

THE ANALYSIS OF THE CAPITAL MARKET OFFENCES

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Abstract: *Law no.297/2004 regarding the Capital market is a non-criminal law which regulates a special area – the Capital market and its financial instruments – but in order to ensure the unity in settling the aspects related to the Capital market, it has been necessary to include criminal provisions. Thus, the lawmaker used a distinctive legislative technique from the criminal rules, by comprising some divided provisions, which fill out with the content of other provisions from the law text expressly mentioned. This legislative technique has been criticized by the doctrine, being considered to give raise to confusions. Still, in the content of the indictment provisions comprised in title X of the law, we can identify the common constituent elements of the offences regarding the Capital market.*

Key words: *Capital market, offence, legal object, material element, securities.*

1. Introduction

Law no.297/2004 regarding the Capital market is a non-criminal law, which regulates the establishment and functioning of the markets in financial instruments, the institutions and operations specific to the activity of mobilizing financial assets.

Given the high volume of transactions, but also the frauds committed on the Capital market in the last years, the lawmaker has acknowledged the need of criminal protection of the Capital market, even through the common Criminal Law, the protection of these social values is ensured, a reason why he included in Law no.297/2004 criminal provisions, comprised in title X, also named „Responsibilities and sanctions” – Article 271 – Article 279. These criminal dispositions in addition to the liability offence aim at criminally

sanctioning some deeds which are considered as representing an increased social hazard by violation of the legal relationships between the Capital market and the public trust in the Capital market and in the economic system in general.

Related to Article 297 in Law no. 297/2004, which comprises the criminal provisions of the law, we must say that it is the standard criminal framework, an incomplete framework with internal difference to Article 237, paragraph (3) and Articles 245-248. Thus, in order to establish the legal content of the offence charged, the text of Article 279, paragraph (1) in Law 297/2004 refers to mandatory regulations, contained in rules explicitly stated, among which the obligation of adopting a certain attitude through performing an action or refraining from doing something that might impede the protected relationship.

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Under these circumstances, the criminal deeds that are committed within the Capital market are both omission and commission ones, and the consequence can consist in producing damage or disturbances, but also creating a dangerous condition [1].

The opinion shared by the majority of criminal doctrine [2] maintains that the criminal law must be well structured and contain clear statements, which exclude ambivalence and erroneous interpretations, and the criminal rule of indictment must be unitary, which concentrates in the same text all the constituent elements of the offence [3]. In case of Law no. 297/2004, the lawmaker opted for this legislative technique of the reference standards, having in view the non-criminal character of the law, which represents a special law in the field of financial instruments.

We must remember the fact that the indictment comprised in Article 279 of Law no.297/2004 is similar, inclusively in terms of the character of reference standard, to the indictment contained in the previous Article 181, paragraph 1 from the Government Emergency Ordinance no. 28/2002 regarding securities, the financial investment services and the regulated markets, where reference was made to the deeds provided in Articles 130, 131, 133, 150 paragraph (3) and Article 155 in the Government Emergency Ordinance no. 28/2002. Thus, by repealing Government Emergency Ordinance no. 28/2002 through Law no. 297/2004, the indictment of the deeds committed on the Capital market was kept.

For a better understanding of the indictments in Law no. 297/2004, we will proceed in the present Article to the presentation of the offences by comprising in the definition the reference standard so that we have the content of a complete standard.

2. The offence provided in Article 279, paragraph 1 related to Article 237 paragraph 3 in Law no.297/2004

According to Article 279, paragraph 1 compared to Article 237 paragraph 3 in Law no.297/2004, *the intentional infringement by the administrator, director and/or executive director of a company admitted to trading of the obligation to present to the shareholders the exact accurate financial statements and true information regarding the economic conditions of the society* represents an offence and shall be punished by imprisonment from 6 months to 5 years or with fine.

Relating to the fact that the companies operating on the Capital market, namely admitted to trading, are in fact companies established under the Companies Act no.31/1990, we also understand the similarity between the offence provided in Article 279 paragraph 1 related to Article 273 paragraph 3 in Law no.297/2004 and the offence provided in Article 271 point 2 from the Companies Act.

Thus, the regulation in Law no.297/2004 on the Capital market has a special character and will be applied prevalently in relation to the common law of companies, regulated by Law no.31/1990, according to the principle *specialia generalibus derogant*.

2.1. Constitutive elements

The specific legal subject is represented by the social relationships regarding the truthfulness of the information comprised in the financial statements of companies admitted to trading on a regulated market [4].

The material object is represented by the financial statements of the company, which deliberately contain unreal data and information about the economic situation

of the company, this aspect being known by the administrator or the director who presents these situations.

In case the financial situations are correctly drawn up and in agreement to the actual economic situation of the company but the administrator or the director present them as unreal when describing the situation to the shareholders, there is no real res, although we consider that the deed meets the elements of an offence provided in Article 279 paragraph 1 related to Article 237 paragraph 3 in the Law, given the lawmaker's formulation: „*intently committing the deed, related to the administrator and the director's duty to present the accurate financial statements and the real information concerning the economic conditions.*”

The active subject is qualified, being, according to the case, the company's administrator, the director or the executive director.

In order to understand the restrictive enumeration made by the lawmaker concerning the active subject, we shall refer to the Company Law, which regulates the two management systems of a joint stock company: the unitary system – with a unique administrator or with a Board of Directors formed of the administrators of the company – and the dual system, structured on two levels of competence – the directorate and the supervisory board [5].

In what concerns the criminal participation, this is possible in all three forms – complicity, instigation, co-authorship – mentioning that in case of co-authorship, there must be people of the same title required by the law, for the author and the co-author must contribute directly to the commitment of the deed. This specification conforms to the principle in the reference books on Criminal Law [6], applicable regarding offences which, according to the law, can only have one author with a certain title.

And the passive subject is qualified by standard incrimination, meaning that the deed must be committed towards the respective company.

Being a commissive offence, the material element of the objective side is represented by the perpetrator's deed, who presents inaccurate financial statements and unreal information regarding the economic status, thus breaking his/her legal obligation to present accurate and real financial statements.

Presenting the unreal financial statement can take place during the General Meeting of Shareholders, in the Board of Directors where the shareholders participate, having the right to vote or with any other occasion when a decision has to be made by the shareholders [7].

The immediate consequence consists in a state of danger regarding the possibility of the shareholders taking certain disadvantageous decisions from a patrimonial point of view, without demanding or producing any material results for the existence of the offence [4].

In case the shareholders, based on the unreal information that they took notice of from the administrator or director, they adopt measures that cause patrimonial prejudice both to themselves and the company, the prejudice caused will be subject to a civil trial even within the criminal trial, the generation of the prejudice not having any importance on the consummation of this particular offence.

The causation does not have to be proven, as it results from the materiality of the deed.

The subjective aspect. The guilty condition is the intent, as the lawmaker expressly stipulates „*committing intendedly*”. The mobile and the purpose of the perpetrator have no relevance for the existence of the offence.

Being a commissive, intentional offence, the deed incriminated in Article 279

paragraph 1 related to Article 237 paragraph 3 in the law is susceptible of acts of preparation and attempt, but the law does not sanction them.

The punishment is prison from 6 months to 5 years or fine, taking into consideration the form of Law no.297/2004 modified through the Government Emergency Ordinance no. 32/2012.

3. The offence stipulated in Article 279 paragraph 1 related to Article 245, corroborated with Article 247 in the Law

According to Article 279 paragraph 1 related to Article 245 in the Law, we consider an offense *the deed of each person who possesses inside information as a member of the Board of Directors or the management or supervisory structures of the issuer; as a result of holding in the issuer's share capital; by exercising his/her position, profession or duties; illegally or fraudulently, as a result of criminal activities (Article 245 paragraphs and 2 in the Law), as well as the deed of any person possessing inside information given that the respective people know or should have known the fact that this information is inside (Article 247 in the Law), to use designedly the respective information in order to acquire or alienate, or with the intention of acquiring or alienating, on one's account or on somebody else's account, directly or indirectly, of financial instruments to which such inside information refers.*

According to Article 245 paragraph 3 in the Law, *if the person who possesses inside information and acts in this respect is a legal person, the deed entails the criminal responsibility of the criminal liability of the legal person, as well as that of the natural person who took part in the decision to perform a transaction on the account of the legal person.*

Although in theory [4] it is argued that the offense referred to in Article 279 paragraph 1 in relation to Article 245 and Article 247 of the law is a species variant of the offense provided for in Article 12 b of Law no.78/2000, what customizes this crime, which is specific to the capital market, is the concept of inside information, used in the text of the reference standard, the significance of this concept being close to the phrase used in Article 12 b of the Law No.78/2000 "*information not intended for publication.*"

It is a specific offense for the capital market and it sanctions what is generically called "*market abuse*", unlawful use of inside information being criminalized also at community level by Directive 2003/6/EC [8].

3.1. The Constitutive Elements

The specific legal object of the offense aims at protecting the capital market against unfair activities of the participants on the capital market, activities which affect the balance and the free mechanism of demand and supply on which the stock market functions.

There is no material object of the crime because the use of inside information in trading financial instruments on the market and the subject of trading consists in securities, which are dematerialized anyway.

The active subject is described as a natural or legal person possessing inside information.

We mention that the standard reference - Art.245 of Law - lists the people that may have the quality of author, but the listing is not exhaustive, but illustrative, because if firstly the author is justified regarding the qualities he/she holds within the legal person admitted to trading, later, the standard reference extends to the domain of active subjects to any person who

possesses inside information, regardless of how he/she came into their possession, including as a result of the perpetration of fraudulent or criminal deeds.

The passive subject is the state, as the holder of the obligation to ensure the equilibrium on the capital market through National Securities Commission (CNVM).

It is possible that the position of a secondary passive subject to be held by a natural or legal person who has been prejudiced by market abuse [9].

The material element consists in the author's action to use inside information in another way than the one legally admitted, thus committing a market abuse through his/her inside position on acquisition or disposal of, or the intention to acquire or transfer, on their own or on behalf of a third person, directly or indirectly, of financial instruments to which the information owned relates.

In order for the crime to exist, it is essential that the use of the inside information should always have the destination of the intended acquisition or disposal of financial instruments for the perpetrator, even if it is done directly or indirectly, on his/her own or on behalf of a third party.

Thus, the perpetrator seeks, using the advantage conferred by the insider that the financial instrument get directly or indirectly in his/her power to dispose of.

Specifically, the essential conditions to classify an act as an offense of market abuse are:

1) to prove the existence of an activity of using inside information,

2) the activity to be committed by somebody who knows this information,

3) the third requirement - transactions not to have been made - is mandatory cumulatively with the first two where the material element of the objective side is the intention of acquiring or disposing of, because the person involved in such

operations has a contractual obligation to acquire or dispose of financial instruments and the contract had been concluded before the person concerned entered into possession of inside information.

The immediate result consists in creating a state of danger regarding the free functioning of the capital market on the principle of supply and demand, without the need for the market participants being on a lower position to the one owning and using inside information to suffer a concrete prejudice.

In terms of the subjective side, the offense is committed with direct intent, for standard reference - Article 245 of the Law - indicates the aim of the use of inside information "*acquisition or disposal of, or the intention to acquire or transfer, on its own or on account of a third party, directly or indirectly, of financial instruments to which the information owned relates directly.*"

The penalty is the same: imprisonment from 6 months to 5 years or a fine, considering the form of Law no.297/2004 amended by Government Emergency Ordinance no.32/2012.

The special cause of non-existence of the offence is provided in the standard reference - Article 245 paragraph 4 of the Law - because the act is not an offense if the person referred to in Article 245, paragraph 1 and paragraph 2 of the law had a contractual obligation to acquire or dispose of financial instruments, and the contract had been concluded before the person concerned came into the possession of the inside information.

4. The criminal offense stipulated under paragraph 1 of Article 279 in relation to Article 248 of the Law

From corroborating Article 279 paragraph 1 with Article 248 related to Article 244 paragraph 5 of Law

no.297/2004, *the deed of capital market manipulation* is a crime punishable by imprisonment from 6 months to 5 years or fine.

With reference to the provisions of paragraphs 5 and 7 of Article 244 of Law no.297/2004, we agree with Cristian Duţescu's definition [10], according to which capital market manipulation *is the act of one or more participants in the capital market who, because of certain transactions or orders to trade which led or kept the price of one or several financial instruments at an artificial level or because of false information provided by the media, the internet or other mass media were misled regarding the supply, demand or price of financial instruments, or have been led to conclude transactions at artificial prices or not to conclude transactions because of the misleading price.*

The definition contained in the Romanian doctrine on the offense of capital market manipulation and retrievable in the text of Article 244 of the Law, is in accordance with Article 1 paragraph 2 of the European Parliament Directive no.6/2003 [8].

4.1. Constituents

The specific legal object of this crime aims at protecting the activity in the capital market area against acts of manipulation. Regarding the material object of the crime of capital market manipulation, the opinions are divergent.

Thus, according to Cristian Duţescu, the material object consists in the financial instruments admitted to trading on a regulated market.

But in this approach, we find that the material object has no tangible, direct existence, as the financial instruments lack materiality, given that even their issuing in a dematerialized form is a prerequisite for

their admission to trading on the capital market (Article 2 Law no.297/2004).

We believe that in most ways of the offense referred to in paragraph 5 of Article 244 in Law no.297/2004, the material element does not exist, the only exception being in the case provided by letter c paragraph 5 Article 244 of the Law, a law regarding the dissemination in mass media, in which case the object can be the support material (traditional or electronic) on which the information is printed[12].

Regarding the active subject, given the wording of the text of the law, there is no legal restriction justified by the person's legal nature, so that both individuals and legal entities can be both active subjects.

With reference to the specific legal object, it appears as a prerequisite for the quality of active subject that the legal or individual entity to be engaged in capital market activities, either as an investor or as an intermediary. Making this statement regarding the active subject will not be construed to be a qualifying feature of the active subject with respect to criminal regulations [12].

Regarding the passive subject, we identify the Romanian state as the main subject due to its interest that the capital market operates in the standard parameters and that the specific trading operations be the result of supply and demand.

In order to establish the material element of actus reus of the crime, we resort to the indictment standard - Article 279 paragraph 1 of Law no.297/2004 - incomplete reference standard because even following the analysis of Article 248 to which reference is made, we must complete the objective contents of the crime by analyzing Article 244 paragraph 5 of the Law where the content of market manipulation is specified.

Thus, according to Article 244 paragraph 5 of Law no.297/2004 by transposing into national law the provisions of Directive

no.2003/6/CE regarding market abuse, the *capital market manipulation means*:

a) *transactions or orders to trade*:

1. *which give or may give false or misleading signals in relation to supply, demand or price of financial instruments;*

2. *maintaining, by the action of one or more people acting together, the price of one or several financial instruments at an artificial, nonstandard level;;*

b) *transactions or orders to trade which employ fictitious devices or any other form of cheating;*

c) *dissemination of information through the media, including the Internet or by any other means, which gives or may give false signals or misleading ones regarding the financial instruments, including the dissemination of rumours and false or misleading information, given the person who made the dissemination knew, or had to know that the information is false or misleading.*

And this offense has alternative contents regarding the material element, all three ways of committing the action being considered deception [4].

Regarding committing the offense in the manner described in Article 244 paragraph 5 letter a of the Law, the lawmakers included in the action of manipulation both the conduct of trading or that of issuing orders to trade which mislead, also the situation in which this kind of operations gives or could give false evidence, meaning the situation in which transactions or orders to trade would create a risk of misleading the market participants.

For the manipulation offense committed under Article 244 paragraph 5 b of the Law, to have an illicit nature, it is necessary that the issuance of fictitious trading orders be followed by actual transactions in the benefit of the manipulator, although from the structure of the legal definition this is not apparent, but otherwise we consider that, in the absence

of transactions, the goal that the manipulator proposed to himself/herself would not be accomplished [12].

The doctrine correctly argued that this form of capital market manipulation (Article 244 paragraph 5 b of the law) resembles the qualified version of the offense of cheating incriminated in paragraph 2 Article 215 Criminal Code [11].

The immediate result is endangering the standard course of the capital market operations, creating damage to property for market participants being also possible. The form of guilt with which the offense is committed is intention.

5. The criminal offense provided for in Article 279 paragraph 2 of the Law

According to Article 279 paragraph 2 of the Law, *intentionally accessing unauthorized electronic trading, storage or clearing and settlement systems constitutes an offense.*

If case of this criminal standard, we are currently in presence of a full criminal standard that contains all the constitutive elements of the offense.

The specific legal object is a complex one, targeting mainly the effective exercise of market trading through electronic trading systems, and secondary, targeting the social relations regarding the observance of the use of electronic tools [9].

The material object is represented by the electronic trading, storage or clearing and settlement system, as defined in Article 2 of Law no.297/2004 pct.26 accessed without authorization. This kind of trading instrument is used for concluding distance contracts, contracts that are considering financial investment services by using means of distance communication [13].

The active subject is not expressly qualified through the indictment standard

and the passive subject is also the state, as the holder of the legal obligation to ensure the legal functioning of the capital market operations.

The material element of the action consists in the unauthorized accessing the electronic trading system, i.e. in the absence of an authorization issued by CNVM under the Law no.297/2004.

In this regard, we can state that the criminal offense of Law no.297/2004 is a variant species of the crime of unauthorized access of a computer system, an offense prosecuted according to Article 42 paragraph 1 of Law no.161/2003.

The immediate result of the offense is to produce a state of danger for performing operations on the capital market in terms of legality.

The form of guilt is intention, although possible, the attempt is not punishable.

The penalty imposed is imprisonment from 6 months to 5 years or fine, as in Article 297 paragraph 1 of the Law.

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