of Loss Adjusters (hereinafter: CILA),¹ a loss adjuster is defined as "a person whose predominant activity is the investigation, management, quantification, validation and resolution of property, casualty or any other losses (whether insured or not) arising from any contingency and the reporting thereof."²

¹ Incorporated in United Kingdom by Royal Charter in 1961, the Chartered Institute of Loss Adjusters is an organisation of individual members. The Institute sets the professional and ethical standards for those who work in the handling of losses.

² CILA's Charter, Article 1, available at: <http://www.cila.co.uk/about-us/charter-and-by-laws/charter.>, 30.10.2013.

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Insurance claims investigated by loss adjusters include both property claims (e.g. fire loss, building damages etc) and liability claims (i.e. personal injury or third-person property damage from liability situations, such as car accidents, alleged negligent behavior etc). Depending on the insurance claims that they handle, adjusters can be multi-line or all-lines. Multi-line adjusters may handle property and liability claims, whilst all lines adjusters may handle any type of claim (e.g. professional liability, excess liability, physicians, hull and machinery, ocean marine, etc).

In some European countries there are adjusting companies which undertake the management of insurance claims upon instructions from insurance companies,³ whereas in other European countries, loss adjustment services are an integral part of the insurance undertaking business (in-house adjusters). A combination of both systems is also common, as undertakings maintain an in-house loss adjusting department but delegate the investigation and settlement of complex claims to external specialized experts. Policyholders also appoint their own loss experts to negotiate claims on their behalf (often referred to as loss assessors). For the provision of their services, loss adjusters are paid fees according to the complexity of the case.

2.2. Role of Loss Adjusters

Loss adjusters are expected to have a fair and just approach of insurance claims that enables insurance companies to process the claim without delay. The scope of their business may vary according to the mandate they are given and may include the following:

- (a) visiting the sites of the loss for investigation of the circumstances of the claim;
- (b) interviewing customers about the claim for evidence of possible causes;
- (c) gathering evidence, such as security camera films and police reports;
- (d) requesting detailed reports from specialists, if required;
- (e) completing the paperwork required;
- (f) assessing the extent of the physical damage/loss;
- (g) checking whether the loss or damage is covered by the terms of the insurance policy, whether the sums insured on the policy are adequate and whether the amount claimed by the policyholder is fair and reasonable;
- (h) negotiating settlement payments;

³ For instance in the United Kingdom, indicatively see <http://www.insurance-directories.com/productdetails.aspx?id=69&name=Loss+Adjusting.>, 20.10.2013.

- (i) pointing aspects of the claim which the policyholder may have overlooked, advising on repair techniques and organizing clean-up or salvage operations;

- (j) making further investigations in case of suspected fraudulent claims;

- (k) drafting a report including the findings and recommendations to the insurance company;

- (l) advising claimants how security and safety could be improved to avoid further losses or incidents.

3. EUROPEAN REGULATION OF LOSS ADJUSTERS

It is a common understanding that loss adjusting services must be based on professionalism and independence to ensure an impartial and accurate assessment of claims. Therefore, loss adjusters should meet certain professional requirements and standards of professionalism. However, currently there is no European uniform regulation of loss adjusting experts. In Europe the provision of loss adjusting services depends on local practices and the structure and maturity of the relevant national insurance market.⁴ As a matter of fact, the standards of professional conduct of loss adjusters are mainly self-regulated through codes of ethics established by their representative associations, whilst national regulation of professional requirements is not so common in all EU member states. Insurance companies also set out guidelines regarding the provision of loss adjusting services and the professional requirements that must be met for the expert to be employed by them. These guidelines are not of a statutory character but dictate the professional standards expected from the insurance industry. The entry into force of the Solvency II framework may, however, indirectly regulate the conduct of business of loss adjusters as elaborated below under paragraph.

3.1. Self-regulation

Given the serious competition distortions threatening the stability of their profession throughout Europe, European loss adjusting associations have established the European Federation of Loss Adjusting Experts (hereinafter: FUEDI). FUEDI, which currently comprises fourteen members associations

⁴ Letter of FUEDI dated 13.02.2013 addressed to the Committee on Economic and Monetary Affairs of the European Parliament available at: <http://www.expert-cea.com/c/lettre-fuedi-fevrier-2013>, 20. 10. 2013.

and three provisional members,⁵ is recognized by the European Commission as the representative body for all professional loss adjusters in Europe. Among FUEDI's main objectives are the promotion of the independent and impartial profession of loss adjusters, the maintenance of high standards of professional conduct and competence and the unification of standards of education and expertise through its member countries.⁶ FUEDI insists that all its members ensure that they achieve a minimum level of education. To this end, for a uniform professional training of its members, the Federation promotes educational programs in member countries.⁷ The attendance of these programs from the members of the national associations is a good starting point. However, from a regulatory point of view, obligatory participation in such programmes or admission requirements for the exercise of loss adjusting could ensure a uniform level of professionalism throughout Europe. In particular, self-regulation is common in highly competitive markets, whilst in countries where there is a lack of a competitive environment, it is ambiguous whether there is a motive for high-level education of loss experts. Therefore, an EU uniform level of professionalism cannot be achieved merely through self-regulation. Whether such an EU-wide regulation of loss adjusting services is desirable is a matter of dispute, as elaborated below.

3.2. Application of Solvency II Directive to Loss Adjusting services

Loss adjusting services which are carried out by insurance companies, as part of their main scope of business, fall within the scope of the Solvency II Directive.⁸ Solvency II Directive establishes coordinated rules relating to the supervision of insurance companies, with a view to promote the protection for policy holders. According to the Directive's recital under number 17, Solvency II

⁵ *Members associations*: Austria (AFILA), Belgium (GEBCAI), Denmark (DALAX), France (CEA), Germany (BTE), Italy (AIPAI), Luxembourg (CEL), Netherlands (NIVRE), Poland (SNELS), Portugal (CNPR), Russia (NAIA), Spain (AESPER), Sweden (SOFIS), United Kingdom and Ireland (CILA) – *Provisional members*: Czech Republic (CKSLPU), Greece (HALA), Romania (ROLAA), available at: <http://www.fuedi.eu/members.htm>, 23. 10. 2013.

⁶ Available at: <http://www.fuedi.eu/>, 23. 10. 2013.

⁷ Available at: <http://www.fuedi.eu/education.htm>, <http://www.fuedi.eu/adjusted.htm>, 23. 10. 2013.

⁸ Directive 2009/138/EC of the European Parliament and of the Council, of 25 November 2009, on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), p. 1–155.

requires “member states to provide supervisory authorities with the resources to fulfill their obligations set out by this directive. This encompasses all necessary capacities, including financial and human resources.” Following postponements, the timeline for the transposition of Solvency II Directive in the member states is 30 June 2013 and for its implementation by insurance companies 1 January 2014. However, in early October 2013, the European Commission proposed the extension of the date for first application of Solvency II to 1 January 2016.⁹

3.2.1 General governance requirements

Loss adjusting services which are undertaken by insurance companies fall under the “general governance requirements” set out in article 41 of Solvency II Directive, which provides that: “all insurance and reinsurance undertakings must have in place an effective system of governance which provides for sound and prudent management of the business.” This system, being subject to regular internal review, “shall at least include an adequate transparent organizational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. The system of governance shall be proportionate to the nature, scale and complexity of the operations of the insurance or reinsurance undertaking.” Of course, the Solvency II Directive provides the core values of regulation but the exact effect of these general requirements on loss adjusting can only be identified through Level 2 measures.

3.2.2 Outsourcing provisions applied to loss adjusters delegated by insurance undertakings

Loss adjusting services that are delegated by insurance undertakings to third parties fall under the outsourcing provisions of the Solvency II Directive.¹⁰ In particular, Solvency II sets the following supervisory

⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

¹⁰ Solvency II Directive, articles 13 (28), 38, 41, 49 and 50. According to article 13 (28), “outsourcing” is defined as “an arrangement of any form between an insurance or reinsurance undertaking and a service provider, whether a supervised entity or not, by which that service provider performs a process, a service or an activity, whether directly or by sub-outsourcing, which would otherwise be performed by the insurance or reinsurance undertaking itself.”

requirements which are applicable to outsourced loss adjusting services (Solvency II Directive, art. 38):

outsourced loss adjusters must cooperate with the supervisory authorities of the insurance undertaking in connection with the loss adjusting service;

the insurance undertakings, their auditors and the supervisory authorities must have effective access to data related to the outsourced loss adjusting services;

the supervisory authorities must have effective access to the business premises of the service provider and must be able to exercise those rights of access.

Furthermore, as provided by article 49 (3) of Solvency II Directive, insurance undertakings must “notify the supervisory authorities prior to the outsourcing of critical or important functions or activities as well as of any subsequent material developments with respect to those functions or activities.”

3.3.3 EIOPA Guidelines

Based, among others, on articles 40 to 49 of Solvency II Directive, the European Insurance and Occupational Pension Authority (hereinafter: EIOPA)¹¹ published the Guidelines on System of Governance on 31.10.2013.¹² These Guidelines must be put in place by the competent authorities from 1.1.2014 so that insurance undertakings take the appropriate steps to fully implement Solvency II.¹³ Guideline 13 provides that „national competent authorities should ensure that the undertaking has a policy on the fit and proper requirements”, including “a description of the fit and proper procedures for assessing other relevant personnel not subject to the requirements of article 42 of Solvency II Directive according to internal standards, both when being considered for the specific position and on an ongoing basis.” Regarding the outsourcing of key functions, Guideline 14 provides that national competent authorities should ensure that (a) “the undertaking applies the fit and proper procedures in assessing persons employed by the service provider or sub service provider to perform an outsourced key function” and (b) “the undertaking designates a person

within the undertaking with overall responsibility for the outsourced key function who is fit and proper and possesses sufficient knowledge and experience regarding the outsourced key function to be able to challenge the performance and results of the service provider.”

It is evident that the Solvency II framework relies upon the insurance industry to accommodate procedures which fulfill the above criteria of assessing the standards of professionalism required from persons performing outsourced key functions, such as loss adjusters.

4. PROPOSAL FOR THE APPLICATION OF INSURANCE MEDIATION DIRECTIVE 2 TO INDEPENDENT LOSS ADJUSTERS

As already mentioned above, independent loss adjusters are not directly regulated by Solvency II Directive. Therefore, following the introduction of Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 2 (IMD 2).

IMD 1 sets out the professional requirements and the registration and notification formalities that must be observed by insurance intermediaries.¹⁴ As currently in force, IMD 1 expressly excludes from its scope of application the management of insurance claims on a professional basis, loss adjusting and expert appraisal of claims, given that these activities are not considered insurance mediation [art 2 (3)]. Insurance mediation, as defined by IMD 1 [art. 2 (3)], includes “the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.” Furthermore, these activities, when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking, are not considered insurance mediation and do not fall within the scope of IMD 1, but will be regulated by Solvency II Directive as outlined above.

In line with the provisions of Solvency II Directive, from early 2010 the European Commission put forward the drafting of a proposal for the revision of IMD 1, taking into account the consequences of Solvency II

¹¹ EIOPA is the European Insurance and Occupational Pensions Authority, one of three European Supervisory Authorities. EIOPA is part of the European System of Financial Supervision consisting of three European Supervisory Authorities and the European Systemic Risk Board. It is an independent advisory body to the European Parliament, the Council of the European Union and the European Commission. See: <https://eiopa.europa.eu/>, 29.10.2013.

¹² Available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/guidelines/System_of_Governance/Final_EN_SoG_Clean.pdf, 29. 10. 2013.

¹³ Guidelines on System of Governance, paragraph 1.6.

¹⁴ Directive 2002/92/EC of the European Parliament and of the Council of 9. 12. 2002 “on insurance mediation” (IMD), p. 3–10.

for policyholders. During the preparatory work for IMD 2, loss adjusters themselves advocated for the establishment of a mutual recognition regime (sectoral passports) in order to boost their cross border trade.¹⁵ Moreover, several consumer organisations suggested that transparency and regulatory consistency should be applied for all market players.¹⁶ Following the completion of the impact assessment work, in 2012 the European Commission published its proposal for the revised IMD 2.¹⁷ In broad terms, the IMD 2 project “aims to expand the scope of application of IMD to all distribution channels (e.g. direct writers, car rentals, etc.); identify, manage and mitigate conflicts of interest; raise the level of harmonisation of administrative sanctions and measures for breach of key provisions of the current IMD; enhance the suitability and objectiveness of advice; ensure sellers’ professional qualifications match the complexity of products sold; simplify and approximate the procedure for cross-border entry to insurance markets across the EU.”¹⁸ In light of the above, the proposal brings ancillary sellers and after-sales businesses, including loss adjusters and claims handlers within its scope. In particular, the activity of the professional management of claims and of loss adjusting is included in the definition of insurance mediation.¹⁹

4.1. Simplified registration procedure – declaration of activities

Article 4, paragraphs 2 and 3, of the Proposal provides that loss adjusters (if this is their sole activity) are excluded from the registration procedures set out in article 3 and under a simplified procedure they must submit a declaration to the competent authority of their member states whereby they inform the competent

¹⁵ Letters from FUEDI to the European Commission, available at: www.fuedi.eu, 30. 10. 2013.

¹⁶ Annexes to the impact assessment accompanying the proposal for revision of the Insurance Mediation Directive, available at: http://ec.europa.eu/internal_market/insurance/docs/consumers/mediation/20120703-impact-assessment_annex_en.pdf, 30. 10. 2013.

¹⁷ Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3.7.2012, COM (2012) 360 final, 2012/0175 (COD).

¹⁸ Paragraph 1.1 of the Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3.7.2012, COM (2012) 360 final, 2012/0175 (COD).

¹⁹ Paragraph 3.1 of the Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3.7.2012, COM (2012) 360 final, 2012/0175 (COD).

authority of their identity, address and professional activities. Insurance undertakings must only use the services of loss adjusters who have fulfilled this registration procedure (IMD 2, art. 14).

4.2. Professional requirements

According to recital under number 22 of the Proposal of IMD 2, “the professional knowledge of persons carrying on the activities of the management of claims, loss adjusting or expert appraisal of claims needs to match the level of complexity of these activities. Continuing education should be ensured.” In light of this, article 8, paragraph 1, of the Proposal provides that loss adjusters must “possess appropriate knowledge and ability”, as determined by their home member states, “to complete their tasks and perform their duties adequately, demonstrating appropriate professional experience relevant to the complexity of the products they are mediating”. Furthermore, member states shall ensure that loss adjusters “must update their knowledge and ability through continuing professional development in order to maintain an adequate level of performance.”

The Commission is empowered to adopt delegated acts in accordance with articles 8 (8) and 33. Those delegated acts shall specify:

(a) the notion of adequate knowledge and ability of the loss adjusters;

(b) appropriate criteria for determining in particular the level of professional qualifications, experiences and skills required for carrying out loss adjusting services;

(c) the steps that insurance intermediaries and insurance undertakings might reasonably be expected to take to update their knowledge and ability through continuing professional development in order to maintain an adequate level of performance.

Member states must publish the general good rules for loss adjusters and EIOPA must collect and publish information about such rules (IMD 2, art. 9).

4.3. Objections to the application of IMD on Loss Adjusters

The European Economic and Social Committee of the European Parliament, in its opinion on the “Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast)” dated 13. 12. 2012, pointed out that further consideration of some of the proposals before their implementation should take place. This is because, according to its opinion, including the professional management of claims and loss adjustment in the definition of mediation

activities seems “strange.”²⁰ In the same direction, in its draft report dated 14. 12. 2012,²¹ ECON has proposed several amendments to the IMD 2 proposal. As EPON explains in the Explanatory Statement that is included in the Draft Report, the management of claims either by insurance undertakings themselves or by third parties (by insurance outsourcing contracts) falls within the scope of Solvency II Directive. Therefore, ECON argues that only activities which are not governed by an outsourcing agreement fall outside the Solvency II Directive. According to ECON, this by itself is not a justifiable reason for the inclusion of claims management in IMD 2. ECON’s approach, however, is rather formalistic; the protection of the policyholder’s interests must be met regardless of whether the expert provides services on behalf of the insurance undertaking or whether the expert is employed by the policyholder himself. Solvency II clearly does not cover the latter.

Another argument expressed by the Committee on Legal Affairs, in its opinion addressed to the Committee on Economic and Monetary Affairs dated 21 March 2013,²² is that loss adjusting activities are already sufficiently covered by national legislation and do not relate to the sales and administration of insurance products. In the same direction, the Committee on the Internal Market and Consumer Protection, in its opinion for the Committee on Economic and Monetary Affairs on the proposal for IMD2 dated 30.4.2013,²³ has expressed its concern for the introduction of new occupations, such as loss adjusters, which are irrelevant to the activities regulated under IMD. In

²⁰ Opinion of the European Economic and Social Committee on the „Proposal for a Directive of the European Parliament and of the Council on insurance mediation” (recast), p. 95–98.

²¹ Draft Report on the proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) (COM(2012)0360 – C7-0180/2012 – 2012/0175(COD)), Committee on Economic and Monetary Affairs, Rapporteur: Werner Langen, (Recast – Rule 87 of the Rules of Procedure), dated 14.12.2012, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARG+PE-502.060+01+DOC+PDF+V0//EN&language=EN>, 20. 10. 2013.

²² Opinion dated 21. 3. 2013 of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) (COM(2012)0360 – C7-0180/2012 – 2012/0175(COD)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARG&reference=PE-504.065&format=PDF&language=EN&secondRef=02>, 30. 10. 2013.

²³ Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARG%2BPE-502.077%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>, 30. 10. 2013.

line with the Parliament Committees, Insurance Europe²⁴ has expressed, in October 2012, its objection to the extension of the scope of IMD 2 to loss adjusting services, given the technical nature of these activities and their regulation under the Solvency II regime.²⁵

Evidently, these arguments raise concerns as to whether a Directive purporting to primarily regulate the sale of insurance products is the appropriate legal instrument for the introduction of a coordinated set of rules to an industry that is largely divergent between member states. In other words, it is questionable whether IMD 2 itself is the proper vehicle for the regulation of loss adjusting or whether these activities should be separately dealt with at EU level.²⁶ According to the press, this argument may have resulted in the exclusion of loss adjusting from the scope of application of IMD 2.

5. CONCLUSION

EU regulation of loss adjusting through IMD 2 is a matter of dispute. Nonetheless, the Commission’s approach to include loss adjusters in the expanded definition of insurance mediators has raised awareness over an industry which has been overlooked at EU level. It is indeed questionable whether IMD 2 is the proper vehicle for the regulation of the loss adjusting profession and arguably a separate legal instrument could better focus on the particularities of these activities. For instance, loss adjusters specialized in large risks address their services in a global market and their clients, if other than the insurer, are not typically policyholders whose interests need the standard of protection that the IMD intends to provide to policyholders.

²⁴ Insurance Europe is the European insurance and reinsurance federation. Through its 34 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Available at: <http://www.insuranceeurope.eu/about-us>, 30. 10. 2013.

²⁵ Letter of Insurance Europe dated 4. 10. 2012, available at: <http://www.insuranceeurope.eu/uploads/Modules/Publications/insurance-europe-key-messages-on-imd2.pdf>, 30. 10. 2013.

²⁶ The French CEA through FUEDI in its letter dated 12.7.2013 and addressed to the ECON Committee insisted that the provisions related to the loss adjusting experts activities must not be withdrawn from the proposal of the IMD2, despite opposite recommendations of EP ECON Committee, however also notes that IMD may not be the appropriate instrument, available at: <http://www.expert-cea.com/c/lettre-cea-juliet-2013>, 30. 10. 2013.

SUMMARY

Loss adjusters should meet certain professional requirements and standards of professionalism. The profession of loss adjusters, which has been overlooked at EU level till recently, is mainly self-regulated or regulated according to guidelines set out by insurance companies; national regulation of professional requirements is rather uncommon in EU member states. Under the Solvency II regime insurers must enhance the operational efficiency of their claim handling procedures, whether performed by in-house departments or outsourced to loss adjusters. Following the introduction of the Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 1 (IMD 2). Despite the European Commission's proposal to include loss adjusters in the expanded definition of insurance mediators and, therefore, within the scope of the revised IMD 2, serious arguments have been raised whether IMD is the appropriate legal instrument for the introduction of a coordinated set of rules to an industry that is largely divergent across EU member states.

Key Words: Loss adjusters, loss adjusting services, insurance claims, Solvency II, EIOPA Guidelines, IMD 1, IMD 2 (recast)

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