REGULISANJE INVESTICIONI FONDOVA: SRBIJA VS EU

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Rezime

Zakon o investicionim fondovima („Službeni glasnik RS”, br: 46/06, 51/09 i 31/11) reguliše oblast poslovanja investicionih fondova koji posluju u Srbiji. Kako se naša zemlja nalazi u procesu pristupanju EU, te nam predstoji obaveza postepenog preuzimanja rešenja EU i usklađivanja regulative sa relevantnim direktivama EU, analiziraćemo prostor za izmene Zakona, radi daljeg usklađivanja domaće regulative vezane za investicione fondove, a u cilju podsticanja razvoja domaće industrije fondova.

Ključne reči: UCITS, AIFM, ESMA, ESRB, investicioni fond, otvoreni fond, zatvoreni fond, privatni fond, investicione jedinice, kapitalni zahtevi, neto vrednost imovine otvorenog fonda, revizija finansijskih izveštaja fonda, zaduživanje fondova, spajanje i pripajanje fondova

JEL: K22, G18, G22, G28

UDC 336.717.18(497.11:4-672EU)

*original
scientific
paper*

REGULATING INVESTMENT FUNDS: SERBIA VS. EU

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Summary

The Law on Investment Funds ("Official Gazette of the RS", no. 46/06, 51/09, and 31/11) regulates the field of investment funds operating in Serbia. Bearing in mind that Serbia has been in the process of joining the EU, and that it faces the pending obligation of gradual acquisition of the EU solutions and harmonization of local regulations with the relevant EU directives, in this paper we analyze the room for amendments to the concerned Law, with a view to further harmonization of domestic regulations related to investment funds, and facilitation of the local fund industry's development.

Keywords: UCITS, AIFM, ESMA, ESRB, investment fund, open-end fund, closed-end fund, private fund, investment units, capital requirements, open-end fund's net asset value, audit of the fund's financial statements, funds' borrowing, mergers and acquisitions of funds

JEL: K22, G18, G22, G28

Uvod

Pravni okvir za poslovanje investicionih fondova u Srbiji čine Zakon o investicionim fondovima i sledeća podzakonska akta Komisije za hartije od vrednosti: Pravilnik o uslovima za obavljanje delatnosti društva za upravljanje investicionim fondovima, Uputstvo o načinu računanja kapitala društava za upravljanje investicionim fondovima, Pravilnik o investicionim fondovima, Uputstvo o primeni čl. 41-42 i člana 55. Pravilnika o investicionim fondovima, Uputstvo o načinu računanja kapitala zatvorenih investicionih fondova, Pravilnik o kontnom okviru i sadržini računa u kontnom okviru za društva za upravljanje investicionim fondovima, Pravilnik o sadržini i formi finansijskih izveštaja društva za upravljanje investicionim fondom, Pravilnik o sadržini izveštaja eksternog revizora i Pravilnik o uslovima za obavljanje delatnosti kastodi banke.

Sa druge strane, osnov regulisanja poslovanja investicionih fondova u Evropskoj uniji čine dve osnovne direktive i to su: UCITS (Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities UCITS) i AIFM (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending directives 2003/41/ec and 2009/65/ec and regulations (EC) no 1060/2009 and (EU) no 1095/2010). UCITS i AIFM se razlikuju ne samo po investicionoj strategiji fondova koje uređuju, već i po tipu investitora kojem su namenjeni.

Dok je do sada u EU poslovanje investicionih fondova bilo regulisano samo UCITS direktivom

koja uređuje poslovanje institucija kolektivnog investiranja najpribližnijih našim otvorenim fondovima, ostali oblici kolektivnog investiranja nisu bili posebno regulisani. Međutim, nakon izbijanja svetske finansijske

krize i njenog preliivanja na EU, doneta je 2011. godine nova direktiva AIFM koja reguliše i poslovanje društava za upravljanje alternativnim investicionim fondovima. Cilj donošenja ove direktive je praćenje doprinosa izloženosti sistemskom riziku pojedinačnih velikih fondova koji posluju u EU, a nisu UCITS fondovi. Sa ovom direktivom zemlje članice su bile dužne da se usklade do 1. jula 2013. godine. Time je EU pokušala da uvede određeni stepen regulacije za takozvane rizičnije, hedž fondove, čije je poslovanje do sada bilo prilično liberalizovano.

Investicioni fondovi u Srbiji

Domaća industrija investicionih fondova je relativno mlada i prolazi kroz krizni period usled svetske finansijske krize i slabe investicione aktivnosti u zemlji. Naime, prvi investicioni fondovi u Srbiji pojavili su se 2007. godine, odmah nakon donošenja neophodnih propisa kojima se reguliše poslovanje investicionih fondova, a u predvečerje svetske finansijske krize. Kriza u ovom segmentu poslovanja reflektovala se kroz drastičan pad vrednosti imovine investicionih fondova pod upravljanjem do 2009. godine (što zbog pada vrednosti investicionih jedinica fondova, što zbog povlačenja sredstava klijenata iz fondova), kroz pad broja investicionih fondova, trend spajanja i pripajanja preostalih subjekata ove industrije. U 2010. godini vrednost ukupne imovine otvorenih fondova počinje da raste i dostiže na kraju 2012. godine 20 miliona evra, što je za trećinu manje u odnosu na 2007. godinu.

Imovina otvorenih investicionih fondova u Srbiji u evrima na dan 31.12.2012.

VREDNOST IMOVINE OTVORENIH INVESTICIONIH FONDOVA U EVRIMA					
31.12.2007.	31.12.2008.	31.12.2009.	31.12.2010.	31.12.2011.	31.12.2012.
32.285.396	11.146.019	8.502.121	9.812.142	15.357.693	20.441.697

Izvor: Godišnji izveštaj o radu Komisije i kretanjima na tržištu hartija od vrednosti u 2012. godini

UCITS

UCITS direktiva 2009/65/EC zamenila je Direktivu 85/611/EEC (Council Directive 85/611/EEC of 20 December 1985 on the coordination of

Introduction

The legal framework for the operation of investment funds in Serbia includes the Law on Investment Funds, and the following by-laws of the Securities Commission: Rulebook on operating requirements for investment fund management companies; Instruction on calculation of capital of investment fund management companies; Rulebook on investment funds; Instruction on implementing Articles 41-42 and Article 55 of the Rulebook on investment funds; Instruction on calculation of capital of closed-end investment funds; Rulebook on the chart of accounts and the content of accounts within the chart of accounts for investment fund management companies; Rulebook on the contents and layout of financial statements of investment fund management companies; Rulebook on the contents of the external auditor’s report, and Rulebook on operating requirements for custody banks.

On the other hand, the basis for regulating the operations of investment funds in the European Union includes two main directives: **UCITS** (Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferrable securities UCITS) and **AIFM** (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending directives 2003/41/ec and 2009/65/ec and regulations (EC) no. 1060/2009 and (EU) no. 1095/2010). UCITS and AIFM differ not only in terms of investment strategy of the funds they regulate, but also in terms of type of investors they target.

Until recently, operations of investment funds were in the EU regulated only by means of the UCITS Directive, regulating the operations of collective investment institutions, most similar to our open-end funds, whereas other forms of collective investment were not particularly

regulated. Nevertheless, after the outbreak of the global financial crisis and its spill-over effects in the EU, a new AIFM Directive was adopted in 2011, also regulating the operations of alternative investment fund management companies. The objective of this directive’s adoption was to monitor the contribution to the systemic risk exposure of large individual funds, other than UCITS funds, operating in the EU. The EU member states were obliged to harmonize their regulations with this directive by 1 July 2013. This was an attempt of the EU to introduce a certain level of regulation into the so-called riskier, hedge funds, whose operations had until then been rather liberalized.

Investment funds in Serbia

The domestic investment fund industry is relatively young and currently undergoing a critical period due to the global financial crisis and low investment activities in Serbia. Namely, the first investment funds in Serbia appeared in 2007, right after the adoption of necessary regulations regulating the operations of investment funds, and on the eve of the global financial crisis. In this operational segment, the crisis was reflected in a drastic fall in value of investment funds’ assets under management until 2009 (partly due to the drop in the funds’ investment units value, and partly due to the withdrawal of assets from the funds by their clients); in a reduced number of investment funds; and in a series of mergers and acquisitions of the remaining entities in this industry. In 2010 the value of total assets of open-end funds started to increase, reaching the amount of EUR 20 million at the end of 2012, which was by one third less than in 2007.

Assets of open-end investment funds in Serbia in EUR as of 31.12.2012

ASSET VALUE OF OPEN-END INVESTMENT FUNDS IN EUR					
31.12.2007	31.12.2008	31.12.2009	31.12.2010	31.12.2011	31.12.2012
32,285,396	11,146,019	8,502,121	9,812,142	15,357,693	20,441,697

Source: Annual report on the Securities Commission’s operations and trends at the securities market in 2012

UCITS

UCITS Directive 2009/65/EC replaced the

laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)) koja je uređivala institucije kolektivnog investiranja u prenosive hartije od vrednosti do 1. jula 2011. godine, a kako bi regulativu prilagodili razvijenim finansijskim tržištima XXI veka.

Poželjno je bilo obezbediti veću harmonizaciju odredbi koje se tiču davanja dozvole za obavljanje poslova UCITS fondova i posrednog sistema nadzora u zemljama članicama, na način da dozvola izdata UCITS fondu u jednoj zemlji članici važi i u celoj EU. Da bi se ovaj cilj postigao propisani su zahtevi u vidu početnog kapitala i sopstvenih sredstava društva za upravljanje UCITS fondom.

Radi zaštite investitora zahteva se sistem menadžmenta sa dva lica uprave. Kako bi se postigla ekonomija obima, omogućava se UCITS fondovima da vode i individualne portfolije klijenata, na način koji propisuje MIFID Direktiva 2004/39 (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC). Direktiva stoga propisuje posebna pravila za sprečavanje sukoba interesa kada društvo za upravljanje istovremeno vodi portfolio fonda i individualni portfolio klijenta. Takođe, direktiva definiše i koje funkcije može društvo za upravljanje delegirati trećim licima, a kako bi se povećala efikasnost obavljanja glavne funkcije UCITS fonda.

Jedan od ciljeva donošenja ove direktive je bio i da se omogući UCITS fondovima ulaganje i u druge finansijske instrumente koji nisu prenosive hartije od vrednosti, a ukoliko su dovoljno likvidni. Direktiva propisuje šta spada u prenosive hartije od vrednosti, ali samo u smislu ove direktive i hartija u koje UCITS fond može da ulaže, bez namere da propisuje definiciju prenosivih hartija od vrednosti koje se koriste u nacionalnim zakonodavstvima. Ograničava se preterano izlaganje jednom licu u transakcijama, kao i grupi povezanih lica. Direktiva naročito dozvoljava UCITS fondovima ulaganje u finansijske derivate, kao

deo investicione politike ili za potrebe hedžinga. Međutim, ograničava se ukupna izloženost finansijskim derivatima do nivoa ukupne neto imovine portfolia fonda. Ovi rizici moraju biti konstantno praćeni i mereni. Kod ulaganja u OTC derivate pažnja se usmerava na rizik druge strane u transakciji, te se tako direktivom propisuju maksimalna moguća izlaganja OTC derivatima u zavisnosti od pouzdanosti druge strane u transakciji.

Direktiva opisuje i tri načina merđžovanja fondova. Međutim, nisu sve zemlje članice obavezne da implementiraju sva tri načina u svoja zakonodavstva, ali svaka zemlja članica mora prepoznati ove načine transfera sredstava koji proizlaze iz navedenih merđžera. Vlasnici investicionih jedinica fonda koji vrši merđžer kao i onog fonda koji se merđžuje treba da imaju pravo na otkup investicionih jedinica ili na konvertovanje u investicione jedinice nekog drugog fonda sa sličnom investicionom politikom, a kojima upravlja isto društvo za upravljanje. Takođe potrebno je obezbediti kontrolu merđžera od treće strane - depozitara.

Podstiče se razmena informacija između nacionalnih regulatornih tela i ojačava njihova saradnja u smislu efektivne nadzorne funkcije na ujedinjenim osnovama.

AIFM

AIFM direktiva je doneta 2011. godine kako bi je zemlje članice implementirale u svoja zakonodavstva do jula 2013. godine. Ovom direktivom EU je želela da reguliše poslovanje društava za upravljanje ostalim oblicima kolektivnog investiranja koji nisu pokriveni UCITS direktivom, a u značajnom se obimu pojavljuju u trgovanju na finansijskim tržištima i mogu da vrše značajan uticaj na tržišta i kompanije u koje investiraju. Iako je uticaj ovih fondova na finansijsko tržište uopšte uzev koristan, nedavno se pokazalo da njihove aktivnosti takođe mogu biti i faktor širenja rizika kroz finansijski sistem. Usled nekoordinisanog odgovora zemalja članica na ove rizike, postaje teško efikasno upravljati ovim rizicima. Cilj ove direktive je da obezbedi jedinstveno unutrašnje tržište za ove fondove i da harmonizuje i ojača regulatorni i nadzorni okvir ovog oblika investiranja u zemljama članicama.

Directive 85/611/ECC (Council Directive 85/611/ECC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferrable securities (UCITS)), which regulated undertakings for collective investment in transferrable securities until 1 July 2011, with a view to harmonizing these regulations with the developed 21st century financial markets.

It was desirable to provide better harmonization of provisions concerning the issuance of operating licenses for UCITS funds, and the indirect supervisory system in the member states, so that a license issued to a UCITS fund in one member state would be valid across the entire EU. In order to achieve this goal, relevant requirements were prescribed in terms of initial capital and own funds of UCITS management companies.

For the purpose of investors' protection, a two-person management system is required. In order to achieve economies of scale, UCITS funds are allowed to manage individual clients' portfolios as well, in the manner prescribed by the MIFID Directive 2004/39 (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC). The Directive, therefore, prescribes special rules for preventing conflicts of interest when a management company simultaneously manages the fund's portfolio and an individual client's portfolio. Moreover, the Directive defines the functions that a management company may delegate to third parties, in order to increase the efficiency of performing the main functions of the UCITS fund.

One of the objectives of this Directive's adoption was to enable UCITS funds to invest in other financial instruments other than transferable securities, provided that they are sufficiently liquid. The Directive also prescribes what falls into the category of transferable securities, but only in terms of this Directive and securities in which UCITS funds may invest, without any intention to prescribe the definition of transferable securities used in national jurisdictions. It limits excessive exposure to a

single person in conducted transactions, and to a group of affiliated persons. The Directive especially allows UCITS funds to invest in financial derivatives, as part of their investment policy or for hedging purposes. Nevertheless, it limits the overall exposure to financial derivatives to the level of total net assets value of the fund's portfolio. These risks must constantly be monitored and assessed. When it comes to investing in OTC derivatives, the attention is directed to transaction counterparty risk; hence the Directive prescribes the maximum possible exposure to OTC derivatives, depending on the reliability of the transaction counterparty.

The Directive also describes three ways of merging funds. However, not all member states are obliged to implement all three ways into their legislations, although each member state has to recognize these ways of funds transfer arising from the concerned mergers. Owners of investment units in the fund performing the merger, and the fund being merged, should have the right to repurchase the investment units or to convert them into investment units of another fund with similar investment policy, managed by the same management company. It is also required to ensure that the merger is controlled by the third party - i.e. depository.

Exchange of information among national regulatory bodies is encouraged, and their cooperation strengthened in terms of effective supervisory function on common grounds.

AIFM

AIFM Directive was adopted in 2011 so that the member states could implement it into their legislations by July 2013. By adopting this Directive, the EU wanted to regulate the operations of companies managing other forms of collective investment not covered by the UCITS Directive, yet appearing in substantial volume in trading at the financial markets, thereby being in the position to considerably impact the markets and companies in which they invest. Although the impact of these funds on the financial market is, generally speaking, rather useful, it recently showed that their activities can also be a factor of risk contagion in the financial system. Due to the uncoordinated response of the member states to these risks, it became difficult to manage them

AIFM direktiva se bavi društvima za upravljanje alternativnim fondovima, bez obzira da li su sami fondovi osnovani javnom ponudom ili ne, koju pravnu formu imaju i da li su listirani na berzama. Istovremeno, ova direktiva se ne odnosi na holding kompanije, porodične kompanije koje se oslanjaju na sopstveni kapital bez eksternog prikupljanja kapitala, niti na društva za upravljanje penzionim fondovima. Poslovanje samih alternativnih fondova direktiva ostavlja zemljama članicama da samostalno urede. Direktiva uređuje poslovanje društava za upravljanje kroz postavljanje kapitalnih zahteva i propisivanje kao obaveznih funkcija društava upravljanje portfoliom i upravljanje rizikom. Cilj direktive je da se minimizira sukob interesa u poslovanju društava za upravljanje investicionim fondovima, kroz postavljanje određenih organizacionih zahteva. Proces vrednovanja imovine fonda i obračun neto vrednosti imovine fonda mora biti odvojen od funkcije upravljanja portfoliom, što se postiže kroz obavezu delegiranja ovih poslova depozitaru.

Radi praćenja i kontrole sistemskog rizika na finansijskom tržištu EU, neophodno je uspostaviti specijalne zahteve za društva za upravljanje alternativnim investicionim fondovima koji značajno koriste leveridž u svom poslovanju. Ova društva obavezna su da obelodanjuju informacije o ukupnom stepenu leveridža koji koriste: leveridža koji proizilazi iz pozajmljivanja novca, hartija od vrednosti ili iz pozicija koje imaju u derivatima. Zemlje članice mogu da propišu maksimalno dozvoljen stepen leveridža koje alternativni fondovi mogu koristiti prilikom upravljanja sredstvima. Takođe, Evropska uprava za hartije od vrednosti i tržišta (European Securities and Markets Authority - ESMA) može uz konsultaciju sa Evropskim odborom za sistemski rizik (European Systemic Risk Board-ESRB) da odredi nivo leveridža koji predstavlja značajan rizik

po sistemsku stabilnost finansijskog tržišta i da predloži odgovarajuće mere.

AIFM i domaći fondovi

U Srbiji najpribližniji ovom obliku investiranja bili bi zatvoreni i privatni investicioni fondovi. Međutim, AIFM direktiva na samom početku skreće pažnju da se ne odnosi na fondove koji imaju pod upravljanjem manje od 100 miliona evra. Kako se može videti iz donje tabele u Srbiji ukupna imovina otvorenih fondova iznosi na dan 31/10/2013 tačno 4.589.760.000 dinara što predstavlja oko 40 miliona evra. Dok su privatni fondovi ugašeni, zatvoreni fond postoji jedan, Fima SEE Activist ad čija neto imovina na dan 29.10.2013. godine iznosi 117.900.593,61 dinara, što znači da je ukupna imovina svih fondova u Srbiji oko 41 milion evra. Očigledno je da domaći privatni i zatvoreni fondovi zbog vrednosti imovine kojom upravljaju ne potpadaju pod regulaciju AIFM direktive, osim odredaba jednog člana ove direktive, koji uopšteno propisuje obavezu registracije fonda, obavezu pružanja informacija o investicionoj politici fonda i izveštavanju nadležnog tela za nadzor. Drugim rečima navedene oblike domaćih fondova za sada ne treba dodatno regulisati u skladu sa AIFM direktivom, već postoji prostor i za eventualno deregulisanje i olakšavanje poslovanja ove vrste fondova.

Otvoreni balansirani fondovi	Datum	Vrednost IJ	Promena u % za 6 m	Kapital u mil. din.
ILIRIKA Balanced	31/10/2013	1542.66	+2.61	149.19
Otvoreni fondovi rasta vrednosti imovine				
FIMA ProActive	31/10/2013	399.18	-3.64	130.11
ILIRIKA Dynamic	31/10/2013	323.65	+3.14	25.9
ILIRIKA Global	31/10/2013	296.67	-9.83	9.58
ILIRIKA Gold	31/10/2013	641.49	-6.66	2.36
KOMBANK InFond	01/11/2013	648.38	+4.02	61.6
Raiffeisen WORLD	31/10/2013	1284.41	+6.73	501.55
Triumph	31/10/2013	437.76	-0.50	32.87
Otvoreni fondovi očuvanja vrednosti imovine				
ILIRIKA Cash Dinar	31/10/2013	1484.83	+4.66	308.86
ILIRIKA Cash Euro	31/10/2013	1201.97	+4.33	24.45
KomBank NOVCANI FOND	31/10/2013	1030.46	-	63.84
Raiffeisen CASH	31/10/2013	1519.87	+5.48	2235.75
Raiffeisen EURO CASH	31/10/2013	1049.51	+4.44	1043.7

Izvor: www.mojnovac.rs

efficiently. This Directive is aimed at ensuring a uniform internal market for these funds, harmonizing and strengthening the regulatory and supervisory framework of such form of investment in the EU member states.

AIFM Directive concerns alternative investment funds managers, regardless of whether these funds were based through public offering or not; which legal form they have, and whether they are quoted on stock exchanges. At the same time, this Directive does not refer to holding companies, family businesses relying on their own capital with no external capitalization, or pension funds management companies. The operations of alternative funds themselves are left to the member states to regulate independently. The Directive regulates the operations of management companies by setting up capital requirements and prescribing portfolio management and risk management as mandatory functions of these companies. The Directive aims to minimize the conflict of interest in the operations of investment funds management companies, by establishing certain organization requirements. The process of measuring the value of the fund’s assets, and calculating the fund’s net asset value, has to be separate from the portfolio management function, which is to be achieved through mandatory delegation of these operations to the depositary.

For the purpose of monitoring and control of the systemic risk at the EU financial market, it is necessary to establish special requirements for alternative investment funds managers which substantially use leverage in their operations. These managers are obliged to disclose information about the overall level of leverage they use: leverage arising from lending money, from securities, or from their derivatives positions. Member states may prescribe the maximum allowed level of leverage that alternative funds may use in the process of managing funds. Also, the European Securities and Markets Authority - ESMA, after consulting the European Systemic Risk Board - ESRB, may determine

the level of leverage incurring substantial risk for the systemic stability of the financial market, and subsequently propose appropriate measures.

AIFM and domestic funds

The closest to this form of investment in Serbia are closed-end and private investment funds. However, the AIFM Directive at the very beginning draws attention to the fact that it does not refer to funds managing less than EUR 100 million. As can be seen from the table below, the total assets of open-end funds in Serbia as of 31/10/2013 amounted to exactly RSD 4,589,760,000, i.e. about EUR 40 million. Whereas the private funds have been closed, there is only one close-end fund, SEE Activist a.d, whose net assets as of 29/10/2013 amounted to RSD 117,900,593.61, meaning that the total assets of all funds in Serbia amount to about EUR 41 million. Evidently, the domestic private and closed-end funds, due to the value of assets under management, do not undergo the regulations of the AIFM Directive, except for the provisions of one article of this Directive, generally prescribing that a fund must be registered, must provide information about its investment policy, and report to the competent supervisory body. In other words, the stated forms of domestic funds, for now, do not need additional regulations in line with the AIFM Directive. Instead, there is room for potential deregulation and facilitation of such funds’ operations.

Open-end balanced funds	Date	IU Value	Change in % in 6 mon.	Capital in RSD mill.
ILIRIKA Balanced	31/10/2013	1542.66	+2.61	149.19
Open-end funds with increased asset value				
FIMA ProActive	31/10/2013	399.18	-3.64	130.11
ILIRIKA Dynamic	31/10/2013	323.65	+3.14	25.9
ILIRIKA Global	31/10/2013	296.67	-9.83	9.58
ILIRIKA Gold	31/10/2013	641.49	-6.66	2.36
KOMBANK InFond	01/11/2013	648.38	+4.02	61.6
Raiffeisen WORLD	31/10/2013	1284.41	+6.73	501.55
Triumph	31/10/2013	437.76	-0.50	32.87
Open-end funds with preserved asset value				
ILIRIKA Cash Dinar	31/10/2013	1484.83	+4.66	308.86
ILIRIKA Cash Euro	31/10/2013	1201.97	+4.33	24.45
KomBank NOVCANI FOND	31/10/2013	1030.46	-	63.84
Raiffeisen CASH	31/10/2013	1519.87	+5.48	2235.75
Raiffeisen EURO CASH	31/10/2013	1049.51	+4.44	1043.7

Source: www.mojnovac.rs

Prostor za usklađivanje sa UCITS direktivom

Što se pak tiče otvorenih fondova, tu prostora za dalje usklađivanje sa direktivom UCITS ima značajno više. Naime, direktiva propisuje da društvo za upravljanje ne može imati učešće u kapitalu i upravljanju drugim pravnim licima, kao ni preko investicionih fondova kojima upravlja ukoliko time stiče značajan uticaj na upravljanje izdavaocem. Naš zakon ne dozvoljava učešće u kapitalu i upravljanju drugim pravnim licima bez obzira da li se time stiče značajan uticaj na upravljanje izdavaocem ili ne. Pored toga, po našim propisima, u toku poslovanja društvo za upravljanje novčani deo osnovnog kapitala može držati u hartijama od vrednosti sa rokom dospeća do jedne godine čiji je izdavalac Republika Srbija ili Narodna banka Srbije, dok direktiva ne poznaje ovakvu vrstu ograničenja za ulaganje kapitala društva za upravljanje investicionim fondovima.

Kapitalni zahtevi

Što se tiče osnovnog kapitala društva za upravljanje, direktiva propisuje minimalno 125.000 evra, dok je prema našim propisima neophodno uplatiti na privremeni račun 200.000 evra kod osnivanja društva za upravljanje, a pre upisa privrednog društva u APR. Takođe, direktiva propisuje obavezu održavanja adekvatne visine kapitala društva za upravljanje u visini najmanje jednako četvrtini opštih troškova društva za prethodnu poslovnu godinu, a domaći propisi ne manje od dinarske protivvrednosti od 200.000 evra. Očigledno i ovde postoji prostor za dodatno olakšavanje osnivanja i poslovanje društava za upravljanje.

Obaveza revizije finansijskih izveštaja

Direktiva propisuje posebne odredbe vezane za reviziju finansijskih izveštaja društava za upravljanje koje su u skladu sa odredbama zakona kojim se uređuje tržište kapitala o reviziji finansijskih izveštaja javnih društava. Direktiva propisuje i obavezu javnog objavljivanja i dostavljanja Komisiji pored

godišnjih finansijskih izveštaja za društvo i za investicione fondove kojim ono upravlja, sa izveštajem eksternog revizora do 30. aprila tekuće godine za prethodnu godinu i obavezu dostavljanja polugodišnjih izveštaja za svaki investicioni fond posebno do 31. avgusta tekuće godine za prethodni period. Ova bi odredba mogla u celosti da se prenese u domaću regulativu za otvorene investicione fondove s obzirom da polugodišnji izveštaji ne moraju biti revidirani, te ne predstavljaju dodatne troškove za društva za upravljanje, a povećavaju transparentnost poslovanja fondova.

Ograničavanje naknada fondova

Dok član 44. Zakona propisuje maksimalnu naknadu za otkup investicionih jedinica koju društva za upravljanje mogu da obračunaju klijentu na najviše 1% vrednosti investicionih jedinica koje se otkupljuju, dotle uporedna regulativa ne postavlja ovakva ograničenja, kao ni direktiva EU. Naime, naknada za otkup se slobodno utvrđuje i predstavlja instrument tržišne konkurencije među fondovima. U situaciji u kojoj se nalaze domaći fondovi trenutno, ova naknada se često uopšte i ne naplaćuje, upravo radi privlačenja novih klijenata u fond. Ova odredba Zakona nije neophodna, niti celishodna, imajući u vidu dobrovoljnu prirodu ulaganja u investicione fondove i predstavlja administrativno ograničavanje naknada fonda.

Objavljivanje neto vrednosti imovine otvorenog fonda po investicionoj jedinici

U skladu sa direktivom EU, utvrđivanje neto vrednosti imovine otvorenog fonda po investicionoj jedinici se vrši svakog radnog dana, a objavljuje najmanje dva puta mesečno. Po domaćoj regulativi objavljivanje vrednosti investicione jedinice se vrši u jednom dnevnom listu koji se distribuira na celoj teritoriji Republike tiražom od najmanje 100.000 primeraka, kao i na internet stranici društva za upravljanje ili otvorenog fonda. Očigledno i ovde ima prostora za dodatno rasterećenje domaće industrije fondova.

Room for harmonization with the UCITS Directive

When it comes to open-end funds, there is, yet, considerably more room for further harmonization with the UCITS Directive. Namely, the Directive prescribes that a management company can neither have a share in the capital nor participate in the management of other legal entities, not even through investment funds under its management, if this entitles it to considerable influence on the management of the issuer. The Serbian law does not allow a share in the capital or participation in management of other legal entities, regardless of whether this entails considerable influence on the management of the issuer or not. Moreover, according to the Serbian regulations, in the course of its operations, a management company may hold a pecuniary part of its core capital in securities with up to one year maturity, issued by the Republic of Serbia or the National Bank of Serbia, whereas the Directive does not prescribe this kind of limitation for investments of an investment fund management company.

Capital requirements

As for the core capital of a management company, the Directive prescribes the minimum of EUR 125,000, whereas according to our regulations it is necessary to effect a payment of EUR 200,000 into the interim account when establishing a management company, prior to the business company's registration at the Business Registers Agency (BRA). Furthermore, the Directive prescribes the obligation of maintaining an adequate level of the management company's capital, equal to at least one fourth of the company's general expenditures in the preceding business year, which is, according to our regulations, not less than the dinar counter value of EUR 200,000. Evidently, there is room here for additional relaxation of establishment procedures and regulations concerning the management companies' operations.

Mandatory audit of financial statements

The Directive prescribes special provisions concerning the audit of management companies' financial statements, in line with the provisions of the law regulating the capital market, in the segment related to the public companies' financial statements auditing. The Directive also prescribes the obligation of public disclosure and submission of annual financial reports to the Commission, for the concerned company and investment funds under its management, along with the external auditor's report, by 30 April of the current year for the year before, and the obligation of submitting semi-annual reports for each investment fund separately, by 31 August of the current year for the preceding period. This provision could be fully transposed into the domestic regulations for open-end investment funds, given that the semi-annual reports do not have to be revised, which means that they do not incur additional costs to the management company, yet increase the transparency of the funds' operations.

Limiting funds' compensations

While Article 44 of the Law prescribes the maximum compensation for a repurchase of investment units that management companies can calculate for their clients to be no higher than 1% of the repurchased investment units' value, the comparable regulations do not set any such limits, nor does the EU Directive. Namely, the repurchase compensation is determined freely, being an instrument of market competition among the funds. Given the situation in which domestic funds are at the moment, this compensation is often not charged at all, with a view to attracting new clients to join the fund. This provision of the Law is neither necessary nor purposeful, bearing in mind the voluntary nature of investing in investment funds, serving as an administrative limitation of the fund's compensations.

Disclosure of an open-end fund's net asset value per investment unit

In accordance with the EU Directive, an open-end fund's net asset value per investment

Minimalan broj članova

Kod nas prilikom sticanja investicionih jedinica član otvorenog fonda ne može steći više od 20% neto vrednosti imovine otvorenog fonda. To drugim rečima znači da otvoreni fond mora imati minimalno pet članova kod osnivanja. Direktiva ne propisuje ovakvo ograničenje, ali definiše da je UCITS fond namenjen javnosti, a dalje Uputstvo Evropske komisije propisuje da se pod javnošću smatra 2 ili više osoba. Stoga bi se moglo razmisliti o podizanju ovog limita na 30%, čime bi se omogućilo da manji broj lica upiše investicione jedinice prilikom osnivanja, a da fond ipak zaživi.

Zaduživanje fondova

Što se tiče zaduživanja, društvo za upravljanje kod nas može, isključivo radi održavanja potrebnog nivoa likvidnosti otvorenog fonda, u svoje ime a za račun otvorenog fonda, vršiti zaduživanje sa rokom otplate do 360 dana, i to zaključivanjem ugovora o kreditu ili repo ugovora sa drugim investicionim fondovima i bankama, čiji predmet mogu biti i akcije, pri čemu ukupno zaduživanje može iznositi najviše do 20% vrednosti imovine fonda. Međutim, direktiva je za otvorene investicione fondove mnogo rigoroznija i dozvoljava zaduživanje samo do 10% vrednosti imovine fonda. Sa druge strane fondovi koji nisu UCITS, mogu se zaduživati slobodno.

Merdžeri i akvizicije

Po direktivi EU kada se govori o spajanju i pripajanju otvorenih investicionih fondova, članovi otvorenih fondova koji se spajaju imaju pravo na otkup investicionih jedinica ili konvertovanje u jedinice drugog fonda kojim upravlja isto društvo za upravljanje bez naknade, a najkasnije do pet radnih dana pre momenta spajanja. Troškovi spajanja fondova vezani za administrativne troškove ili savetodavne usluge ne mogu pasti na teret imovine fondova koji se spajaju niti na teret članova fonda. Ove bi odredbe trebalo uneti u Zakon, a u cilju zaštite imovine članova fonda.

Zaključak

Kako nas očekuje veoma kompleksan proces usklađivanja kompletne pravne regulative sa direktivama EU čiji su principi obavezujući za sve zemlje članice EU potrebno je kontinuirano sprovoditi usklađivanje domaćih zakona. Međutim, na tom putu još uvek nam predstoje pregovori sa EU u kojima se tačno precizira šta u kojoj oblasti je potrebno uskladiti i kojim tempom, a kako bi momentom pristupanja EU naš pravni poredak bio u potpunosti usklađen sa pravom EU. Stoga je na nama da procenimo koje nam odredbe direktiva EU koristi da primenimo odmah, a koje će zbog svoje zahtevnosti biti bolje što kasnije ugraditi u domaće zakone. Što se tiče zatvorenih i privatnih fondova, potrebno je razmisliti o daljoj liberalizaciji njihovog poslovanja, pošto oni ne predstavljaju UCITS fondove u smislu direktive EU 2009/65, a nemaju ni neophodan kapital pod upravljanjem da bi bili predmet AIFM direktive.

unit is determined every working day, and disclosed at least twice a month. Pursuant to domestic regulations, the investment units' value is disclosed in a daily newspaper, distributed across the Republic of Serbia, with the circulation of at least 100,000 copies, and at the webpage of the concerned management company or open-end fund. Evidently, there is room here for additional elimination of burden imposed on the domestic fund industry.

Minimum number of members

In Serbia, when acquiring investment units, a member of an open-end fund cannot acquire more than 20% of the concerned open-end fund's net asset value. In other words, this means that an open-end fund must have a minimum of five members at the moment of establishment. The Directive does not prescribe any such limitations, but it defines that the UCITS fund is targeted at the public, and the supplementary Instruction of the European Commission prescribes that "the public" implies 2 or more persons. Therefore, it could be considered to raise this limit to 30%, enabling a smaller number of persons registering for investment units in the process of establishment, and making the fund go live.

Funds' borrowing

When it comes to borrowing, a management company in Serbia, exclusively for the purpose of maintaining the required level of an open-end fund's liquidity, on its own behalf and for the account of the open-end fund, may borrow with up to 360 days repayment period, by signing a loan agreement or a repurchase agreement with other investment funds and banks, whose subject may also be shares, under the condition that the total borrowing may not exceed 20% of the fund's asset value. However, the Directive is, in case of open-end investment funds, much more rigorous, allowing them to borrow only up to 10% of the fund's asset value. On the other hand, non-UCITS funds can borrow without any limitations.

Mergers and acquisitions

According to the EU Directive, when discussing mergers and acquisitions of open-end investment funds, the members of open-end funds being merged have the right to repurchase investment units or convert these units into the units of another fund managed by the same management company, without any compensation, but up to five days, at the latest, before the merger takes place. The costs of funds' merger related to administrative costs or consulting services cannot be at the expense of the funds being merged, or at the expense of the funds' members. These provisions should be integrated into the Law, in order to protect the assets of the funds' members.

Conclusion

Given that ahead of us there is the extremely complex process of harmonizing complete legal and regulatory framework with the EU directives, whose principles are binding for all EU member states, it is necessary to continuously perform the harmonization of domestic laws. Nevertheless, at this path we still have to undergo negotiations with the EU, during which process it is stated precisely what has to be harmonized, in which field, and at which pace, so that at the moment of joining the EU our legislation would be fully compliant with the EU acquis. Therefore, it is our task to assess which provisions of the EU directives would be useful to implement immediately, and which ones, due to their complexity, would be better to integrate into domestic laws at a later stage. As for the closed-end and private funds, we have to consider further liberalization of their operations, given that they neither fall into the category of UCITS funds in terms of the EU 2009/65 Directive, nor do they possess the required capital under management to be subject of the AIFM Directive.

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