

THE LEGISLATIVE CHANGES ON CRIMINAL LIABILITY ON THE CAPITAL MARKET

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Abstract: *Given the entry into force of the new Penal Code and of the Law no.187 / 2012 implementing the Criminal Code, amid the legislative changes at Community level, the criminal liability regarding the deeds on the capital market has changed both in terms of sanctions, as well as the criminalization, although some persist. Tightening the sanctions regime by removing the penalty of fines and introducing the complementary punishment in the national law and the adoption of Directive 2014/57 / EU on criminal sanctions for the market abuse are issues which we will develop in this study, given that the offenses on the capital market are regarded as particularly serious crimes having a crossborder dimension by their nature and impact.*

Key words: *manipulation, insider information, capital market.*

1. Introduction

In the evolution of the exchange of goods, the nascent form of the barter was replaced with the advent of the currency as a tool of exchange, while at present, the movement of goods is expressed in a high and more abstracted form, under the form of securities, while the physical currency is replaced by the electronic one. On the background of globalization and elimination of the physical and economic borders, we can say that the securities are beginning to have an increasing importance, citing as an argument the growing attention that states, the international organizations and the European Union attach to the regulations of the financial markets in general and the capital market in particular.

The current concept of capital market is of interest for both the sophisticated investors and the retail investors who, equally, motivated by the interest of getting a benefit, choose to direct their available funds to this market, the fundamental mobilizing element being given by the trust shown to financial instruments [1], for the stability and transparency of the financial instruments and the transparency of the regulated operations.

Because of the negative effects of the attempts to use abusively the insider information and market manipulation on the integrity of the financial markets and investor confidence in those markets, the offenses punishable in the original form of the Law no.297/2004 [12] are qualified currently, by the nature and impact on the national economies, as particularly serious offenses having a cross-border dimension.

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If the beginning of XXI century, the majority of the disputes with implications on the capital market concerned the shareholders rights, namely observing the rights of the minority shareholders by the majority in decision-making, gradually cases for criminal liability in deeds committed on the capital market begin to appear before the court, after criminal investigations. Given the complexity of a crime on the capital market and the considerable direct and indirect damages, given the possibility of committing such acts remotely, thus introducing an element of extraneity, and in most cases the establishment of organized groups acting focused on the stock market, by Law No. 508/2004 on the establishment, organization and functioning the Directorate for Investigating Organized Crime and Terrorism within the Public Ministry, the jurisdiction to investigate capital market crimes falls on DIOCT, regardless of the quality of the perpetrator.

Thus, in 2007, out of the 2,564 high-crime cases handled at the General Directorate for Combating Organised Crime within the General Inspectorate of Romanian Police, 30 crimes dealt with crimes on the capital market, at the time the 30 files representing an increase of 36.33% compared to the previous years, in the report of the Directorate for Investigating Organized Crime and Terrorism for 2013 [15] it is shown that out of 275 cases solved, 145 cases were related to economic crimes, including capital market offenses.

2.Regulating capital market crimes before the entry into force of the New Penal Code

Given the key role of the financial markets in an economy based on supply and demand, given the free movement of capital held as a principle of the common

market at EU level, the Romanian legislature sought to protect the trade relations which run through the capital market but also to provide a level of confidence sufficient to attract equity holders on the market. Adding these economic and legal goals, by Law no.297/2004 [12], a special law on the financial instruments and the collective investment schemes, certain deeds that disrupt the functioning of financial markets have been criminalized, so that the Law no.297/2004 is a special criminal law in a particular area - the securities market.

In terms of investor confidence in the institutions and mechanisms of the capital market, for which the responsible authorities must ensure a stable legal framework to guarantee equal access to information and protection measures in the event of illicit situations.

Given the functioning of the capital market operations and the speculative character, the capital market, through the action on supply and demand, not only involves conducting legal investments but also the deliberate and controlled speculation of the increases / decreases in the price, in order to obtain the highest possible profit [10], but when the speculative action is carried out through fictitious and misleading procedures, we place ourselves in the realm of wilful criminal offenses committed on the capital market. Thus, the criminal acts which can be committed on the capital market are so omissive as well as commissive, the result consisting of producing a direct financial damage or the disturbance of market transactions, as well as the creation of a state of danger [9].

In the initial form of the Law no.297 / 2004 and the amendments brought until 2012, being in line with the Community rules - Directive 2004/39/EC (MiFID) [4], Directive 2003/6/EC [5] and Directive 2003/124/EC [6] - the criminal rules on

market manipulation and using the insider information for the acquisition or disposal of financial instruments were in line with the EU rules and the definitions of the normative texts.

Presented as a variant of the offense provided for in article 271 item 2 of the Company Law No.31/1990 before the amendments introduced by Law no.187/2012[13] the offense under art. 279 paragraph 1 related to paragraph 3 of art. 237 of Law no. 279/2004 [12], in its original form, referred to the breach by the administrator, the director and / or the chief executive of a company with intent of the obligation to provide accurate and actual financial statements to shareholders regarding the economic conditions of the company.

Given the similarity of the two specific incriminations contained in the extrapenal rules of certain strict legal areas - the operation of the companies and the capital market - in the literature [3] it was established that the competition between the two incrimination norms (item 2 of article 271 of the Law No.31/1990 and art. 279 paragraph 1 related to art. 237 paragraph 3 of the Law no.297 / 2004) to be resolved by recognizing the special nature of the regulations of the Law no.297/2004[12], the text of art. 279 paragraph 1 to be enforced prioritarily when the deed is committed in the context of certain capital market transactions.

The offense referred to in paragraph 1 art. 279 compared to art. 245 of the Law no.297/2004 in its original form, the act criminalizes any person holding privileged information which s/he uses for the acquisition or disposal or the acquisition or disposal intent, on their own or on the account of a third party, directly or indirectly, of financial instruments to which the information held refers.

Directive 2003/124/EC [6], advancing a characterization related to the confidential information, characterization taken over by

art.244 paragraph 1 of Law no.297/2004. Thus, for the purposes of enforcing article 1 (1) of Directive 2003/6/EC, it is considered that the information "has a precise nature" if it indicates a set of circumstances which exist or about which there are reasonable grounds to believe that they will exist, an event that took place or about whom there are reasonable grounds to believe that it will occur, and it is sufficiently precise to lead to a conclusion on the possible effect of the set of circumstances or the courses of the financial instruments concerned or of the financial instruments derived from the basic products [3].

For the purposes of article 1 (1) of Directive 2003/6 / EC, respectively art.244 para.1 of Law no.297/2004, "by information which, if made public, could significantly influence the course of the respective financial instruments or the course of the financial instruments derived from the base products "respectively "the information that if it were made public, could have a significant impact on the price of those financial instruments or on the price of the derivative financial instruments to which it is connected " means information that a reasonable investor would be likely to use as the basis of investment decisions.

The content of the offense under paragraph 1 of 279 to 245 reported in the Law no.297/2004[12] has issues of similarity with the offenses provided for in article 12 b of the Law no.78/2000, the differences between the two incriminations mentioned consisting of the existence of conditions in addition to art.12 of Law no. 78/2000, namely, whether the facts are committed for the purpose of obtaining for himself or for another person money, goods or other undue benefits.

As regulated in art. 12 of Law No.78/2000, the term undue benefit refers to bribe, not representing the profit obtained

from the operation or commercial transaction, in which case, the phrase loss of bargain would have been used.

In this regard, Dorin Ciuncan, chief prosecutor in the National Anticorruption Directorate, shows that when the law speaks of undue benefits, it refers to the common law meaning of the term in the sense of the Romanian criminal law; and these benefits can be direct or indirect, but without sacrificing the character of official payment of the worker's services [2].

In case of the offence stipulated in art.279 related to art. 246 paragraph 1 of Law no.297/2004[12] the active subject of this crime is qualified by the fact that it legally possesses that privileged information - as a member of the Board of Directors or the management or of supervisory bodies of the issuer; due to owing a share of the issuer's social capital; the quality of people responsible for the execution of the orders concerning the trading of financial instruments when the information relates to orders not yet executed - or illegally - as a result of criminal activities by which s/he intentionally obtained such information.

Capital market manipulation as defined in art.244 paragraph 5 of Law no.297/2004 is prohibited under art.248 of the law, otherwise such infringement is considered an offense criminalized in the form of 279 para.1 related to art.248 of Law no.297/2004. In case of this crime, we are no longer in the presence of an active subject expressly qualified, although the active subject of the crime being in the domain of capital market, s/he must be a person who is active on the capital market.

3. Changes at Community level regarding the criminal liability on the financial instruments markets

The functioning of the European Union judicial area could be undermined by the

differences in the national legislation in criminal matters, given that, amid the globalization, many crimes acquire a transnational character. We must stress that the harmonization of laws in criminal matters in the EU does not mean a total unification but adapting to a minimum common standard of the rules for criminal penalties, both in terms of definitions, as well as in terms of the application of thresholds for the sanctions at national level so as to secure the minimum thresholds established at Community level, as appropriate.

Regarding the rules at Community level on the capital market, by Directives 2003/6/EC [5] and 2004/39/EC [4], mandatory minimum requirements were set to be taken over in the EU Member States' legislation regarding the conditions for authorization, the conduct rules for the provision of investment services and obligations coming to investment firms and national authorities to ensure the transparency and integrity of the capital market, without these laws imposing rules on criminal liability, being Community acts adopted before the Lisbon Treaty.

Moreover, Article 14 of Directive 2003/6/EC[5] stipulates that without prejudicing their right to impose criminal penalties, the Member States shall ensure that, in accordance with the national legislation, appropriate administrative measures may be taken or that administrative sanctions may be enforced on the people responsible for the violation of the law, the option of the Community legislature being in 2003 to ensure the guarantee of an administrative contraventional liability for the breach of the principles regarding the organization and functioning of capital markets, leaving it up to the Member States the criminalization of the deeds affecting the market integrity and the transparency of operations.

When amending the Treaty regarding the European Union by the Treaty of Lisbon (2007), the European Parliament and the Council were given powers to establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross-border dimension.

In the legislative framework amended by the Treaty of Lisbon and in the context of increasing the capital market offenses, transnational crimes and with direct serious economic consequences for the issuers and/or investors as passive subjects, respectively with indirect economic consequences for the national economies by disrupting the activity of the business capital markets, the Directives 2014/57/EU on criminal sanctions for market abuse [7] and EU Regulation no 596/2014 [8] have been adopted.

Thus, at Community level, it has been established that the abusive use of insider information and the market manipulation be mandatorily criminalized as offenses by the Member States and in order for the penalties for such conduct, endangering the integrity of the capital market and negatively affecting the investor confidence in the market mechanism, to be effective and dissuasive a minimum of the maximum penalty of imprisonment should be set in order to ensure uniformity.

In this respect, Article 3 and Article 4 of Directive 2014/57/EU [7] define the minimum framework for the criminalization of insider dealing or unlawful disclosure of such information, and in Article 5 of the Directive [7] the offense of capital market manipulation is defined by listing certain activities that may be present in the material element of the offense.

Directive 2014/57/EU [7] establishes in Article 7 that in the national legislation, thresholds must be set for penalties ensuring a minimum of 4 years as maximum penalty for the offenses of

insider dealing and market manipulation by individuals, i.e. a minimum of 2 years as maximum penalty for the offense of unlawful disclosure of inside information. Also, the national legislation must provide for the criminal liability of legal entities for offenses on the capital market effective, proportionate and dissuasive penalties, ranging from criminal fines as well as the exclusion from entitlement to public benefits or aid, placing under judicial supervision or the judicial dissolution, the temporary or definitive interdiction to conduct business.

4. Legislative amendments to the Law no.297/2004 by adopting new Romanian Criminal Code

With the entry into force of Law no. 187/2012 [13], there have been punctually brought through art. 152 of the Law no.187/2012[13], amendments to Law no.297/2004 on the criminal liability, namely on the reformulation of art. 279, the new text presenting in a more coherent manner in terms of expression and reference to other rules, the offenses that it punished before, without changing the thresholds of the imprisonment penalty.

We also note that the fine sanction disappears as the main penalty and implicitly art. 276 is repealed from the original form of Law no.297/2004 and the interdiction of certain rights appears as a complementary punishment.

Although it was criticized in the literature [3] in the sense that the provisions of art. 279 paragraph 1 related to art. 248 from the previous form of Law no.297/2004 (currently art. 279 letter c of the law) are too vague by strict reference to only art.248 of the law, we find that the form of referring only to art.248 was maintained. Given that in order to identify the material contents of the crime it is not sufficient only referring to art.248 of the law, we still maintain that the text of art.

279 letter c of Law no.297/2004 amended by Law no.187/2012 must be completed and by reference to art.244 paragraph 5, where the capital market manipulation is defined, stating explicitly that the crime envisages the acts committed on a regulated market, as the regulated market is defined by Directive 2004/39/EC[4]. Besides, this conclusion was also reached by the High Court of Cassation and Justice which held that the offense of capital market manipulation set out in art. 279 para. (1) combined with art. 248 related to art. 244 par. (5) a) letter a) of Law no. 297/2004[12] can be committed only in relation to the financial instruments admitted to trading on a regulated market or the financial instruments for which there has been registered a request for admission to trading on a regulated market, according to art. 253 of Law no. 297/2004 (Decision no.865 of 13.03.2013 [16]).

This legal solution regarding the criminal offense of market manipulation only in relation to the regulated markets is in line with the Community legislation and the judgment of the Court of Justice of the European Union (Second Chamber) of 22 March 2012 in Case C-248/11 which established that the RASDAQ market is not a regulated market and therefore, the actions described in the art. 279 par.(1) combined with art. 248 related to art. 244 par.(5) letter a) of Law no.297/2004, committed in connection with the RASDAQ market, do not constitute an offense under the above-mentioned incrimination rule.

Given the new legislation on criminal liability of legal entities - art.135-137 the New Penal Code [11] even if after redrafting the text of art. 279 of the Law no.297/2004 the penalty with fine disappeared, it follows that where the manipulation facts are committed by legal entities, the provision of article 136 par.2 in conjunction with article 137 par. 4 letter b) of the new Penal Code[11] should be enforced.

Also regarding the sanctioning regime, we find the elimination from the text of the law of the accessory penalty from the previous form, prohibition laid down in article 273 par. (1) letter c) pt. 3, that although it was qualified in the text of art. 279 paragraph 1 of Law no.297/2004, the original form as an accessory penalty did not have this character considering the definition of accessory penalty and the period in which it may be imposed. From this point of view, in relation to art. 54-55 and art.65-68 from the New Penal Code, in case of the criminal liability of individuals under art. 279 of the Law no.297/2004[12], it follows that the court in applying the sentence, also order the prohibition of certain rights with the title of additional penalty.

Also art. 152 of the Law no.187/2012 [13] eliminated paragraph 2 of art. 279 of the Law no.297/2004, text that criminalized the intentional access by unauthorized people of the storage, clearing and settlement electronic trading systems in the context in which the new Penal Code criminalizes distinctly the computer fraud in art. 249, unlike the previous criminal regulation which did not include cybercrimes.

5. Conclusions

In order to prevent, combat and punish illegal activities in the capital market, Law no. 297/2004, as an extra-penal special law, includes in its content penal provisions for the purposes of establishing the criminal liability for certain acts which are considered to present the seriousness of an offense as affecting the social relations concerning the birth, modification or termination of the legal relations within the financial instruments markets and the public confidence in the capital market, particularly in the economic system and in the public institutions of regulation and supervision in general.

Regarding the criminal rules from the wording of Title X - Responsibilities and penalties, these are criminal standards, incomplete and with internal reference to texts of Title VII of the Law (art. 245-248) establishing binding rules of conduct within the meaning of doing or not doing something that is likely to affect the capital market relationships.

After the entry into force of the new Romanian Criminal Code, we observe that the criminal liability on the facts present on the stock market are supplemented by the amendments to the Law no.10/2015 by introducing two new offenses: art. 2731 of the Law no.297/2004[12], without authorization procedure for the conduct of the operations for which the Law no.297/2004[12] requires authorization, respectively art. 2791 concerning the theft of financial instruments.

At the same time the criminal liability framework is reviewed by reformulating in a more concrete manner the incriminations contained in art.279, following the adoption of the Law no.187/2012[13], although the amount has not been changed, as the sanctions in the national legislation in force since 2004 provide the application of a minimum threshold of the maximum penalty as stipulated by Article 7 of the Directive 2014/57/EU [7], namely imprisonment of up to 5 years for individuals.

Referring to the rewording of the offense in art. 279 par. 1 in relation to art. 237 paragraph 3 of the initial form adopted of Law No.187/2012 [13], an offense covered by the current form of Law no.297 / 2004 in art. 279 letter a, we agree with the comments made by Catalin Oroviceanu [14] in the sense that he makes the offense of intentional presentation of inaccurate financial statements to shareholders or unreal information on the economic conditions of the company by the administrator, manager or chief executive of the company applicable, the text of law omitting to include it in the active subject

of the bodies in the dualist system of joint stock companies, omission perpetuated by Law no.297 / 2004 that addresses by its wording only to the unitary system of administration of the joint stock company.

Referring to the correlation of the two special laws - Law no. 31/1990 and Law no. 297/2004 - in terms of organization and operation of the joint stock companies, since the shares represent financial instruments subject to trading under the Law no.297 / 2004, we notice that the legislature has not resolved even after the adoption of the Law no.187/2012 [13] the problem of correlating the two conducts sanctioned criminally and/or contraveniently in the two normative acts. Thus, if the art. 275 par. (1) b) of Law no. 31/1990 penalizes (without distinction) the fail to assemble the general meeting where provided for under the Company Law, Law no. 297/2004 by art. 272 par. (1) letter g pt. 3 in relation to art. 243. (11) for the sanctioning of such a deed in the practically plausible hypothesis of inobservance the convening of the general meeting at the request of shareholders holding at least 5% of the joint stock.

The Romanian legislature is to amend the texts of articles 244-246 of Law no.297/ 2004 under the imperative deadline of 3 July 2016 in order to bring the national legislation on market abuse - the criminalization of the use of inside information and capital market manipulation - in the current context modified by Directive 2014/57/EU [7] and the EU Regulation no. 596/2014 [8], although perhaps this would require the repeal of the present Law no.297/2004 and adopting a new law of the capital market and of the financial instruments in the current legal and economic context in the European Union level and that of the current national institutional level (we have in mind the replacement of the special surveillance and control authorities of the capital market by setting up the Financial Surveillance

Authority who took over the duties of the National Securities Commission).

References

1. Chiricheş, A., Porumb, D.: *Infracţiunea de manipulare a pieţei de capital prin tranzacţionare (The offense of capital market manipulation by trading)*. In: The Judicial Courier, 2011, No.4. Bucharest.
2. Ciuncan, D.: *Prevenirea, descoperirea şi sancţionarea faptelor de corupţie, Legea nr. 78/2000 comentată şi adnotată (Preventing, detecting and punishment of corruption; Law no. 78/2000 commented and annotated)*. In: The supplement to the P.N.A. Documentary Bulletin, 2004, December 3, p.55.
3. Corlăţeanu, S., Ciuncan, D.: *Infracţiuni de corupţie şi infracţiuni privind piaţa de capital (Offenses of corruption and crime son the capital market)*. Bucharest. Universul Juridic, 2009.
4. Directive 2004/39/EC of 21 April 2004 on the markets of the financial instruments amending the Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC, published in the Official Journal no.L145/1 of 30.04.2004.
5. Directive 2003/6/EC of 28 January 2003 on insider information and market manipulation (market abuse), published in the Official Journal no.L96 of April 12, 2003.
6. Directive 2003/124/EC from 22 December 2003 laying down detailed rules for implementing Directive 2003/6/EC concerning the definition and publication of confidential information and the definition of market manipulation, published in the Official Journal no.L339/70 of 24 Dec. 2003.
7. Directive 2014/57/EU of 16 April 2014 on the criminal sanctions for market abuse (Market Abuse Directive), published in the Official Journal no.L173/179 of 12 June 2014.
8. EU Regulation no.596/2014 of 16 April 2014 on market abuse (market abuse regulation) published in the Official Journal of the European Union L173/1 of 6.12.2014.
9. Gorunescu, M.: *Infracţiuni privind piaţa de capital reglementate de Legea nr. 297/2004 (Offenses on the capital market regulated by Law no. 297/2004)*. In: Dreptul 2005, no. 11, p. 197, Bucharest.
10. Jemboiu, A., Jemboiu, G.: *Manipularea pieţei de capital şi alte infracţiuni (Capital market manipulation and other crimes)*. In: *Finanţe, Bănci, Asigurări*, 2012, no.10 Bucharest.
11. Law no.286/2009 – Penal Code, published in the Official Gazette no.510 of 24 July 2009.
12. Law no.297/2004 on the capital market, published in the Official Gazette no.591 of 29 June 2004.
13. Law no.187/2012 for the implementation of the Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette no.757 of 12 November 2012.
14. *** *Infracţiunile din Legea societăţilor şi Legea pieţei de capital după intrarea în vigoare a NCP* posted by Cătălin Oroviceanu. Available at www.juridice.ro/308280/infracţiunile-din-legea-societatilor-si-legea-pietei-de-capital-dupa-intrarea-in-vigoare-a-noului-cod-penal.html. Accessed :25/04/2015.
15. www.diicot.ro/images/documents/rapoarte_activitate/raport_2013.pdf Accessed: 15-04-2015.
16. www.scj.ro/1093/Detailii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=83707. Accessed: 22-04-2015.