

CAPITAL MARKET AND THE CRIME

EAZRU Elena Mihaela¹

Globalization of the economy and the transaction toward capital market in Eastern Europe are processes which determined the proliferation and diversification of economic-financial fraud in its national and international dimensions but also its transformation into a real threat to economic and social stability at a national, regional and international level. The inclusiveness of economic- financial fraud, the diversity of its forms, wide coverage of economic, social and politic areas, but also increased costs due to organized crime, led to imposition of adopting combat strategies, more or less efficient, against economic-financial fraud in all states.

The existent links between organized crime and corruption highlight a link between offence intended and offence means. Thus, most of the time, organized crime structures use corruption as a way to assure protection to illicit activities in this area, separately from this, the need to hide money from corruption acts put us in front of ingenious financial recycling, money laundering coming from corruption acts and deeds. The effects are pervert, influencing economic life, respectively capital market.

The illegal acts committed in capital market, although part of a special crime category, affects Romanian business environment. In fact, national economy is being influenced by the decisions taken on capital market.

What really happens?

It all starts with the misled of the investors. “Transactions or launching transaction orders that involve fictive procedures or any other form of mislead or information dissemination through mass media, Internet included, or in any other way, which gives, or could give false signals, constitutes manipulation. This information misleads, regarding financial instruments, given that the person who disseminated the information knew or

¹ Masterand, Lucian Blaga University, Sibiu

should have known that the information was false”, investigators from IGPR said. Also market manipulation is when transactions are closed or transaction orders are launched that give or are able to give false or misled indications regarding the offer, demand or price of financial instruments. These illegal acts are able to maintain, through the action of one or more persons, an abnormal or artificial price for financial instruments.

Preexistent conditions

A. Crime object

a) Special legal subject of the analyzed crime is complex. We can distinguish in their composition social relations regarding developing economic activities on the capital market, their forming and development are imposed to be under penal protection. Also, we should observe social relations which require that the behavior described by incrimination rules to be adopted during operations upon capital market.

What is to be noted is that the market was the public place where provisions or other objects were up to sale, but, generalizing, today, the market represents a group of persons which are in thigh business relations which effectuates a large scale of transactions regarding any commodity².

So, a series of relations is created through which financial assets are transacted with capital market satisfying the inquirers need of capital with citizen’s capital availability.

Thus, capital market functions are: emitting and selling financial titles for the first time to financial capital owners who wish to buy financial assets; negotiation of securities, provided that they are sold and transformed into liquidities by their first owners and before term.

b) Material subject

At some normative ways of analyzed crimes there is a material subject such as:

- financial assets, meaning the writings that give the owner, present or future money rights, as a result of their capitalization- interests, dividends, so on- when they were made in some persons interest;
- securities;
- usual negotiable titles;

² V. Stoica, E. Ionescu, Capital market and stock exchange, second edition, Economic Publishing, Bucharest 2002, page 14

B. Subjects

a) The active subject

The regulated deed by Article 279, alignment 1 and Article 237 alignment 3 consists in intentional violation by the administrator, director and/ or executive director of a commercial company of the obligation to show exact and accurate financial situation regarding the company's economic conditions to their shareholders.

Thus, the active subject can be the administrator, director and/ or executive director who commit one of the incriminated acts.

In most cases, these sort of crimes are committed by some representatives of certain commercial societies or responsible from within some public institutions (administrators or executive directors), which, having possession of certain privileged information move forward to initializing some transactions for them.

In case of other normative modalities, the active subject can be any other person. So is the crime provided at Article 279 alignment 2 which can be committed by any unauthorized person who accesses the electronic systems of transaction, settlement or atonement.

The crimes are likely in all participation forms: coauthor, instigation, complicity. Excepting coauthor, at all the other forms, the offender doesn't have to have a certain quality.

b) The passive subject of the analyzed crimes is the legal person or individual whose interests were affected by committing one of the incriminated acts.

The constitutional

A. Objective side

a) The material element- regarding the crime mentioned in Article 297 alignment 1 and Article 237 alignment 3, the material element consists in violating the obligation to present accurate financial situations and real information regarding the economic conditions of the company to shareholders.

So, the material element can be realized through two different ways: failure in presenting accurate financial situations to the shareholders, as in elision (without action) and meeting with bad will the obligation, meaning the financial situations are inexact or unreal, here we can talk about an action.

The law shows in a limitative way the actions or omissions through which the crime is committed- by reference to “the obligation to present to the shareholders real financial situations concerning the company’s economic conditions”.

It is not important if the offender broke one or more of his obligations, or if he broke them totally or partially.

At the same time, another method is used: completion of transactions for others through whom an important number of stocks are bought before these information became public. Usually, these information influences in a significant way the price of stocks on the market.

The material element at the mentioned deed consists in the offenders act to use the privileged information contrarily to laws in force

Legal texts apply to any person who holds privileged information:

- a) as member of the administration council or managerial structures or as a supervisor of the issuer;
- b) as a result of holding it to the social capital of the issuer;
- c) through exercising its function, profession or job duties;
- d) illegally or under false pretences;

What is important is that incrimination texts, such as other prohibition dispositions, will not be applied in transactions where the person who was engaged in operating them had a contractual obligation to obtain or give financial instruments, and this contract was signed before the person in cause came in possession of privileged information.

Through Article 247 dispositions of Law 297/1994, the active subjects list is widen and so is the list for Article 245 and 246 which now applies to any other person who own privileged information given that those persons know, or should know, that those pieces of information are privileged.

With respect to manipulation, the phenomenon is present in Stock Exchange. Any time a sudden price increase or decrease occurs, there is the fear of manipulation. Manipulation is favored by major price increase or decrease, taking advantage of the investor’s psychology.

It seems ordinary, but everything is speculated, starting with businessmen’s optimism and ending with panic. If prices grow, the manipulator acts to redraw the increase, and if they decrease, he acts for a bigger decrease. So, he can over sale some stocks and can under buy others.

According to Article 244 of Law, privileged information means a kind of precise information which has not been made public, and refers, directly or indirectly, to one or more issuers or to one or more financial instruments which, if available to the public, could have a significant impact on the price of those financial instruments or on the price of derivate financial instruments.

It is forbidden to any person, subject of Articles 245 interdiction to:

- a) reveal privileged information to any person, exception is the situation where the reveal is a normal exercise of activity, profession or job duties;
- b) recommend to a person to acquire or dispose financial instruments on the privileged information given;

So, the material element represents the action of disclosure in forbidden ways indicated through the incriminator text of privileged information, which, due to their specifics, can lead to an abuse upon the capital market.

According to provisions in force is forbidden to any legal person or individual to commit itself in activities of market manipulation.

Concerning journalists, in doing their jobs, information dissemination will be considered taking in account the rules that regulates their activity, excepting persons using this information in order to gain advantages or profits.

We must highline the exceptions from the provisions of alignment 5, letter a: persons who close transactions or sent transaction orders and prove that their reasons are legitimate and that they are conforming the accepted market practices on that regulated market.

Manipulation is also favored by the existing money at a certain moment. If credit access, for example, is easy, the manipulator burrows large amounts of money and buys stocks when prices are decreasing. Afterwards, the price increase due to the large volume of purchases and the stocks are resold to small investors at big prices. The mystery regarding a company's situation in terms of profit, new contracts, association with other companies, investments and other, is a motive which contributes to realizing the handling strategy. All this information can be used both on increase and decrease market.

B. The subjective side

The analyzed crimes are committed with intention in both its forms- direct and indirect. The form of guilty can easily be recognized by analyzing the texts. Thus, the

offenders have a clear representation of the consequences of their acts and aim or accept them.

Forms

Examined crimes are likely to be performed in an imperfect form of attempt. Anyhow, no text provides sanctioning attempt.

Crime consuming occurs while consequences appear, meaning, the state of danger.

Theory versus reality

In 2010, regarding great crime, increases were recorded as followed: over 35% in organized crime (Law 39/2003), from 442 cases to 597, money laundering with 2.6%, from 345 cases to 354, crimes regarding the capital market (Law 297/2004) with 36.3% and fraudulency with 353.84% from 52 cases to 236.

Conclusions

The research of legal norms in force results in forming a wide range of law overtures, the necessity of legislative modifications, manifesting itself in all fundamental areas of the capital market legislation, starting with the organization and functioning of the administrative authority of surveillance and control, continuing with legal issues on intermediary function, ending with legal issues providing issuers activity and their relation with investors.

Bibliography:

V. Stoica, E. Ionescu, Capital market and stock exchange, 2 nd ed. Economic Publishing (Bucharest 2002), 14

Law 39/2003