MARKET MANIPULATION AND ABUSE IN THE EUROPEAN DIRECTIVES AND ROMANIAN LAWS

ALEXANDRU CRISTIAN DOBRE *

ABSTRACT: *The European directives and the norms of application of the Romanian laws on market abuse and manipulation have the role of facilitating transactions between capital market. Privileged information or inside information can be used for immoral purposes to disinform the public about the actions of the instrument on the capital markets. Therefore, it is necessary to delimit clearly what are the acts that constitute abuses of laws and directives and which are allowed in the investment process. Information can not be classified as privileged from the start, but only as a result of its interpretation. In this sense, information qualification becomes an important phenomenon on the capital market.*

KEY WORDS: *abuse, manipulation, market, directives.*

JEL CLASSIFICATIONS: *G15, G18.*

1. INTRODUCTION

Insider information on the capital market may have an effect on the deregulation of activity under the moral aspect of transactions. Promoting fake news or publishing business information related to companies can influence the public, but also the price of listed stock. Thus, good regulation in this area can prevent market irregularities and protect so-called participants.

We live in the age of information through the media, the Internet and publications, and it is scientifically proven that the more information about the same subject there is, the harder it will be to discern true information from false information. The European Directive and the Romanian law support the delimitation of these irregularities by specifying the facts that are considered to be abuses or attempts to manipulate the market.

* *Research Assistant, Ph.D., University of Petrosani, Roamania,* my_xpress_2005@yahoo.com

2. MARKET ABUSE IN THE EUROPEAN DIRECTIVES AND ROMANIAN LAWS

The term "privileged information" is the translation of the so-called "insider information." This formula could translate more semantically, though not in the spirit of Romanian language, by "inside information", that is, information that could be directly known only by avised people that coexist inside a structure.

In the operational sense of the directive, privileged information, as it is defined, is less than it includes semantic syntax. Therefore, information can not be considered by itself or by its nature to be privileged, but must be qualified as such after its interpretation. Qualification is a mandatory step because of its consequences for both those who use that information on the capital market and those who judge it.

For information to be classified as privileged information under the terms of the Directive, it must meet four cumulative conditions to which we will refer in the following:

a) *The information must be of a precise nature.*

The wording is somewhat elliptical due to its direct takeover as such from the text of the directive. Should the information be precise or its nature be precise? What then refers to nature when it is theoretically given a type of information? To the field she's referencing? There are questions to be asked because of the consequences of incorrect classification.

Obviously, those who will have to declare information as privileged or not will have to deal with these issues in concrete terms. In our view and in the spirit of the directive, precision must characterize both the domain and the content of the information itself so as to qualify it as privileged information. Not the generalities or abstractions, but the concrete aspects or those conditions.

This interpretation derives from the fact that an individual within an organization knows both qualitative and quantitative aspects of information. In other words, information is accurate when it has the vocation to refer to concrete effects.

b) *Information must be public.*

This clarification preserves the status of privileged information for information as long as it has not been born or has not become public. The justification of the condition is obvious. The use of inside information is prohibited to preserve the equality of the investment decision for all potential investors. If they were allowed to react on its basis, insiders would have an unfair advantage over and against the uninitiated.

On the other hand, it would be equally incorrect for those who knew it to be privileged to be able to see what the general public could do in relation to information that was made public. The legislative solution is a fair and logical one: information loses its privileged character once it is brought to the attention of the public and disappears in this way the prohibitions of its use by the original initiates.

c) *The information relates to one or more issuers or to one or more financial instruments.*

The disclosure circumscribes the scope of the privileged information regime to products and instruments in which capital markets can be invested. Obviously, most of them are put into circulation by issuers and their yield or safety is related to their status and evolution. That's why information about them is potentially a privileged information.

It may be privileged information and information about the instrument itself, without any irrelevant connection with the status and evolution of its issuer, all the more so as there are products and tools that are not issued or issued directly by any issuer. In this respect, it is overcome the prejudice that privileged information can only be held by those who work within or relate to an issuer.

d) *If it were publicly disclosed, the information could have a significant impact on the price of the instrument with which it is linked or on the price of the derivatives to which it is related.*

The condition is one that qualifies the weight of information, separating it from the mass of information inside the company that is not publicly known. Only information that is unknown to the public is likely to lead to a noticeable price change. We note that the definition is not a quantitative one, at the limit capable of conducting measurements, but a qualitative one:

- "if it was publicly transmitted" refers to the fact that the effect the research information produces on the price can not be analyzed at the very moment of its use, but only later when it becomes public (and when the price suffered other influences, takes into account another context, or the information does not become public "at once") or because of its confidential nature it will never become public (and therefore its effect can not be measured).

  Obviously, the clarification indicates that the effect of information is not to be found, but to be appreciated. The key to the formulation of appreciation is the magnitude of the effect that the fact contained in the information may have on the actual value, but especially the future, of the issuer / issuers and / or the pledged financial instrument(s) but not necessarily in reality, as much as the directive says to the public.
- "could have" is read in light of the association, in the effort to qualify information as privileged or not, with a response identified as typical of the public in relation to such information.

  The difficulty of this explanation comes from the fact that investors do not always react on the basis of a single isolated information. As a rule, they make decisions taking into account the whole and complicated context of the moment. How unfair it is to disregard this (because, however, in a real and specific context, those in the knowledge of privileged information gain an advantage), it is equally unfair to worsen a person's situation by judging its use of privileged information at a time when the public's reaction to it could be simply exaggerated for external reasons.

- "Significant impact" is a specification meant to give the substance itself the effect of information on market investors' reactions, the price of a financial instrument varies continuously, then it is normal for the effect to be translated to have a significant impact. The Directive does not give a quantitative definition of what the significant impact means and, unfortunately, the elements of a qualitative determination. Under these circumstances, it remains for the person called to qualify to rule on it.

It is clear from the above analysis that without being able to deny the necessity to qualify information as privileged, the premise and the basis of the criminalization of abusive behaviors, it is not easy and self-fulfilling to do so, the legislator introducing elements of principle only to allow this and at the same time allow an abusive approach to matter through automatic, generalized and unwarranted qualifications by the authorities.

The caseload on the capital market is extremely diverse, so the legislator did not specifically list the cases of privileged information in the directive, but the main grid that allows the inclusion of information in this class. Although typical situations can be identified, in general, however, we can not speak, in our opinion, of insider information itself, but information that, in a given context (commented above, based on legal provisions) qualifies as information privileged. This is the key in which it is introduced by the legislator and it is natural to use the notion of privileged information operationally.

The directive (Directive 2014/57/EU) contextualizes the notion of privileged information in the case of commodity derivatives by adding a clarification: the information to qualify as privileged must be one of those that market participants expect to receive. The formulation is sibilinic. The main question that arises is from who do the participants epect to receive it from?

The Directive does not respond, but makes reference to accepted market practices. These, as we shall see in the Romanian legislator definition, which does not accurately take over the text of the EU Directive, would be - even more or less - than practices used on the market, agreed by the Romanian regulator and in line with Community procedures.

The definition of Romanian law seems to be a tautological one. Moreover, it follows from the fact that the task of solving the problem of generating the legal elements that make it possible to place information on the trading of commodity derivatives as privileged is the regulated market itself by issuing its own procedures in the matter; and if the market does not have these rules? Can no longer qualify as privileged information in this case?

The problem arises because of the imperfect takeover of the text of the directive: practices do not necessarily belong to the particular market, but should be reasonable to belong to one or more such markets. So be acceptable and - if they do not - become accepted. The wording of the Romanian legislator leads to the obligation of the regulated market to generate such rules and reduces the case-law to the situations so explicitly defined, thus losing the generality of the resulting classification as a principle of the presumed harmonized European norm.

In the case of the persons involved - it is meant - professionally in the execution of client orders the privileged information is also the one received (and of course we have - we complete such features) from the clients in relation to their orders. The clarification seems to be redundant, but its purpose is to overcome any ambiguity about the specific behavior of professionals, who should nevertheless enjoy a derogatory regime.

As long as privileged information has not become public, before, during, or after the execution of orders, if it has become known to professionals, it qualifies them as holders of privileged information with the consequent consequences on the framing of their behaviors.

Interestingly, neither the directive nor the Romanian law extends the privileged character and the implicit characteristics of the orders (for example, quantity), which is a weakness in the markets and intermediaries, especially by institutional investors.

In the directive, the transaction or intention is incriminated (obviously, at least - a materialization beginning) to trade by qualified traders, on the basis of the privileged information as defined, the financial instruments to which it refers or with which it has tangible information privilege.

The ban covers both own-account and third-party transactions.

Initially qualified individuals are defined as those who can legally have access to privileged information, so-called insiders (administrators, members of the executive management, members of the supervisory structures, people inside or outside a company that is doing business for it, shareholders) and those who get it through illegal / fraudulent ways.

If the person inside the issuing company is a legal person, obviously his / her quality in the matter extends to the persons within him / her who have been privileged in this capacity.

A delicate problem that emerges from the ban is that it restricts the rights to trade for people who have this intention before they have the privileged information or - after all - regardless of that. It is obvious that we have here to deal with a legal intent to dispose of introduced for certain citizens. The directive makes one exception to this, namely for persons who have been contracted to trade before finding out privileged information.

Our proposals and considerations regarding market abuse are summarized as follows:

Although neither the directives nor the law of market abuse mentions it, it is essential in the spirit of this to be a fundamental consideration for framing an act in the incriminated category of insider trading is the intention to obtain price advantages, taking advantage of the counter part's lack of knowledge of that information, through transactions with a quoted instrument on a regulated market.

The normative act (Directive 2014/57/EU) contains provisions aimed at preventing opportunities for the proliferation of insider trading by:

a) the prohibition imposed on the holders of such information to communicate them to third parties, not related to professional or service obligations (even though this information, as seen, is not always of a particular nature under other legal provisions).

Obviously it will be seen that those who get the information and become aware of their character - very important, even without their will! - will be assimilated to those qualified as persons with privileged information, with all the prohibitions imposed by this statute. These consequences may, in some cases, obviously lead to suspicions of unconstitutionality, which should find a fair solution / interpretation.

b) through investment recommendations made to third parties, on the basis of the same privileged information, regardless of the fact that it would be unlawful to justify those recommendations.

A consequence of this last prohibition is the difficulty of discerning whether an investment recommendation for a financial instrument made by the holder of inside information is unlawful (because it would be made on the basis of such privileged information, forbidden by law) or licit (if was made on the basis of indifferent perceptions of privileged information held, which is not - here - prohibited by rules).

As far as those who receive the recommendation are concerned, we consider that their innocence with regard to the source of that is relieving them of their responsibility.

3. MARKETS MANIPULATION

Market manipulation is generally defined by stating, in a restrictive way, three distinct situations in which it can occur. Assimilation of an act with one of the three qualifies as market manipulation, a) Both transactions and orders (possibly unfinalized in transactions) that are aimed not at investing / disinvesting as such (which, moreover, are often done) but the production of effects on the market (in the case of the price) or its context. Orders are also incriminated not only successful transactions because they influence the market context and its perception by investors.

Obviously, the incriminated maneuvers must be carried out with intent and in our view the onerous interest is implicit.

Two forms of manipulation are included in the definition:

a. when transactions or orders are intended to mislead other bidders, bid or price. Obviously, market participants are cutting their investment / disinvestment strategy according to their market situation or evolution as a result of the equilibrium level (current price) and dynamic market dynamics (price evolution, demand and active offer). In order for this to take place on equal and fair conditions, those elements must be the real ones. Their intentional influence on their own or, more seriously, their distortion leads to both possible damage and the violation of a fundamental market function: the formation of the correct price.

b. when transactions or orders are meant to keep the price at a level that no longer represents the real level of balance of true demand and offers.

The subclass is the symmetric of the previous subclass, but now it is not intended to direct the price to convenient areas, but to prevent its natural movement and preservation, this time, in a preferred area.

It is exempt from market manipulation the facts for which, although the general situations described in a. and b. May be circumstantial, their authors show that they have legitimate reasons and adhere to accepted market practices. The statement seeks to transform the absolute character of the presumption of guilt into a relative character for the perpetrators of the facts pertaining to points a) and b). The task of proving innocence on the basis of this exception lies with the perpetrators.

We are in a situation of market manipulation and when used, using transactions or orders, fictitious procedures or to mislead the other participants.

The wording chosen by the legislator is particularly laconic. It is understood that its ambition is to encompass and incriminate all situations, regardless of the means by which they have been reached (such as simulation), in which the originator's purpose is not transactional, but the creation of a false image on the market in order to take advantage of it.

A last category of market manipulation covers the influence or attempt to influence the market not through transactions or orders, as with the first types of manipulations described above, but through the dissemination of false or tendentious information, including through mass dissemination channels or the Internet. This time price formation is no longer influenced by the direct transactional activity of the perpetrators, but by the misleading transactional reactions of the audience (Duțescu, 2008).

It is criminalized, including the guilty dissemination of rumors and false news.

It also criminalizes the intentional manipulation of the press by journalists if it is for purposeful purposes, otherwise in the case of the dissemination of false information with the potential to influence the market, taking into account the rules regulating the specific activity their journalism.

However, to remove any possibility of interpretation, because of their gravity, the law of abuse directly qualifies three cases of market manipulation:

a) The situation when the fixing of selling and buying prices in the market (or the creation of other unfair market conditions) is achieved by seizing and using the dominant positions (or by a group of perpetrators acting in concert) for that purpose demand or offer.

The lawmaker's wording, in order to be understood, needs some clarification: - the prices mentioned are not (yet), this time, trading prices, but internal market prices (ask and bid), translating the most competitive sales orders and purchase, with the decisive potential to impose transaction prices;

- dominant positions refer to those expressed at one point in the market, on demand and on offer, and not on holdings;
- the "dominance" qualification is circumstantial and not quantitative, characterized by its effect (fixation of sale or purchase prices).

Obviously, there are market situations in which large investors hold, at some point in the volume of orders placed, dominant positions on demand or on offer. So far we do not have price manipulation, especially if the orders are totally introduced into the system.

This occurs when someone opposes the upward or downward trend of the market by repeatedly introducing new orders at the same competitive price in the market or at close prices instead of those already concluded in contracts dominating in a position of the contrary (and contrary to own interests!): on purchase at the price drop and on sale at its increase.

But this too, we have market manipulation only if we can determine the intention to stop (so to "fix") this way the evolution of the price: so to stop the growth (by massive sales), or the decrease (by substantial purchases) facts that are conducive to setting a price inconsistent with the real balance of demand and supply, so with the market value of the asset at that time.

b) transactions concluded to influence the value of the closing price.

Again, the closing transaction is not criticized, but its purpose (influencing the value of the closing price, regardless of whether this value has been achieved by regulatory means). The closing value is a static one and cannot be corrected until the next day through the corrective market reaction. It gets into the statistics and creates a picture of the trading day and, especially, of the next day trend, useful for preparing investors' short-term strategies. This also includes the manipulative effect of the incriminated act.

In addition, this value can be included in the pricing of the various derivatives.

c) exploiting the advantage of public dissemination of own views and influencing in this way the price of an instrument in its own portfolio, without prior knowledge of this conflict of interest. The first comment is formal: as with other norms, but rather unfortunate, the text of the European directive is mistakenly semantically taken up.

We have to do with the following succession of actions and inactions:

- the perpetrator has acquired a financial instrument;
- the perpetrator delivers favorably to the public about the value of the financial instrument or its issuer;
- the perpetrator does not know that he can benefit from the appreciation of the value of the financial instrument;
- the value of the instrument grows (the effect of actual market manipulation) on the perpetrator's best references;
- the perpetrator capitalizes or registers another benefit following the valuation of the instrument's value.

In this situation, we believe that incrimination can give rise to reservations. Indeed, what is fully attributable to the perpetrator is failure to report conflict of interest. The rule would have been correct to contain the nuance, contained in the text of the directive, that the perpetrator deliberately pursues through his statements artificially increasing the market price of the financial instrument. Thus expressed, we really have the conditions for market manipulation (Lipara, 2012).

4. CONCLUSIONS

The European Union is a very complex and ambitious project. Community policies in the field of investment services and the capital market are significant in this respect, being dominated by two distinct objectives: the establishment of a common and uniform functioning regime in the Member States, offering free and equal opportunities for specific services within the Union, but also the significant modernization and development of the field.

Initially planned - at least officially - for economic reasons (the common market!), The EU seemed to focus for a good period of time, especially on political objectives. The economic component - initiates know this - has never been neglected, and in recent years, with the desire to take on a major global role, it has become a fundamental public concern, including the ambitious provisions of the Agenda of Lisbon.

Obviously, the financial segment is the engine of financial development, but also its subtle part. The mobilization of resources, the circulation of money, their fructification are fundamental aspects of modern economics. The investment industry, the financial markets and the stock market are the key - at least in the American rivalry experience, worldwide reference - of this development option.

The traditional reticence of such a consistent, conservative and adherent approach to the funding system, which is heavily but surely predominantly banking, the continent's "old Europe" seems to have been discovered over the past ten years with the fascination and efficiency of the capital market.

For this reason, the Community policies in the field, as we have seen, aim not only to harmonize the rules and the regime of investments in the member countries, but also to build viable, modern and performing institutions in the field.

From the above it is clear that the project, from an institutional point of view, is viable and has high chances of rapid completion, and the economy will absorb it and make proper use of it.

For the proper fitting of the field in the context of the community policies, it was insisted on its correct fitting at the intersection of the core areas of the free movement of capital and the free movement of services, in particular to the financial services.

REFERENCES:

[1]. Anghelache, G. (2000) *Bursa și piața extrabursieră*, Editura Economică, București
[2]. Corduneanu, C. (2009) *Piețe de capital: Teorie și practică*, Editura Universității de Vest, Timișoara
[3]. Divecha, A.; Morse, D. (1984) *Market Responses to dividend Increases and Changes in Payout Ratios*, Journal of Financial and Quantitative Analysis
[4]. Dodd, N. (2016) *The Social Life of Money*, Princeton University Press
[5]. Duțescu, C. (2008) *Manipularea pieței de capital*, Editura C.H. Bech, București
[6]. Fox, M.B.; Glosten, L.; Rauterberg, G. (2019) *The new stock market: Law, Economics, and Policy*, Columbia University Press

[7]. Lipara, C. (2012) *Evaluarea acțiunilor: o abordare din perspectiva teoriilor comportamentale*, Editura ASE, București
[8]. Marks, H. (2018) *Mastering the Market Cycle: Getting the Odds on Your Side,* Houghton Mifflin Harcourt
[9]. Directive 2014/57/EU of The European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)
[10]. www.researchgate.net
[11]. www.finint.ase.ro