

METHODOLOGICAL PARTICULARITIES REGARDING CRIMINAL INVESTIGATION OF CRIMES RELATED TO MARKET ABUSE, FACTS CRIMINALIZED IN THE CAPITAL MARKET LEGISLATION

Constantin NEDELUCU*

Abstract

The interest in investigating the issue of techniques for investigating capital market crimes is based on several considerations:

Research is timely and responds to the imperative of the moment, to combat these crimes. It is to be noticed the novelty and the diversity of the issues addressed in the context in which this criminal field is little researched and known both as a modus operandi and as an investigative technique, although it is constantly expanding and amplifying.

Investigating capital market offenses is emerging as one of the major challenges addressed to the judicial authorities.

Keywords: *capital market crimes; criminal investigation; market abuse; methodological particularities.*

The capital market field is a highly controversial one because of its relative novelty in our country, the special technique it presents, and the seriousness of some crimes that can be committed through it.

The capital market plays a particularly important role in any free trade economy, i.e. to engage available capital reserves¹, other than those provided by loan institutions, in the economic circuit.

The capital market is the part of the financial market in which financial instruments are issued and traded in accordance with the legal regulations². Currently, the functioning of the financial instruments markets, as well as the formation and functioning of the bodies operating on these markets are regulated by Law no. 31/1990 regarding companies, Law no. 297/2004 regarding the capital market and Law no. 24/2017 regarding issuers of financial instruments and market operations, these two normative acts representing the general framework and, obviously, the secondary legislation represented by regulations and instructions issued by the Financial Supervisory Authority (hereinafter referred to as ASF) or its predecessor, the National Securities Commission (NSC)

All offenses defined by Law no. 297/2004 imply that the anti-social behaviors described by the criminalization rules have been manifested within or in connection with some operations on the capital market.

We note from the beginning that the body with special attributions in this area is the Financial Supervisory Authority.

ASF is the national authority with powers of supervision, investigation and control in the field of market abuse, the criminal sanction of this behavior being obviously the exclusive competence of the judicial bodies.

ASF supervises the market in order to prevent, detect and sanction market abuse.

But what is market abuse? To answer this question, we will have to focus on art. 108 of Law no. 24/2017, from which it results that this notion refers to the abusive use of inside information, the unauthorized disclosure of inside information or market manipulation.

It should be noted that prior to the entry into force of Law no. 24/2017 (01.04.2017), the market abuse provisions applied only to the regulated financial instrument markets but following the transposition into national law of the provisions of Directive 2014/57/EU *on criminal sanctions for market abuse*, they are now also applicable to multilateral trading systems.

The elaboration of a methodology for investigating capital market crimes implies the systematic identification and analysis of the operating methods used by authors (perpetrators), the in-depth knowledge of the market mechanisms, malpractice and economic and financial “engineering” found in the practice of judicial bodies³.

The new and sophisticated operating methods implemented by capital market authors, based on teamwork of the teams comprising of specialists with rigorously established tasks, have led to appropriate mutations in the design and conduct of an investigation in this area, transforming teamwork from a professional option to a criminal prosecution imperative: how to act by using specialized teams or investigative units⁴.

In the European doctrine and practice, there is a particular interest in the development of pro-active or special investigative techniques designed to perform ante-delictum investigations or special investigations,

* Lecturer, PhD, Faculty of Law, “Nicolae Titulescu” University, Bucharest (e-mail:constantin nedelcu@univnt.ro.)

¹ M.Hotca, N.Neagu, M.Gorunescu, A.Sitaru, A.L.Galetschi –Ghidul penal al omului de afaceri –Ed.Hamangiu -2015, pg.275

² Art 1 din Legea nr.297/2004 stabilește cadrul legal al pieței de capital

³ Manual de Anchetă în Mediul Economico-Financiar, București, 2009, pg.22

⁴ The Public Prosecutor for Series Economic Crime, Denmark, Parchetul Național Anticorupție, România, A.Lazăr, S.Alămoreanu, Jurgen Dehn, Helmit Brandau

including before a particular offense has been committed or discovered⁵.

In order to proceed with the investigation of the criminal offenses that are incidental to market abuse, we must first of all know who the capital market players are. From the general legal framework applicable to this field, we find that the participating entities are the following:

- I. ISSUERS – “open” joint-stock companies whose stocks/bonds are traded on a stock exchange;
- II. INVESTORS - natural or legal persons holding capital surplus;
- III. INTERMEDIARIES - financial investment service companies or banks, the ones that connect issuers with investors or investors among themselves;
- IV. COLLECTIVE INVESTMENT UNDERTAKINGS - investment management companies, depository of financial assets, open-end investment funds, investment companies, closed-end investment funds, closed-end investment companies;
- V. INVESTMENT CONSULTANTS - authorized natural or legal persons;
- VI. FINANCIAL AUDITORS - authorized natural or legal persons;
- VII. MARKET OPERATORS;
- VIII. REGULATED MARKETS AND MULTILATERAL TRADING SYSTEMS;
- IX. STOCKHOLDER REGISTERS;
- X. DEPOSITORY;
- XI. CUSTODIANS;
- XII. COMPENSATION FUND;
- XIII. SUPERVISORY/REGULATORY AUTHORITY.

We note that each of these remains a “trace” which must be identified, researched, interpreted and administered, of course, in the criminal trial.

In the following we will briefly refer to a possible method of investigating the market manipulation offense, if the financial instrument refers to the stocks issued by a company, as defined by art. 120 of the Law no. 24/2017, namely:

1.
 - a) making a transaction, placing a trading order or any other behavior that gives or is likely to give false or misleading indications regarding the offer, demand or price of a financial instrument, a spot commodity contract or an auctioned product that is based on emission allowances or that sets or is likely to set the price of one or more financial instruments, a spot commodity contract, or an auctioned product based on an abnormal or artificially emission allowance unless the reasons why the person who participated in the transactions or placed the trading orders acted as such in accordance with the applicable legal provisions and those transactions or trading orders are in

accordance with market practices accepted at the trading venue in question, as they have been approved pursuant to the provisions of art. 13 of Regulation (EU) No. 596/2014;

- b) carrying out a transaction, placing an order or any other activity or conduct that influences or is likely to influence the price of one or more financial instruments, a spot commodity contract or an auctioned product based on emission allowances, by resorting to a fictitious process or any other form of deception or artifice;
 - c) the dissemination of information by the media, including the internet or by any other means, which gives or is likely to give false or misleading signals concerning the offer, demand or price of a financial instrument, of a spot commodity contract or auctioned product based on emission allowances or setting the price of one or more financial instruments, a spot commodity contract, or a auctioned product based on emission allowances at an abnormally or artificially level, including the dissemination of rumors, when the persons who carried out the dissemination obtain, for themselves or for others, benefits as a result of the dissemination of the information in question and provided that these persons knew or ought to have known that they are false or misleading; or
 - d) the transmission of false or misleading information or the provision of false or misleading entry data or any other behavior manipulating the calculation of a reference index, provided that the person who carried out the transmission or supply of that information or data knew or ought to have known that they are false or misleading.
2. For the purposes of the provisions of para. (1), the following are considered to be market manipulation operations:
 - a) the conduct of a person or persons acting jointly to secure a dominant position over the demand or offer of a particular financial instrument, spot commodity contract or auctioned product based on emission allowances that has or is likely to have the effect of directly or indirectly setting the sale or purchase price or the creation of other unfair trading conditions;
 - b) the purchase or sale of financial instruments at the time of the opening or closing of the market which has or is likely to have the effect of misleading investors acting on the basis of the prices displayed, including opening and closing prices;
 - c) the placement of orders at a trading venue, including their cancellation or modification, by any available means of trading, including electronic means such as algorithmic and high frequency trading strategies, and which has one of the effects referred to in letter a) or b) by:

⁵ Manual de Anchetă în Mediul Economic-Financiar A.Lazăr, S.Alămoreanu, Jurgen Dehn, Helmut Brandau, București, 2009,pg.45

- I. interrupting or postponing the operation of the trading system in that trading venue or creating the conditions for such effects to occur;
 - II. causing difficulties for others to identify the actual orders in the trading system in that trading venue or likely to generate such effects, including by introducing orders that result in overloading or destabilizing the order book; or
 - III. creation or likelihood of creating a false or misleading signal about the offer, demand or price of a financial instrument, in particular by introducing orders to initiate or accentuate a particular trend;
- d) benefiting from the regular or occasional access to media, electronic or traditional media by expressing an opinion on a financial instrument, a spot commodity contract or an auctioned product based on emission allowances or indirectly in relation to its issuer provided that the financial instrument, the spot commodity contract or the auctioned product based on emission allowances was already owned and subsequently profited from the impact of the opinions expressed concerning that financial instrument, spot commodity contract or auctioned product based on emission allowances, without at the same time making that conflict of interest public in a fair and efficient manner;
- e) the purchase or sale of emission allowances or related derivative instruments on the secondary market prior to the auction conducted in accordance with the provisions of Regulation (EU) No. 1031/2010, which has the effect of setting the auction price for the auctioned products at an abnormal or artificial level or misleading the bidders.

The market manipulation offense is, in essence, a kind of offense of deceit, and that is why, as a rule, the manipulator seeks to obtain a material benefit from other market participants. However, there are cases where the manipulator does not necessarily pursue a material benefit, but, as it is pointed out in art. 121 para. (1) let. b, he/she may pursue the transfer of stocks held on behalf of other persons for the purpose of circumventing the articles of association of the issuer which, for example, limits holdings to a certain percentage of the share capital. This is precisely why, by the rule of criminalization, the legislator has determined that the market manipulation offense is a crime of danger and not a damage, although in some cases the damage can be located.

We believe that at this point it is appropriate to make it clear that the market manipulation offense may be even a means of crime, for example for offenses of embezzlement, offenses provided and punished by art. 279 para. 1 let. a and let. b of Law no. 31/1990 regarding companies, money laundering or even tax evasion.

A first problem that arises in investigating this crime, obviously after knowing the issuer whose stocks

have been the object of manipulative actions (in practice the issuer's stock exchange symbol) is to establish what the clues that make us believe that a crime of a criminal nature has been committed. This problem finds the answer in the law itself, namely false or misleading indications regarding the offer, demand or stock price, etc.

Next, it is necessary to establish how the manipulative action was carried out, namely whether through transactions or order placements that could have resulted in a significant increase/decrease of the price/volume of the traded stocks, the dissemination of information by means of mass media, including the internet, that give or are likely to give false or misleading indications as to the demand, offer or stock price, the dissemination of false information, etc.

The next step in the criminal investigation is to establish with certainty who is the subject/are the subjects of the crime of manipulation.

At this point, to identify transactions or orders, the market operator, for example the Bucharest Stock Exchange, should be required to report the trading report for the issuer whose stocks were subject to the manipulative process. It is mandatory to indicate the period for which this report is requested because, as a rule, the manipulative process may involve several material acts. From the trading report we can extract more information, namely:

- I. The date and time of the transaction;
- II. The volume of stocks involved in the manipulative process;
- III. Price variation;
- IV. The type of market on which the manipulative transaction was made;
- V. If the transaction is bilateral or not;
- VI. The transaction intermediary/intermediaries.

If, from the transaction report cannot be identified the transaction having a manipulative effect, we can conclude that the manipulative operation had the premise of trading orders entered into the electronic system managed by the market operator, orders which were subsequently either deleted or withdrawn, but were likely to give false or misleading indications as to the offer, demand or stock price.

After identifying the intermediary/intermediaries, since they are currently operating global accounts, the financial investment services company will be required to file the records of all those customers that, during the research period, traded the issuer's stocks under the manipulation operation.

It is relevant to obtain, in addition to the brokerage agreement and its annexes, the trading orders, the bank statements relating to the settlement of the transactions, and the account statements issued by the stockholders' register regarding the stockholdings. A particular peculiarity is encountered when the manipulator resorts to the services of a custodian agent, the latter being the one to whom one must resort in order to obtain the account statement for the stockholdings.

It should also be noted that in the criminal investigation that is carried out in a case of manipulation, relevant information may be obtained from the current reports that the issuers or intermediaries are obliged to transmit to the market where the stocks are traded for certain events set by the legislator. At the same time relevant information can be obtained from the stockholders register or depositary.

Of course, special investigative methods may be used in the investigation (art. 138 and the following of the Code of Criminal Procedure), which may be used only in a strictly determined legal framework with the authorization of the judge of rights and freedoms, in order to collect the evidence.

ASF analyzes the financial flows underlying the financing of transactions, natural or legal persons involved in transactions.

During the investigation, ASF may request and analyze the following:

- The trading orders underlying the transactions as well as the information on the internal client accounts stored at the ASF level and received from the broker;
- Cash flows evidenced by account statements period investigated and for the clients involved;
- Details of the bank account, including the account holder, the real beneficiaries recorded in the documents related to the opening of the accounts of the persons with the right of signature to the persons holding the power of attorneys and the account managers;
- Account history for the targeted persons and the justificatory documents for the operations underlying the stock records;

References

- M.Hotca, N.Neagu, M.Gorunescu, A.Sitaru, A.L.Galetschi –Ghidul penal al omului de afaceri, București, Ed.Hamangiu -2015
- Manual de Anchetă în Mediul Economico-Financiar, București, 2009
- The Public Prosecutor for Series Economic Crime, Denmark, Parchetul Național Anticorupție, România
- A.Lazăr, S.Alămoreanu, Jurgen Dehn, Helmut Brandau, Manual de Anchetă în Mediul Economico-Financiar, București, 2009