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הדירקטוריון חלוקת דיבידנד וסולבנסי II

ד"ר משה ברקת

אפריל 2017

מצגת מפגש ענף הביטוח במכון קסירר

הקדמה: רגולציה והדירקטוריון

רגולציה – לא שאלה של חוסר/עודף
אלא שאלה של מיקוד ותפיסת פיקוח

אשליית " הגברת" הרגולציה

איך משפיעה הרגולציה על מנגנוני
השוק?

שכר ועונש, אכיפה, מידע, שומרי
סף

תפקיד הדירקטוריון

פיקוח ובקרה (מאיזה סוג?) מול
קביעת מדיניות ומעורבות עסקית
(גם נטילת סיכונים) – הילכו שניים
יחדיו?



דירקטוריון – מה עדיין לא עובד

מעורבות בקביעת אסטרטגיה ומדיניות

- 👉 תפיסה שגויה של התפקידים
- 👉 הדירקטוריון, הממוקם בין הבעלים להנהלה, מוצא עצמו מובל ולא מוביל
- 👉 היעדר משאבים לתכנון אסטרטגי

ניהול סיכונים

- 👉 היעדר חשיבה מספקת והתמודדות מתודית
- 👉 היעדר ידע או נכונות לאתגר את ההנהלה
- 👉 הסתמכות עודפת על ההנהלה

ניגודי עניינים

- 👉 נושא לא נוח לטיפול
- 👉 לא נבחן באופן פרו-אקטיבי אלא אד-הוק



אחריות הדירקטוריון - המשפט הישראלי מול עולם המעשה

❑ ביהמ"ש טבע עקרון מנחה ביחס לאחריות של דירקטור. הבחינה אם היה רשולן תיעשה לא לפי מבחן האדם הסביר אלא בחינה של **איש מקצוע - "הדירקטור הסביר"** (פסק דין בנק צפון אמריקה)

❑ ההסכמה לכהן כדירקטור מהווה הצהרה של הדירקטור, כי הוא בעל **הכישורים הנדרשים לכהן בתפקיד דירקטור**

❑ פסיקת בית המשפט הישראלי בעניין **כלל השיקול העסקי - Business Judgment Rule** "**מטעה" מי שמקל ראש באחריות הנגזרת**

❑ הפסיקה בעת האחרונה מחמירה לכאורה, אולם לטעמי בעיקר בפן הטכני/בירוקרטי: דרישה לחומר מלא, תהליך תקין, שאלות וייעוץ...

❑ **האם תפקוד הדירקטוריון בצד העסקי עמד לאחרונה* במבחן משפטי אמיתי? האם מבחן כזה בכלל נדרש / ישים?**

בעניין דיבידנד, למשל, מוגשות (אקס פוסט) חוות דעת כלכליות עבות כרס לבסס את סולבנטיות התאגיד טרם החלוקה. מי שעומד למבחן הוא אולי הכלכלן שכתב את אותה חוות דעת.

* בפרשת בנק צפון אמריקה ובפרשת פלד גבעוני כן נעשתה בחינה מהותית יותר מעמיקה, אולם שם הדברים היו בוטים וברורים יותר ברשלנותם המקצועית של הדירקטורים.

חלוקת דיבידנד מתחילה במדיניות דיבידנד

מדיניות הדיבידנד מאזנת בין שיעור החזר הוגן וסביר לבעלי החוב, מול החזר השקעה ותשואה לבעלי המניות



יש קדימות לנושים אולם בדיעבד היא לא מוחלטת! (אחרת החוק היה דורש מנגנונים נוספים להבטחת החזר מלא, לרבות אפילו איסור על חלוקת דיבידנד עד לפירעון החוב)



על מדיניות הדיבידנד להביא בחשבון:



- את הצרכים השוטפים (ט"ק)
- את יעדי התאגיד וצרכי ההשקעה (ט"א)
- ואת יכולת החזר החובות, המימון והפקת משאבים נזילים (ט"ק וט"א)

כמו כן חלוקת דיבידנד כפופה למבחני רווח וסולבנטיות



חלוקת דיבידנד כפופה לפיקוח - 1

Restrictions on Dividends and Returns of Capital from Subsidiaries

Our insurance companies are subject to limitations on the payment of dividends and other transfers of funds to Prudential Financial and other affiliates under applicable insurance law and regulation.

Domestic insurance subsidiaries. Prudential Insurance is permitted to pay ordinary dividends based on calculations specified under New Jersey insurance law, subject to prior notification to the New Jersey Department of Banking and Insurance, or NJDOBI. **Any distributions above this amount in any 12-month period are considered to be “extraordinary” dividends, and the approval of NJDOBI is required prior to payment.**

Prudential Financial, Annual Report

חלוקת דיבידנד כפופה לפיקוח - 2

“credit institutions need to establish dividend policies using conservative and prudent assumptions in order, after any distribution, to satisfy the applicable capital requirements.”

הדרישה כוללת כרית בטחון (Capital Conservation Buffer) של 2.5% CET1 מעל המינימום, אשר נוספה על פי באזל III, ומגבילה חלוקת דיבידנד עד לשיקום ההון העצמי (כאשר שיעורו מעל 7% מנכסי סיכון)

“Credit institutions which under the 2014 comprehensive assessment have a capital shortfall that would not be covered by capital measures by 31 December 2014....should in principle not distribute any dividend.”

**RECOMMENDATION OF THE EUROPEAN CENTRAL BANK
of 28 January 2015
on dividend distribution policies
(ECB/2015/2)**

חלוקת דיבידנד בעת המשבר הפיננסי

Bank's dividend payout post the financial crisis

- Bank dividend payouts increased from 0.4% of assets in 2000 to 1.1% of assets in 2007.
- Through the first three quarters of 2008 they were still at 0.7% of assets – that is, **banks barely reduced their dividends in the first fifteen months of the crisis.**
- Acharya *et al.* (2009) argue that dividend payments represent a transfer to equity holders from creditors (and taxpayers) in violation of the priority of debt over equity.

חלוקת דיבידנד – לקחי המשבר הפיננסי -1

Federal Reserve – Division of Banking (2010)

- **Supervisory Capital Assessment Program for Banking Holding Companies (SCAP BHC)** *ensure that they hold adequate capital under adverse conditions to maintain ready access to funding, continue to serve as credit intermediaries, and continue operations.*
- *Bank holding companies should consult with Federal Reserve staff before taking any actions that could result in a diminished capital base, including actions such as increasing dividends, implementing common stock repurchase programs, or redeeming or repurchasing capital instruments more broadly (planned capital actions).*

חלוקת דיבידנד – לקחי המשבר הפיננסי-2

- Goodhart et al. (2010) show that introduction of **dividend restrictions** is a **favoured regulatory action** (compared to, for example, quantitative easing) to stimulate interbank and credit markets and it provides an improvement in the welfare of borrowers and banks' shareholders.
- Guntay et al. (FDIC WP 2015-5) claim that regulators' discretionary dividend restrictions may cause a firm eager to signal its health to issue a dividend only to demonstrate to the market that the regulator approved of it doing so. These **regulator-induced dividend payments could reduce the loan supply and potentially increase risk in the market.**

חלוקת דיבידנד – לקחי המשבר הפיננסי-3

Basel III vs. Previous Accords

- One weakness of both Basel I and Basel II lies in their dependency on capital rather than liquidity. Defaults across asset classes become highly correlated during an economic downturn, often occurring unexpectedly. In such scenarios, what is needed is not only capital or assets, but also liquid capital or assets.

חלוקת דיבידנד וכשלים פיננסיים

- **HBOS**, formed by the 2001 merger of Halifax and the Bank of Scotland, was one of the largest UK banking and insurance businesses and **UK's largest mortgage lender**.
- **On 1 October 2008**, HBOS was unable to meet its liabilities as they fell due and sought Emergency Liquidity Assistance from the Bank of England. The Group's liquidity shortfall reflected underlying concerns regarding its solvency – concerns that turned out to be justified. Lloyds Bank took over HBOS in Jan. 2009.
- HBOS sought to pay out what it considered to be excess capital through dividends or share buybacks. **HBOS committed to paying out at least 40% of its earnings, and in 2007 announced that it would increase its dividend pay-out ratio to 46%** (This was not out of line with other UK banks).
- As a result, **HBOS paid out around £11 billion in dividends and share buybacks between 2001-2008**, with the **last payment made on 12 May 2008 (£1.2 billion)**.
- **Between 2008-2011 HBOS suffered a loss of £25 billion.**

כשלים פיננסיים בעולם הביטוח - 1

- **American International Group (AIG)**, the global insurance giant with ~ \$1 trillion in assets prior to the crisis, lost \$99.2 billion in 2008, and rescued from bankruptcy owed to government bail-out.
- AIG nearly collapsed due to large CDS exposure, securities lending and other ABS related transactions, causing losses and triggering severe liquidity deficiency due to imminent collateral calls.
- **Conseco Inc.** became the third-largest U.S. bankruptcy in history, as the insurance and loan company sought Chapter 11 protection from creditors. Conseco, which grew from a small company set up in 1979 to become one of the largest U.S. home lenders and personal insurers by the late 1990s, collapsed in 2002 under the weight of debts caused by ambitious expansion and mounting bad loans.
- **First Executive Life Insurance Co.** constituted the 12th largest bankruptcy in US during the time period 1980–2005. One of the largest insurance bankruptcy ever. Due to massive failed investments in junk bonds.

כשלים פיננסיים בעולם הביטוח - 2

- **Equitable Life Assurance Society** (Equitable Life), oldest life insurance company in the UK, which had £26 billion under management, came close to collapse. It had allowed large unhedged liabilities to accumulate in respect of guaranteed fixed returns to policy holders without making provision for adverse market changes. Due to the failure it closed to new business in December 2000 and reduced payouts to existing members. Policyholders lost half their life savings.
- A 2007 European report concluded that regulators had focused on solvency margins and failed to consider the increasing risk of accrued terminal bonuses.

כשלים פיננסיים בעולם הביטוח - 3

- **HIH Insurance** was Australia's second largest insurance company. It was placed into provisional liquidation on 15 March 2001. The largest corporate collapse in Australia's history, with estimated losses of up to \$5.3 billion.
- HIH had \$8 billion in assets. However, after offsetting debts and potential insurance claims against the company, HIH was left with net assets of only \$133 million. The liquidators described HIH's solvency as "marginal" and stated in their report that "an extremely small movement (just 1.7%) in the value of assets could move the balance sheet into net asset deficiency.
- This situation was reached due to aggressive acquisitions of insurance businesses, especially LBO life insurance acquisitions.

כשלים פיננסיים בעולם הביטוח - 4

- In 2005 the German Federal Government enacted a **reform of the German Insurance Supervisory Law** that provides better protection of insured, extension of supervision applying to reinsurance companies; and extension of the regulation which applies to insurers' holding companies. **The reform partly reflects the German government's response to the collapse of Mannheimer Leben AG in 2003.**
- **Mannheimer Leben** was the first life company in the country to be put into insolvency in more than 50 years. This was mainly due to guaranteed life and annuity schemes, and relatively high allocation into European equities. With the collapse, it was forced to transfer its policies to industry-sponsored safety net Protektor and pledge to repay hidden losses on the contracts over time. Since then, Mannheimer has sold a 51% holding of Mannheimer Health to locally based insurer Continentale and transmuted other “hidden losses” into loans from Protektor, stabilizing its position.

כשלים פיננסיים בעולם הביטוח - 5

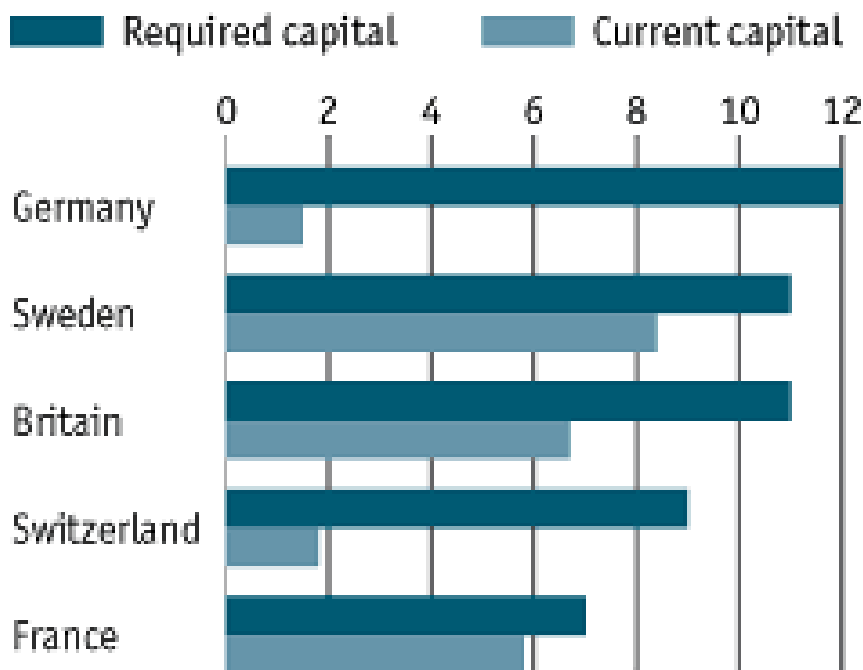
- Insurer **Tokyo Mutual Life** filed for court protection from creditors at the end of 2000 after denied debt refinancing from banks.
- Factors being negative spread between returns promised to policy holders and lower investment returns, coupled with soaring number of policy cancellations amid public distrust concerning the financial health of the insurance industry following the failures of midtier insurers **Chiyoda Mutual Life** Insurance Co. and **Kyoei Life Insurance Co.** in October, 2000.

חוסר בהון של חברות ביטוח חיים באירופה

בשנת 2004 (לידתו של סולבנסי 2)

Life threatening

Required capital for life insurers under new EU rules versus current capital, as % of assets



Source: Mercer Oliver Wyman

- הערכות דיברו על כך שהענף זקוק להשלמת הון של כ-60 מיליארד יורו.
- FITCH העריכה אז שהמבטחים הגרמניים יאלצו לגייס כ-20 מיליארד יורו.

חוסר בהון של חברות ביטוח חיים באירופה (2011)

Percentage of companies with Solvency II ratio below 100%

Line of business	Germany	France	Italy	UK
Life	25%	8%	0%	21%
Property & casualty	0%	15%	50%	8%

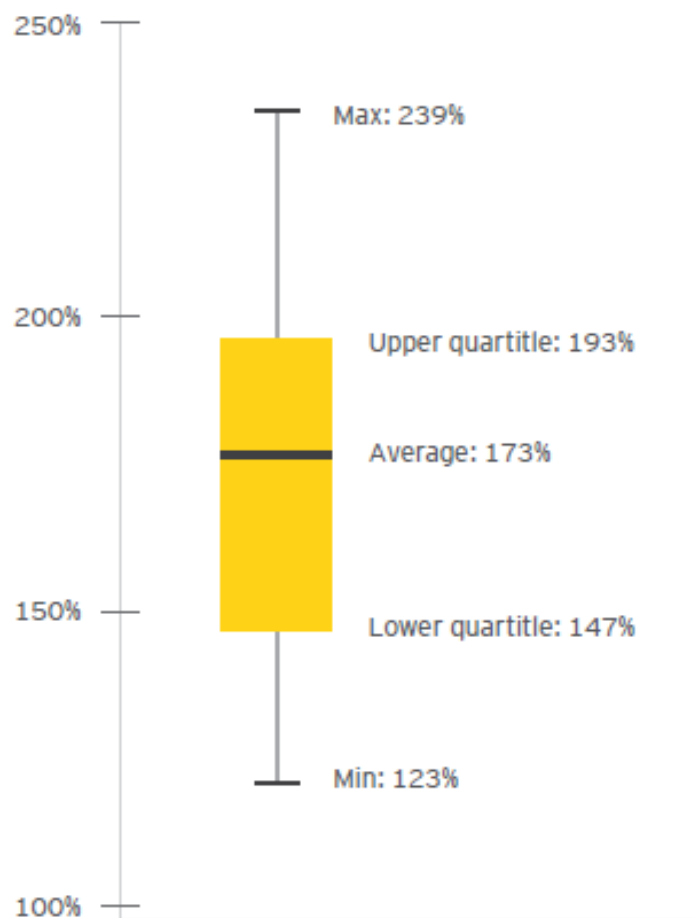
<10%
 10%–20%
 >20%

Note: Solvency II ratio calculated for Top 20 groups per market per LOB
Source: Proprietary Bain & Company and Towers Watson QISS tool

עודף בהון של חברות ביטוח באירופה

במאחד ובסולו (2015)

Figure 2: Comparison of disclosed Solvency II ratios



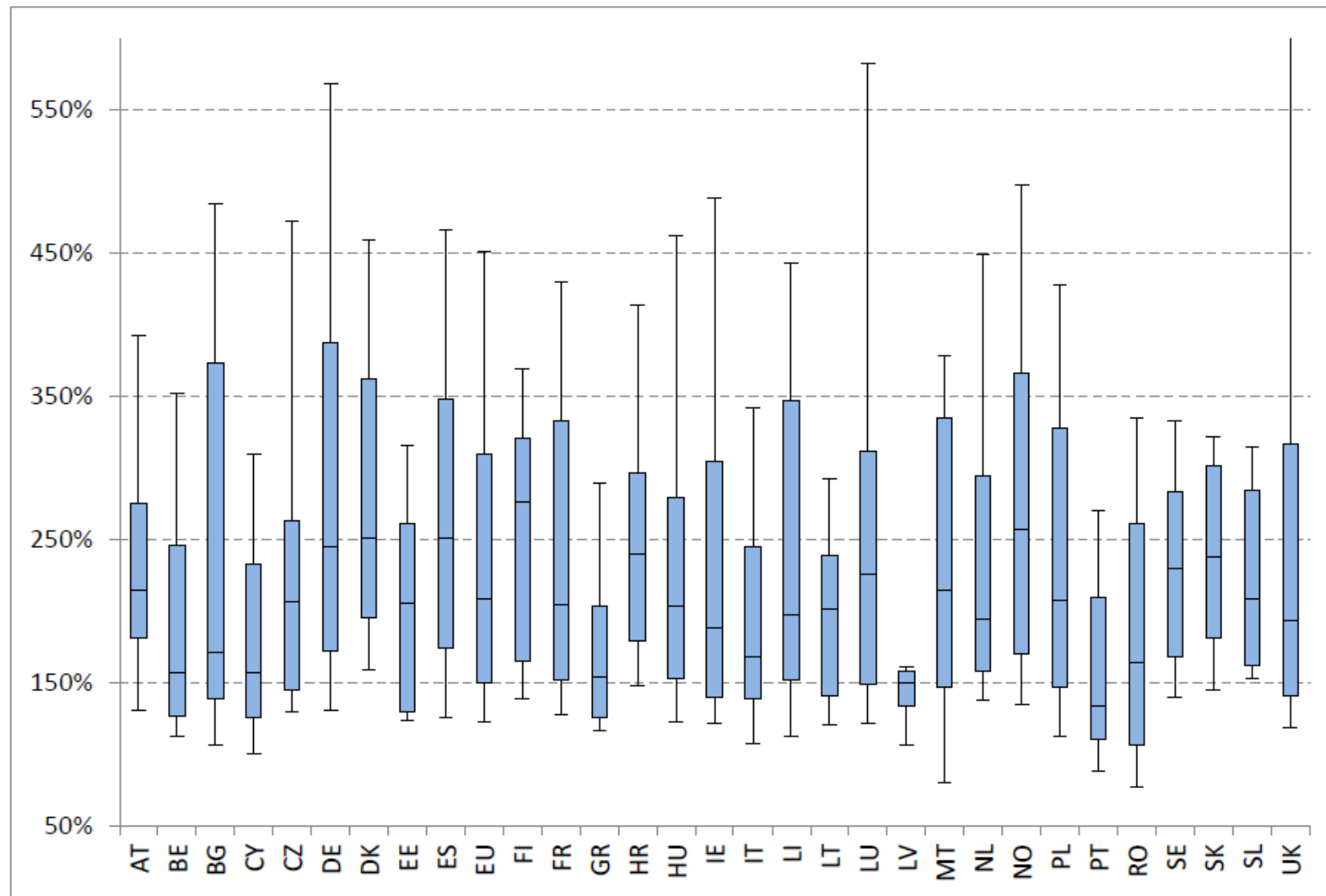
Source: Year-end 2015 company disclosure and EY analysis

Figure 6: Comparison of target solo entity solvency

Target unit solvency	
Aegon	130% - 150% for EEA units.
Allianz	100% - 130% after stress
AXA	Limited volatility buffer above 100% .

Source: Company disclosure

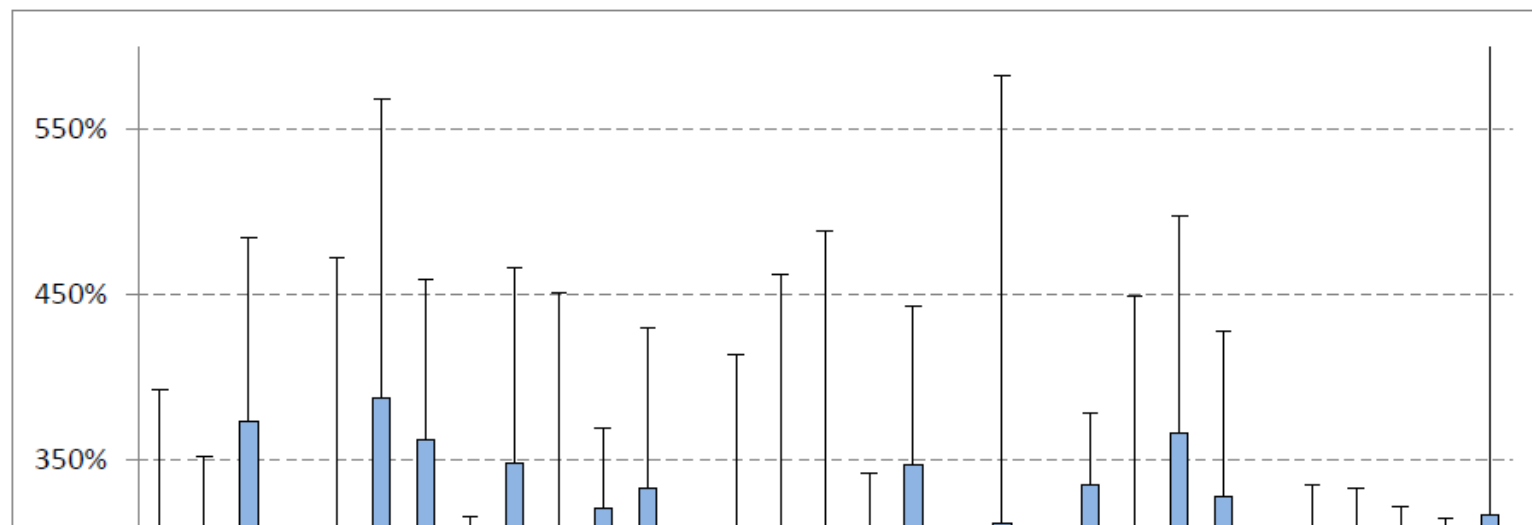
Figure 2.14: SCR coverage ratio by country (in per cent; median, interquartile range and 10th and 90th percentile)



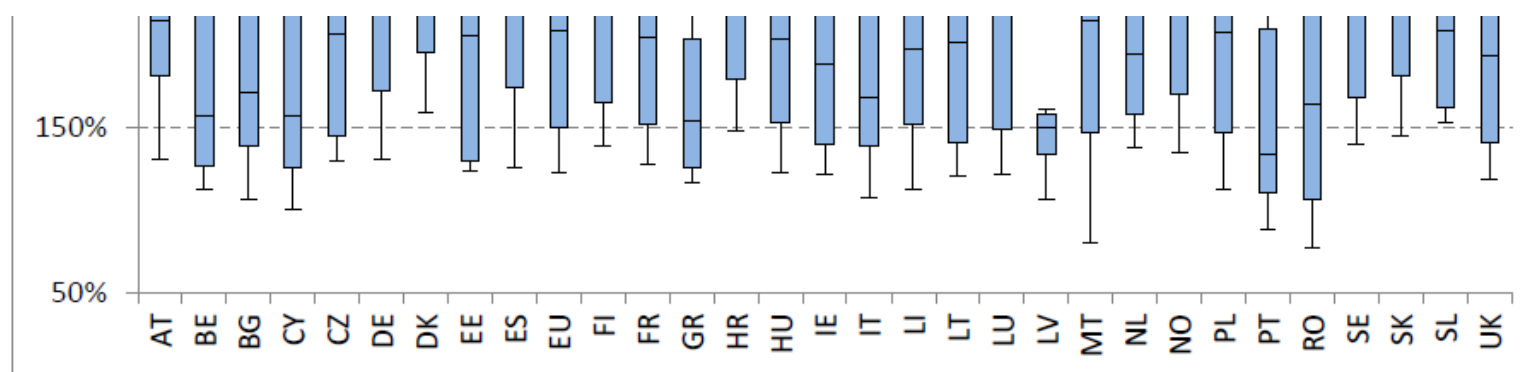
Source: EIOPA (sample based on 2600 solo insurance undertakings in EEA)

Reporting reference data: 30/06/2016

Figure 2.14: SCR coverage ratio by country (in per cent; median, interquartile range and 10th and 90th percentile)



Most undertakings made use of both transitional measures and volatility adjustments in their ratio calculations. This means that some insurance

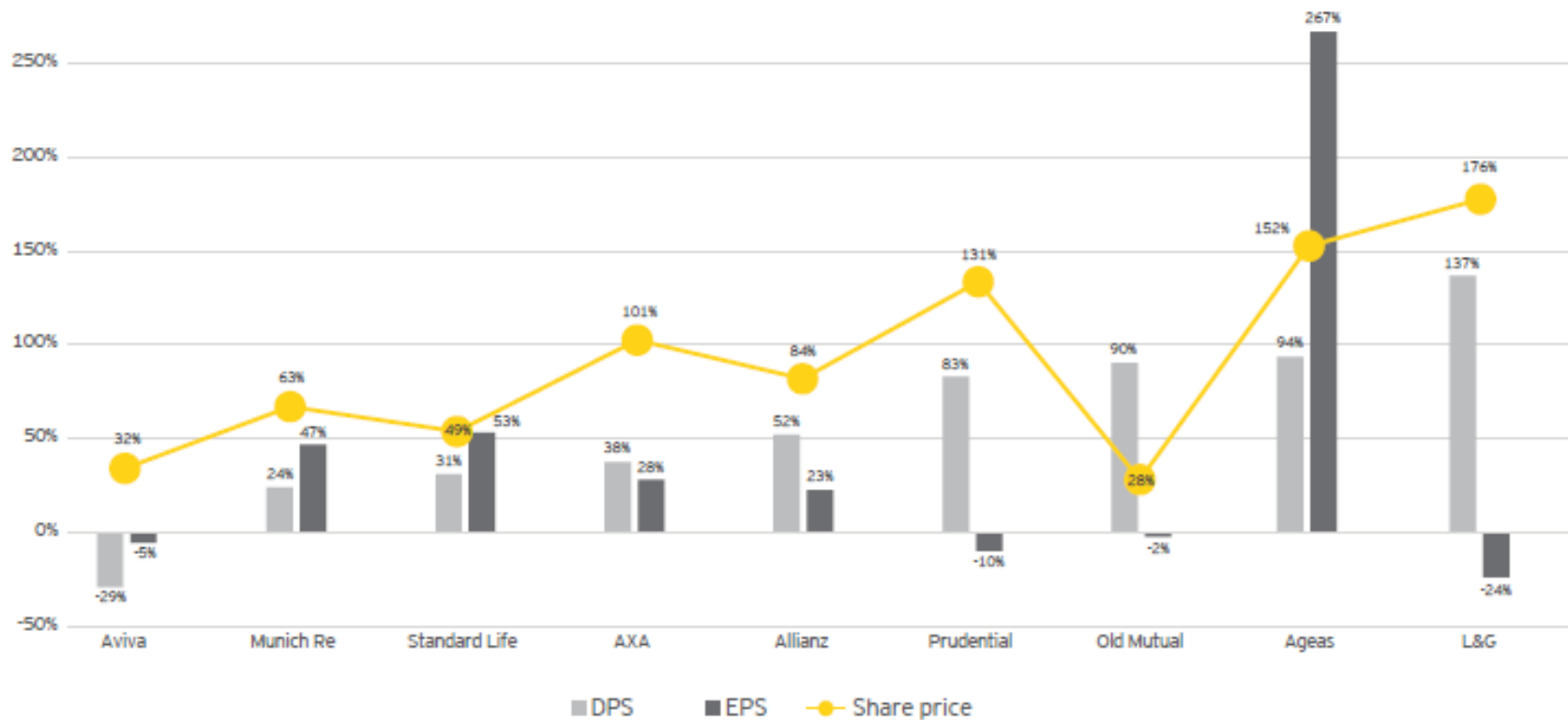


Source: EIOPA (sample based on 2600 solo insurance undertakings in EEA)

Reporting reference data: 30/06/2016

צמיחה בדיבידנד של חברות ביטוח חיים באירופה יותר מהצמיחה ברווח (2010-2015)

Figure 8: Change in earnings per share and dividends per share: 31 December 2010 to 31 December 2015



Source: S&P Capital IQ

השפעת סולבנסי 2 על חלוקת דיבידנד

What does Solvency II imply for insurers' dividend policies?

Insurance companies are responsible for their own dividend policies as part of their overall capital policies. DNB believes that insurers would do well to take account of the impact of the UFR – which forms part of the actuarial interest rate – and other adjustments. In the context of adequate risk management under Solvency II, insurers are also expected to

pay attention to this in their ORSA. Where needed, DNB will consider the UFR impact in assessing an insurer's capital and dividend policies. Insurance companies have a statutory obligation to seek DNB's approval before distributing dividends if they fail to meet their solvency requirements or foresee noncompliance within the next twelve months.

DeNederlandscheBank

EUROSYSTEEM

חלוקת דיבידנד בעולם של סולבנסי 2

"It is also fundamental that market analysts and investors understand that **Solvency II adjustments and transitional measures are a legitimate part of the regime. Transitional measures do not distort the solvency reality: they are designed to ensure a smooth transition to the new regime, avoiding disruptions in the market** and allowing a certain period for companies to fully recognize the impact on old books of contracts that have been underwritten in a different regulatory framework.

Especially within the context of the low interest rate environment, it is important that while using the transitional measures, firms will continue to take the necessary steps to restructure their business models."

Gabriel Bernardino
Chairman of EIOPA
European Insurance Conference
London, 2 June 2015

חלוקת דיבידנד בעולם של סולבנסי 2

"For the benefit of investors, let me be crystal clear: **when we consider whether or not firms are in a position to pay dividends, one of the main quantitative yardsticks we will use is capital levels after the benefit of transitionals.** Now, investors taking a close interest may be concerned about the **capital strain** firms using the TDTP* may face as the transitional benefit unwinds over 16 years. They are right to have an eye to that, but I would like to point out that there will be some off-setting benefit in the form of the release of the risk margin as the back book rolls off – it will be up to firms to set out this picture for analysts and investors, but it is the net adjustment we should be focused on."

Sam Woods

Executive Director of Insurance Supervision, Bank of England

At the Association of British Insurers

London, 9 July 2015

* Transitional Deduction from Technical Provisions

דוגמא למדיניות דיבידנד בעולם של סולבנסי 2

> 300%	Excess capital adequacy	<ul style="list-style-type: none">• The possibility of increased risk appetite• The possibility of more aggressive growth in the volume of operations and consideration of possible changes to the business strategy• The possibility of increasing the share of dividend payments• The possibility of excess capital payout (capital reduction)
250–300%	Target capital adequacy	<ul style="list-style-type: none">• The payment of dividends within the target range of 30–50% of consolidated net profit of the Triglav (payout ratio of 30–50%)• Maintenance of the applicable risk appetite• Room for growth in the volume of operations in line with the applicable business strategy

דוגמא למדיניות דיבידנד בעולם של סולבנסי 2

(המשך)

200–250%	Sub-optimal capital adequacy level	<ul style="list-style-type: none">• Analysis of possible measures to prepare a capital adequacy improvement plan• Assessment of possible selective reduction in the volume of operations• Changes to the plans for expanding operations• The possibility of reducing the share of dividend payments (a lower payout ratio)
150–200%	Warning capital adequacy level	<ul style="list-style-type: none">• The preparation of the plan and the implementation of measures aimed at improving capital adequacy• The implementation of measures for selective reduction in the volume of operations• Strict limitation of the expansion of operations• Reduction in the share of dividend payments•
< 150%	Insufficient capital adequacy	<ul style="list-style-type: none">• Assessment of the possibility of issuing subordinated capital instruments• Implementation of the restructuring plan• No dividend payments• Consideration of the possibility to increase capital

דוגמא למדיניות דיבידנד בעולם של סולבנסי 2

(המשך)

Figure 5: Comparison of disclosed capital management frameworks

Summary capital management and solvency target	
Aegon	Target range of 140% - 170% at group level
Ageas	Targeting 175% SCR coverage. Risk appetite capital limited to 40% of own funds calibrated to a 1/30 year event
Allianz	> 160% : dividend policy threshold
ASR	> 140% : will pay a cash dividend. Risk appetite is to be above 120%
AXA	Target range of 170% - 230%
SCOR	Optimal target range 185% - 220% .
Storebrand	Target of greater than 130%

Source: Company disclosure and EY analysis

סוף דבר: מחשבה לסיכום

- אני חושש שבשנים האחרונות ראינו כרסום גובר של רגולטורים בזכויות בסיסיות של בעלי מניות, ללא איזון ראוי לטעמי מול הכוח הפיקוחי המשרת אינטרסים שונים בתכלית מאשר טובת בעלי המניות.
- הדבר עלול להוביל לפגיעה בלתי מידתית בכלל בעלי המניות ובשוק ההון.
- בהקשר זה דיבידנד הוא זכות בסיסית שיש לעודד ולא לדכא.

תודה על ההקשבה