UNLAWFUL CONDUCT ON THE CAPITAL MARKET

Cristian GHEORGHE*

Abstract

European Union Law had explicitly authorized the use of a double punishment (administrative and criminal) in the context of the fight against illegal conduct on the financial markets. Thus many facts and behaviours on the capital market have a double regulation, especially in the area of market abuse. For example, we have the misconduct of market manipulation punished with administrative (pecuniary) penalty and the market manipulation offense punished with criminal penalty. Criminal liability conditions are different from administrative liability but generating facts and behaviours are rigorously identical. Therefore acts of market manipulation are punished as misdemeanours (administrative procedure) when acts are committed without the form of guiltiness required by law to qualify them as offenses (criminal procedure).

The question raised by European and Romanian regulations on financial market is the compatibility with or violation of the European Convention on Human Rights (ECHR). In order to ensure the integrity of markets and to enhance investor confidence in those markets, European law has created broad administrative offences, which punish the risk of harm to the market with severe, pecuniary and non-pecuniary penalties. Access to a subsequent court in administrative proceedings is an evasive guarantee that does not compensate the unfairness of the administrative procedure. ECHR case law concluded that market pressure and need for compliance in that field cannot prevail over international human rights obligations of States bound by the Convention (ECHR).

Keywords: *capital market, market abuse, double punishment, ne bis in idem, ECHR.*

1. Introduction.

Many facts and behaviours on the capital market have a double regulation, especially in the area of market abuse. Romanian law provides the misconduct of market manipulation punished with administrative penalty[1] and market manipulation offense, punished with prison[2]. Of course, criminal liability is inflicted under different conditions than administrative contravention, but the facts are rigorously identical. This is even suggested by the law when declares guilt as the only difference between provisions. Thus acts of market manipulation are sanctioned as offenses when deeds are committed without the form of guiltiness required by law to qualify them as offenses[3].

2. Administrative liability and criminal liability on the Capital Market.

The Romanian Capital Market Law suggests a certain timeline in the investigation of the acts related to market abuse. Respectively the identification of such facts requires first a criminal investigation for criminal offense. If the criminal procedure is completed without incurring criminal liability and applying a penal penalty - explicitly the act was prosecuted as an offense and subsequently it was established that it constitutes an administrative contravention only - then administrative liability remains incumbent[4].

The applicable law on administrative contravention emphasizes the same indisputable principle of criminal liability primacy[5].

Administrative contraventions are generally defined by their legal object represented by social values threatened or injured through misbehaviours, values less important to be protected by criminal law. Theoretically it is not possible administrative liability overlapping criminal liability simply because the offense and the administrative contravention are mutually exclusive (have different legal object)[6].

However, capital market regulation, following the European regulation (Market Abuse Regulation), does not follow this exclusion[7]. Double regulation of the same acts as crimes and administrative offenses contravenes the general principles of national regulation.

The anticipated conduct of Romanian Authority of the Capital Market (Financial Supervisory Authority – FSA) seems to solve the overlapping of liabilities, in practice. Respectively the FSA will assess the possible criminal nature of the reported facts and notify the criminal investigation authorities for the investigation

* Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: profesordrept@gmail.com).

[1] Regulation (EU) no. 596/2014, Market Abuse Regulation (MAR), Art. 30 para (1) a) and Art. 15. Romanian Law no. 24/2017, Art. 132 para (1) which refers MAR.

[2] Law no. 24/2017, Art. 134 para (5).

[3] Law no. 24/2017, Art. 132, para (3) b) i).

[4] Law no. 24/2017, Art. 133 para (5).

[5] Government Ordinance (GO) no 2/2001, Art. 30.

[6] GO no 2/2001, Art. 1. The law (contravention) protect social values which are not protected by penal law.

[7] Administrative misbehaviours related to market abuse are enacted directly by European Regulation no. 596/2014 (MAR), Art. 30. Criminal liability are inflicted by European Directive on market abuse (for the same facts).

of the facts in criminal proceedings. To the extent that criminal liability is established and a criminal penalty will be imposed, any administrative procedure ceases. FSA will no longer apply any sanction.

This chronology of events is above all criticism. In the rest of the situations, however, the legal perspective is more tumultuous.

If criminal liability is not engaged (termination or acquittal in the criminal proceedings), FSA resumes its investigation, the statute of limitation for administrative procedure being declared suspended during criminal procedure[8].

At first glance this situation seems beyond any controversy. It not seems to be a double prosecution. The perpetrators are subject to a criminal investigation and then subject to an administrative investigation for the same facts.

The *non bis in idem* principle prohibits not only a double conviction but also a double trial or investigation for the same facts. The principle in question is a principle with wide international recognition, but in criminal law only.

3. Ne bis in idem.

Immunity acquired for the same facts as a result of a previous criminal trial has a wide European and international recognition, in a sensibly different form. United Nations Covenant on Civil and Political Rights states that: "*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*."[9]

Charter of Fundamental Rights of the European Union[10] reads as follows: "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*."

American Convention on Human Rights[11] establishes that: "An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause."

The Court of Justice of the European Union (CJEU) has also enshrined the principle in its jurisprudence[12].

Of particular importance for European countries is the ECHR Convention[13]. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State[14].

If, in the past, the principle was assimilated to a negative effect of the double-jeopardy clause which protect defendants from the burdens of multiple trials, domestic law (procedural criminal law) has now included *ne bis in idem* by enacting that no person can be prosecuted for committing an offense when that person has been previously given a final criminal judgment on the same offense, even under a different classification of the offense[15].

In the ECHR case law a person enjoys three distinct guarantees derived from the *ne bis in idem* principle: he cannot be prosecuted, tried or punished twice for the same conduct. From this perspective, even if the first proceedings end with acquittal (criminal charges) and the person is subsequently subject to the second proceedings (administrative charges), there is a violation of the Convention. There is no need to be two convictions for the violation of the Convention. The ECHR expressed the view that the perpetrator's acquittal of the charge under the criminal code *did not deprive him of his status as a "victim"* of the alleged violation of Article 4 of Protocol No. 7 of the Convention[16].

4. Cumulation of criminal liability with administrative liability.

National law does not explicitly address aggregation of administrative and penal liability but excludes it by defining the concepts. Placing administrative penalties outside the object of the criminal offenses should make it impossible to overlap the two concepts. But the content of many criminal offenses contains elements or circumstances that may constitute contraventions. In the case of market abuse, the situation is even more manifest as the same conduct is also a criminal offense and a contravention so that cumulation of liabilities is a possible situation. If administrative investigation is found to be inadmissible after criminal liability and punishment as a criminal offense, in the rest of the cases administrative liability remains applicable. The administrative procedure, pending after the criminal nature has been removed in

[8] Law no. 24/2017, Art. 133 para (6). However in all cases an elapsed term of 4 years from time of facts excludes the application of a penalty.

[9] UN Convention, Art. 14 par. 7, adopted by UN General Assembly on December 16th 1966, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

[10] Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament, the Council and the Commission in Strasbourg on 12 December 2007 (OJ 14.12.2007), C 303/1, Art 50.

[11] American Convention on Human Rights, Art. 8 par. 4. http://www.cidh.org/basicos/english/basic3.american%20convention.htm.

[12] CJEU, https://curia.europa.eu/jcms. *Limburgse Vinyl Maatschappij NV (LVM) and Others v. Commission of the European Communities*, Joint cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P la C-252/99P and C-254/99 P, § 59, 15.10.2002. *Norma Kraaijenbrink*, Case C-367/05, 18.07.2007.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms known as European Convention on Human Rights (ECHR).

[14] Article 4 of Protocol No. 7 ECHR.

[15] Romanian Criminal Procedure Code, Art. 6.

[16] *Sergey Zolotukhin v. Rusia*, Case no. 14939/03, ECHR Judgement on 10.02.2009, para (119).

a criminal proceedings, is expressly regulated (by suspending the prescription of the application of the sanction in investigation of the administrative nature). However, this case does not involve cumulation but a successive check of the conditions of the criminal liability and contravention.

The premise of undeniably cumulation is that of imposing an administrative sanction by the FSA (which may consider that no criminal investigation is required). Such conduct of FSA does not hinder by anything the subsequent action of criminal prosecution authorities. They have no impediment (*ex officio* or by criminal complaint of others than FSA) to pursue investigation as they are not held by the FSA's opinion that the conduct is a contravention, not a crime.

The French doctrine has constantly held that criminal liability and contravention have different grounds so that the situation of the cumulus of contravention liability with criminal liability is allowed[17]. Cumulation is unambiguously accepted in French law, with the imputation of the administrative fine on the possible criminal fine. Thus, when the competent authority (in France this is the Sanctions Committee of the Financial Market Authority - AMF) imposed a financial penalty that became final before the criminal court finally ruled on the same facts, the criminal court may order that the pecuniary sanction to be deducted from the fine the court may pronounce[18]. Such provision basically validates the right of the criminal court to impose a penalty (fine or imprisonment) in criminal proceedings, after an administrative proceedings.

The evolution of French law on the matter. After constant criticism in the doctrine regarding the double incrimination and non-compliance with the ECHR Convention, Constitutional Council of France declared unconstitutional the cumulating of criminal and administrative penalties for the same deed, in particular the situation in which the same facts are subject to a plurality of sanctions.

By allowing the prosecution of similar behaviours to those pursued before the administrative regulator (AMF) in violation of the non bis in idem principle, these provisions violate the principles of the necessity of offenses and punishments, the proportionality of the punishment and respect for legally acquired rights.[19]
Romanian law faces the same situation with respect to Art. 134 para (2) (offense of misuse of privileged information) and Art. 132 para (3) of the Law no. 24/2017 (contravention). Respectively for the same facts there are administrative and criminal proceedings that can lead to double incrimination.

5. Double incrimination on the Capital Market in ECHR case-law. Civil limb and criminal limb of the right to a fair trial.

French case law as well as European developments on capital market unlawful conducts have been strongly influenced by the constant jurisprudence of the European Court of Human Rights to classify administrative sanctions in this field as "criminal" in nature. This practice enables the *ne bis in idem* principle in order to stop the effects of double prosecution, judgments and incriminations.

The jurisprudence of the ECHR applicable to the capital market was strongly influenced by the case *Grande Stevens v. Italy*.[20] In essence, the case concerns market manipulation. The competent authority of the market has investigated and punished the unlawful conduct by imposing significant pecuniary penalty aimed to deter market manipulation. Criminal investigation authorities have also been referred to as a result of the right conferred on Member States to impose administrative sanctions without prejudice to the right of States to apply criminal sanctions[21].

The criminal court also pronounced a conviction for the same conduct of market manipulation. The ECHR first examined the application of the Art. 6 of the Convention (right to a fair trial). This rule has civil limb (civil rights and obligations) and criminal limb (criminal sanctions). The ECHR has invoked its consistent case-law that the existence of a "criminal charge" requires verification of three elements: the legal classification of the measure in national law, the nature of the measure and the nature and severity of the sanction[22]. These criteria are alternative and not cumulative. In the case, the conduct of market manipulation investigated by the competent authority does not constitute a criminal charge (under Italian law). The facts were punished with an "administrative" sanction. But the qualification given by the national law has only a relative value in terms of the applicability by the ECHR Court of Article 6 of the Convention in its criminal limb[23].

Deficiency of a fair trial. The Court of the ECHR analysed the sanctions imposed in the area of market abuse and concluded that they are of special gravity and

[17] A.-D. Merville, *Droit financier*, Gualino, 2015, p. 356. Constitutional Council of France formerly decided that double penalties, as they have different nature, are allowed and principle *non bis in idem* is not infringed, Decision 89-260 DC (Constitutional Council) from 18.07.1989.

[18] French Monetary and Financial Code, Art. L 621-16, quoted after https://www.legifrance.gouv.fr

[19] Constitutional Council of France, Decision no. 2014-453/454 QPC and 2015-462 QPC din 18.03.2015 - *John L. Daimler AG and others*, quoted after http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2014-453/ 454-qpc-et-2015-462-qpc/version-en-anglais.143599.html.

[20] *Grande Stevens v. Italia*, Case no. 18640/10, ECHR Judgment from 4.03.2014, quoted after https://hudoc.echr.coe.int.

[21] Directive 2003/6/EC, Article 14, which invited the member States of the European Union to apply administrative sanctions against persons responsible for manipulating the market, contained in turn the phrase "without prejudice to the right of Member States to impose criminal sanctions". The provision is now in Regulation (EU) no 596/2014 (MAR), Art. 30 para (1) that replaces the Directive.

[22] *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22.

[23] *Öztürk v. Germany*, 21 February 1984, § 52, Series A no. 73.

are of a criminal nature which leads to the application of Art. 6 § 1 of the Convention in its criminal limb. The requirements of a fair trial are stricter in the sphere of criminal law. The absence of a hearing is mainly the weakness of the proceedings before the competent authority. The Court concludes that the procedure before the authority, in the light of the classification of sanctions as criminal, is not satisfactory[24].

Independent and impartial tribunal condition. The Italian authority has an investigation office and the commission itself. The ECHR considers that they are departments of the same administrative body, acting under the authority of a single president. In this way the investigative and sanctioning functions are cumulated by a single body. In criminal matters such a combination of functions is not compatible with the requirements of impartiality laid down by Article 6 § 1 of the Convention[25].

Non bis in idem. ECHR has found that the unlawful conduct of market abuse is the same thing in administrative and criminal proceedings which means a double prosecution and breach of the Convention[26].

ECHR conclusions concern the regulatory capital market system of Italy and of all EU Member States that share the same legislation in the field. ECHR judgment is equally valid in its conclusions in Romania (lack of a fair trial, non-compliance with the requirement of the independent and impartial tribunal, *non bis in idem* in administrative and criminal proceedings for market abuse).

6. Conclusions

Judgment of the ECHR did not draw its conclusions, but dissenting opinion (partly concurring, partly dissenting opinion) pointed more precisely the context of the controversy.

European States are confronted with a dilemma. In order to ensure the integrity of European markets and to enhance investor confidence in those markets, States have created very broad administrative conduct-based offences, which punish the abstract risk of harm to the market with severe, undetermined pecuniary and non-pecuniary penalties, which are classified as administrative sanctions and applied by "independent" administrative authorities in inquisitorial, unequal and prompt proceedings. These authorities combine punitive and prosecutorial powers with a broad power of supervision over a particular sector of the market, and exercise the latter in such a way as to pursue the former, sometimes imposing on the supervised/suspected person an obligation to cooperate in the bringing of charges against him or her.[27]

Access to a subsequent court in administrative proceedings is only an evasive guarantee that does not compensate the unfairness of the procedure.

The conclusion of the divergent opinion of the ECHR is that market pressure cannot prevail over international human rights obligations of States bound by the Convention (ECHR).

We expect that this judgment will provide the domestic courts with an opportunity to deliver full justice to the applicants, and the Italian legislature with the incentive to remedy the structural deficiencies in the administrative and judicial procedure for the application and review of administrative sanctions by the CONSOB [Italian authority for Capital Market]. If the Italian legislature is up to this challenge, its work could provide an example of cross-fertilization to other legislatures which are faced with a similar systemic problem[28].

References

- St. D. Cărpenaru, *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2016
- St. D. Cărpenaru et al., *Legea societăților. Comentariu pe articole.* Bucharest: C.H. Beck, 2014
- C. Duțescu, Legea privind piața de capital. Comentarii pe articole, Bucharest: C.H. Beck, 2009
- I.L. Georgescu, *Drept comercial român*, Bucharest: All Beck, 2002
- Cristian Gheorghe, *Drept comercial român*,, Bucharest: CH Beck, 2013
- Cristian Gheorghe, *Dreptul pietei de capital*, Bucharest: CH Beck, 2009
- C. Hamangiu, I.Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român*, Bucharest: All, 1996
- N.K. Kubasek et al., *The legal environment of business*, Prentice Hall, Upper Saddle River, New Jersey, 1996
- A.-D. Merville, *Droit financier*, Issy-les-Moulineaux: Gualino, 2015
- O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003
- T. Prescure, N. Călin, D. Călin, *Legea pieței de capital, Comentarii și explicații*, Bucharest: C.H. Beck, 2008
- I. Tanoviceanu, *Tratat de Drept și Procedură Penală*, Tome V, Bucharest: Curierul Judiciar, 1927

[24] *Grande Stevens v. Italia*, para (123).
[25] *Piersack v. Belgium*, 1.10.1982, §§ 30-32, Series A no. 53 and *De Cubber v. Belgium*, 26 October 1984, §§ 24-30, Series A no. 86.
[26] *Grande Stevens v. Italia*, para (227), (228).
[27] *Grande Stevens v. Italia*, Case no. 18640/10, Partly concurring, partly dissenting opinion of judges Karakaş and Pinto de Albuquerque, para (32).
[28] Ibidem, para (33).