

The right to information and the capital market

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Abstract

The right to information, the citizen's fundamental right, must be regarded as a right whose scope is wider, to the extent of social evolution. More and more often, the need for individual information is observed in the most diverse areas, including the economic field. In my opinion, economic information cannot be approached without reference to information regarding capital markets. The information provided to investors must be up-to-date, real, not likely to distort the natural course of the market or be manipulative or misleading. Citizens need market information as an individual right to information, but society as a whole needs well-informed citizens with a minimal economic and financial culture, in order to develop harmoniously and avoid potential attacks on system stability. A relevant, accurate and current piece of information provides the investor with protection and gives him the opportunity to make informed economic and financial decisions. Also, free movement of capital market information, within the limits of competition rules, provides the guarantee of a stable, fair and risk-free market.

Keywords: *right to information, capital market, securities, privileged information.*

JEL Classification: K10, K22

1. General considerations

Providing the right to information in the field of financial investments is essential for achieving a fair value market without any abuse or manipulation. In this area also, in my opinion, we can discuss about the bivalence of the right to information: on the one hand, the right of the investor to information, and on the other hand the right of authorities to request information from investment firms, information which, within the legal limits, they make available to the public. Transparency and fair information are the guarantees of a balanced and fair market.

In the economic and financial field, information plays a major role both from the point of view of investors and from the point of view of the supervisory authority. The Report of the Larosière Group (2009) recommends the authorities to regulate the financial sector more severely and effectively so as to create a macro-prudential framework that should ensure an upright market without financial crisis-inducing incidents. The same report recommends increased transparency in financial markets, especially for systemically important investment funds, and setting clear requirements for certain information to be provided to supervisory

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authorities (adopted strategies, used methods, financial impact). This transparency is necessary in order to be able to correctly identify the risks and the investment funds that have "systemic importance".²

Following the report by the Larosière Group, ESMA was set up³ - European Securities and Markets Authority, an independent EU authority that helps protect the stability of the financial system of the European Union by strengthening investor protection and promoting stable and orderly financial markets. ESMA promotes transparency and investor protection by providing information and issuing warnings about potential market risks. ESMA also draws up guidelines for the implementation of European regulations applicable to regulated markets, the directions contained in these guidelines being intended for "market participants" (authorities, investors, issuers, etc.). At the same time, ESMA disseminates good practice and develops guidance in the form of Q & As (questions and answers on important topics).

The Romanian legislation on the capital market⁴ gives particular importance to the information that must be made available to investors so that the latter can understand the risks they expose to when deciding to make an investment. This "essential information" must be decisive for the investor and must be structured in such a way as to define the risks to the latter's understanding.

The National Financial Supervisory Authority (ASF) is bound to regulate the prudential requirements that financial investment firms must meet in order to be able to properly assess risks, provide effective investor protection, and ensure that the financial market is stable and competitive. Transparency in securities markets is aimed at preventing and identifying cases of money laundering or terrorist financing, as well as market abuse.

The supervisory authority must adopt the measures it deems necessary so that the public is properly informed while preserving the confidentiality of data that is not intended to be advertised and is likely to affect fair competition in the market.

Public offers of securities must contain information to enable the investor to make an informed decision: prices, risks, compensation schemes, etc. Companies operating on the securities market are required to comply with the authority's regulations on transparency, investor and authority information, reporting of data requested by the authority, etc.

Given the specificities and risks of the capital market, the legislation establishes an "Investor Compensation Fund", which, in its turn, has obligations on informing the public about a company's impossibility to honour its obligations towards investors and how to compensate them.

² Report from the High Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, page 25, consulted on 11.11.2017.

³ <https://www.esma.europa.eu/about-esma/who-we-are>, consulted on 11.11.2017.

⁴ Law no. 297 of 28 June 2004 on the capital market, published in the Official Gazette, Part I no. 571 of 29 June 2004, as subsequently amended and supplemented.

Market operators have the obligation to provide investors with certain information of public interest, i.e. the rules governing the market on which they operate, quotations and trading volumes. They are also required to establish by their own rules how they manage and transmit information to the public, security measures for the protection of the information held, and what categories of information they make available to investors, in order to ensure minimal transparency. In order to strengthen investors' confidence in financial markets, quick, unbiased and non-selective information is required, with full information being the basis for investors' decisions.

When launching a public offer, statements that advertise must contain "exact, complete and accurate" information that corresponds to the information in the tender. The tender document must contain the information necessary for investors to properly evaluate the bid (operator's financial situation, prospects, etc.), and the summary of the document must be concise, in a language accessible to the public (non-technical), to contain essential information for investors and, if necessary, additional information to protect them. The law establishes clear responsibilities for the "reality, exactness and accuracy of information" made available to the public through the tender document.

At the level of the Bucharest Stock Exchange, a Corporate Governance Code was adopted⁵, applicable on a voluntary basis to companies traded on this market. The Code aims to establish principles that will lead to good governance, transparency, as well as effective protection of investors and of the regulated market. The Code establishes the principle of achieving one effective and active communication between companies and shareholders, recommending that relevant information should be made available to shareholders so that they can exercise their rights in a "fair manner". The Code also establishes the "Corporate Information Regime", setting as a principle the observance of the confidentiality of the documents and information that the administrators and the directors of the companies took notice of during the mandate. Thus, an exception to the free movement of information is in place, meant to protect the financial interests of the company. The Code recommends establishing an internal circuit of information and the procedure by which information is made public, with particular attention being paid to price - sensitive information (likely to influence the market price of securities).

All these European and national regulations guarantee investors' right to information, while ensuring a transparent, efficient and trustworthy market. At the same time, harmonized legislation removes barriers to free circulation of information, prevents the risk of committing illegalities such as market abuse - manipulation of the capital market, unauthorized disclosure of information or misuse of information.

2. Confidential information - privileged information

⁵ <http://www.bvb.ro/info/Codul%20de%20Guvernanta%20Corporativa%20al%20Bursei%20de%20Valori%20Bucuresti.pdf>, consulted on 11.11.2017.

For the proper functioning of the capital market, the information provided to investors is essential in order for them to make the best decisions. The evolution of information technology now allows for borderless, easy access to information for both professionals working in the financial markets and the public. At the same time, there is increasing risk that the rapid communication systems will be spreading false or misleading information to the public.

In order to ensure an integrated capital market at European and national level, regulations were adopted defining information that would have the potential to influence, in a significant manner, the evolution of the market as a whole or of securities traded on these markets.

Directive 2003/6/EC on the abusive use of confidential information and market manipulation (market abuse)⁶, now abrogated, called this sensitive information "confidential information" and defined it as "any information of a precise nature that has not been made public relating directly or indirectly to one or more issuers of financial instruments and which, if disclosed, would be likely to have a significant effect on the course of the financial instruments concerned or on the course of related derivative financial instruments. For persons in charge with the execution of orders concerning financial instruments, "inside information" shall also mean information conveyed by a client and related to the client's pending orders, which is of a precise nature, which directly or indirectly relates to one or more issuers of financial instruments or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such financial instruments or on the price of related derivative financial instruments."

In terms of classifying information as confidential information, it is its precise nature that raises concerns and it is important for it to target an issuer of financial instruments or a financial instrument and to be likely to significantly influence the regulated market. The use of confidential information by natural or legal persons who are aware that it is confidential is transposed into the market in the trading of financial instruments in a speculative way. For the purposes of the Directive, if confidential information is used within negotiations to take over control of a company or to carry out a merger, it is considered to be commercial practice and does not in itself constitute abusive use of confidential information."

Regulation (EU) No 596/2014 on market abuse⁷, which repealed Directive 2003/6 / EC, uses, for information providing unfair advantages on the securities market, the name "privileged information" and devotes a chapter, Chapter II, to

⁶ Directive 2003/6 / EC of the European Parliament and of the Council of 28 January 2003 on abusive use of confidential information and market manipulation (market abuse) - repealed, OJ L 96, 12.4.2003, pp. 210-219.

⁷ Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and for repealing Directive 2003/6 / EC of the European Parliament and of the Council and Directives 2003/124/EC, 2003/125/EC and 2004/72/EC of the Commission (Text with EEA relevance), OJ L 173, 12.6.2014, p.1-61, <http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32014R0596&from=RO> , consulted on 11.11.2017.

"privileged information, abusive use of privileged information, unauthorized disclosure of privileged information and market manipulation".

Art. 7 of the Regulation defines "privileged information" in a much broader way than the previous definition covered by the Directive, but the general characteristics of this information remain basically the same: it should be precise, refer to issuers or financial instruments, and their disclosure should be likely to materially influence the price of financial instruments and market development.

The legal regulation of such information is aimed at ensuring fair access for investors 'to information, protecting the financial market from abusive manoeuvres which could undermine investors' confidence.

The Regulation sets out the obligation for issuers of financial instruments to publish as soon as possible any inside information related to their business, to keep this information for five years on their website and to publish them "in a way that allows for quick access and complete, accurate and timely evaluation of information by the public."

It can be noticed that the European legislator has placed the investor's right to information on a higher level, and for the dissemination of information through the media, establishes the applicability of the common rules on freedom of the press and freedom of expression. However, if it is found that the information has been disseminated with intent to influence the market or to mislead investors, and the disclosure or dissemination of information has created advantages or benefits, then the special provisions relating to the misuse of information shall apply.

ESMA, in the guidelines for the application of the Regulation⁸, recommended the evaluation of the privileged information separately, taking into account the characteristics of the information analysed, the precise nature and the price-sensitive quality of the information. However, the European authority specifies certain criteria "for the information to be considered" *reasonably expected to be disclosed*", they should be: (i) widely available in a non-discriminatory manner after such disclosure, (ii) contained in an official statement and not in a private or personal opinion or analysis, and (iii) not be rumours or speculative statements".

The Regulation also sets out exceptions to the regime for the immediate publication of privileged information, namely "postponement of privileged information disclosure". As can be seen, it is only a delayed disclosure of information, which can only be done under certain well-defined conditions: the issuer can ensure the confidentiality of such information, the deferment is not likely to deceive or mislead the public, and it should be justified by legitimate interests.

⁸ MAR Guide - Information on commodity derivatives financial instruments or on related spot markets to define privileged information on commodity derivatives financial instruments, https://asfromania.ro/files/capital/regulamente_europene/2017/ghid-esma-MAR-2016-1480_ro.pdf, consulted on 11.11.2017.

ESMA also issued a guide on postponing the disclosure of inside information⁹, which presents a "non-exhaustive and indicative list of the issuers' legitimate interests" as well as "situations in which postponement of privileged information disclosure is likely to mislead the public."

Another distinct situation the Regulation envisages and which restricts access to information is that of postponing the "disclosure of inside information for credit institutions or financial institutions" provided that the supervisory authority has expressed its consent. The legislator's reasoning is that, in exceptional circumstances, the public interest as a whole should be protected and, in particular, the stability of the financial system should be maintained. The analysis of these "exceptional circumstances" should be done by balancing the "general public and economic interest" and the right to information of market participants. When by postponing disclosure, the collapse of a system (for example, solvency crises) is avoided, it can be argued that the public interest is superior to the market interest in receiving this information, thus justifying this limitation of the right to information.

In the Romanian legislation, by means of the regulations issued by the Financial Supervisory Authority, the attributes of the privileged information¹⁰ are: the "precise nature" of information and the "significant impact on the price" of financial instruments.

3. Market abuse and market handling

In order to maintain the integrity of capital markets and increase the confidence of investors, transparency in these markets and the proper dissemination of information is necessary. At an European and national level, the legislation provides for clear regulation to combat the misuse of confidential information and market manipulation.

Market abuse and manipulation are based on the misuse of information. Dissemination of false or misleading information, failure to publish privileged information on time, issuing orders that will not be executed represent market manipulation techniques.

The fact that information circulates much faster and without barriers in the context of technological development has led to an increased concern for the legislator to include explicit definitions about the disclosure of confidential information via the Internet or blogs as well as the dissemination of false or misleading information on these channels. Thus, from the point of view of illegal practices, the information transmission channel is not relevant, but rather the result, that is if it harms the investors' rights and if it meant to affect the regulated market.

The dissemination of information that has the potential to manipulate the market is dangerous for both issuers and investors, because once the information

⁹ MAR Guide - Postponing the publication of privileged information, https://asfromania.ro/files/capital/regulamente/2016/esma-2016-1478_ro.pdf, consulted on 11.11.2017.

¹⁰ <https://www.bvb.ro/info/Rapoarte/Ghiduri/ghidul%20companiei%20listate%20RO%20web.pdf>, consulted on 11.11.2017.

has been disseminated in public space, it is very difficult to counter it and the effects can persist in the market for a long time.

Art. 1 of Directive 2003/6/ EC on abusive use of confidential information and market manipulation (market abuse), currently repealed, defined "market manipulations", stating that "the definitions of market manipulation are adapted to include new behaviours that are actually manipulations market. "

With the adoption of Regulation (EU) No. 596/2014 on market abuse the following have been distinctly defined: the misuse of privileged information, the unauthorized disclosure of inside information, market manipulation.

As we have shown in the previous section, in order to avoid abuse use or manipulation of inside information, it is necessary for them to be published by the issuer as soon as possible in order to guarantee the integrity of the market and the fair treatment of investors.

ESMA, in Questions and Answers on the Market Abuse Regulation (MAR)¹¹, specifies the conditions under which the postponement of the disclosure of inside information is not abusive or manipulative, namely „i) the disclosure of confidential information entails the risk of undermining the financial stability of the issuer and of the financial system, ii) it is in the public interest to delay disclosure, and iii) information confidentiality can be ensured." If the issuer does not meet these conditions, and late disclosure may mislead investors, we are in a situation where the issuer can be held accountable for market manipulation. Also, if the information for which postponement of the disclosure has been ruled out, it loses one of the characteristics of inside information (for example, price sensitivity disappears), then the issuer is no longer subject to the provisions of the Regulation and is no longer required to disseminate information to the public.

The regulation expressly states "the ban on market manipulation" and the "prohibition of abusive use and unauthorized disclosure of inside information", and sets administrative penalties and other administrative sanctions in case of violation of these provisions.

Law no. 297/2004 regarding the capital market incriminates as an offence the perpetrating of the facts provided by art. 245-248, respectively, market manipulation activities, unauthorized disclosure of insider information and misuse thereof.

By Decision No. 865/2013¹², on "The offence of capital market manipulation. Regulated Market ", delivered in open session on 13.03.2013, the Criminal Section of the High Court of Cassation and Justice, has ruled in judicial practice, in the light of the judgment of the Court of Justice of the European Union on the offence of capital market manipulation (Second Chamber) dated 22 March 2012 in Case C-248/11, that the constituent elements of the market manipulation offence are met only when it is a regulated market, as defined in Article 125 of

¹¹ Questions and Answers on the Market Abuse Regulation (MAR), https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf, consulted on 11.11.2017.

¹² <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=83707>, consulted on 12.11.2017.

Law no. 297/2004. Thus, the use of privileged information targeting issuers or financial instruments on an unregulated market¹³ cannot be classified as a market manipulation activity. An unregulated market is not subject to the transparency and reporting rules of the supervisory authority. However, the existence of an unregulated market can jeopardize the integrity of the capital market and undermine the confidence of investors.

Regulation 596/2014 sets out rules for "preventing and identifying market abuse" so as to ensure the transparency and integrity of the financial market. Investment firms and market operators are required to inform the supervisory authority immediately of potential market abuse, including in the attempt phase. Authorities are also required to monitor how the rules of the regulated market are observed and must obtain without undue delay all the information necessary to investigate any and all abusive practices that are likely to throw the market out of gear.

4. Conclusions

The citizen's right to information is an increasingly dynamic right and whose limits are changing more and more often, along with technological progress and social evolution.

Starting from the generically called "public interest" information, access to useful information is regulated in more and more sectors of social life and limitations of the right to information are set. It is very important for the citizen to be aware of these rights in order to be able to exercise them knowingly.

As shown, in the regulated markets information plays an essential role and its preferential, abusive or misleading use is likely to harm the interests of investors because the trading decision could be based on inaccurate or distorted information, but also the market as a whole, because it lowers confidence in market participants and they, in turn, can be affected by limiting access to credit, damaging their good reputation in the market, etc., unwanted effects that can persist and affect the integrity of the market and investor protection.

These sensitive areas, regulated markets, require the adoption of such strict rules meant to confer prudential nature and to set out well-defined conduct rules so as to prevent abusive behaviour.

The rules guaranteeing access to information as well as those limiting access to information on the capital market need to be rigorously regulated in order to create a prudential legal framework to prevent illicit speculation with financial instruments. These rules of conduct on the regulated market (operating mode,

¹³ An example of such a market is RASDAQ, a market where shares of some issuers who did not meet the conditions to be traded on the BSE - regulated market were trading. Law no. 151/2014 clarified the legal status of the shares traded on RASDAQ or on the market of unlisted securities, thus achieving harmonization with the European legislation and the provisions of Law no. 297/2004.

market access, transaction mode) are likely to encourage fair competition and provide the framework for monitoring compliance with any and all regulations.

Certainly, the guarantee of investors' right to information does not remove the obligation to observe professional secrecy, the confidentiality of data obtained through the nature of service duties, and the protection of personal data. Also, preventing the misuse of privileged information should not harm freedom of the press and freedom of expression.

A transparent capital market where information circulates freely and fairly to all participants guarantees a fair business environment, prevents obtaining unfair advantages for certain individuals or legal entities, and provides reliable financial services.

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