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GOOD REGULATION AND THE PRINCIPLE OF ECONOMIC FREEDOM IN THE CASE OF EUROPEAN INSURANCE LAW

Abstract: *The authors put forward the thesis that the European regulator's activity can be assessed in the context of the criteria of good regulation (in each of their dimensions). This is due in particular to the form and content of the legislative process in the European Union. They analyze the Directive (EU) 2016/97 (hereinafter: 'the Insurance Distribution Directive' or 'IDD') in the context of its quality per se, the legislative process and the intended objective of preventing misselling, while assessing its impact on economic freedom. The first objective of the paper is to discuss the hypothesis that 21st century is the time of transition from government to governance, which is connected with the postulate of the necessity of good governance in the European Union (hereinafter: 'EU') and in the Member States. The second objective of this paper is to discuss the analytical issues related with the very concept of good regulation in the EU and its impact on economic freedom. The next objective of this paper is to evaluate the selected legal act (IDD) in terms of criteria of Better Regulation for Better Results to show the practice dimension of European Insurance Law regulation.*

Keywords: *European Insurance Law, good regulation, legislation, economic freedom.*

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1. Introduction

The European Union is, and probably will remain for many years, in the process of determining its own legal and political standards. It is still an open question whether the standards will be copied from the familiar solutions of its member states, from the international institutions, or whether new and specific standards of defining structures of the EU will be created. Even though the EU has already introduced some novel solutions borrowed from its member states (e.g. the Ombudsman institution, or the 'freedom of information') or some copied from international law (e.g. the list of human rights from the European Convention of Human Rights), in the course of its further development, the EU will have to define a number of institutions characteristic for its unique institutional structure. This process is called 'standard-setting' and an example of this process is the concept of good governance and better regulation as well, which has been shaped by the EU institutions (Grzeszczak, 2015: 385).

As the EU produced measurable economic benefits, the initial political motivation behind integration was replaced by a mainly economic one. Still, the development of the Single Market led to the initiation of a formal political integration (based on treaties) and the establishment of the European Union. In consequence, the EU has developed its own *modus operandi* that is still pursued. It concerns, for instance, the manner in which political decisions regarding European integration are negotiated and implemented in the member states. This 'EU style' of decision-making has not been laid down in any official documents and does not follow directly from the treaties establishing the EU. The *modus operandi* of European integration is also based on the overlapping and conflicting powers of the EU and the member states, and the limited decision-making autonomy at both the EU and state level (Scharpf, 1994: 122). The member states or, specifically, their governments have adopted a new supranational EU legal order and surrendered the exercise of some of their powers, as the national governments themselves actively participate in the European governance within this new legal order (Grzeszczak, 2015: 386).

Therefore, there is a call for a considerable (far-reaching) change as to how the European Union (as well as its Member States) is governed, which has been reflected in the good governance concept. The elements of good governance can be identified in the actions taken by the European as well as national authorities, for instance in the initiatives aimed at European Insurance Law, bringing Europe closer to its citizens (and strengthening customer protection), improving the legislative environment ('Better Regulation scheme'), improving the functioning of justice systems in order to promote the internal and external security of the EU, establishing the principles of a modern approach towards the financing of

public authorities, reducing the risk of the disintegration of the internal market, as well as promoting the principles of democratic governance based on the good governance concept, also in third countries, especially the ones located on the borders of the internal market of the EU (Grzeszczak, 2016: 12).

2. Good regulation through Better Regulation for Better Results

In this paper, we present an overview of good governance through Better Regulation, which is strictly connected with improving the legislative environment. There is a direct link between: good governance, better regulation and the proportionality principle. The good governance principles, which are conceptualized by the European Commission's (hereinafter: 'EC' or 'Commission') Better Regulation agenda, should be broadly recognized not only by the EC's internal staff but also by other institutions and Member States. On the EU-level, the well-performed decision-making process is crucial to provide good governance through the examination of legislative competences by EU institutions. The form most plausible to deliver it is an impact assessment described in detail by the Better Regulation instruments.

Good regulation is understood and assessed in very different ways. This is certainly a multidimensional category in which various criteria, accents and approaches can be interwoven, depending on the type of regulation and expectations of stakeholders (the regulator, regulated entities and other participants of the regulatory process). Due to the fact that 'societies evolve and laws may become obsolete [...] they simply may not have been updated to take into account social, business or technological changes', involvement of various stakeholders in the regulatory processes seems as a reasonable solution (World Bank, 1991: 43)¹. Certainly the development of social and economic relations, and rapid technological progress require specialized knowledge which is not necessarily possessed by the law-makers themselves. Previously, legal criteria prevailed, later economic criteria joined, and nowadays social criteria also decide about the value of regulation. All of these remarks greatly affect our examples –European Insurance Law.

The paradigm which envisions an inclusive and participatory approach to the regulatory processes in the EU is the concept of good governance. Since the 1990s, it has gained high recognition among policy makers and politicians, lawyers and scholars, as it can be perceived as an approach which is more flexible and adjusted to the ongoing processes of globalization and the digital revolution.

¹ The World Bank, "Managing Development – The Governance Dimension. A Discussion Paper" (1991), 43, available at <http://documents.worldbank.org/curated/en/884111468134710535/pdf/34899.pdf>

Flexibility of regulation is necessary in the era of ever-growing interaction between regulation, development of economies and technology, specialization in regulation. As such, good governance holds special importance for the areas of law touched by the revolutionary changes. It took another decade to coin the EU's approach towards good governance. The understanding of the good governance concept within the EU policy-making process was finally formed by a white paper on European Governance, adopted in 2001². Good governance was characterized there as the tool to 'boost the effectiveness and enforcement powers of international institutions'. Implementation of the concept should be based on five principles: openness, participation, accountability, effectiveness and coherence. It should be noted that currently, the concept of good governance is envisaged in Article 15(1) of Treaty on the Functioning of the European Union, which says: 'In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible'³.

In the literature, there is an unfinished, but not revitalized, debate on what should be understood by good regulation (Rosenau, Czempiel, 1992: 311). Three dominant definitions defining good regulation can be distinguished. The first definition refers to the product of the legislative process. Good regulation is a legal act (an instrument of interference) that meets the quality requirements (e.g. it is clear, precise, consistent, changing the attitudes of regulated entities). The second approach to good regulation evaluates the quality of the regulatory process. The third approach recognizes that good regulation achieves goals formulated or desired by the regulator (Kasiewicz, 2016: 242).

Tools which are provided by the Better Regulation agenda address all elements of the EU policy cycle and all the dimensions mentioned above. Juncker's Commission's agenda from 2015 is therefore deeply rooted in the initiatives taken by the preceding Commissions, included Better Regulation for Better Results (hereinafter: 'Better Regulation')⁴. The EU policy cycle requires the ongoing connection of the following components: 1) *ex-post* evaluation of the existing legislative framework; 2) public consultation; 3) *ex-ante* impact assessment (IA); 4) draft of the proposal; 5) legislative procedure; 6) transposition and

2 European Commission (2001). *European Governance - A White Paper*, OJ 2001 C 287/1, available at <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52001DC0428>

3 Art. 15(1), Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

4 European Commission, COM(2015) 215 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better regulation for better results - An EU agenda*, Strasbourg, 19.5.2015, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015DC0614/>

implementation; 7) enforcement (Schout, Schwieter, 2018: 2). The realization of the aims of Better Regulation provided by these instruments is indeed coherent with the good governance principles.

However, it should be emphasized that the effective implementation of this program requires a balance not only with the principle of institutional and procedural autonomy of the Member States but also with the principles of legal certainty and the stability of executive acts (Klemt, 2016: 371). Better Regulation is not a complicated bureaucratic procedure. It is about making the law when it is necessary to achieve common goals that can only be effectively achieved through joint actions at the EU level. It is not a deregulation program. Better lawmaking means considering alternative ways of achieving results, because legislation should never be a goal itself. Better Regulation is to ensure that: 1) the decision-making process is open and transparent; 2) citizens and stakeholders have the opportunity to participate in the process of shaping policy and law; 3) activities at the EU level are based on documented knowledge and understanding of impacts; 4) regulatory burdens for enterprises, citizens and public administrations are kept to a minimum.

Without going into the details of the idea of improving the legal environment in the EU (good law program), it should be critically emphasized that even though the EC declares will to 'be open to their feedback, at every stage of the process'⁵, the adopted solutions seem to be focused on consultations conducted at the beginning of the legislative process, not on the actual involvement of various stakeholders in the legislative stages that follow. A good example confirming this observation is the process of agreeing and adopting the Insurance Distribution Directive.

3. Efficiency of Better Regulation

As mentioned above, the first steps to improve the quality and transparency of European Union law were taken as early as at the beginning of the 1990s. The problems of overregulation and poor quality of the law had already been known, and their severity increased as the processes were further developed and common EU domains, such as economy, legal and human rights were being shaped. With the development of its integration processes, the EU has become a 'regulatory state' which, with its relatively small budget and without its own

⁵ European Commission, COM(2015) 215 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better regulation for better results - An EU agenda*, Strasbourg, 19.5.2015, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015DC0614/>

executive apparatus, engages itself primarily in regulatory activity, which then translates into national law (Majone, 1999: 1).

The EU legal system is affected by similar flaws to those of national legal systems, even though it is a non-state legal system. The most troublesome shortcomings are the excess of legal regulations (legislative inflation) related to, among others, the extension of administrative structures and excessive instability of the law (though less acute than in the case of many states), bureaucracy, unclear division of competences, mixing of governmental and EU (community) methods, persistently non-transparent comitology procedures, over-regulation or archaization, and unjustified (too high) costs of the law made due to the lack of prior assessment of the costs of the given regulation. As a result, there is also an inconsistency of norms and their archaization, which in turn overburdens the addressees and results in over-complication of the law. The number of new legal acts of EU origin gives rise to the conviction that EU legislation is too bureaucratic. Incidentally, however, bureaucracy is mentioned with reference to the areas that do not fall within the competence of the EU but of the Member States, such as: taxation, labour law, social security (with the major example of national pension systems), spatial planning, construction law, and many others. Similar problems also apply to European Insurance Law.

In late 2018 and early 2019, the Commission took stock of the 2015 Better Regulation agenda. The aim was to identify what is working well or less well and bring the agenda forward. The EC has reviewed the literature and sought the views of the public, the staff from other EU institutions as well as the Commission staff. The external and internal consultations have been the centerpiece of this stocktaking. The 596 people and organizations took part in the public consultation. On 15 April 2019, the College of Commissioners adopted a Commission communication describing the Better Regulation agenda, discussing its strengths and shortcomings, and identifying possible avenues for progress. This communication is accompanied by a staff working document summarizing the results of the stocktaking, in particular the extensive consultations, in facts and figures (European Commission, 2019: 32). The Better Regulation agenda brought the following changes:

1. the new online portal *Have Your Say* enables citizens to participate in the legislative process at all stages;
2. the Regulatory Scrutiny Board, with 3 members from outside the Commission, has replaced the purely internal Impact Assessment Board. The Re-

gulatory Scrutiny Board ensures that impact assessments and evaluations meet high quality standards;⁶

3. the explanatory memoranda setting out the reasoning behind the proposal now accompany each of the Commission's legislative proposals;
4. the REFIT Platform facilitates gathering feedback from civil society on how to improve existing EU laws.⁷

The last but not least initiative from 2018 when the Committee of the Regions (which is also involved in the law improvement process as the body that gives opinions on EU legislative proposals) launched an interesting and increasingly important pilot project (RegHub 2019-2020)⁸ on a network of regional centres to collect local and regional data on EU policy implementation by using special questionnaires.

However, there are a number of problems. The key problem concerns the impact assessment. Impact assessments are mainly used as a source of information useful to the Commission when making political decisions. They justify the need for action by the EU, determine the value provided by such action, and provide information about who will be affected and how by providing a holistic view of economic, social and environmental impacts. By the end of 2018, the Commission had developed 259 evaluations. Currently, the evaluation is accompanied by around three-quarters of impact assessments on legislative changes. Unfortunately, the subsidiarity assessments presented in the impact assessments are often rather general, excessively legalistic and formalistic. There is also no link between this assessment of subsidiarity and the assessment of proportionality of individual policy options.

In addition, the European Parliament, the Council and the Commission have not adopted yet a coherent approach to the evaluation of legislation, despite the commitments they have made in the inter-institutional agreement on better law-

6 See: European Commission: Regulatory Scrutiny Board, available at https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en

7 The REFIT Platform allows national authorities, citizens and other stakeholders to get involved in improving EU legislation. They can make suggestions on how to reduce the regulatory and administrative burdens of EU laws, which are then analyzed by the REFIT Platform and the Commission; see: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

8 European Commission: *Better Regulations- why and how*, available at https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en, <https://cor.europa.eu/en/our-work/Pages/network-of-regional-hubs.aspx>, accessed 17 June 2019.

making⁹. In many cases, the Commission does not have sufficient information on the functioning of EU legislation in the Member States because the proposed measures adopted by the co-legislators have been removed from the legislation allowing the collection of data necessary for proper evaluation. Obtaining data on the results and effects of the practical application of Union law in all Member States remains a challenge. In other cases, the co-legislators introduce additional requirements for a number of other reviews or set deadlines for the evaluation of legislation that are too early for sufficient experience to be put into practice.

Evaluation is one of the key pillars of better lawmaking. Traditionally, the quality of law is associated with observance of the rules of law-making. Therefore, the legislative process, its content and its effects on the addressees must all be subject to evaluation. Good legal regulation is effective; good law delivers the intended result and achieves the intended positive objective(s). Law is, in principle, subject to a cumulative assessment usually made from the different perspectives of effectiveness, applicability, efficiency and usefulness. It enables to check whether European legislation and funding programs are delivering the expected results and are up-to-date and suitable to achieve your goals. In the impact assessments prepared by the Commission, evaluations could be better used to identify the problem. Unfortunately, the European Parliament and the Council generally do not include evaluation in their work¹⁰.

In the area of burden reduction (one of the objectives of Better Regulation), the EC is still not convinced that the use of pro-active approaches, which the Council and in particular some Member States have asked for, would be particularly helpful. In 2017, the Commission justified its position in detail and the justification did not change in any way. Target-oriented approaches usually do not take into account the fact that imposing certain costs in pursuing important social goals is justified and necessary. The Commission prefers to focus on costs that are not necessary to achieve the objectives of the legislation, based on substantive foundations and involving stakeholders. This approach is more transparent, less arbitrary and is unlikely to trigger deregulation impacts, hampering the achievement of desired policy objectives¹¹.

9 *Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making*, OJ L 123, 12.5.2016, p. 1–14.

10 European Court of Auditors, *Special report No 16/2018: Ex-post review of EU legislation: a well-established system, but incomplete*, Retrieved 12 July 2019, available at <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=46063>

11 European Commission COM (2017) 0651 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Completing the Better Regulation Agenda: Better solutions for better results*; accessed 17 June 2019, available at

4. Insurance Distribution Directive analyze in a context of Better Regulation

The EU policy cycle requires the ongoing connection of the following components: 1) *ex-post* evaluation of the existing legislative framework; 2) public consultation; 3) *ex-ante* impact assessment (IA); 4) draft of the proposal; 5) legislative procedure; 6) transposition and implementation; 7) enforcement (Luchetta, 2010: 561).

Economic freedom is one of the fundamental principles of EU law and of domestic law, in particular insurance law, based on civil law. Entrepreneurs are entitled to undertake and to execute economic activity within the limits of the applicable provisions of the law. On the grounds of EU law, economic freedom is a basic right, proclaimed in the jurisprudence of the Court of Justice of the European Union (CJEU) (i.a. in the case of *Sky Österreich*, C-283/11, EU:C:2013:28, section 42; in the case of *Schaible* C-101/12, EU:C:2013:661, section 25; in the case of *Pillbox* 38 C- 477/14, EU:C:2016:324, section 155) and in Article 16 of the Charter of the Fundamental Rights of the EU. Both on the grounds of EU law and of domestic law, which is directly connected with EU law, economic freedom may be restricted only due to an important public interest (i.a. the CJEU judgments in the case of *Sky Österreich*, C-283/11, EU:C:2013:28, section 45; in the joined cases of *Spain and Finland vs the Parliament and the Council* C-184/02 and C-223/02, EU:C:2004:497, section 51 and 52; in the case of *DeutschesWeintor* C-544/10, EU:C:2012:526 section 54, and related jurisprudence).

The main criterion for establishing the restrictions of the basic rights defined in the EU Charter of Fundamental Rights, as well as the restrictions of constitutional freedoms, is whether such restrictions are defined in the acts having legislative force. They should also come from a rational premises and they should serve the protection of an important public interest, without infringing the essence of a given right or freedom. Subject to the principle of proportionality, they have to be necessary and they have to truly meet the objectives of the general interest, or they should result from the need to protect the rights and freedoms of other persons (the CJEU judgment in the case *Sky Österreich*, C-283/11, EU:C:2013:28, section 48).

In this context, the introduction of a new legal act, the Insurance Distribution Directive¹², should be assessed. Meanwhile, in Germany, the greatest burden (bureaucracy costs to businesses) in the 2017/2018 reporting period was caused by the Regulation on Implementing Directive (EU)2016/97 on Insurance Dis-

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0651>

12 Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)Text with EEA relevance, OJ L 26, 2.2.2016, p. 19-59

tribution (EUR 5.6 million) (NKRГ, 2018: 17)¹³. The question remains whether such costs could be reduced (while maintaining the intended goals)?

Better Regulation practices also involve costs. They require investments in the form of monetary and human resources and increase the time needed to prepare an initiative for adoption, taking into account the formal requirements of the policy-making process. The investment returns in the form of benefits, including contributions to faster and more conscious decision-making by the co-legislators on the Commission's proposals. The costs (both for the administration and business) must remain proportional.

On 2 February 2016, the Insurance Distribution Directive (hereinafter: IDD) was published in the Official Journal of the EU. The Directive entered into force on 22 February 2016, and Member States were required to implement the new requirements by 23 February 2018. However, following requests from the European Parliament and Member States for a postponement, on 20 December 2017, the European Commission announced a proposal to push back the application date of the Insurance Distribution Directive by seven months to 1 October 2018. National transposition measures communicated by the Member States concerning the IDD range from 1 (Greece, Luxembourg, Latvia, Italy, Romania) to 26 (Finland).¹⁴ This clearly shows how complicated and multidimensional the matter it is.

The IDD's goal is to improve the regulation in the field of retail insurance sales and distribution practices across the single European market. It aims to bring greater transparency and improved, more comprehensible information to consumers, to help them ensure that they buy products that suit their needs. The form of this legal act is the Directive. This means adopting a minimum harmonization standard. Member States may increase the standard of customer protection (gold-plating).

In November 2010 (i.e. before the introduction of Better Regulation for Better Results), the Commission launched a consultation on the review of the Insurance

13 Nationaler Normenkontrollrat (NKRГ)/National Regulatory Control Council (2018). *Annual Report 2018 of the Nationaler Normenkontrollrat (National Regulatory Control Council) pursuant to Section 6 (2) of the Act to Institute a National Regulatory Control Council (NKRГ)*, October 2018; accessed 24 July 2019, <https://www.normenkontrollrat.bund.de/resource/blob/656764/1548226/a53ca395512296087f96a45d0b839d44/2018-11-09-jahresbericht-englisch-data.pdf?download=1>

14 National transposition measures communicated by the Member States concerning *Dyrektywa Parlamentu Europejskiego i Rady (UE) 2016/97 z dnia 20 stycznia 2016 r. w sprawie dystrybucji ubezpieczeń (wersja przekształcona)* Tekst mający znaczenie dla EOG, *OJ L 26, 2.2.2016, p. 19–59*; accessed 10 July 2019, available at <https://eur-lex.europa.eu/legal-content/pl/NIM/?uri=CELEX:32016L0097>

Mediation Directive (hereinafter: IMD) focusing on modernization of the rules in this Directive, increasing consumer protection, and eliminating obstacles to the functioning of the single market through greater harmonization. As the IMD was a minimum harmonization Directive, it has resulted in differences in how it has been implemented by Member States. One of them was insufficient quality of information provided to consumers; the existing national insurance markets were fragmented and unsuitable advice was being given, thus increasing the potential for regulatory arbitrage. Moreover, there was legal uncertainty due to the unclear definition of scope in the IMD diverging interpretations concerning exemptions from its scope (no guarantee of a level-playing field between all participants involved in the selling of insurance products; insurance undertakings and their employees are exempt from scope). Other problems included: conflicts of interest, transparency of remuneration, legal uncertainty due to the unclear definition of the IMD scope, the need to achieve a higher level of competence and professionalism of insurance intermediaries (European Commission, 2019: 2).¹⁵

It resulted in key changes to the IMD regime, which was included in the IDD project. It extends the scope of the IMD to all sales of insurance products, covering all participants in the sale of insurance products. The IDD applies not only to (re)insurance intermediaries but also to distributors of insurance products that sell directly to customers without the use of an intermediary, i.e. insurers and reinsurers. Insurance undertakings which sell insurance products directly are brought within the scope of this Directive. In order to guarantee that the same level of protection applies regardless of the channel through which customers buy an insurance product, the IDD also covers other market participants who sell insurance products on an ancillary basis, such as travel agents and car rental companies, unless they meet the conditions for exemption.

The IDD introduced new requirements to individual managers and employees who need to possess an appropriate level of knowledge and competence appropriate to product complexity and nature of activities conducted (including minimum 15 hours of Continuing Professional Development/CPD requirement). The IDD introduced provisions that recognize the importance of guaranteeing a high level of professionalism and competence among firms involved in insurance distribution and their employees. The IDD provided greater detail and clarity on the procedure for cross-border entry by intermediaries into insurance markets across the EU. The European Insurance and Occupational Pensions Authority (EIOPA) is to establish a single electronic public register containing records of all

15 European Commission (2019), *Consultation document on the Review of the Insurance Mediation Directive (IMD) Commission Staff Working Paper*, Retrieved 16 August 2019, available at: https://ec.europa.eu/finance/consultations/2010/insurance-mediation/docs/consultation-document_en.pdf

intermediaries that have notified their intent to carry on cross-border business. In addition to compliance with the business standards defined for all insurance products, insurance-based investment products are subject to specific standards aimed at addressing the investment element embedded in those products. Such specific standards must include provision of appropriate information, requirements for advice to be suitable, and restrictions on remuneration¹⁶.

The Insurance Distribution Directive began to be applied from 1 October 2018 (including the national transposition measures for incorporating the IDD into domestic law). Six months after that date, we conducted a survey of two categories of entities: representatives of the Polish insurance market regulator (Polish Financial Supervision Authority-‘UKNF’) and entities applying the regulation (agents, insurance brokers, insurance companies). Our goal was to examine the practical dimension of the effects of the Directive, while assessing its impact on economic freedom.

Both groups indicated a lack of information about the practical dimension of the new regulation and overregulation in the approach to consumer law. The respondents pointed out that thus far there was no emphasis on consumer protection, but rather on the development of the insurance market. They think that there are too many regulations that protect the consumer. Overregulation means that the consumer is less protected than he would be if the regulations were less extensive, but simpler. This has resulted in financial institutions, especially insurance companies, providing customers with a lot of information and documents, e.g. General Terms and Conditions (GTC), Insurance Product Information Document (IPID), etc. Customers sign these documents without understanding the provisions; later only, when problems arise, do they become aware of the consequences. It is necessary to regulate certain issues, but it may be done differently. The respondents pointed to soft-law solutions (recommendations, guidelines) and education. The use of such measures can be ensured by means of pressure (reputational risk).

Yet, the prevailing problem is that regulations are being adopted and entered into force whereas entities have no idea about it, or they do not understand how it all works and how to prepare for them in accordance with the law. It is interesting that both the regulator and the private sector do not know how to apply the rules. They learn it only in practice. Both categories of entities are recipients of the enacted regulations, not its creators. Hence, the regulator has a problem in terms of giving practical tips and guidelines. For example, to this

16 Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)Text with EEA relevance, OJ L 26, 2.2.2016, p. 19–59

day, no one knows how to properly examine the needs and requirements of an insurance client.

This leads to the conclusion that the IDD was certainly needed as a new piece of regulation. However, despite the postponement of the IDD application, an overly complex system of customer protection was created, incomprehensible both to national administrative authorities and to the entire market. In spite of conducting the requisite consultations, the solutions expected by the market (which would concurrently be flexible enough not to raise the cost of insurance protection) were not introduced. It seems that in this case an educational campaign for market entities and a proactive approach of the European Insurance and Occupational Pensions Authority (EIOPA) would be necessary. The EIOPA could provide explanations, just like the European Data Protection Board does for the General Data Protection Regulation (GDPR)¹⁷. This ultimately means that it is necessary to implement the amended Better Regulation agenda and to constantly monitor and improve the law-making process in the European Union. In particular, it is necessary to involve legal entities in this process (both the regulator and business entities).

5. Conclusion

The main reason for taking up this research topic was the authors' observation of the increasing tendencies to regulate the particular market sectors in greater and greater detail. The obvious reason for this phenomenon is that the consequences of the financial crisis of the last decade are still felt and that the crisis itself has revealed many threats, which emerge when the state decides to leave too much space for an unrestricted market game. The lesson which should be learned from that event is that the state must not totally abdicate from the role of a supervisor. At the same time, it is necessary to draw a distinct line between the regulated economic freedom and the centrally controlled system.

European law is created as a result of the interaction between private and public entities, EU institutions and member states, as well as specialist (expert) groups, leading to what is known as European governance. A distinguishing feature of EU legislation is the propensity to the continuous increase in the law-making activity of the administration, which creates peculiar legal subsystems while arranging the fulfilment of collective needs on a mass scale. These subsystems often modify the most fundamental legal standards and influence the legal and

¹⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119*, 4.5.2016;

factual situation of the citizens, which entails a weaker legitimization of the law. Our research has shown numerous imperfections in European Insurance Law. In particular, the current direction of changes raises numerous doubts about practical application of EU regulation on this matter. Moreover, increased customer protection may worsen the availability of insurance (by increasing its cost). This means that it is necessary to implement the amended Better Regulation agenda and to constantly monitor and improve the lawmaking process in the European Union.

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ДОБРА РЕГУЛАТИВА И ПРИНЦИП ЕКОНОМСКЕ СЛОБОДЕ У СЛУЧАЈУ ЕВРОПСКОГ ПРАВА ОСИГУРАЊА

Резиме

Увођење принципа доброг управљања кроз бољу регулативу проистекло је из жеље за бољим европским управљањем и учвршћивањем циљева одрживог развоја у процесу креирања политика Европске уније кроз истовремено сагледавање економских, социјалних и еколошких утицаја. Боља регулатива подразумева професионализацију свих аспеката креирања политика Уније као и настојање да креиране политике одговарају потребама савременог света. Основни разлог за избор ове теме истраживања је запажање аутора да постоји све већа тенденција да се одређени тржишни сектори што детаљније регулишу. То је природан процес који углавном проистиче из професионализације различитих аспеката друштвеног живота, глобалног развоја технологије и економских односа. С друге стране, тенденција детаљне регулације неминовно покреће следећа питања: где су границе стварања нових прописа и како се ти регулаторни трендови одражавају на принцип економске слободе, која почива на слободи предузетништва? На основу истраживања аутори долазе до закључка да, упркос значајним побољшањима, квалитет прописа још увек није задовољавајући. У том контексту, неопходно је спровођење измењене европске агенде о бољој регулативе, као и стално праћење и унапређење процеса доношења закона у Европској унији. Аутори нарочито истичу важност укључивања свих правних лица, како регулаторних органа тако и пословних субјеката, у процес доношења закона.

Кључне речи: Европско право осигурања, добра регулатива (прописи), законодавство, економске слободе.

