

# CONCEPTUAL APPROACHES REGARDING THE FINANCIAL INSTRUMENTS ON THE CAPITAL MARKET IN ROMANIA AND THE REPUBLIC OF MOLDOVA

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**Abstract:** *In the capital market development, the starting point consists in securities, concept on which the current insitution of financial instruments developed, a basic institution of the financial markets law. From the initial legal concept of security, the theory and practice of securities has gone through new conceptual developments through the addition of economic and financial content and, as a consequence, the European legislation, including Community - Directive no.2004/39/CE - presently use the concept of financial instruments, with incidence in the capital market domain. In the Republic of Moldova, the capital market regulation is carried out with the use of the Civil Code and the law, and the concept used is that of securities.*

**Key words:** *financial instruments, securities, rights of claim, capital market, trading.*

## 1. Introduction

From certificates (documents) that incorporate asset values (bills and representative certificates for goods) new concepts in financial and accounting field have developed, namely: financial securities and financial instruments. This development followed, as Senior lecturer PhD Elena Dobre ascertains, the development of financial markets on which such securities are traded, and the need to account as faithfully as possible the transactions and their financial effect.

The object of legal relationships on the capital market is represented by the financial instruments.

The Romanian legislator opted for Law no.297/2004 in order to define the concept

of financial instruments by exhaustively listing all the typical documents which fall within this concept, European-inspired enumeration which sets the scope of the concept without providing details of its contents .

It should be stated that the Romanian legislator has also taken and detailed the definition of financial instruments in the legislation on credit institutions as well (Emergency Ordinance No.99/2006 on credit institutions and capital adequacy), although the scope is essentially the same in the two legal documents mentioned.

In the Moldavian legislation regarding securities market [2], the concept of securities was used until the enactment of Law no.171/2012 on capital market [3],

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when, by transposing Community directives, the concept of equity securities started to be used.

## 2. The definition of financial instruments in Romanian legislation

According to section 11 paragraph 1 of Article 2 of Law no.297/2004, after being amended by Government Emergency Ordinance no.32/2012, through **financial instruments** we mean: a) securities, b) money market instruments, c) units in collective investment undertakings; d) options, futures, swaps, forward rate agreements and on foreign exchange and any other derivative contracts related to securities, currencies, interest rates or return rates, or other derivative instruments, financial indices or financial indicators that may be settled physically or in cash; e) options, futures, swaps, forward rate agreements (one rate) and any other derivative contracts related to commodities that must be settled in cash or may be settled in cash at the request of one party (otherwise than by default or any other incident leading to termination) f) options, futures, swaps and other derivative contracts related to commodities and which can be physically settled provided that they are traded on a regulated market and / or in an alternative trading system; g) options, futures, swaps, forwards and any other derivative contracts related to commodities that can be physically settled not otherwise provided for in the letter. f) and not having commercial purposes (...); h) derivatives for the transfer of credit risk; i) financial contracts for differences j) options, futures, swaps, forward rate agreements and on foreign exchange and other derivative contracts related to climatic variables, freight, approvals for emissions of substances or inflation rates or other official economic indicators

*which must be settled in cash or may be settled at the request of one party (otherwise than by default or any other incident leading to termination), and any other derivative contracts related to assets, rights, obligations, indices and indicators not included in this definition, that display the characteristics of other derivative financial instruments, taking into account, inter alia, if they are traded on a regulated market or on multilateral trading systems and are cleared and settled through recognized clearing houses or are subject to regular margin calls; k) other financial instruments qualifying as such under European law.*

Thus, unlike the previous text of Article 2 paragraph 1, section 11 of Law no.297/2004, we note that the legislator has harmonized by adopting GEO no.297/2004, the original text of Law no.32/2012 with definitions comprised in Article 7 of GEO No.99/2006, and redrafted letter i in the old Article 2, paragraph 1 section 11 of Law no.297/2004, relettering it as letter k, which refers to financial instruments classified as such by Community law, thereby directly aligning national legislation with the community acquis in terms of financial instruments.

Basically, by adopting Ordinance No.99/2006, the Romanian legislator has taken over and redefined the terms regarding financial instruments and investment services within the meaning of Community rules - Directive no.2004/39/CE also known as MiFID article 4 paragraph.18 - noting that these definitions are incident also in the capital market field, a reason why the Ordinance no.32/2012 amending Law no.297/2004 has been adopted.

The present form of Article 2 paragraph 1 point 11 letter k of Law no.297/2004 eliminated the contradiction regarding the previous definition of financial instruments

using the same concept, for the original form of the Law no.297/2004 text, the definition of financial instruments used the definition itself: *financial instruments include ... h) any other financial instrument admitted to trading on a regulated market in a Member State (...).*

In conclusion, in terms of major species listed the text of Article 2 paragraph 1 of section 11 of Act no.297/2004 concept of financial instruments comprise securities, money market instruments, units in collective investment undertakings and derivatives, given corroborating article 2, paragraph 1 of Article 2 paragraph 1 item 12 of section 11 of the Act lit.dj.

### **3. The definition of financial instruments in the Moldavian legislation**

The securities market in the Republic of Moldova was initially regulated by the adoption of Law no.199/1998, the Law regarding Joint Stock Companies adopted in 02.04.1997, the Law regarding the National Financial Market Commission adopted in 12.11.1998 and the special instructions adopted by the Commission.

We note that the legislator from the Republic of Moldova, although introducing the concept of the financial instrument without defining it as such in Article 6 of the Law no.171/2012, which comprises several definitions, uses mainly the notion of securities circumscribed to the concept of financial instruments thus maintaining the terminology in Law no.199/1998.

Thus, initially, according to article 3 of Law 199/1998 *the security* was defined as financial asset which confirms the property or non-property rights of any person in relation to another person, rights which can not be taken or transmitted without providing the financial security, without the respective registration in the register of registered securities holders or in the records of the holder of such securities rated.

Through the current Capital Market Law no.171/2012, by transposing several European Directives into the national law of the capital market, including MiFID Directive no.2004/39/CE, the legislator of the Republic of Moldova no longer defines the concept of securities, but uses in defining the financial instruments an exhaustive list, similar to the first Romanian regulations of Law no.297/2004, before being amended by Ordinance no.32/2012.

Thus, according to article 4 of Law No. 171/2012 (entitled Categories of financial instruments) the financial instruments are: *"a) securities, b) units (shares) issued by collective investment in transferable securities, c) monetary market instruments d) options contracts, futures, swaps, forward interest rate and other derivatives related to securities, currencies, interest rates, rates of return, financial indices or assets e) financial derivative instruments for transfer of credit risk; f) contracts for difference, g) other financial instruments admitted to trading on a regulated market and / or in a multilateral trading system. "*

However, the Moldavian legislator, after listing the scope of the concept of financial instruments, comes in paragraph 3 Article 4 of the Law no.171/2012 and defines securities included in the enumeration in Article 4, paragraph 1 of law by reference to the concept of financial instruments, as follows: *"the following are considered securities : the following financial instruments: a) shares and other securities equivalent to shares, including depository receipts on these securities, b) bonds and other securities debt, including depository receipts of these securities c) any other financial instruments which can be converted or have the right to buy or sell securities mentioned in letters a) and b). "*

Unlike the previous regulation in Article 3 Law no.199/1998, we believe that although the current definition of securities

contained in article 4, paragraph 3 of Law no.171/2012 is consistent with reference to the rules in matters of capital market, it creates confusion between the concepts of securities markets and financial instruments, each concept being defined by reference to the other concept.

#### **4. The analysis of the financial instruments concept from the Romanian commercial law perspective**

As noted above, the concept of financial instruments is centered on the concept of securities, the latter being the starting point in the development of the capital market operations. Thus, given the movement of goods on the market, the commercial law has established the possibility of movement of material goods through securities representing property values relative to those goods, thus enshrining the concept of security.

According to Professor D. Stanciu Cărpenaru [2], the commercial title of value is defined in the literature as a support document, a legitimation of the conferred rights on material goods, a document under which its legitimate owner was entitled to exercise at a given time the right conferred by the document. In the same work of Professor Stanciu Cărpenaru [2], debt securities are classified in the category of bills (bills of exchange, promissory notes, cheque), the category of securities (shares and bonds) and the category of representative titles of goods (bill the receipt of deposit and warrants).

Thus in the sense of the commercial law, stocks and shares are securities that incorporate property and non-property rights conferred to their holder regarding the capital of the issuer and regarding the administration and operation of these companies. The classical commercial doctrine [3] keeps for these securities the

character of marketable securities but also the refusal to align exactly to the general features of securities: the shares do not meet the condition of independence and accuracy to the text, namely the rights incorporated in the action are not completely independent regarding the act of incorporation and the social will, being the expression of the capital regulated by the articles of incorporation, while the extent of those rights conferred by possessing the action is not determined completely by the title itself [4].

#### **5. Conclusions**

According to the internal rules in Romania, the concept of securities keeps *latu sensu* the meaning in commercial law, but in capital market operations, the concept becomes a species of the concept of financial instruments, being limited in terms of the rights conferred to the proprietor, the marketable securities ascertained on the capital market.

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