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Direktiva EU 2009/138 o osnivanju i vođenju poslova osiguranja i reosiguranja – opšti uvod u pravni okvir „Solventnost II"**

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Apstrakt

Direktiva o solventnosti II o osnivanju i poslovanju u delatnosti osiguranja i reosiguranja je okvirna Direktiva koja reguliše delatnost osiguranja i društva za osiguranje na teritoriji Evropske unije i Evropskog ekonomskog prostora, čiji je cilj ne samo konsolidacija i izmena svih direktiva o osiguranju u jednom tekstu, već i uvođenje novog organizacionog, upravljačkog i nadzornog pristupa, pristupa zasnovanog na riziku.

Po usvajanju Direktive 2009. godine, EU se suočila sa finansijskom krizom i jedna od njenih prvih reakcija bilo je formiranje Agencije EU za nadzor bankarstva, Agencije za hartije od vrednosti i tržišta kapitala i Agencije za nadzor osiguranja i penzijskih fondova (dalje u tekstu: ANOPF). Zbog toga je nacrt Direktive pretrpeo brojne izmene kako bi se obuhvatile primedbe u vezi sa ANOPF.

Glavne karakteristike novog sistema odnose se na to da se njegova pravila i cela Direktiva zasnivaju na brojnim pravilima iz delegiranih dokumenata i regulatornih tehničkih standarda, tzv. „tehničkih zakona" kao i to da je najveća pažnja posvećena Vladinim pravilima za društva za reosiguranje.

Ključne reči: Lamfalusijev proces, Direktiva o solventnosti II, rizik niskog intenziteta, unutrašnje tržište, propisani kapital, uslove solventnog kapitala, pravilo o principima, princip srazmernosti, uslov minimalnog kapitala, princip prudentnog investitora

1. ISTORIJA PROJEKTA I KAŠNJENJE U PRIMENI PROJEKTA SOLVENTNOST II

Sistem Solventnost II predstavlja radikalno prepravljanje nadzora osiguranja[1] u EU. Reč je o temi koja je imala najviši prioritet u diskusijama tokom proteklih deset godina u svetu evropskog osiguranja. Solventnost II predstavlja doprinos sektora osiguranja finansijskoj integraciji na jedinstvenom tržištu i doprinos konkurentnosti u EU. Ona ima za cilj da pomiri promenljive potrebe privrede i društva.

Primenjujući tzv. Lamfalusijev proces, Solventnost II na prvom mestu reorganizuje i menja svih postojećih trinaest direktiva u sklopu jedinstvenog pravnog okvira direktiva, uključujući i brojna nova pravila koja uvode sveukupno novi pristup po pitanju nadzora osiguranja, posebno nadzora solventnosti.

Originalni tekst Direktive 2009/138 o solventnosti II Evropski parlament je usvojio 22. 4. 2009. godine, otprilike u isto vreme kada je predstavljen i Izveštaj Larosijera o potrebi promena pravnog okvira finansijskog nadzora EU zbog finansijske krize. Sa odlaganjem od četiri godine, pomenuta Direktiva je počela da se primenjuje 1. 1. 2016. godine.[2]

Određeni broj izmena, posebno u proširenim aneksima na osnovu čl. 2 Omnibus II Direktive (2014/51), kojima je dopunjeno nekoliko direktiva u vezi sa ovlašćenjima evropskih agencija za nadzor (Evropska agencija za nadzor osiguranja i penzijskih fondova – EANOPF i Evropska agencija za tržišta hartijama od vrednosti), bio je razlog zbog kojeg je pokretanje procedure usvajanja Direktive odlagano četiri puta sve do konačnog sprovođenja u državama članicama EU. Izmene koje su izvršene Omnibus II direktivom posebno su se odnosile na uvođenje novih pravila u Direktivu o solventnosti II za EANOPF i za druge dve evropske agencije za nadzor (Evropsku agenciju za nadzor bankarstva

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[1] U narednim pasusima pod terminom „osiguranje" podrazumevamo osiguranje i reosiguranje.

[2] Tzv. Drugom popravnom direktivom 2013/58.

i Evropsku agenciju za tržišta hartijama od vrednosti), koje su formirane na osnovu Izveštaja Larosijera, zajedno sa delegiranim aktima i regulatornim tehničkim standardima.

2. SOLVENTNOST II NIJE ODGOVOR NA FINANSIJSKU KRIZU

Solventnost II je ogroman i ambiciozan projekat koji je pokrenula Evropska komisija (dalje u tekstu: Komisija) kao deo Akcionog plana za finansijske usluge za period 1995–2005, a rad je započet uglavnom posle stupanja na snagu kodifikovane Direktive 2002/83 o osiguranju života. Prvi nacrt Direktive o solventnosti II Komisija je predstavila 10. 7. 2007. godine, koji, u vidu inicijative, nije bio provociran finansijskom krizom. Posle predstavljanja nacrta, evropski zakonodavac je bio prinuđen da rešava novonastalu finansijsku krizu i unese neke izmene u nacrtu.

Delatnost osiguranja bila je posebno pogođena u oblasti osiguranja kredita i jemstava, uključujući dugoročna osiguranja života i proizvode vezane za investicionu jedinicu. Neke od glavnih promena u organizaciji sistema nadzora nisu osmišljene samo za sektor osiguranja, već su deo sveukupnih promena i novog pristupa pomoću kojeg je Evropski pravni okvir finansijskog nadzora prilagođen uredbama G20, Odbora za finansijsku stabilnost i Bazela, koje su nastale izbijanjem međunarodne finansijske krize. EU je pokrenula formiranje **Evropskog sistema finansijskih nadzornih organa** (*European System of Financial Supervisors – ESFS*) koji se sastoji od tri prethodno navedene evropske agencije za finansijski nadzor. Zbog toga, po prvi put nadzor osiguranja je u suštini, integrisan u ukupni finansijski nadzor, uključujući banke i investicione kompanije. Međutim, sve glavne karakteristike Solventnosti II, a posebno izmene u nadzoru i sistematici zakonskih odredbi, primenjuju se isključivo na sektor osiguranja, i u brojnim aspektima se jasno razlikuju od onih koje se primenjuju na bankarske i investicione usluge.

3. SOLVENTNOST II / SOLVENTNOST I

Direktive minimalne harmonizacije u oblasti osiguranja Solventnost I (kao što su direktive o pružanju pravne pomoći, pomoći na putovanju, osiguranje troškova pravne zaštite, reorganizaciji i likvidaciji društava za osiguranje) pre nego što su počele da se zamenjuju Direktivom o solventnosti II, nisu bile poznate pod nazivom Direktive o solventnosti. Naziv Solventnost I koristi se po uzoru na Solventnost II i odnosi se na direktive o osiguranju života i direktive o neživotnom osiguranju, posle njihovih izmena direktivama 2002/12 i 2002/13 koje su se odnosile na unapređenje margine solventnosti u prethodnom sistemu.

Direktive o solventnosti I su dopunjene kroz nacionalno zakonodavstvo, koje je fragmentiralo i otežalo funkcionisanje unutrašnjeg tržišta, dok je Solventnost II direktiva pune harmonizacije koja je smanjila sklonost nacionalnih zakonodavaca uvođenju dodatnih nacionalnih pravila, pogotovo što Komisija donosi sekundarne propise i smernice. Sistem Solventnosti I nije bio sposoban da reši nove izazove, bio je netransparentan i neadekvatan u pogledu internog upravljanja u društvima za osiguranje i jednodimenzionalan u vezi sa rizicima u poslovanju društava za osiguranje. Solventnost I se zasnivala na poverenju u alokaciju kapitala po polisama osiguranja umesto na prirodi rizika. Nadzor je bio organizovan na kvantitativnoj umesto kvalitativnoj osnovi. Stari režim nije funkcionisao u pogledu nivoa očekivanja i, kao posledicu je imao povremene probleme društava za osiguranje da održe adekvatnu solventnost uprkos tome što su primenjivali sva pravila, sa jedne strane, zbog čega je ovaj fenomen kulminirao usred finansijske krize sa druge strane, a u vezi sa obavezom društava za osiguranje da ograniče svoju slobodu investiranja kapitala na tržištu kroz zaštitne mere u nekoliko situacija u kojima je to moglo da se izbegne. Treba imati u vidu da suprotno od značenja termina „solventnost", primećeno je da zainteresovana lica, po pravilu, zaključuju da su nivo kvaliteta uprave i odluka o upravljanju rizicima glavni uzroci problema u sektoru osiguranja, a ne njihova neadekvatna kapitalizacija.

Solventnost II uklanja ove prepreke uvođenjem metoda zasnovanog na riziku sa ciljem da dodatno pojača i popravi nadzorni okvir EU. Pored toga, Solventnost II ne predstavlja samo novi režim zahtevanog solventnog kapitala, već više od toga: on obuhvata skup pravila za nadzor evropskih društava za osiguranje.

Jedna od najvažnijih inovacija Solventnosti II je u domenu promena ponašanja društava za osiguranje prema svojim internim funkcijama.

4. SOLVENTNOST II SLEDI LAMFALUSIJEV PROCES

Sistem Solventnosti II sadrži **tri cilja** u skladu sa Lamfalusijevim procesom – **formulisanje pravila**, **jednoobrazno tumačenje i primena pravila** i poslednje, **nadzor nad uspešnošću prilikom ujednačavanja zakona**. Sistem Solventnost II je izgrađen u **četiri nivoa**. **Okvirna direktiva** o solventnosti II pripada **prvom nivou** sistema, dok u **drugom,** Evropska komisija do-

nosi mere za primenu kako bi **tehničke** odredbe bile u skladu sa kretanjem tržišta. Za tu svrhu Komisija je na osnovu čl. 290 i 291 Ugovora o funkcionisanju EU donela **delegirane akte** o nebitnim elementima Direktive, uključujući donošenje važne delegirane Uredbe 2015/35, koja je izmenjena delegiranom Uredbom 2016/467, kao i **aktima** koji uvode jednoobrazne uslove za primenu prava EU (**akti o primeni**). U **trećem nivou** formiraju se ekspertske komisije sa zadatkom da **savetuju nacionalne nadzorne organe** u vezi sa pitanjem tumačenja i upoređuju praksu nacionalnih nadzornih organa kako bi doprineli jednoobraznom tumačenju i primeni prava EU o nadzoru osiguranja. Na osnovu takvih saveta, **EANOPF** donosi **smernice** koje su nacionalni nadzorni organi dužni da primene i koji donose svoje smernice posle sprovođenja posebnog „mirnog" postupka. U **četvrtom nivou**, Komisija nadgleda **jednoobrazno tumačenje** prava EU u saradnji sa državama članicama, zajedno sa zainteresovanim učesnicima sa tržišta i ekspertima navedenim u trećem nivou.

5. SISTEMATIKA DIREKTIVE O SOLVENTNOSTI II

Dobro je poznato da se Direktiva o solventnosti II zasniva na „tri stuba" u skladu sa modelom Bazel II koji se odnosi na banke. Prvi stub odnosi se na zahteve u pogledu adekvatnosti kapitala (tzv. kvantitativni zahtev). Drugi stub je sistem uprave (tzv. kvalitativni zahtev), koji nalaže, pored ostalog, uspostavljanje četiri osnovne funkcije **odvojene jedna od druge**: **funkciju upravljanja rizicima**, **aktuarsku funkciju**, **internu reviziju** i **funkciju usklađenosti sa zakonom**. Ako društvo za osiguranje poverava obavljanje neke od svojih poslovnih funkcija trećem licu, funkcija poveravanja poslova mora, takođe, da bude uspostavljena. Sva navedena pravila se, takođe primenjuju, uz izvesna dodatna odvojena pravila na **osiguravajuće grupe**. Treći stub posvećen je tržišnoj transparentnosti, koja se odnosi na pružanje informacija na uvid javnosti, kao i na pravila o izveštavanju nadzornog organa.

Treba napomenuti da sadržaj tri stuba, iako obuhvata nova nadzorna pravila, nije bio poznat u starom sistemu nadzora. U stvari, kvantitativni zahtevi su bili najvažniji deo starog sistema nadzora, ali zasnovani na drugačijem pristupu. Samim tim je i obaveza objavljivanja informacija javnosti bila ograničena.

Pravila Direktive o solventnosti II nisu precizno svrstana u određene stubove, jer veliki broj odredbi pripada većem broju stubova, a druge ne pripadaju nijednom.

6. DIREKTIVA ZASNOVANA NA RIZIKU

Sistem Solventnost II uvodi novi režim zasnovan na riziku za društva za osiguranje, uzimajući u obzir ne samo intenzitet i kvantitet rizika, već i njegov kvalitet. **Glavna karakteristika** novog režima je uvođenje kapitalnih zahteva **za sve vrste rizika** koji bi mogli da ugroze solventnost društva za osiguranje, što nije bio slučaj u prethodnom režimu. Za tu namenu, Solventnost II je kategorisala nekoliko rizika koje imaju društva za osiguranje i koje oni moraju da razmotre ne samo radi izračunavanja osnovnog kapitala, već takođe i **za održavanje njihovih tehničkih rezervi**, koje utiču na politiku preuzimanja rizika, posebno u vezi sa odgovornošću i dugoročnim polisama. Uveden je nivo minimalnog poverenja u regulatorne svrhe kako bi društva za osiguranje mogla da podnesu najteže okolnosti koje mogu da negativno utiču na solventnost društva, sve do situacije od 0,5% koja bi mogla da nastane u periodu dužem od godine dana, što znači nivo poverenja od 99,5% (pokazatelj vrednosti izložene riziku). To ne znači da Solventnost II prihvata da jedno od dve stotine društava za osiguranje tokom godine postane nesolventno, već da društva za osiguranje raspolažu dovoljnim solventnim kapitalom kako bi mogla da podnesu ekstremne okolnosti čija verovatnoća nastanka iznosi 0,5%.

Pored navedenog, kako bi imali realan pogled na kapitalne zahteve pojedinačnog društva za osiguranje koje posluje u okviru osiguravajuće grupe ili konglomerata, mora se uzeti u obzir sveukupna finansijska situacija svih članova grupe.

U navedenom smislu, sistem tzv. sopstvene procene rizika i solventnosti, koji je uveden smernicom EANOPF, Bos-14-259-28.1.2015, predstavlja važno sredstvo za sistem zasnovan na riziku, koji mora da važi u svim odlukama društava za osiguranje u vezi sa upravljanjem finansijskim pitanjima. Pored ostalog, smernica propisuje da direktori i službenici društva za osiguranje moraju da budu upoznati sa svim rizicima društva, bez obzira na to da li se radi o rizicima koji se moraju uzeti u obzir prilikom izračunavanja solventnog kapitala ili da li se oni mogu kvantifikovati.

7. TRANSPARENTNOST

Radi unapređenja **transparentnosti** tržišta, novi režim uvodi obavezu javnog objavljivanja informacija putem finansijskog izveštavanja. Transparentnost tržišta je prioritetan zadatak za Odbor za finansijsku stabilnost (*Financial Stability Board – FSB*) jer, pored ostalog, povećava poverenje investitora. Takođe treba imati uvidu da transparentnost nije cilj sam po sebi, koji bi za po-

sledicu imao prekršaj ili neku sličnu štetu društvu za osiguranje. Ona mora da postoji kako bi služila suštini cilja regulatornog okvira, koji se sastoji u zaštiti ugovarača osiguranja i korisnika osiguranja.

8. PRAVILA SISTEMA SOLVENTNOSTI II I NJIHOVA OPŠTA PRIRODA

Stari i novi sistemi imaju za cilj prvenstveno **zaštitu ugovarača i korisnika osiguranja,** ali novi sistem ima za cilj dodatno poboljšanje nivoa zaštite pomoću **modernih pravila** imajući u vidu dosadašnje iskustvo EU. Pravila Direktive obuhvataju širok krug **principa**, dok su pravila celokupnog sistema Solventnosti II delimično **prirode finansijskog upravljanja, koja** se **pretvara, uglavnom, u tehnička pravila u drugom nivou**. Razlog zbog kojeg prvi nivo sadrži pravila zasnovana na načelima je želja da izveštavanje bude rezultat sprovođenja napora EU u smeru postizanja jednoglasnog prihvatanja Direktive u svim državama članicama.

Sa druge strane, **imovina** i **obaveze** moraju da se obračunavaju prema njihovoj **tržišnoj vrednosti**, pri čemu osnovni kapital mora da odgovara tzv. „ekonomskom kapitalu" kako bi mogao da odgovori na najteže finansijske okolnosti. Na taj način, nadzor postaje fleksibilniji kako bi postao bliži finansijskoj realnosti i zato, bolje zaštitio finansijsko stanje nadziranog društva u korist ugovarača osiguranja.

Princip nastavka postojanja društva za osiguranje se dalje unapređuje skupom drugih pravila. Ovaj princip je sočivo pod kojim se upravlja rizikom i poslovanjem, a to je takođe uzak fokus uprave društva za osiguranje u vezi sa privremenim ciljevima.

9. DIREKTIVA O SOLVENTNOSTI II KAO PRAVO ZASNOVANO NA PRINCIPIMA

Direktiva o solventnosti II obuhvata uopštene slogane i opšte principe poslovne politike koji predstavljaju „**pravo zasnovano na principima**", prema praksi nadzornog organa Velike Britanije, koje je u tom smislu preuzeto u pravo EU. Nije reč o „**pravu zasnovanom na pravilima**." Karakteristika prava zasnovanog na principima je česta upotreba neodređenih pravnih koncepata, kao što su „razuman", „odgovarajući", „nesrazmeran", „adekvatan", „strategija rizika", „politika" itd. Ipak, u drugom nivou **neodređeni pravni koncepti** postaju delimično određeni preko pravila koja imaju tehničke karakteristike. Lamfalusijev proces odvaja glavna pravila Direktive od tehničkih, sadržanih u delegiranim aktima, aktima o sprovođenju i smernicama EANOPF.

Međutim, nije uvek jasno koja pravila se primenjuju u prvom a koja u drugom nivou, jer postoje pravila u drugom nivou koja karakteriše neodređeni pravni koncept.

Jedna prednost ovog sistema je da omogućava razmatranje **pojedinačnog profila rizika** i finansijskog stanja nadziranih društava za osiguranje, zbog čega nadzor postaje efikasniji i sprečava primenu istih pravila u različitim situacijama kao što je to bio slučaj sa pravilom prethodnog sistema „**jedan model pokriva sve.**" Na taj način, kapital se oslobađa iz društava za osiguranje jer više nije vezan pravilima i u većoj meri se može koristiti za investiranje. Treba imati u vidu da novi sistem pruža nadzornom organu veća ovlašćenja u pogledu odlučivanja nego što je to bio slučaj u prošlosti i, na neki način, ograničava prava društava za osiguranje, dok su istovremeno društva za osiguranje zaštićena **principom srazmernosti** primenjenim kao glavni metod tumačenja pravila o solventnosti II, tako da je sadržaj i forma intervencija nadzornog organa da se drži postavljenog cilja.

10. NOVA PRAVILA I NOVA IMENA, ALI BEZ JEDNOSTAVNE EVOLUCIJE POSTOJEĆIH

Ako se uporedi stari sistem u vezi sa **adekvatnošću kapitala** sa novim, oni su slični jedino u pogledu iznosa sopstvenog kapitala koje društvo za osiguranje mora da obezbedi kako bi dobilo dozvolu i moglo da se bavi vrstama osiguranja koje je odlučilo da obavlja. Sve ostalo se promenilo, čak i nazivi. Institucija margine solventnosti, uvedena u Evropi 1973. godine, preimenovana je u **zahtev solventnog kapitala** i drugačije je regulisana, pri čemu njena analiza prevazilazi obim ovog izveštaja, a osim toga ne obuhvata važna pravna pitanja. Cilj zahteva solventnog kapitala je da društvo za osiguranje ima sposobnost da podnese **sve moguće vrste rizika,** koje eksperti, u najvećem broju slučajeva, dele zbog vršenja nadzora na: preuzimanje rizika (u osiguranju života, neživotnom osiguranju, zdravstvenom osiguranju, uključujući rezervisanje), tržišne, kreditne, poslovne (uključujući i pravne) i rizike ugovorne strane, kao i podkategorije tih rizika. Promenjena je i stara struktura garantne rezerve, koja se sada zove **minimalno potrebni kapital**.

Novi režim pridaje najveću pažnju **kvalitetu rizika** uvođenjem skupa detaljnih i sofisticiranih pravila, koja takođe utiču na kvantitativne zahteve solventnosti.

Solventnost II uvodi **upravu usmerenu na rizike** društava za osiguranje. **Da bi uspešno funkcionisalo, rizik mora biti predvidiv, ali to nije moguće ako nema pravne osnove koja će ukazati šta je predvidivo.**

Osim toga, okvirno pravilo moguće je primenjivati na arbitraran način.

11. DRUŠTVA ZA OSIGURANJE I BANKE

Društva za osiguranje imaju pravo da rade primenom **standardnog modela** propisanog korpusom pravila ili da primene svoj **interni model** koji mora odobriti nadzorni organ. Sa druge strane, banke **ne primenjuju takve modele**. **Društvo za osiguranje je daleko ranjivije na nelikvidnost u poređenju sa bankom. U situaciji krize ili situacijama sličnim kriznim, ugovarači imaju tendenciju da otkupljuju svoje polise osiguranja života ili polise vezane za investicionu jedinicu, što nije slučaj sa bankarskim depozitima, što govori da bi do nesolventnosti banke došlo u mnogo težim okolnostima.** Drugim rečima, investitor će pre povući sredstva iz društva za osiguranje i uložiti ih kao depozit kod banke. Pored toga, ciljevi nadzora kod banaka se razlikuju od onih kod društava za osiguranje i društava za reosiguranje, kao i u vezi sa karakteristikama rizika i poslovnog plana, iako se i društva za osiguranje i banke suočavaju sa tržišnim i poslovnim rizicima.

12. PROCENA IMOVINE I OBAVEZA, PRINCIP PRUDENTNOG INVESTITORA

Kada je reč o proceni imovine i obaveza, primenjuju se sledeća nova pravila: imovina se vrednuje u iznosu koji se može postići kod kratkoročnih poslova između dobro obaveštenih strana, dok se obaveze vrednuju u iznosu za koji se može očekivati da se prenese ili plati između dobro obaveštenih ugovornih strana u istoj vrsti posla. Što se tiče investicionih pravila, naglasak je na principu **prudentnog investitora** koji je istaknut u propisu i zamenjuje limite u vezi sa prirodom i obimom prihvatljive imovine po režimu Solventnost I.

13. DELEGIRANA UREDBA 2015/35, IZMENJENA UREDBOM 2016/467

Delegirana Uredba 2015/35 drugog nivoa je važna i veoma proširena radi dopune pravila iz Direktive o solventnosti II. Odmah posle stupanja na snagu Direktive o solventnosti II, Komisija je donela drugu delegiranu Uredbu 2016/467 koja doprinosi postizanju cilja EU da promoviše privatno finansiranje strateških investicija i materijalizaciju evropskog cilja prema tržištima kapitala EU, koja imaju za cilj podsticanje investiranja u **infrastrukturne** projekte nebankarskim finansiranjem. Tačno je da **princip prudentnog lica** po Solventnosti II, koji je delimično zamenjen kvantitativnim ograničenjima starog sistema, oslobađa mogućnost investiranja za društva za osiguranje, iako zahtev solventnog kapitala može da dovede do primene konzervativnijeg izbora. Nova Uredba uvodi pravila koja dozvoljavaju društvima za osiguranje i društvima za reosiguranje da, pod izvesnim uslovima, investiraju svoje rezerve i kapital u infrastrukturne projekte, ali ti uslovi predviđaju zaštitu od dobrovoljno preterano konzervativnih izbora. Očekuje se da će evropska društva za osiguranje koja su najveći institucionalni investitori u EU, sa investicijama od 8,4 triliona € u 2015. godini, doprineti značajnom unapređenju infrastrukturnih projekata u EU.

14. MEĐUNARODNI ASPEKTI

Međunarodno udruženje nadzornih organa (*International Association of Insurance Supervisors – IAIS*, dalje u tekstu: MUNO) usvojilo je principe Solventnosti II, kao što je princip vrednosti izložene riziku, koji podiže nivo poverenja do 99,5%.

Kada je reč o osiguravajućim **grupama**, MUNO smatra da nadzorni organ cele grupe treba da ima dovoljno ovlašćenja i moći da koordiniše i distribuira bitne informacije neophodne za reviziju i procenu rizika i procenu solventnosti za celu grupu. Nadzorni organ cele grupe treba da u poslednjem stepenu bude nadležan za obezbeđivanje efikasnog i efektivnog nadzora cele grupe. Zato su pravila o Solventnosti II u vezi sa nadzorom društava za osiguranje u grupi veliki korak napred.

Ipak, treba pomenuti da se odluke Komisije primenjuju podjednako i na društva za osiguranje i reosiguranje iz trećih država, kao što su Japan, SAD, Brazil, Kanada, Australija i Švajcarska.

15. DRUGA PRAVNA PITANJA PROISTEKLA IZ SOLVENTNOSTI II

Kao što je prethodno rečeno, pravila Solventnost II su osnažila element finansijskog upravljanja u sistemu nadzora u obimu u kojem pravna kontrola čini deo discipline upravljanja rizicima. Ipak, još uvek postoji određeni broj pravnih pitanja koja treba rešiti, kao na primer, delegirani akti u sklopu delegiranih ovlašćenja.

Direktiva i delegirani ili akti o sprovođenju predviđaju obaveze direktora, što pokreće pitanje novih obaveza direktora prema ugovaračima osiguranja, trećim licima i zainteresovanim stranama. Međutim, građanska odgovornost se zasniva na nacionalnim, neujedna-

čenim pravilima. Pravilo o poslovnoj odluci primenjuje se bez promene, čak i posle Solventnosti II.

Gotovo sve odredbe Direktive o solventnosti II odnose se i na **društva za reosiguranje,** ali treba istaći da su ta društva po prvi put regulisana u EU na sličan način kao i društva za osiguranje Direktivom o reosiguranju 2005/68 (koja je sprovedena u državama članicama krajem 2007. godine). Tako, iskustvo stečeno u vezi sa pravnim okvirom EU u oblasti nadzora osiguranja od početka devedesetih godina XX veka, koje je dovelo do novog režima, u beznačajnom obimu se odnosilo na društva za reosiguranje, što se takođe nije ispoljavalo u tadašnjim propisima.

Mala (na koja se primenjuje Solventnost II) društva za osiguranje zabrinuta su zbog ogromnog regulatornog opterećenja po novom sistemu i nadaju se da se to uravnoteži primenom principa srazmernosti. Međutim, princip srazmernosti nije lek za olakšanje teškog regulatornog položaja malih društava za osiguranje u odnosu na velika, koja imaju bolje diverzifikovan portfelj, te zato imaju lakši pristup sistemu smanjivanja rizika.

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EU Directive 2009/138 on the taking-up and pursuit of the business of Insurance and Reinsurance – A general introduction to the Solvency II framework

UDC: 368(4-672EU)
Informative contribution

SUMMARY

The original core of Solvency II is not to respond to the financial crisis, but to radically change the system of the insurance supervision. The focus of the new rules is oriented towards the qualitative and not only the quantitative criterion, as was the case with the Solvency I regime. The Framework Directive 2009/138 is the first out of five levels which constitute the Solvency II system according to the Lamfalussy process. The Directive rather features principles than concrete rules requiring specific actions (principles based law). The second level includes the delegated and the implementing acts, which specify the abstract rules of the Directive, while the third level consists in advising the national supervisory Authorities. The role of EIOPA is significant in issuing the guidelines addressed to national supervisory Authorities, which are adopted not compulsory by the Member States but rather with amicable proceedings. The fourth level relates to the effort for a uniform implementation of EU law.

The Directive is based on a three-pillar-system introduced by the Basel II model for banks. It is important that the second pillar on governance includes four separate functions (risk management, actuarial function, internal audit and compliance function). It is also worth mentioning, that the new rules on market transparency enable customers to be better informed about the financials of insurance undertakings.

Another main feature of the system is that supervision includes capital requirements as regards all kinds of risk that could affect the solvency of the company, which was not the case in the former regime.

Keywords: Lamfalussy process, Solvency II Directive, internal market, capital requirements, solvency capital requirement, proportionality principle, minimum capital requirement, prudent investor principle

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EU Directive 2009/138 on the taking-up and pursuit of the business of Insurance and Reinsurance – A general introduction to the Solvency II framework**

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1. THE HISTORY OF THE PROJECT / THE DELAY OF IMPLEMETING SOLVENCY II

Solvency II system presents a radical renewal of the EU insurance[1] supervision. It was the number one theme of discussion over the last ten years in the European insurance world. Solvency II constitutes the contribution of the insurance sector to the EU financial integration within the single market and to EU competitiveness. It aims to meet the changing needs of the economy and the society.

Applying the so called Lamfalussy process, Solvency II at first recasts and replaces all the 13 existing related Directives with a unique framework Directive including numerous new rules which introduce an overall new approach on insurance supervision, particularly on solvency issues.

The original text of the Solvency II Directive 2009/138 was approved by the European Parliament on 22.4.2009, about the same time as the de Larosière report on the necessary changes on the EU financial supervisory framework related to the financial crisis was presented. With a delay of four years the Directive was implemented into national laws on 01.01.2016.[2]

A number of changes, in particular the extended supplements introduced with article 2 of the Omnibus II Directive (2014/51) amending several Directives in respect of the powers of the European Supervisory Authorities – **ESA** (European Insurance and Occupational Pensions Authority – **EIOPA** and European Securities and Markets Authority – **ESMA**), was the reason why the launching of the Directive's enacting was postponed four times until its final implementation to the EU Member States (MS). The changes that Omnibus II brought were particularly in order to include in Solvency II the new rules imposed for EIOPA, the European Insurance and Occupational Pension Authority and for the other two European Supervisory Authorities (ESAs, i.e. the European Banking Authority – **EBA** and the ESMA), that were created on the basis of the de Larosière report, along with the delegated acts and regulatory technical standards.

Keywords: Lamfalussy process, Solvency II Directive, internal market, capital requirements, solvency capital requirement, proportionality principle, minimum capital requirement, prudent investor principle

2. SOLVENCY II IS NOT A RESPONSE TO THE FINANCIAL CRISIS

Solvency II is a huge and ambitious project initiated by the European Commission as part of the financial services action plan 1995–2005, the works of which commenced mainly after the implementation of the codified (recast) life insurance Directive 2002/83. The first draft of the Solvency II Directive was presented by the Commission on 10.7.2007, thus, Solvency II Directive had preceded as the initiative for it was not due to the financial crisis. Subsequently, after the presentation of that draft the European legislator had to deal with the arisen financial crisis and introduced some changes in the draft.

Insurance industry was particularly hit in credit and suretyship insurances including long-term life

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[1] In the following we use the word "insurance" for both, first- and reinsurance.

[2] By the so called 2. Quick-Fix-Directive 2013/58.

insurances and unit linked products, as well as in the low-interest risk which is still one of the biggest threats to the insurance industry. Some of the main changes of the structure of the supervisory system are not tailor-made only for the insurance sector; they are rather part of the overall changes and the new approach in the European financial supervisory framework is aligned with the G20/ FSB/ Basel resolutions that were generated by the international financial crisis. The EU proceeded with the creation of the **European System of Financial Supervisors** (ESFS) comprising of the three mentioned ESAs. Thus, for the first time, insurance supervision is in substance integrated in the overall financial supervision, including the banking and investment firms. However, all main specific characteristics of the Solvency II and the notable changes in supervision and in organization law provisions, applied exclusively to the insurance sector, which in many aspects clearly differ from the ones applied to the banking and investment services sectors.

3. SOLVENCY II VS SOLVENCY I

The Solvency I minimum harmonisation insurance Directives (such as the Directives on legal aid, tourist assistance, legal expenses insurance, reorganization and winding-up of insurance undertakings) prior to being replaced by Solvency II Directive were not known as Solvency Directives. The name Solvency I is used in contrast to Solvency II and refers to the life and non-life Directives after their amendments by the Directives 2002/12 and 2002/13 respectively which referred to the improvement of the solvency margin requirement of the old system.

Solvency I Directives, were supplemented by national legislations which in turn fragmented and hindered the function of the internal market, whereas Solvency II is a full harmonisation Directive, deterring the national legislators' appetite for introducing supplementary national rules, given that even secondary legislation and guidelines are issued by the Commission. Solvency I was incapable of tackling the new challenges, was lacking transparency and adequacy as to internal governance of insurance companies and was one-dimensioned in regard to the risk that the insurance companies face overall. Solvency I used to rely the capital requirements on the number of the policies rather than on the risk inherent in them; the supervision was orientated on the quantitative rather than on the qualitative basis. The old regime did not deliver at the level of expectations and resulted on the one hand to the insurance companies' occasional failure of acquiring solvency adequacy, despite the fact that they had followed the rules, a phenomenon which peaked amidst the financial crisis and on the other hand, to the insurance companies' obligation of restricting their freedom of investment of capital in the market by protective measures on several occasions where this could be avoided. It should be noted, that contrary to what the term "solvency" indicates, it is reported that stakeholders broadly conclude that the quality level of management and risk decisions are the main causes of insurance sector failures and not the inadequate capitalisation.

Solvency II removes these obstacles by introducing a risk-sensitive approach and it intends to further strengthen and repair the EU's supervisory framework. In addition, Solvency II does not only stand as the new regime of the Solvency Capital Requirement (SCR) but more than that, it includes the ensemble of the rules for the supervision of the European insurance undertakings.

One of the most important innovations of Solvency II is the change on the behavior of the insurance companies towards their internal functions.

4. SOLVENCY II FOLLOWS THE LAMFALUSSY PROCESS

The Solvency II system refers to **three tasks** according to the "Lamfalussy process": The task of **setting the rules**, the task of **uniformly interpreting and applying the rules** and lastly, the task of **supervising the successful harmonisation of law**. The Solvency II system is built on **four levels**. The Solvency II **framework-Directive** belongs to the **first level** of the Solvency II system, while at the **second** one the European Commission adopts implementing measures ensuring that **technical** provisions can be kept up to date with market developments. For this purpose the Commission based on articles 290 and 291TFEU issues **delegated acts** on non-essential elements of the Directive, including the issuance of the important delegated Regulation 2015/35, which was amended by the delegated Regulation 2016/467, as well as **acts** that introduce uniform conditions for implementing EU law (**implementing acts**). At the **third level** expert committees are formed with view to **advise** the **national supervisory Authorities** on interpretation issues, comparing the practices of national supervisory Authorities and in order to contribute to the uniform interpretation and application of Union law on supervision of insurance. Based on such advice, **EIOPA** issues **guidelines** that are addressed to the national Supervisory Authorities, which

in turn adopt the guidelines after a special "amicable" proceeding is followed by them. At the **fourth level**, the Commission oversees the **uniform implementation** of EU law in collaboration with the MS, along with the market stakeholders and the experts mentioned in the third level.

5. THE STRUCTURE OF SOLVENCY II DIRECTIVE

It is well known that the Solvency II Directive is constructed on "three pillars" following the Basel II model for banks. The first pillar refers to the capital adequacy requirements (the so called quantitative requirements). The second pillar is the system of governance (the so called qualitative requirements), which requires, among others, four main functions, **separate from** each other: the **risk management**, the **actuarial function**, the **internal audit** and the **compliance function**. If the company outsources any of its operations, the outsourcing function must be in place as well. All these rules also partly apply, and with certain additional separate rules on the **insurance groups**. The third pillar has to do with the market transparency one, which refers to information being made available to the public and to reporting rules to the supervisory Authority.

It should be mentioned that the content of the three pillars, even though it encompasses new supervising rules, was not unknown in the old system. Actually, quantitative requirements were important core of the old system of supervision but based on a different approach. Comparatively, the obligation to diffuse information to the public was restricted.

The provisions of the Solvency II Directive are not strictly categorised in specific pillars; further a large number of provisions either belong to more than one pillar- or does not belong to any pillar at all.

6. RISK BASED DIRECTIVE

The Solvency II system introduces a new risk-based solvency regime for the inscos taking into account not only the intensity and quantity of the risk but also its quality. The **main feature** of the new regime is the inclusion in the capital requirements of **all kind of risks** that could affect the solvency of the company, which was not the case in the former regime. For this purpose, Solvency II has categorized several risks that inscos face which have to be considered not only for the counting of the regulatory capital, but also **for their technical provisions**, which in turn affect the underwriting policy, especially regarding the liability and long-tail insurance policies. A minimum confidence level for regulatory purposes is introduced so that to be possible to face even the most extreme adverse circumstances that may adversely effect the company's solvency, up to a situation that could occur 0,5 % over a one-year period, meaning a confidence level of 99,5% (value-at- risk measure). This does not mean that Solvency II accepts that one out of two hundred inscos is expected to go into insolvency yearly, but it means that the insco has sufficient solvency capital to face extremely adverse circumstances the possibility of which occurring is 0,5%.

Additionally, in order to have a realistic view of the capital requirements of a solo insco that belongs to an insurance group or conglomerate, the overall financial situation of all the members of the group must be taken into consideration.

On this regard, the system of the so called own risk and solvency assessment, introduced by EIOPA guideline Bos-14-259-28.01.2015, is an important tool for a risk sensitive approach, which has to govern all the decisions of inscos related to management of financial issues. It provides, among others, that directors and officers of inscos must be aware of all the risks which the company faces, regardless, of whether these are risks which have to be considered in the SCR or whether these can be quantified.

7. TRANSPARENCY

Further, in order to enhance the market **transparency**, the new regime introduces information publicly disclosed by financial reporting. The market transparency is a priority task for the Financial Stability Board (FSB), since, among others, it enhances investors' trust. And it should be noted, that transparency is not an aim in itself, which would result in defamation or any similar damage to the inscos. It must occur in order to serve the main essence of the regulatory framework's objective, which is the protection of the policyholder and the beneficiary of the insurance money.

8. THE RULES OF THE SOLVENCY II SYSTEM AND THEIR NATURE IN GENERAL

Both the old and the new systems aim firstly at the **protection of the policyholder** and the **beneficiary** of the insurance money but the new one aims at further improving the level of protection via **modern rules** given the experience EU has gained so far. The rules

of the Directive, include a wide range of **principles**, while the rules of the whole Solvency II system are partly of a **financial management nature, which** then **transformed mainly into legal technical rules at the second level**. A reason that the first level incorporates principle-based rules is reported to be the result of the EU's effort to gain unanimous acceptance of the Directive by all MS, since it would have been difficult to obtain acceptance on such extensive provisions that are included in it.

On the other hand, **assets** and **liabilities** have to be measured on their **market value** and the regulatory capital has to correspond to the so called "economic capital" in order to be able to confront the most adverse financial circumstances. In this way, the supervision becomes more flexible in order to be closer to the financial reality and thus, better protect the financial soundness of the supervised company so as to benefit the policyholders.

The **principle of continuance of the insurance undertaking** is further improved by a set of rules. This principle is the lens under which the risk and operation shall be processed, and this is also for avoiding narrow focus of management on temporary goals.

9. SOLVENCY II DIRECTIVE AS A PRINCIPLE – BASED LAW

The Solvency II Directive includes broad headings and general policy principles which constitute the "**principle-based law"**, according to the UK supervisory Authority practice, which in this respect was adopted by the EU law. It is not a "**rule-based law**". Principle-based law's characteristic is the frequent usage of indeterminate legal concepts, such as "reasonable", "appropriate", "disproportional", "adequate", "risk strategy", "politics" etc. Nonetheless, at the second level the **indeterminate legal concepts** become partly determinate via rules that have technical attributes. The Lamfalussy process separates the main rules of the Directive from the technical ones included in the delegated and implementing acts and EIOPA Guidelines.

However, it is not always clear which of the rules are deemed to be listed at the first level or the second level, while there are still rules at the second level with indeterminate legal concept.

One advantage of this system is that it makes it possible to consider the **individual risk profile** and financial situation of the supervised inscos and thus supervision gets more efficient and prevents the application of the same rules in different situations as it was the case with the "**one model fits all**" rule of the previous system. In this way, capital is released from the undertakings, and is not so much conditioned by rules making it more available for investment options. It should be noted though that the new system provides the supervisory Authority with much greater decision making powers than in the past and restricts the rights of the insurance undertakings in some ways, but at the same time, inscos are protected by the **proportionality principle** applied as a major interpretation method of the Solvency II rules, so that the content and form of the action of the Authority to be in keeping with the aim pursued.

10. NEW RULES, NEW NAMES, NOT A SIMPLE EVOLUTION OF THE EXISTING ONES

If you compare the old system, as regards **capital adequacy**, to the new one, it is similar only in terms of the amounts of own capital which the insurance undertaking must possess in order to be licensed and operate in the insurance classes it chose to operate. Everything else has changed, even the names. The institution of the solvency margin, founded at European level in 1973, is renamed into **solvency capital requirement** (SCR) and is regulated in a different way, the analysis of which exceeds the scope of the present report, and additionally it does not include important legal issues. The aim of the SCR is for the company to be able to encounter **all possible kinds of risks** which the experts divide for supervision purposes, mainly in underwriting (life, non life, health, including reserving) market, credit, operational (including legal) and counter party risks, as well as in subcategories of risks. The old structure of the guarantee capital, which is now called **minimum capital requirement** (MCR), has also changed.

The new regime gives the utmost attention to the **quality of the risk** by introducing a set of detailed sophisticated rules which also affects the quantitative solvency requirements.

Solvency II introduces a **risk-oriented management** of the insurance companies. **In order to work successfully, the risk must be foreseeable; but this is not possible, if there is no legal basis specifying what is foreseeable. Otherwise, the framework rule might apply arbitrarily.**

11. NSCOS AND BANKS

Inscos are entitled to work on the basis of either a **standard model** provided by the corpus of regulation,

or implement their own **internal model** which must be approved by the supervisor. On the contrary, banks **do not work on the basis of such models**. **The insurance undertaking is more vulnerable to illiquidity compared to a bank: in a crisis or similar-to-crisis situation, policyholders tend to surrender their life insurance policies, or their unit-linked policies, which is not the case with bank deposits, in the sense that a bank-run would happen in more extreme circumstances.** In other words, the investor will prefer to take the assets from the insurance company and deposit it in a bank. In addition, the supervision purpose of banks differs to that of (re)inscos, as well as the risk situation and the business plan, and while both commonly face market and operational risks.

12. EVALUATION OF ASSETS AND LIABILITIES, PRUDENT INVESTOR PRINCIPLE

As regards to the evaluation of assets and liabilities, the following important new rules apply: Assets shall be valued at the amount for which they could be exchanged between knowledgeable willing parties in an arm's length transaction, while liabilities shall be valued at the amount for which they could be transferred, or settled, between knowledgeable willing parties in the same type of transaction. With respect to investment rules, the emphasis is given to the **prudent investor** principle which is stressed in the law and replaces the limits on the nature and extent of admissible assets of the Solvency I regime.

13. THE DELEGATED REGULATION 2015/35 AS AMEDED BY 2016/467

Delegated Regulation 2015/35 of the second level is an important and very extended supplement to Solvency II Directive. Right after the implementation of Solvency II Directive, the Commission issued the further delegated Regulation 2016/467 that contributes to the EU goal to promote private financing for strategic investments and to the materialisation of the European target of the Capital Markets Union which in turn aims at promoting investment in **infrastructure** projects by non-banking finance. It is true that **prudent person principle** of the Solvency II, which has partly replaced the quantitative restrictions of the old system, releases the investment option of the inscos, although the consideration of SCR can lead to more conservative choices. The new Regulation introduces rules that permit (re)inscos, under certain conditions, to invest capital designated for the insurance provisions and own capital, for infrastructure projects, but these conditions provide a protection against the voluntarily exaggerative conservative options. It is expected that, European inscos being the biggest institutional investors in the EU, with investments of 8.4 trillion in 2015, will contribute significantly to the improvement of infrastructure projects in the EU.

14. INTERNATIONAL ASPECTS

International Association of Insurance Supervisors (**IAIS**) has adopted principles of Solvency II, such as the value-at-risk principle, which raises confidence level up to 99,5%.

As regards to the insurance **groups**, the IAIS considers that the group-wide supervisor should have sufficient authority and power in order to coordinate and disseminate the essential information needed for reviewing and evaluating risks and assessing solvency on a group-wide basis. A group-wide supervisor ultimately should be responsible for ensuring effective and efficient group-wide supervision. The Solvency II rules on supervision of insurance undertakings in a group are a considerable improvement in this respect.

It should be mentioned that the Commission decisions apply the equivalence status to third party jurisdictions, such as Japan, the US, Brazil, Canada, Australia, Switzerland.

15. FURTHER LEGAL ISSUES ARISEN OUT OF SOLVENCY II

As mentioned, the rules of Solvency II have strengthened the element of financial management in the system of supervision, to the extent that the legal control is made part of the discipline of risk-management. Nevertheless, there are still a number of legal issues that need to be processed, such as whether the delegated acts are within the ambit of the delegated powers.

The Directive and the delegated/implementing acts impose obligations on directors, which, in turn, raise the question of respective new liabilities of directors towards insured persons, third parties, shareholders. However, the civil liability is based on the National, non-harmonised rules. The business judgement rule applies without any change, even after Solvency II.

Almost all provision of the Solvency II Directive include **reinsurance** undertakings BUT it needs to be

mentioned that those undertakings have for the first time been regulated in the EU, in a similar way to the insurance undertakings by the reinsurance Directive 2005/68 (transposed in the MS at the end of 2007). Thus the experience gained as to the EU insurance supervisory legal framework from the early 90s onwards, which led to the new regime, had marginally referred to reinsurance undertakings which were not catered for in the respective regulations.

Small (non exempt by Solvency II application) inscos' concerns as to the considerable regulatory burden of the new system are hoped to be counterbalanced by the application of the proportionality principle. However, the proportionality principle is no cure for alleviating the disadvantage of small inscos as against the bigger ones, which have a more diversified portfolio and for this reason they have better access to the system of mitigation of risk.

SUMMARY

The original core of Solvency II is not to respond to the financial crisis, but to radically change the system of the insurance supervision. The focus of the new rules is oriented towards the qualitative and not only the quantitative criterion, as was the case with the Solvency I regime. The Framework Directive 2009/138 is the first out of five levels which constitute the Solvency II system according to the Lamfalussy process. The Directive rather features principles than concrete rules requiring specific actions (principles based law). The second level includes the delegated and the implementing acts, which specify the abstract rules of the Directive, while the third level consists in advising the national supervisory Authorities. The role of EIOPA is significant in issuing the guidelines addressed to national supervisory Authorities, which are adopted not compulsory by the Member States but rather with amicable proceedings. The fourth level relates to the effort for a uniform implementation of EU law.

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Another main feature of the system is that supervision includes capital requirements as regards all kinds of risk that could affect the solvency of the company, which was not the case in the former regime.