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ELEMENTS OF COMPARATIVE LAW REGARDING THE PROTECTION OF SECURITIES UNDER CRIMINAL LAW

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Abstract: *The advantages of investing the available money resources through financial instruments, capital market transactions, are speculated by the companies that need funding and who propose potential investors several types of securities, and not infrequently, the capital market participants turn to various methods in order to influence the investment decision, methods that violate the prudential or conduct rules laid down at the market level through the regulatory framework. Given the importance of the principle of investor protection, the national laws of EU Member States and the Community regulatory framework for securities do not exclude, on the contrary, ascertain the right to criminalize the deeds that affect securities and transactions.*

Key words: *securities, market manipulation, market abuse, transactions, investors.*

1. Introduction

Given the advantages of financing through the capital market (rapidity, minimal cost, variety of tools, legal guarantees) as well as the public tendency to invest in financial instruments that ensure a lower risk of the investment, the capital market law aims at mobilizing the available financial funds through investments in financial instruments, in terms of investor protection.

Based on the central idea of investor protection, criminalization of practices on market abuse and market manipulation has become a necessity in increasing investor confidence in the domestic market, ensuring legal, transparent and honest practices.

While at Community level, investor protection, transparency and capital market integrity are guiding principles of the regulatory framework, imposed as such by the legislation of the Member States, criminalization of practices which affect these principles is not imposed as a measure of transposition, allowing the Member States to determine the criminal or administrative-conventional nature of certain offenses and the liability for those guilty of breach of transparency and integrity. In this regard, we quote Article 51 paragraph 1 of Directive 2004/39/CE [13] according to which *"without prejudicing the procedures for the withdrawal of authorization and their right to impose criminal sanctions, the Member States make sure, in accordance with their*

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national law, that appropriate measures can be taken or adequate administrative sanctions can be enforced against the people responsible for the infringement of the provisions adopted pursuant the present Directive. They shall make sure that these measures are effective, proportionate and dissuasive ".

We note that both Directive 2004/39/EC [13] and Directive 2003/6/EC [12] require one prerequisite, regardless of the criminal or contraventional framework adopted by the Member State in the context of the national legislative and market tradition, on the failure to comply with the principles of transparency and integrity of the national capital market: *these measures are to be effective, proportionate and dissuasive (Article* 51 paragraph 1 of Directive 2004/39/EC and Article 14 paragraph 1 sentence II Directive 2003 / 6/CE).

By acting in administrative and /or criminal measures to sanction the deeds that compromise the investors' interest and the investment approach regarding securities by acts of manipulation or market abuse, implicitly through investor protection, the legislator ensures a protection of securities, thus ruling such measures that ensure the free and unadulterated functioning of the supply and demand mechanism to determine the real and free price of securities.

In order to get an overview and to identify to what extent the measure prevails criminal liability or the administrative-contraventional one in terms of securities and investor protection, we will further analyze the legal status regarding the protection of securities in several EU Member States and respectively in the U.S. law, some with a considerable stock tradition, both in a common-law legal system, as well as the legal continental system of German Roman inspiration.

2. The legal regime in Romania regarding securities protection

The Romanian legislator has opted for a primarily contraventional-administrative legal system in case of inobservance of certain conduct or prudential measures, as well as for violating the rules and measures concerning the information and obligations of the participants on the capital market, committed without intention, being explicitly defined as offenses in Art.272 of Law no.297/2004 [19], and penalized under Art.273 of the law.

But in case the market abuse or market manipulation are committed intentionally, the facts are punished as criminal offenses and sanctioned as such under article 279 in relation to art.244 and art.248 b of Law no.297/2004.

Starting from *nullum crimen sine lege* principle, confirmed by Article 1 of the New Criminal Code, compared to the character of Article 279 of Law no.297/2004, which is a norm with reference to two other laws, we find a relatively unregulated modality of criminalization by describing the content of the deed in two other articles of the law, the assignation of the criminal nature being accomplished in the contents of a separate provision.

Therefore, the exact understanding of the content of the offenses in question necessarily involves a rigorous exercise of coordination of all the law texts that refer to these, as the authors of the article "The offense of capital market manipulation by trading the stock market" observed [1].

Thus, in Title VII of Law no.297/2004 (art.244-Article 257), entitled *"Market abuse",* the Romanian legislator takes and develops the definitions of point 1 and point 2 of article 1 in Directive 2003/6/EC on confidential information (called insider information in transposing the national legislation) and market manipulations ,

regulates the duties of supervision, control and investigation of the competent administrative authority, the National Securities Commission in the text of law, namely today's Financial Services Authority, by the reorganization of the National Commission according to Government Emergency Ordinance no.93/2012.

In this context, according to art.248 of Law no.297/2004, *it is prohibited to any natural or legal person to engage in market manipulation activities,* given the fact that in art.244 paragraph 4 of the law previously defined market manipulation, taking over the definition of the directive regarding market abuse [12] and the examples given in this document by introducing them in art.244 paragraph 7 of the law, while Article 279 letter b of the law qualifies as crime the intentional infringement of this prohibition contained in article 248 of the law.

With reference to the provisions of paragraphs 5 and 7 art.244 of Law no.297/2004, we agree with the definition provided by Cristian Duțescu [3] that capital market manipulation is *the deed of one or more participants on the capital market, due to certain transactions or orders to trade which led or kept the price of one or several financial instruments at an artificial level or due to incorrect information transmitted by the media, the internet or other mass media, were misled on the supply, demand or price of financial instruments, or were determined to conclude transactions at artificial prices or not to conclude transactions because of the misleading price.*

Since the specific legal subject of the offense of manipulation is the social value which is prejudiced by intentionally committing acts prohibited by law, respectively the social relationships that manifest on the capital market and whose normal development is necessary for the capital market to be orderly and efficient, so that securities transactions be concluded at fair prices, naturally determined by supply-demand ratio, some authors [4] consider that the subject matter of the offense of capital market manipulation consists of the financial instruments admitted to trading on a regulated market.

Unlike Cristian Duțescu, there are authors [1], [11] who consider that in most of the normative rules of the offense, this does not have a material subject, a conclusion that we also reach, with the argument that the relevance in determining the material subject of the offense is given by the special classification of offenses in offenses of danger, those which do not have a material subject, and offenses of result, those which have a material subject [5], [9].

3. The legal regime in the EU Member States regarding the protection of securities

Given the fact that, as mentioned above, Directive 2003/6/EC [12] establishes from the very title that manipulating the stock market represents a "market abuse", i.e. an incorrect deed, an act falling within the scope of illicit, it is prohibited starting from the first texts of the Directive (Article 5), that any person engage in market manipulation, and emphasizes the necessity of applying administrative sanctions to the *people responsible for the infringement of the provisions adopted in the implementation of this Directive* (s.n. Directive 2003/6/EC, Article 14 paragraph 1) in the Community regulatory framework does not impose mandatory criminalization of acts of abuse on the capital market, leaving the possibility of cumulation between administrative and criminal liability in the hands of the legislation in each Member State.

We find that EU States generally opted for the realization of the cumulation between administrative and criminal liability, although there aren't elements of unequivocal differentiation between the conditions of contraventional and criminal liability.

As Professor Voicu Costică mentioned in a study on stock fraud, the criminal aspect is accountable through the fact that stock exchange crimes affect not only individual interests, but also the very structure of the state and even the market, as it weakens public confidence in the economic and social system, while the administrative aspect provides a special effectiveness of combating this type of crime, offsetting "if not the judge inertia, at least some of his/her lack of interest for crimes too technical and even indifference, too often linked to a **sense of incompetence"** [10].

In **France,** we find a dual legal nature (criminal, contraventional-administrative) regarding the financial crimes on the capital market. In the first case, it is about art. L.465-1 - L.465-2 of the Monetary and Fiscal Code, and in the second case it is the non-compliance with the general rules with an administrative character contained in the General Regulation of Financial Markets Authority (article 621-1 of the General Regulation of Financial Markets Authority), rules that are meant to penalize stock exchange practices in which their authors pursue for themselves an unfair advantage on the market or which affect the equal opportunities and equal treatment of the investors and their interests [7].

Thus the French legislator's option for the criminalization of deeds that impeded the good functioning of stock exchanges dates back to the provisions of the Napoleonic Penal Code in 1810 and were in force until 1994. According to art.419 of the old French penal code, fraudulent acts like intentionally spreading false news in public, libelous acts meant to increase or decrease the price, either of goods or of property, or of public effects, contrary to the law of natural competition, as well as the association or coalition between the main holders of the same goods or property in order to sell or not to sell only at a certain price were punished with imprisonment between one month and one year [8].

In 2000, the French Monetary and Financial Code was adopted which penalizes both the spread of false or misleading information that affect the price of the financial instruments traded (art.L.465-1) and acts of manipulation by misleading investors in order to imbalance the capital market (art. L.465-2). Thus, art.L.465-1 paragraph 1, the Monetary and Financial Code:

"The directors of a company referred to in Article L. 225-109 of the Code of Commerce and people who have, by profession or function, insider information on the perspective of evolution or the situation of an investor whose securities are traded on a regulated market or on the prospects for development of a financial instrument or asset referred to in paragraph II of Article L. 421-1, which is admitted to trading on a regulated market, and either directly or through an intermediary, performs or facilitates one or more transactions before the public has become aware of this information shall bear a penalty of two years imprisonment and a fine of 1.5 million euros, an amount that can be increased to a figure that is up to ten times the amount of any profit made and will be no less than the declared profit " while paragraph 3 rules *that" Any person, other than those mentioned in the two preceding paragraphs, who knowingly obtains inside information on the situation and prospects of an issuer whose securities are traded on a regulated market or the likely performance of a financial instrument or an asset referred to in*

Article L. 421-1 point II, which is admitted to trading on a regulated market, and is directly or indirectly engaged in or facilitates a transaction or discloses such information, or allows them to be disclosed to a third party before the public is made aware of them, will incur a penalty of one year in prison and a fine of 150,000 euros, an amount that can be increased to a figure that is up to ten times the amount of the profit thus created and must not be lower than the actual profit "[17].

The French Monetary and Financial Code penalize insider trading, for in the perspective of the French legislator, the author of this offense is called insider and until the changes made in November 15th, 2001, this category included only those who obtained or took insider knowledge as that mentioned in art.L.465-1 by virtue of the functions or duties they performed. Later, the scope of the offense expanded to any person who possesses inside information, knowingly and regardless of how that information came into his/her possession, so that the tort does not mean possession of inside information, but is circumscribed to the usage of this type of information so that the one who uses the information, either directly or through an intermediary, has an advantage on the market compared to other market participants.

Regarding the authors of the offense or insiders, a number of three categories are identified: primary insiders, secondary insiders and external insiders. The primary insiders are, according to art.L. 465-1, paragraph 1 first sentence of the French Monetary and Financial Code *the administrators of a company referred to in Article L. 225-108 of the Code of Commerce,* i.e. presidents and CEOs, members of the board of directors of a company, individuals or legal entities holding positions of company administrator or board members of the legal entity and permanent representatives of the legal entities exercising these functions, and who, because of their position within the legal entity have a conventional obligation to the shareholders of the respective legal entity, in regard to whom and against whom they use the information obtained by virtue of the position held.

Moreover, primary insiders are aware of the importance and the quality of the information they hold, therefore cannot claim ignorance of the law. Using in a personal interest the information that these managers can obtain while exercising their position was treated as misappropriation of social goods [10].

*Secondary insiders defined in art.*L.465-1, following primary insiders as people who, by the nature of their profession or of their duties, have privileged information, is a very broad category, because it includes all those who, without occupying leading positions, work in the company whose securities have been negotiated, while external insiders are people outside the company, whose functions have, however, a direct or indirect connection with the company (e.g. if the legal entity's accounting is provided by another external entity, the auditor or lawyer of a legal entity with access to information about that legal entity).

Both external and secondary insiders acquire information about the legal entity due to this special position that allows them access to the data concerned and who are under a contractual obligation or moral obligation regarding the legal entity not to disclose or use in their own interest the information obtained under employment relationships.

Article L.465-2 of the French Monetary and Financial Code governing the offense of handling courses, indictment designed in terms of combating illegal speculation and states that the *penalties imposed in the*

first paragraph of art.L.465-1 shall apply to any person who performs or attempts to perform, directly or through an intermediary, a deliberate act which prevents the normal functioning of the regulated market by misleading the other participants [17].

The doctrine is of the opinion that each of the three paragraphs of Article L-465 of the French Financial and Monetary Code regulates distinct crimes, but they all refer to the same object, as a common and defining element of the offense, namely: the circulation of inside information about a legal entity participating on the capital market, the specificity of this offense being given by the quality of the active subject. Regarding the definition of inside information in French criminal jurisprudence, the General Regulation of the Financial Markets Authority in France (FMA) takes the European definition of inside information (Article 1 paragraph 1 of Market Abuse Directive no.2003/6/CE includes the definition of confidential information, a synonymous concept with the one of inside information in Romanian and French law) with an emphasis on the characters of confidentiality, sensitivity and accuracy of information.

Regarding the offense of handling the courses of financial instruments, incriminated in art.465-2 of the French Monetary and Financial Code, we must say that the definition contained in art.631-1 of the General Regulation of the Financial Markets Authority in France is identical to the one in the Romanian law and takes the elements in the definitions and texts of Directive no.2003/6/CE.

Analyzing the incrimination text in the Monetary and Financial Code, we note that the material element consists in exercising or the attempt to exercise a maneuver likely to affect the good functioning of the market, so that an action is required, the author using concrete and hidden means to mislead the other participants, and not just simple hearsay or "lies".

Framing the offense of manipulation in the category of financial offences is done after completing an investigation procedure performed, according to the competence, by the Financial Markets Authority (FMA), which has the possibility of referral to the Prosecutor if data indicates the existence of criminal deeds, according to Article .L. 621-15-1 related to art.L. 621-20-1 of the French Monetary and Financial Code. FMA's role in triggering the judicial proceedings is reinforced by the fact that this authority is empowered to receive bills, petitions and complaints of any person interested in facts that disturb the regular functioning of the capital market.

However, once the court proceedings started, FMA has the right to become a civil party in the lawsuit in respect to market abuse under the financial security law, in which case, the procedure of criminal liability is initiated, if FMA uses this right, it must give up on exercising at the same time the administrative sanctioning power.

With regard to penalties, we distinguish between whether the author is a natural person or a legal entity, mentioning that according to Article 121 paragraph 3 of the French Criminal Code, criminal liability of legal entities does not exclude the responsibility of individual authors or accomplices for the same deeds.

Thus, in case of sanctioning individuals, the sanctions provided are the main criminal penalties, prison and fine, varying according to the nature of the offense and the quality and position of the person in relation to the information or maneuvers used for distorting the market and obtaining a personal interest.

The offense of dissemination of insider information (Art.L 465-1 paragraph 3 of the Monetary and Financial Code) is

punishable by a sentence of one year imprisonment and a 150,000 euros fine, while the crime of disinformation and manipulation of the courses is sanctioned in the same way as the insider trading committed by a primary or secondary insider (art.L.465-1 of. 1 and art.465-2 of the Monetary and Financial Code): two years in prison and a fine of 1,500,000 Euro, whose upper limit can be set beyond this figure to the recovery of the total amount of damage created, without the possibility of this limit being lower that the legally obtained profit.

The criminal liability of legal entities may be engaged only when the offense was carried out in their benefit through organisms or representatives, in this case, articles L.465-3 in relation to art.L.573-7 of the Monetary and Financial Code, provide that the penalties applicable to legal entities are: fine in the manner provided in Article 131-38 of the Criminal Code, and penalties mentioned in Article 131-39 of the Criminal Code, namely the dissolution of the company when the prosecution clearly establishes that the legal entity was created specifically to commit the offense; ban, permanently or for a period of five years or more; the prohibition to exercise directly or indirectly any activity during which or in which situation the offense was committed; placing the legal entity under supervision for a period of 5 years or more, and final closure for a five year term or more, of one or more branches of the company which used to commit the alleged misconduct; but also to exclude definitively or for a period of five years or more from the public markets, confiscation of the object that served or was destined to commit the offense or offenses, or the object that produced this offense. Also as an additional criminal sanction, the company may be required to display or disseminate the decision, either through the media or through audio-visual means.

In the UK, the stock market is regulated by the Financial Services and Markets Act (FSMA 2000), considered "a unique and flexible regulatory framework of the financial sector as a whole," which establishes the Financial Services Authority (FSA) as the body responsible for the regulation and control of the financial market (banking, insurance, securities), as well as the prevention and suppression of typical financial crimes, including those involving money laundering [10].

As the regulatory administrative authority of the capital market, FSA, conducts activities to ensure compliance with market discipline, the surveillance of operators' behaviour, as well as the settlement of disputes between investors and market operators, while the FSA is empowered, at the same time, to conduct criminal investigations in case of specific offences on the financial market, being competent to order the seizure of funds operators and investors and to decide on the compensation for the investors, as well as the penalties provided by law.

According to the description of the offense of capital market manipulation under Section 397 of the Financial Services and Markets Act (FSMA 2000) [18], which is thus considered both offense and contravention, we find, in relation to section no.118 FSMA, where market abuse is defined, that an express distinction between market manipulation and insider trading based on the use of insider information is not made.

Financial Services Authority has developed, under FSMA 2000, Section 119 - Code of Market Conduct [16] - in force since 2001, in order to use it as a guide to determine the circumstances in which certain behaviours represent market abuse, respectively in identifying the practices

"under the standards expected of an ordinary investor on the stock market" [6].

In the description of the offense of market manipulation in the Code of Market Conduct, the focus is on the behaviour of the alleged manipulator, with a view to determining whether this behaviour may give a false or misleading impression of the market or to distort market functioning in relation to the perception of the regular investor.

In **Germany,** the stock market was regulated until 2003, by a law passed in 1884, which sanctioned the manipulation of market prices. With the dramatic collapse of the German stock exchange in March 2003, the German legislature transposed in the national law the provisions of the EU Directives relating to the capital market, both in terms of Securities Trade Law in 1998, as well as of the provisions of the German Criminal Code, which, in Section 264, criminalizes fraud in capital investments.

According to the German Criminal Code, anyone making an incorrect statement, favourable to operations (in connection with the sale of securities, subscription of rights or shares which is intended to assign the stake to the yield of a business or an offer to increase capital investment in such shares) or intentionally omits certain negative aspects or representations in prospectuses or surveys on the net assets of a considerable number of people in relation to relevant circumstances to the purchase decision is punishable with imprisonment up to three years or a fine.

Under section 38 of the Securities Trading Act of 1998, we can consider an offense the deed of the person who:

1. acquires or disposes of securities on which insider information exists, against the prohibitions referred to in section 14, paragraph 1, number 1 or section 14 paragraph 2 (s.n. of the German Securities Trade Law)

2. disseminates or makes available insider information against the prohibitions established in section 14, paragraph 1, number 2,

3. recommends the purchase or the sale of securities for which there is insider information against the prohibitions established in section 14, paragraph 1, number 3 and is punishable with imprisonment up to three years or a fine. Section 14 of the Securities Trade Act refers to the interdiction of people who have insider information to trade based on this inside information.

In **Belgium,** the Law of 2nd August 2002 on the supervision of the financial sector and financial services incriminates capital market manipulation by using insider information, whereas the text of the law on market abuse is adapted by the Law of 22nd December 2003 in accordance with Directive no.2003 /6/CE, which takes the definition of the material element of the manipulation offense, namely the definition contained in article 1, paragraph 2 of the market abuse Directive [15].

In the **Netherlands,** the Criminal Code section 334 criminalizes the manipulation of the prices of equity securities, commodities or monetary instruments in order to increase or decrease them artificially, the material element of the offense consisting in spreading false news to influence the price of these securities, in order to obtain an undue advantage from the offender for himself/herself or for another person [2].

Due to the low practical relevance of the wording of incrimination because it was difficult to determine whether the news advertised is false and especially if that item of news has influenced the price of financial instruments, starting from 01.01.2007, the Financial Supervision Act (Wet op het financieel toezicht - WFT)

comes into force, introducing the definition of capital market manipulation by implementing the European Directive concerning market abuse.

Compared to capital market legislation in European countries, legislation in which Directive no.2003/6/CE on market abuse was implemented nationwide, in Asian countries like Japan and Korea, we observe that the criminalization of capital market manipulation is reflected in the national laws, both regarding the spot market and future exchanges, given that the enforcement regime is very drastic.

Thus, in Japan, the penalty for committing the crime of capital market manipulation is up to 10 years of imprisonment and/or a criminal fine of up to 10 million yen (meaning 7 million at an average EURO /JPY exchange rate in 2014), while in Korea, in case the profit made or the loss avoided by manipulation of the capital market is more than 500 million woni (about 330,000 Euro at an average EUR /KRW exchange rate in 2014), the penalty may be life imprisonment, depending on the size of the profit or loss thus avoided.

4. Conclusions

In the process of harmonization of the national legislation with the European regulatory framework regarding the capital market, also in progress in Romania and France, we find that the criminal law of our country regarding capital markets is similar to that of France, including the offense of market manipulation with its specific forms and variants, for the transparency and equality of chances occupy a central role granted to social values in the two EU Member States within the domain of criminal protection.

Compared to the enforcement regime, we can say that the French law is more severe than the one in Romania, as the French law provides a cumulative mixed system, consisting of imprisonment, within certain limits generally lower than those provided in our legislation (article 279 in Law no.297/2004), but combined with a relatively big fine (1.5 million Euro).

Comparing the criminal protection of securities in Germany and Romania, we find that the matter of the criminal German law applicable to the capital market is divided on the one hand between the German Criminal Code and on the other hand, the special applicable law on trade securities although the facts alleged in the German law find their counterpart in the Romanian criminal law.

In the German special law, the concern of the German legislator, as well as the Romanian legislator was to establish an appropriate legal regime and a criminal protection appropriate for trading securities in case of possessing and using inside information, as a defining element of market abuse, in agreement with the definitions of Directive 2003/6/EC.

Starting from the enforcement regime, we can say that German criminal law is milder than the one in Romania, the maximum imprisonment period is shorter than in Romania and may alternate with the sanction of fine, given that in the present form of Law no.297 / 2004, following the latest amendment in 2012, the alternative sanction of fine was excluded by the Romanian legislature and an additional criminal penalty of prohibiting certain rights was provisioned. [14]

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