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DIREKTIVA ZA TRŽIŠTA FINANSIJSKIH INSTRUMENATA

Rezime

Direktiva za tržišta finansijskih instrumenata (engl. *The Market in Financial Instruments Directive - MiFID)* je zapravo dokument usvojen od strane Evropskog parlamenta i Saveta, kojim se uspostavlja jedinstveno tržište i regulatorno uređenje za tzv. Investicione usluge. U ovom radu se navode prednosti i nedostaci primene direktive za tržišta finansijskih instrumenata.

Ključne reči: Akcioni plan za finansijske usluge, alternativni sistem trgovanja, sistematski internalizatori, najbolje izvršenje.

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THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE

Summary

The Markets in Financial Instruments Directive - MiFID, is actually a document adopted by the European Parliament and Council of the European Union, establishing a single market and a regulatory framework for the so-called Investment Services. This paper examines the advantages and disadvantages in the implementation of The Markets in Financial Instruments Directive.

Key words: Financial Services Action Plan - FSAP, alternative trading system, systematic internalisers, best execution

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Uvod - nastanak i oblasti koje reguliše MiFID

U kombinaciji sa dodatnim merama čije je donošenje dogovoreno kao odgovor na dešavanja na finansijskom tržištu, donošenjem FSAP-a[1] je izgrađen stub koji će nositi buduća finansijska tržišta Evrope.[2] Kao rezultat toga, došlo je do značajnog napretka u finansijskoj integraciji u Evropi, posebno u smislu pružanja finansijskih usluga na institucionalnom nivou. Sledeći korak na putu ka potpunoj integraciji je provođenje Direktive za tržišta finansijskih instrumenata (engl. *The Markets in Financial Instruments Directive - MiFID*).

Direktiva za tržišta finansijskih instrumenata predstavlja samo srce FSAP-a, te krupan korak u pravcu uspostavljanja jedinstvenog tržišta hartija od vrednosti u Evropi. Ona je usvojena od strane Evropskog veća i Evropskog parlamenta u aprilu 2004. godine, a primenjuje se od novembra 2007. Nakon Direktive o investicijskim uslugama (engl. *Investment Services Directive - ISD*) koju zamenjuje, MiFID predstavlja najdalekosežniji element evropskog zakonodavstva koji se odnosi na tržište hartija od vrednosti, te pružanje nebankarskih finansijskih usluga. ISD je bila prvi, nepotpuni pokušaj da se uspostavi jedinstveno tržište finansijskih usluga na celom području EU. Iako, u konačnici, MiFID teži ka istim ciljevima kao i ISD koja mu je prethodila, MiFID ipak postavlja sveobuhvatniji i homogeniji regulatorni okvir, uključujući i prošireni sistem pasoša, u svrhu stvaranja okruženja u kojem postoje jednake mogućnosti i uklanjanja preostalih prepreka za pružanje finansijskih usluga vezanih za hartije od vrednosti, izvan granica pojedinačnih država.

MiFID ima potencijal da značajno preobrazi pružanje finansijskih usluga i funkcionisanje tržišta kapitala, a posebno tržišta vlasničkih hartija od vrednosti u Evropi. U naporima da se podstakne veća integracija tržišta hartija od vrednosti u EU, MiFID se oslanja na nekoliko komplementarnih poluga. Radi se o sledećim:

- *Nadmetanje*. Novi okvir donosi novo nadmetanje između finansijskih posrednika pri svakom koraku u ciklusu transakcije hartija od vrednosti, od pružanja usluga investicijskog savetovanja, do praktičnog izvršavanja i saldiranja transakcije. Jedna od glavnih značajki MiFID-a jeste da velikom broju operatera otvara mogućnost izvršavanja (saldiranja) transakcija vlasničkih hartija od vrednosti, kroz mesta trgovanja koja se međusobno nadmeću.
- *Najbolje izvršenje i transparentnost*. Da bi se izbalansirali rizici nedovoljne transparentnosti i gubljenja likvidnosti, koja proističe iz potencijalno još više fragmentirane infrastrukture trgovanja MiFID se, u korist tržišta oslanja na povećanu transparentnost i zahteve koje je potrebno ispuniti u pogledu pružanja informacija, dok zahtevi u pogledu najboljeg izvršenja obezbeđuju veću sistematsku zaštitu ulagača.
- *Saradnja po pitanju regulative te konvergencija nadzornih praksi*. Pojačana saradnja između onih koji rade na izgradnji propisa vezanih za hartije od vrednosti, posebno kroz konvergenciju praksi nadzora, od suštinske je važnosti za homogenu provedbu MiFID-a. Ovo, s druge strane, omogućava konkurenciju koja vodi ka većim i dubljim tržištima, a ne ka većem broju manje likvidnih tržišta.

Ciljevi donošenja direktive za tržišta finansijskih instrumenata

Cilj MiFID-a je da potpomogne uspostavljanje jedinstvenog, konkurentnijeg, prekograničnog tržišta hartija od vrednosti na celom području EU. Ova direktiva podržava i promoviše, a često detaljnim pravilima i propisuje, usklađivanje zakonodavstva na području cele Evrope u smislu glavnih komponenti pružanja finansijskih usluga i u skladu sa tri središnja principa: veća konkurentnost, uključujući prekograničnu, uz jednake mogućnosti konkurencije; zatim veća

[1] Akcioni plan za finansijske usluge (engl. *Financial Services Action Plan - FSAP).*
[2] Dok je nadnacionalna zakonodavna faza FSAP-a zaista najvećim delom završena do ciljnog roka 2005. godine, njegov puni učinak postao je jasan tek u toku narednih godina.

Introduction - MiFID creation and scope that it regulates

In combination with additional measures agreed upon to be passed in response to the developments in the financial markets, with the adoption of the FSAP[1], a cornerstone was constructed to support the future financial markets in Europe.[2] As a result, a significant progress ensued in the financial integration in Europe, especially in the field of financial services provided on an institutional level. The next step on the road to a full integration is the implementation of The Markets in Financial Instruments Directive - MiFID.

The Markets in Financial Instruments Directive is the core itself of the FSAP, thus a major step forward in the direction of establishing a single securities market in Europe. It was adopted by the Council of European Union and by the European Parliament in April 2004, and is applied since November 2007. After the Investment Services Directive - ISD which it replaces, the MiFID is the farthest reaching element of European legislature which pertains to the securities market and providing of non-banking financial services. ISD was the first, albeit incomplete attempt at establishing a single financial services market in the entire area of the EU. Although in its ultimate objective the MiFID is striving for the same goals as the ISD which preceded it, MiFID nevertheless represents a more comprehensive and homogeneous regulatory framework, including an extended "passporting" system for purpose of creating an environment of equivalent opportunities and removal of remaining obstacles for providing financial services in securities trading beyond borders of individual countries.

MiFID has a potential for significantly transforming offering of financial services and functioning of the capital market, and especially markets trading in shares in Europe. In the attempts to boost higher securities markets integration in the EU, MiFID relies on several complementary levers, such as the following:

- *Competition.* A new framework brings about competition between the financial intermediaries at every step of the securities transaction cycle, from providing investment counselling services, up to the practical execution and settlement of transactions. One of the main features of the MiFID is the fact that it opens up the opportunities for a large number of operators to settle shares trading transactions through the trading venues which are mutually competing.
- *The best execution and transparency.* In order to balance risks of insufficient transparency and loss of liquidity resulting from potentially even more fragmented trading infrastructure, MiFID is relying, in favour of the market, on an increased transparency and requirements to be complied with regarding disclosure, publishing of information, while the requirements regarding the best execution are securing a higher systemic protection of investors.
- *Cooperation regarding regulatory framework and convergence of supervisory practices.* An intensified cooperation between those working on the drafting of regulations pertaining to securities, especially through the convergence in oversight practices is of an essential importance for a homogeneous implementation of the MiFID. On the other hand, this allows for the competition that would lead towards bigger and deeper markets, and not towards a larger number of less liquid markets.

The Markets in Financial Instruments Directive Objectives

The objective of the MiFID is to aid establishment of a single, more competitive, cross-border securities market in the entire area of the EU. This Directive supports and promotes, and often by its detailed rules, also prescribes harmonisation of the legislation in the entire area of Europe in the sense of main components in providing financial services concordant with the three central principles: higher competition, including the cross-

1 Financial Services Action Plan - FSAP.

2 Although the supra-national legislative phase of FSAP was truly in most parts completed by the targeted deadline of 2005, its full impact became clear only during the years that were to follow.

efikasnost tržišta; te veća zaštita investitora.[3] Očekuje se da će ovakva kombinacija podstaći posrednike na tržištu da ponude, a ulagače da potražuju više finansijskih usluga i da će povećati učešće (a time i likvidnost) finansijskih tržišta. Konkretnije, MiFID uvodi nadmetanje između mesta trgovanja, te širi i pojednostavljuje upotrebu evropskog pasoša za pružanje finansijskih usluga izvan granica svoje države. Istovremeno, veća transparentnost tržišta, te obaveze najboljeg izvršenja, imaju za cilj očuvanje efikasnosti tržišta bez istovremenog slabljenja zaštite ulagača.

Ograničavanjem mogućnosti državnih vlasti da nametnu obaveze izvršenja naloga na berzama, MiFID ima za cilj podsticanje i pružanje podrške nadmetanju za izvršenje naloga između različitih mesta trgovanja. Neka vrsta obaveza izvršenja naloga na berzama tradicionalno je na snazi u raznim evropskim državama (npr. u Francuskoj, Španiji, Italiji, Njemačkoj, Nizozemskoj, Danskoj i Finskoj). Ovo iziskuje izvršavanje transakcija na uređenom tržištu. Dok MiFID iznova potvrđuje konkretnu ulogu koju imaju uređena tržišta u smislu listinga hartija od vrednosti i finansijskih instrumenata, njime se odobravaju dva dodatna mesta trgovine gde se nalozi mogu izvršavati na organizovan način: multilateralni sistemi trgovanja (engl. *Multilateral Trading Facilities - MTF*) i sistematski internalizatori (engl. *Systematic Internalizers - SIs*). MTF-ovi (ili alternativni sistemi trgovanja, engl. *Alternative Trading System - ATSs*) predstavljaju elektronske platforme koje omogućavaju izvršavanje trgovanja spajajući/usklađujući naloge klijenata.[4] SIs-ovi su firme koje izvršavaju naloge klijenata tako što kupuju i prodaju za svoj račun izvan uređenog tržišta ili MTF-a, na organizovanoj, sistematskoj i učestaloj osnovi.[5]

Imajući u vidu sve učestalije pružanje finansijskih usluga preko granica pojedinačnih država, te razvijanje i podršku konkurentnosti, MiFID širi domet evropskog pasoša. Iako je pružanje finansijskih usluga izvan granica pojedinih država i dalje na niskom nivou, MiFID bi mogao odigrati ulogu katalizatora prekograničnih integracija time što bi ubrzao tempo desegmentacije tržišta, trenutno uglavnom podeljenih duž domaćih granica. Pod pasoškim okvirom, po prvi put uvedenim ISD-om, firma koja poseduje dozvolu za pružanje finansijskih usluga u državi u kojoj je osnovana, ima pravo da iste usluge pruža na području cele EU, bez potrebe za izdavanjem ikakvih dodatnih dozvola. MiFID-om se ovaj pristup primenjuje na široki spektar finansijskih instrumenata, te u značajnoj meri proširuje listu finansijskih usluga koje se korištenjem pasoša mogu pružiti širom Evrope. Na primer, vođenje multilateralnog sistema trgovanja jasno se prepoznaje kao aktivnost koja je obuhvaćena pasošem - jedan MTF može slobodno pružati iste platforme sa pristupom na daljinu na području bilo koje zemlje domaćina.

Slično tome, pružanje usluga investicijskog savetovanja takođe je prepoznato kao jedna od aktivnosti na koju se primenjuje pasoš, kao što je slučaj i sa širokim spektrom aktivnosti upravljanja fondovima. Štoviše, s ciljem omogućavanja korišćenja pasoša i pružanja usluga izvan granica pojedinih država, MiFID uspostavlja princip isključive primene propisa i pravila države u kojoj je firma osnovana, te se time ukida mogućnost da regulatorna tela države domaćina stranim pružateljima finansijskih usluga nameću dodatne zahteve. Međutim, od podružnica investicijskih kompanija zahteva se da se pri provođenju aktivnosti u zemlji domaćinu pridržavaju propisa zemlje domaćina

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3 Direktiva 2004/39/EC (2004); Uredba Komisije (EC) 1287/2006 (2006); Direktiva Komisije 2006/73/EC

4 Postoje različiti oblici ATSs-ova, od sistema koji se vode prema nalozima, preko kotacijskih i sistema market mejkera, do sistema kompjuterizovanih oglasnih ploča i unakrsnih/međusistema (engl. *crossing*). Na području Evrope, MTF-ovi su se razvili prvenstveno na tržištu obveznica (npr. Bondware, MTS i EuroMTS), te manjim delom na tržištu vlasničkih hartija od vrednosti (npr. Instinet, Tradelink). Iako je većina usmerena ka institucionalnim učesnicima na tržištu, određeni broj je dostupan i privatnim ulagačima.

5 Član 4, Direktive 2004/39/EC: Da bi bila smatrana sistematskom internalizacijom, aktivnost se mora provoditi u skladu sa nediskrecijskim pravilima i procedurama, imati materijalnu, komercijalnu ulogu za firmu, te klijentima mora biti na raspolaganju na redovnoj i stalnoj osnovi.

border one, together with equivalent "level playing field" opportunities for competing; also a higher market efficacy; and higher investors protection.[3] It is expected that such a combination will motivate intermediaries on the market to offer, and investors to demand more financial services, and that it will boost the participation (and thus also the liquidity) of financial markets. In concrete terms, MiFID introduces competition between the trading venues, and expands and simplifies the use of European passport for offering financial services cross-border from the home country. Concurrently, higher market transparency, and the best execution requirements have the aim to preserve market efficacy without simultaneously weakening investor protection.

When limiting the options of state authorities to impose liabilities for execution of stock exchange orders, MiFID aims at instigating and supporting competition in execution of orders between different trading venues. Some form of liability for order execution in stock exchanges traditionally still remains in force in various European states (for example, in France, Spain, Italy, Germany, Netherlands, Denmark, and Finland). This demands transaction to be executed on a regulated market. While MiFID confirms again the concrete role to be played by regulated markets in the sense of listing of securities and financial instruments, it also allows for two additional trading venues where the orders can be executed in an organised manner: Multilateral Trading Facilities - MTFs, and Systematic Internalisers - SIs. MTFs (or Alternative Trading Systems - ATSs) are the electronic platforms which allow for the execution of trading by clients' order-matching system.[4] SIs are the firms executing orders from their clients by buying and selling against their own book outside of a regulated market, or the MTSs, on an organised, systematic and regular basis.[5]

Mindful of a growing frequency in offering cross-border financial services by individual countries, and the development of and support for competition, MiFID broadens the scope of the European passport. Although offering cross-border financial services of certain countries is still at a rather low level, MiFID could play the role of a catalyst in cross-border integration by accelerating the tempo of de-segmentation of markets, at present mainly divided along the national border lines. Under the umbrella of a passporting framework, initially introduced by the ISD, the firm holding a licence for providing financial services in the country in which it was incorporated, has the right to offer those same services in the area of the entire EU, without the need to acquire any additional permits. MiFID allows this principle to be applied to a broad spectrum of financial instruments, and substantially broadens up the list of financial services which may be offered throughout Europe with the use of the passport. For example, conducting a multilateral trading system is clearly recognised as an activity that is covered by the passport - one MTF may freely offer the same platforms with the remote access to the area of any host country.

Similarly, offering services of investment counselling is also recognised as one of the activities which are covered by the passport, as is the case also with a broad spectrum of the funds management activities. In addition, with the aim to allow for the use of passport and offering services beyond borders of individual countries, MiFID established the principle of exclusive application of rules and regulations of the country in which the firm was incorporated - the home country, thus eliminating the possibility for regulatory authorities of the host

[3] Directive 2004/39/EC (2004); European Commission Directive (EC) 1287/2006 (2006); European Commission Directive 2006/73/EC.

[4] There are different forms of ATSs, from the systems conducted according to orders, through the quotation and systems of market makers, up to the systems of computerised advertising panels and crossing/midsystems. In the area of Europe, MTFs have developed primarily in the bonds market (for example, Bondware, MTS and EuroMTS), and to a lesser degree in the equity and stock market (for example Instiner, Tradelink). Although the majority is aimed at institutional market makers, a certain number is also accessible to private investors.

[5] Article 4 of the Directive 2004/39/EC: In order to be deemed a systematic internaliser, an activity must be conducted in accordance with the non-discretionary rules and procedures, must have the material and commercial role for the firm, and must be available to clients on a regular and permanent basis.

(npr. provođenje poslovnih aktivnosti, najbolje izvršenje, izvršenje naloga,itd).[6]

U svrhu davanja podstreka ulagačima, a i drugima, da iskoriste ujednačene mogućnosti, MiFID-om se osnažuju i usklađuju pravila zaštite ulagača, a posebno u korist privatnih investitora. Najbolje izvršenje predstavlja ključni koncept uveden MiFID-om. Pojam izvršavanja trgovanja u "najboljem interesu korisnika" bio je uključen i u ISD, međutim provedba se uglavnom ograničavala na uži pojam najbolje cene trgovanja. Nasuprot tome, obaveza najboljeg izvršenja odnosi se na širi spektar kvantitativnih (cena i naknade) i kvalitativnih (brzina izvršenja i izvesnost izvršenja i saldiranja) faktora, te iziskuje da posrednici na tržištu traže najbolje ukupne uslove, uzevši u obzir karakteristike (obim, prirodu) zaprimljenog naloga.[7] MiFID nalaže da investicijske kompanije uspostave i dosledno provode poverljivu, pisanu politiku izvršavanja naloga, za što je potrebna saglasnost klijenata, data pre započinjanja posla. Pored zahteva koji se odnose na najbolje izvršenje, zaštita ulagača organizuje se pomoću ojačanih i usklađenih pravila klasificiranja klijenata, pravila marketinške komunikacije, te principa prikladnosti i primenljivosti ("Morate poznavati svog kupca."). Pravila, čiji je cilj prepoznavanje i sprečavanje sukoba interesa, sprečavanje neopravdanog navođenja, te pojačani zahtevi koji se odnose na izvještavanje, takođe doprinose zaštiti ulagača.

Princip najboljeg izvršenja naloga primenjuje se na sve posrednike na tržištu (bez obzira na mesto trgovanja), te na sve finansijske instrumente koje pokriva MiFID. Međutim, kategorizacija klijenata takođe određuje i obaveze emitenata finansijskih usluga u okviru MiFID-a, posebno u smislu prikladnosti i primerenosti pruženih usluga, te oblika komunikacije sa klijentima. Najveći broj zahteva principa najboljeg izvršenja od koristi su privatnim ulagačima i "profesionalnim" klijentima, ali oni nisu primenljivi na tzv. kvalifikovane klijente.[8] Međutim, kvalifikovani klijenti u svakom trenutku mogu zatražiti uživanje povoljnosti nivoa zaštite koji se dodeljuje nižim kategorijama klijenata. Ovo će najverovatnije biti slučaj kada su krajnji korisnici usluga koje pruža kvalifikovani klijent privatni ulagači, kao što su ulagači u preduzeća za kolektivno investiranje u prenosive hartije od vrednosti (engl. *Undertakings for Collective Investments in Transferable Securities - UCITS*). Obaveza najboljeg izvršenja se primenjuje i na portfolio menadžere, uključujući i menadžere privatnih investicijskih udruženja kao što su hedž fondovi.[9] MiFID će pružiti jedan oblik regulatornog usklađivanja na celom prostoru EU, posebno u smislu pružanja usluga izvan granica pojedinačnih država. Istovremeno, investicijske kompanije koje distribuiraju hedž fondove moraće da se pridržavaju pravila zaštite ulagača određenih MiFID-om, posebno kada obavljaju poslovne aktivnosti sa privatnim ulagačima.

Cilj veće transparentnosti na tržištu je pružanje garancije da nadmetanje različitih mesta trgovanja ne vodi fragmentaciji likvidnosti tržišta, nego da doprinosi boljoj zaštiti ulagača. Zahtevi u pogledu transparentnosti koja prethodi trgovini (tj. objavljivanje aktuelne kupovne i ponuđene cene, visina kamate pri trgovini po aktuelnim cenama, najbolje kupovne i ponuđene cene od strane market mejkera) primenuje se na transakcije akcija koje se obavljaju na uređenim tržištima, MTF-ovima ili preko SIs-ova. Ovi zahtevi su od posebne važnosti, jer ulagačima i drugim učesnicima na tržištu omogućavaju i kompletan uvid u tržišne uslove i pristup mestima trgovanja gde

6 U slučaju aktivnosti koje se provode u drugoj zemlji članici iz podružnice smeštene u zemlji domaćinu, primenjuju se propisi države u kojoj je sedište firme. Aranžmani nadzora podružnica od strane država sedišta/država domaćina, posebno kada se radi o organizovanju izveštavanja o transakcijama, i dalje se nalaze među pitanjima čije se tumačenje smatra najspornijim.

7 Treba imati na umu da su troškovi kliringa i saldiranja jasno pomenuti među troškovima izvršenja koji se trebaju uzeti u obzir. Odražavajući ovu odredbu, direktiva određuje da zemlje članice ne mogu sprečiti investicijske firme, MFT-ove i uređena tržišta da koriste sisteme kliringa i saldiranja locirane u drugim zemljama članicama.

8 "Profesionalni klijenti" su investicijske firme, kreditne institucije i drugi veliki institucionalni ulagači i velika preduzeća. Najsofisticiraniji među ovim profesionalnim klijentima (ili oni koji zatraže da budu klasifikovani na takav način) smatraju se "kvalifikovanim klijentima", te ne uživaju pogodnosti zaštite koje priskrbljuju pravila vođenja poslovnih aktivnosti.

9 Iako se hedž fondovi u Evropi moraju pridržavati skupa propisa EU (Zloupotreba tržišta, Prospekt, Pranje novca), aktivnosti hedž fondova i dalje se uglavnom uređuje propisima na nivou svake pojedinačne zemlje članice.

country to impose on the foreign providers of financial services some additional requirements. However, from the branch offices of investment companies it is requested that in conducting activities in the host country they should adhere to the rules of the host country (for example, those regulating execution of business activities, their best execution, execution of orders, etc.).[6]

In order to provide a further boost to investors, and also to other players, to benefit from equivalent "level playing field" opportunities, MiFID reinforced and harmonised investors' protection rules, and especially the rights in favour of private investors. The best execution is a key concept introduced by the MiFID. The notion of trading performance "in the best interest of the beneficiary" was included also in the ISD; however, implementation was mainly contained within the limits of the particular notion of the best execution price. Conversely, the best execution requirement pertains to a broader spectrum of quantitative cost prices and fees, and qualitative ones (speed of execution and likelihood of execution, and likelihood of settlement) factors, thus requiring for the intermediaries in the market to search for the best overall conditions, taking into consideration characteristics (volume, nature) of the received order.[7] MiFID prescribes that the investment companies must establish and consistently implement confidential, written policy of orders execution, which requires client's consent, given prior to the commencement of trading. In addition to the requirements pertaining to the best execution, investor protection is organised by aid of reinforced and harmonised rules of client categorisation, rules of marketing communication, and the principle of "eligible counterparty" and their suitability for investment products, and the compliance with the "Know Your Client" rule. The rules aimed at identifying and preventing conflict of interest, prevention of unjustified soliciting, and reinforced requirements pertaining to the reporting, also contribute towards the investors protection.

The principle of best execution of orders is being applied to all the intermediaries in the market (regardless of the trading venue), and also to all the financial instruments covered by the MiFID. However, clients' categorisation also determines the obligations of the issuer of financial services within the MiFID, especially in the sense of eligibility and suitability of services offered, and the form of communication with the clients. The largest number of requirements under the principle of best execution is beneficial for private investors and "professional" clients, but they are not applicable to the so-called qualified clients.[8] However, qualified clients at any moment can demand the benefits of enjoying the level of protection which is allocated to the lower categories of clients. This will be most probably the case when the final beneficiaries of services offered by qualified clients are private investors, such as the investors in companies for collective investments into transferable securities (Undertakings for Collective Investments in Transferable Securities - UCITS). The best execution requirement is also applied on portfolio managers, including managers of private investment associations such as the hedge funds.[9] MiFID shall offer a certain form of regulatory harmonisation for the entire EU area, especially in the sense of offering cross-border

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6 In case of activities conducted in another member country from the branch located in the host country, regulations of the country where the seat of the company is located shall prevail. The supervision arrangements of the branches by the home country/host country, especially when speaking of organising transaction reporting, still remain among the issues where the interpretation is considered the most disputable.

7 It should be taken into consideration that the clearing and settlement costs are clearly mentioned among the execution costs which are to be taken into consideration. While reflecting these provisions, the Directive is prescribing that the member countries can not prevent the investment firms, MFTs and regulated markets from using systems of clearing and settlement which are located in other member countries.

8 "Professional clients" are the investment companies, credit institutions and other large-scale institutional investors and major companies. The most sophisticated among these professional clients (or those who are asking to be classified in this manner), are deemed to be "qualified clients", and thus they do not enjoy benefits of protection prescribed by rules governing execution of business activities.

9 Although hedge funds in Europe must adhere to the set of EU regulations (Misuse of Markets, Prospectus, Money Laundering), hedge funds activities are still mainly regulated by provisions prescribed at the level of every individual member country.

je likvidnost na višem nivou. U kombinaciji sa obavezama najboljeg izvršenja, za očekivati je da transparentnost koja prethodi trgovini omogući da veće nadmetanje između platformi za trgovanje ne rezultira fragmentacijom likvidnosti. U skladu sa obavezama obavljivanja nakon obavljene trgovine, svi posrednici na tržištu moraju objavljivati detaljne informacije (cena, obim, vreme) o preduzetim akcionarskim transakcijama. Tačnije, MiFID nalaže izuzetno brzo ("što je brže moguće u realnom vremenu") objavljivanje informacija o transakciji po izvršavanju iste. Međutim, državne vlasti mogu odobriti izuzeća u slučaju velikih trgovina kao i trgovina velikim paketima akcija.[10]

Iako je jedan od ciljeva MiFID-a promocija i podrška postojanju jedinstvenog "pravilnika" za pružanje finansijskih usluga na području cele EU, on ne nameće skup sveobuhvatnih pravila koja se odnose na sve transakcije. U poređenju sa ISD-om, MiFID pokriva širi skup finansijskih instrumenata, a posebno derivatnih instrumenata, uključujući i egzotične strukture. Zahtevi koje direktiva nameće razlikuju se u odnosu na različite instrumente kojima se trguje, platforme za trgovanje, te u odnosu na kvalitet klijenata, što rezultira zamršenom mrežom pravila i višestrukih zahteva koji se nameću posrednicima na tržištu. Na primer, odražavajući rizičniju prirodu svog delovanja, sistemski internalizatori podležu obavezama transparentnosti pre trgovine samo u slučaju akcija listovanih na uređenom tržištu, a koje se smatraju likvidnim u smislu ove direktive, koje je SIs odlučio prodati na tržištu, i samo do standardnog obima tržišta.[11]

Zahtevi u pogledu transparentnosti koje propisuje MiFID, ne primenjuju se na neakcionarska tržišta.[12] Nakon žustre rasprave o transparentnosti na tržištima fiksnih prihoda, te posebno na tržištu korporativnih obveznica na kojem je "spontana" transparentnost prilično retka pojava, Evropska komisija je nedavno potvrdila da, zbog nepostojanja očiglednih "tržišnih neuspeha", nema nameru da postojeće zahteve u pogledu transparentnosti proširi i na ova tržišta. Izražena je zabrinutost da bi se zahtevi u pogledu transparentnosti negativno odrazili na likvidnost, te da bi odvratili učesnike na tržištu od preuzimanja obaveza za sredstva. Dalje, naveden je i argument da s obzirom na pretežno profesionalnu prirodu ovih tržišta, nema mnogo potrebe za dodatnom transparentnošću. Iskustvo SAD, nakon uvođenja Programa izveštavanja o trgovanju i pridržavanju pravila (engl. *Trade Reporting And Compliance Engine - TRACE*), postavlja pitanje koliko je validna ovakva vrsta zabrinutosti.[13] Dok se, sa jedne strane, verovalo da se razlog za veliko opadanje profitabilnosti odeljenja za trgovanje korporativnim obveznicama skriva u uvođenju TRACE-a, njegovo uvođenje nije rezultiralo u značajnom opadanju likvidnosti tržišta, a praćeno je povećanim učešćem privatnih investitora.

Zaključak

Novo okruženje koje je posledica MiFID-a bi moglo pokrenuti drastične promene u samoj strukturi tržišta kapitala i u organizaciji finansijskog posredovanja u Evropi. Takve promene bi mogle proisteći kako iz veće konkurencije kojoj put otvara MiFID, tako i iz izazova tehnološke prirode koje on postavlja. Za očekivati je da će se oboje, iako u različitoj meri, odraziti na sve tržišne posrednike. Verovatno je da će šire mogućnosti korišćenja pasoša, te otvaranje vrata mesta trgovanja novim akterima, podstaći i omogućiti nadmetanje za učešće na tržištu za široki spektar finansijskih usluga, od izvršavanja trgovine do investicijskog savetovanja i upravljanja fondovima. U isto vreme, MiFID predstavlja krupan tehnološki

10 Umesto da državne vlasti odlučuju po svom nahođenju, definicije velike trgovine i dozvoljenog trajanja odgode objavljivanja informacija usklađene su, te se zasnivaju na prosečnom dnevnom prometu po svakoj akciji.

11 Likvidne akcije u smislu ove direktive su one akcije kojima se svakodnevno trguje uz značajan obim prometa, te uz slobodnu promenljivost/fluktuaciju u iznosu od 500 miliona evra ili više. Standardni obim tržišta izvodi se iz prosečne vrednosti trgovine zabeležene na odgovarajućem tržištu za svaku od akcija.

12 Zemlje članice na raspolaganju imaju opciju da prošire i prilagode ovaj režim transparentnosti i na druge finansijske instrumente pored vlasničkih hartija od vrednosti.

13 Program TRACE koji je uveden 2002. godine u realnom vremenu organizuje pružanje informacija o transakcijama i cenama od oko 29.000 emisija korporativnih obveznica (što obuhvata 99 % korporativnih obveznica u svetu).

services of individual countries. Concurrently, investment companies which are distributing hedge funds will have to adhere to be rules for investors' protection specified by the MiFID, especially when conducting business activities with private investors.

The objective of higher transparency on the market is to offer guarantees that competition from different trading venues will not lead towards fragmentation of the market liquidity, but shall contribute towards better protection of investors. Requirements regarding pre-trade transparency (i.e. disclosure of actual buying and selling price, the interest rate at trading according to the actual prices, and the best bids and offers by market makers) shall apply to the transaction in shares traded on the regulated markets, MTFs or SIs. These requirements are especially important because they allow both the investors and other participants on the market to have a complete insight into market conditions and access to the trading venues where liquidity levels are high. In combination with the best execution requirements, it is to be expected that the pre-trade transparency shall allow for a higher competition between trading platforms to take place, yet without resulting in fragmentation of liquidity. In accordance with the requirements regarding post-trade transparency, all market intermediaries must publish detailed information (price, volume, time) on transactions executed in trading in shares. More precisely, MiFID prescribes an extremely fast ("as soon as possible in real time") publishing of information on the transactions upon completion of trading. However, state authorities may approve deferred publication in case of large-scale trading, such as trading in large stock packets.[10]

Although one of the objectives of the MiFID is the promotion and support to the presence of one single "Handbook" of rules and guidance for providing financial services in the area of the entire EU, it does not impose a set of comprehensive rules that pertain to all the transactions. In comparison with the ISD, MiFID covers a broader set of financial instruments, and especially the derivative instruments, including also the exotic structures. The requirements made by the Directive differ in respect to various trading instruments, trading platforms, and in respect of the clients' quality, which results in an entangled network of rules and multiple requirements imposed on the market intermediaries. For example, when reflecting on a higher risk nature of their action, systematic internalisers become a subject of pre-trading transparency requirements, but only in case of shares listed on a regulated market, and which are deemed to be liquid in the sense of this Directive, which the SIs had decided to sell on the market, but only up to a standard market volume.[11]

Transparency requirements prescribed by the MiFID do not extend to transactions in financial instruments other than shares.[12] After a turbulent debate on transparency in fixed income markets, and especially on the corporate bonds market where a "spontaneous" transparency is a rather seldom occasion, European Commission has recently confirmed that, because of the absence of obvious "market failures", it has no intention to expand the existing transparency requirements on to these markets. Concern was expressed that transparency requirements would have a negative impact on liquidity, and that they would discourage market makers from taking over funds liabilities. In addition, the argument was also offered that in view of a mainly professional nature of these markets, there is no further need for additional transparency. Experience of the USA, after the introduction of the programme of Trade Reporting and

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10 Instead of state authorities deciding at their own discretion, definition of a large-scale trading and allowed duration of delay in publishing information have been harmonised and are based on the average daily turn-over, trading, per every stock.

11 Liquid stocks in the sense of this Directive are deemed to be those stocks which are daily traded in a significant trading volume, and with a free variability/fluctuation in the amount of 500 million EUR or more. Standard market volume is derived from the average trading value recorded on a respective market for every one of the stocks in question.

12 EU member countries have available the option to expand and adjust this transparency regime also on to the other financial instruments in addition to the equity or shares trading.

izazov za pružanje finansijskih usluga. Učesnici na tržištu će se morati prilagoditi i prihvatiti nove, stroge zahteve vezane za transparentnost trgovanja i izveštavanja o trgovanju. Uopšteno govoreći, što su mogućnosti izjednačenije, to će tehnologija (tj. mogućnost pružanja širokog spektra usluga i uvođenje inovacija na isplativ način) sve više postajati upravo onaj faktor koji unosi razlike.

Finansijskim posrednicima MiFID istovremeno predstavlja i poslovnu priliku, ali i izvor dodatnih troškova. Jedna od najočiglednijih i najinovativnijih značajki MiFID-a jeste pojava SIs-ova. SIs-ovi se mogu posmatrati kao interne, mini berze za akcije za koje se odluči da se preduzmu određene aktivnosti. Teoretski, posrednici na tržištu internalizuju tržišne aktivnosti (kao i likvidnost) posmatrane kao alternative koje im odgovaraju više od preusmeravanja naloga ka ekstermnim platformama za trgovanje. Ali u praksi, troškovi uspostavljanja odgovarajuće infrastrukture predstavljaju prepreku koju mogu premostiti samo one firme čije su aktivnosti dovoljno velikog obima i koje imaju odgovarajuća tehnička sredstva. Postoji verovatnoća da će slične prepreke onemogućiti male i srednje banke, te pružaoce investicijskih usluga, da u potpunosti iskoriste sve veće pasoške mogućnosti koje otvara MiFID, dok će se, sa druge strane, suočiti sa sve većom konkurencijom na domaćem tržištu. Takođe, očekuje se da će jedan od rezultata MiFID-a biti i značajan porast izrade i obrade podataka od strane pružalaca finansijskih usluga. Procene *BearingPointa,* kompanije za pružanje konsultantskih usluga na polju menadžmenta i tehnologije, govore da bi se finansijske institucije trebale pripremiti za četvorostruko povećanje broja podataka koji se odnose na period pre izvršenja trgovine i udvostručenje podataka koji se odnose na period posle izvršenja trgovine, što je rezultat češćeg ažuriranja cena od strane sve većeg broja mesta trgovine i pojavljivanja novih pružalaca podataka. Ovaj tehnološki izazov bi se mogao pokazati teškim za male i srednje učesnike na tržištu.

Prema tome, MiFID bi mogao povećati polarizaciju industrije finansijskih usluga u Evropi. Isto tako, MiFID bi mogao predstavljati i pretnju integrisanom poslovnom modelu unakrsne prodaje koji je i dalje najzastupljeniji u većini zemalja evropskog kontinenta, jer bi razmatranje troškova i zahtevi najboljeg izvršenja mogli pojačati pritisak da se uvede izmeštanje aktivnosti (engl. *outsourcing)* ili da dođe do oslanjanja na treću stranu pružatelja usluga. Ovo bi posebno moglo važiti u slučaju aktivnosti upravljanja fondovima, te distribucije investicijskih proizvoda. Što se tiče distribucije investicijskih proizvoda, MiFID će verovatno ubrzati prelazak sa zatvorenih distributivnih mreža na otvorene distributivne platforme. U konačnici, mogući ishod bi mogao biti širenje jaza između najvećih i najmanjih posrednika na tržištu, a u tom slučaju bi se najmanji posrednici

Compliance Engine - TRACE, raises the question how valid is this type of concern.[13] While there was a belief, on the one side, that the reason for a large fall in profitability of the corporate bonds trading department is to be found in the introduction of TRACE, its introduction did not result in any significant fall of market liquidity, and was followed by higher participation of private investors.

Conclusion

The new environment that ensued as a consequence of MiFID introduction could set in motion some drastic changes in the very structure of the capital market and in the organisation of financial intermediation in Europe. Such changes could result both from a higher competition that is now opening up through the MiFID, and from the challenges of technological nature that it requires. It is to be expected that both the former and the latter, albeit to a different extent, would be reflected on all the market intermediaries. Probably the broader opportunities in passport deployment, and opening the door to the trading venues with new actors would instigate and allow for the competition in market participation to a broad spectrum of financial services, from trading and investment counselling, and up to the funds management. At the same time, MiFID is a major technological challenge in providing financial services. Market makers will have to adjust to and accept the new, strict transparency requirements and trading reporting. Generally speaking, the more the opportunities are equivalent in a level playing field, the more the technology (i.e. the options for offering a broad spectrum of services and introduction of innovations in a cost effective way) becomes an increasingly significant factor that will introduce the differences.

Financial intermediaries are concurrently faced with the MiFID as a business opportunity but also as a source of additional costs. One of the most obvious and the most innovative significances of the MiFID is the emergence of the SIs. SIs may be perceived as internal, mini-exchanges for shares chosen to be the subject of certain activities. In theory, intermediaries on the market are internalizing market activities (as well as liquidity) deemed to be alternatives that are more convenient for them than the routing of orders towards external trading platforms. But in practice, costs of establishing corresponding infrastructure are an obstacle that can be overcome only by those companies whose activities are of a sufficiently large volume and which have available the adequate technical tools. There is a probability that similar obstacles will disable small and medium banks, and providers of investment services, from benefiting in full from the growing passport opportunities opening up by MiFID, while on the other hand, they will be faced with higher competition on the domestic market. In addition, it is expected that one of the MiFID results will be a significant growth in capturing and processing of data by providers of financial services. Estimates of the *BearingPoint*, a company offering consultancy services in the field of management and technology, indicate that financial institutions should prepare for a quadrupled increase in the number of data pertaining to the pre-trading period and doubling of data pertaining to the post-trading, which is the result of a more frequent prices updating by a growing number of trading venues and the emergence of new data providers. This technological challenge could be a hard task to master for small and medium market participants.

Hence MiFID could increase polarisation of the financial services industry in Europe. Concurrently, MiFID could also be a threat to an integrated business model of cross-selling which is still the broadest represented one in the majority of countries of the European continent, as the deliberation of costs and the best execution requirements could increase pressure for the introduction of outsourcing, or a reliance on a third party by services providers. This could be especially true in the case of the funds management activities,

[13] Programme TRACE, which was introduced in 2002, organises in real time information to be provided on transactions and prices of some 29,000 corporate bonds issues (which covers 99% of the total corporate bonds in the world).

sve više usmeravali ka klijenteli iz posebnih niša i ka posebnim segmentima tržišta. Takav ishod ne bi nužno podrazumevao i manje konkurencije, što bi ulagačima ograničilo mogućnost izbora, pod uslovom da se odvija u post MiFID-ovskom kontekstu tržišta koja dopuštaju veću mogućnost konkurencije. Ukupan broj posrednika bi se mogao smanjiti, međutim veća grupa njih bi se još više nadmetala izvan granica svojih država, pospešujući time efikasnost tržišta.

Berze se već nalaze pod pritiskom konkurencije koju predstavljaju MTS-ovi i SIs-ovi, u smislu održavanja likvidnosti. Ukidanjem obaveze izvršenja naloga na berzama, te okončanjem monopola uređenih tržišta nad pružanjem podataka, berze su se našle u situaciji sličnoj onoj u kojoj su bili telekomunikacioni operateri uoči liberalizacije 90-tih godina prošlog stoleća.

Konkurentski pritisak već raste. Konzorcij velikih investicijskih banka je, u septembru 2006, objavio osnivanje vlastitog servisa pružanja tržišnih informacija (engl. *Project Boat*), da bi se nadmetao sa sličnim servisima koji se pružaju na tržištu akcija. Nadmetanje je uzelo maha i na polju trgovanja, što se može ilustrovati pojavljivanjem MTF-ova kakvi su *Chi-X i Project Turqouise*, te i na polju kliringa. Glavna uređena tržišta akcija su već počela snižavati naknade, u susret novembarskom roku postavljenom MiFID-om dok, sa druge strane, šire lepezu usluga koje podrazumjevaju veliko korištenje tehnologije i time pružaju dodatnu vrednost. Optimizacija naloga, uređaji za algoritamsko trgovanje, analiza transakcionih troškova, te pružanje podataka u realnom vremenu - primeri su usluga koje dobijaju sve veći značaj u okviru MiFID-a.

MiFID predstavlja dodatni, jaki poticaj operaterima na tržištu da ojačaju i intenziviraju saradnju. Ovo posebno važi za manja i srednja tržišta (npr. strategija Bečke berze koja se odnosi na tržišta akcija u srednjoj i istočnoj Evropi), ali čini valjan pristup i kada se radi o većim tržištima. Tokom protekle dve godine, već je došlo do velikog broja značajnih transakcija, što je doprinelo menjanju terena na tržištu akcija u Evropi (i na globalnom nivou). OMX brzo postaje sve prisutniji u nordijskom i baltičkom regionu, te poseduje šest od sedam lokalnih berzi. Ovaj se švedski tržišni operater trenutno nalazi usred ponudbenog rata između američke elektronske berze akcija (engl. *National Association of Securities Dealers Automated Quotations - NASDAQ*) i berze u Dubaiju sa jedne strane, i *Quarter Investment Autority*, jednog od glavnih akcionara na Londonskoj berzi, sa druge strane. Godine 2006, Njujorška berza (engl. *New York Stock Exchange - NYSE*) i *Euronext* su spojene, i time je stvorena prva prekoatlanska grupa berzi. Zatim je 2007. *Eureks*, tržište derivata Njemačke berze, preuzela Međunarodna berza (engl. *International Securities Exchange - ISE*) sa sedištem u SAD, a spojene su i Londonska i Italijanska berza.

Postoji rizik da veća konkurencija i transparentnost dovedu do fragmentacije likvidnosti tržišta. Ovaj se rizik veže za meru u kojoj će otvaranje izvršenja i saldiranja transakcija, zahteva najboljeg izvršenja i pravila o transparentnosti, učinkovito kompenzirati moguće centripetalne učinke fragmentiranijih tržišnih struktura na tržišnu likvidnost. Pre same efektivne provedbe MiFID-a, teško je oceniti rizik negativnog odražavanja većih zahteva u pogledu transparentnosti na osiguranje likvidnosti od strane posrednika na tržištu, posebno kada se radi o akcijama druge kotacije, te će se iste morati pažljivo

and the distribution of investment products. Regarding distribution of investment products, MiFID will probably accelerate the transition from closed distribution networks on to the open-ended distribution platforms. Ultimately, the possible outcome could be a broadening of the gap between the biggest and the smallest market intermediaries, and in that case the smallest intermediaries could be increasingly focused towards the clients from special niches and towards particular market segments. Such an outcome does not necessarily mean lower competition, which would limit for investors the opportunities of choice, on condition that it is taking place in a post-MiFID context of the markets which allow for higher competition opportunities. The total number of intermediaries could be lowered, but a larger group of them would be competing even more beyond the borders of their own countries, thus instigating market efficacy.

Stock exchanges are already under pressure of the MTSs and the SIs competition, in the sense of maintaining liquidity. With the deletion of the order execution liability on stock exchanges, and the ending of monopoly of the regulated markets in providing data, stock exchanges found themselves in a situation similar to the one in which the telecommunications operators were on the eve of liberalisation in the 1990s.

The competitive pressure is already growing. Consortium of major investment banks, in September 2006, announced the establishment of their own market information service provider (Project Boat), in order to compete with similar services providing information on the market trading in shares. Competition was in full swing also in the field of trading, which may be illustrated by the emergence of the MTFs such as the Chi-X and Project Turquoise, and also in the field of clearing. The main regulated markets trading in shares have already started to lower their fees, in the advent of November deadline set by MiFID, while on the other side they are broadening the range of services implying large-scale use of technology and thus offering added value. Optimisation of orders, equipment for algorithm trading, transaction cost analysis, and providing data in real time - all of these are the examples of services that are acquiring a growing importance within the MiFID.

MiFID is an additional, strong impetus for the market operators to strengthen and intensify cooperation. This especially applies to the small and medium markets (for example, the Vienna Stock Exchange strategy which pertained to the markets trading in shares in Central and Eastern Europe), but represents a valid approach also when speaking of major markets. During the last two years, there were already a large number of significant transactions which has contributed to the change in the playing field on the markets trading in shares in Europe (but also on a global level). OMX is rapidly becoming ever more present in the Nordic and the Baltic regions, and already owns six out of the total of seven local stock exchanges. This Swedish market operator, at the present moment, is finding itself in the midst of a bidding war between the American electronic shares stock exchange (National Association of Securities Dealers Automated Quotations - NASDAQ) and the stock exchange in Dubai on the one hand, and the Quarter Investment Authority, one of the main shareholders in the London Stock Exchange, on the other side. During the year 2006, New York Stock Exchange - NYSE and the Euronext were merged and thus the first cross-Atlantic stock exchange group was created. Thereupon, in the year 2007, Eureks, derivatives market of the German stock exchange was taken over by the International Securities Exchange - ISE, with the seat in the USA, and also the London and the Italian stock exchanges merged.

There is a risk that a higher competition and transparency may lead to the fragmentation of the market liquidity. This risk is linked with the measure to which the opening up of transaction execution and settlement, best execution requirement and the transparency rules will compensate for possible centripetal effects of fragmented market structures on the market liquidity. Before the effective implementation of the MiFID, it is hard to assess the risk of negative impact of higher requirements regarding transparency on the insurance of liquidity by the market makers, especially when speaking of shares of second quotation, and thus they must be carefully monitored. Equally, less limiting pre-trading transparency requirements, in case

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pratiti. Slično tome, manje ograničavajući zahtevi u pogledu transparentnosti pre trgovanja u slučaju sistemskih internalizatora mogli bi rezultirati pojavljivanjem džepova netransparentnosti. Ove se zabrinutosti mogu ilustrovati predviđanjima o rastu tzv. "tamnih rupa" (engl. *dark pools)* likvidnosti u Evropi (tj. anonimna sredstva trgovanja kao što su unakrsne mreže koje sparuju naloge izvan tržišta, a može im se pristupiti samo elektronskim putem) i istovremenim razvojem algoritamske trgovine u svrhu otkrivanja te skrivene likvidnosti. Pri tome, još uvek nije u potpunosti testirana mogućnost mnogih mehanizama da na efikasan način izvrše objedinjavanje transakcijskih podataka koji predstavljaju ključnu komponentu mehanizma formiranja cena. U konačnici, to u kojoj meri fragmentacija likvidnosti predstavlja rizik, značajno zavisi o sposobnosti nadzornih tela da na jednak način razumeju pravila MiFID-a, te da ih provedu u duhu tog jednakog razumevanja.

of systematic internalisers, may result in the emergence of non-transparent pockets. These concerns may be illustrated by the predictions on the growth of the so-called "black pools" of liquidity in Europe (i.e. the anonymous trading tools such as cross-networks which are matching orders outside of the market, and may be accessed only electronically), and the concurrent development of algorithm trading for purpose of discovering those hidden liquidities. In addition, the options offered by many mechanisms have not yet been fully tested to lead in an efficient way towards unification of transaction data which are the key component in the pricing mechanism. Ultimately, to what measure fragmentation of liquidity is a risk will significantly depend on the ability of supervisory authorities to understand and perceive in an equivalent manner the MiFID rules and to implement them in that spirit of equitable understanding and perception.