Chapter 10

Capital Markets and Commodities Exchange

I. Capital Markets

1. General

Capital market regulations underwent an important evolution after 1994, when the first law regarding securities and stock exchanges was adopted. This law was preceded, one year before, by a Government ordinance on open-end *investment funds and investment companies*.

On that occasion, the National Securities Commission was established as an autonomous administrative authority under Parliamentary control, and vested with the duty of regulating and overseeing the Romanian capital market.

Several capital market crises, mainly consisting of the collapse of some investment funds in the '90s, as well as of the sharpening of conflicts between majority and minority shareholders within publicly owned companies, entailed a re-examination of the primary and secondary legal framework in the field, along with the strengthening of the National Securities Commission's powers.

Consequently, based on the experience and corresponding regulations in force in the European Union Member States, new enactments were adopted in 2002, aiming to govern the legal regime of the stock exchanges, of any transaction unfolding within the stock exchange, as well as the activity carried out by the specific institutions of the capital markets.

The legal framework established in 2002 lasted for only two years. To cope with the constraints related to Romania's admission into the European Union, as well as the constant evolution of EU directives in the field of capital markets, especially concerning public offerings and passport requirements, Parliament passed Capital Markets Law No. 297/2004.

In 2012, the Financial Supervisory Authority ("FSA") was set-up via Emergency Government Ordinance No. 93/2012 regarding the establishment, organization and functioning of the Financial Supervisory Authority, as an independent autonomus administrative authority, with legal capacity, taking over all duties and prerogatives of the National Securities Commission, the Insurance Supervisory Commission and the Private Pensions System Supervisory Commission, which were wound-up.

In 2015, Romania aligned its legal framework to the EU Directive 2011/61 on Alternative Investment Fund Managers (the "**Directive**"), which aimed to create a comprehensive and effective regulatory and supervisory framework for alternative investment fund managers within the EU. The scope of the Directive is broad; it captures the management and the marketing of alternative investment funds or "AIFs" (*i.e.* most vehicles that would be regarded as "funds", as well as vehicles that one might not think of as a "fund" at all). Managers of AIFs, otherwise known as "AIFMs", who are established in the EU require authorisation. Thus,

an EU AIFM that cannot rely on an exemption from the Directive needs to obtain authorisation from its home regulator in order to manage AIFs.

Taking into account the Directive, our capital markets legislation has new provisions regarding the managers of alternative investment funds (AIFMs) contained in Law No. 74/2015 regarding the managers of alternative investment funds, and FSA Regulation No. 10/2015 on managing the alternative investment funds.

2. Main regulations

- Law No. 297/2004 on the capital market, with subsequent amendments ("**Law No. 297/2004**");
- Government Emergency Ordinance No. 25/2002 approving the National Securities Commission's Statutes, with subsequent amendments ("**GEO No. 25/2002**");
- Government Emergency Ordinance No. 93/2012 regarding the establishment, organization and operations of the Financial Supervisory Authority ("**GEO No. 93/2012**");
- Law No. 113/2013 for the approval of GEO No. 93/2012 regarding the establishment, organization and operations of the Financial Supervisory Authority ("**Law No. 113/2013**");
- Government Emergency Ordinance No. 32/2012 regarding the Undertakings for Collective Investments in Transferable Securities and investments administration companies, as well as for amending and supplementing Law No. 297/2004 regarding the capital market ("**GEO No. 32/2012**");
- Law No. 151/2014 regarding the clarification of the legal status of shares traded on the RASDAQ Market or on the unlisted securities market ("**Law No. 151/2014**");
- Law No. 74/2015 regarding the managers of alternative investment funds, as amended to date;
- FSA Regulation No. 10/2015 on managing alternative investment funds, as amended to date.

3. Capital market structure

The main players on the capital market are private legal entities and/or individuals, as well as entities without legal personality having specific functions and purposes. Such entities are as follows:

(i) regulated markets and their operators, as well as alternative transaction systems and their operators;

(ii) issuers of securities;

(iii) financial investment services companies;

(iv) investment consultants;

(v) rating agencies for issuers and their securities;

(vi) the Central Depository;

(vii) clearing houses, central counterparts and settlement agents;

(viii) the Investors' Compensation Fund;

(ix) investment management companies;

(x) depositories;

(xi) undertakings for collective investment in transferable securities ("UCITS"):

(a) open-end investment funds;

(b) investment companies.

The FSA has been created as an integrated authority of the financial sector comprising capital markets, insurance and the private pension funds, allowing the implementation and application of a sole set of supervision rules for the capital market, insurance and the private pension funds.

Supervisory activity conducted by FSA concerns the activity of financial instruments, the UCITS, the financial instruments market, the Central Depositary, the market operations; and of the issuers, insurers, reinsurers, insurance and reinsurance intermediaries and of other activities in connection with these, as well as the private pension system's activity. This supervisory activity is conducted through:

(i) granting, suspension, withdrawal or refusal to grant authorisations, approvals, notices, certificates, waivers;

(ii) issuance of regulations;

(iii) carrying-out the control over the abovementioned entities, and the operations conducted by the same, based on references and inspections;

(iv) issue measures and apply sanctions.

The FSA is directed by a council formed of 9 members appointed by Parliament based on the joint proposal of the Special Commissions from the Chamber of Deputies.

As integrated authority of the financial sector, the FSA is subrogated in all rights and obligations arising from regulations, contracts, conventions, agreements, protocols, memoranda, arangements and others, as well as in all litigation where the National Securities Commission, the Insurance Supervisory Commission and the Private Pension System Supervisory Commission were involved as parties. Also, the contracts, conventions, arrangements, protocols, memorandums, agreements concluded by the authorities which were abolished on the date of adoption of EGO No. 93/2012, maintain their effects and are taken over by the FSA.

As mentioned above, the FSA is an autonomous administrative authority, with legal personality, which oversees and regulates the capital market, the commodities and derivatives regulated market, and whose fundamental objectives are to:

(i) establish and maintain the proper framework necessary for the development of regulated markets;

(ii) promote trust in financial instruments markets and in financial instrument investments;

(iii) ensure the protection of operators and investors against unfair, abusive and fraudulent practices;

(iv) promote fair and transparent operation of the financial instruments markets;

(v) prevent fraud, market manipulation and ensure the integrity of financial instruments markets;

(vi) establish standards of financial soundness and honest practice in the financial instruments markets;

(vii) adopt any necessary measures to avoid systemic risk on the financial instruments markets;

(viii) prevent any influence upon equality in information and the treatment of investors and their interests.

In order to fulfil its legal objectives, the FSA issues individual acts in the form of authorizations, approvals and orders. As for FSA regulations, these can take the form of decisions, regulations, norms and instructions.

Additionally, the FSA may perform, upon request or *ex officio*, an official interpretation of all regulations issued by it which are applicable to regulated and supervised entities.

Distinctly from the prerogative of officially construing its own regulations, the FSA is allowed to issue notices consisting of official answers in matters concerning the law, and the enforcement of a secondary legal framework, or to formulate estimates regarding regulated markets and financial instruments. In case of disputes, the individual acts issued by FSA with reference to its official interpretations may be challenged with a second-degree appeal before the Supreme Court of Justice, Administrative Division. Until the court renders a final and binding award, the enforcement of the FSA's decisions is not suspended.

4. Regulated markets and their operators

Soon after the enactment of the first piece of securities legislation, two regulated markets emerged. In 1995, the Bucharest Stock Exchange was the first regulated market established in Romania. Soon after, in 1996, the RASDAQ market was established, as an over-the-counter (OTC) market, based on the American NASDAQ market pattern, and was destined to list the companies comprising the Mass Privatization Program.

In 2004, the Bucharest Stock Exchange and the RASDAQ market agreed on a merger and started a merger process that ended on December 28, 2005. The result was the establishment of the Bucharest Stock Exchange (*Bursa de Valori Bucuresti S.A.*), acting as a joint-stock company under the supervision of the former National Securities Commission (currently the FSA).

Further regulated markets can be established based on a FSA authorization, managed by a market operator organized as a joint-stock company. The shareholders of a market operator are not allowed to hold each more

than 20% of the voting rights. Each member of the market operator's board of directors must be validated by the FSA before entering office.

Through Law No. 151/2014, it was decided that RASDAQ Market would be dissolved beginning October 2015. All the companies listed on the above mentioned securities market should have decided by the end of February 2015, via general shareholders' meetings, either a listing on the Bucharest Stock Exchange Regulated Stock Market/Alternative Trading System (ATS) or the delisting of the company.

Based on the Bucharest Stock Exchange alternative trading system existing since 2010, a new market, named AeRO, was launched on February 25, 2015. AeRO is a designed for listing early stage companies, start-ups and SMEs, to finance their projects, increase their visibility and contribute to the development of the business environment.

The market operator is entitled to issue its own regulations regarding the organization and operation of this market, approved by the general shareholders meeting of the operator, and afterwards endorsed by FSA.

The market operator can also establish an arbitration court meant to settle disputes between brokers and/or issuers.

5. Supervision of regulated markets

Regulated markets are supervised by the FSA, which may appoint an inspector for such purposes. The inspector's main task is to oversee securities operations carried out on regulated markets, with free access to all premises and documents, information and records.

The inspector participates in meetings held by the market operator's corporate bodies, and may propose to the FSA the amendment of regulations issued by the market operator, suspend part or all of the operations with financial instruments on the regulated markets, or cancel the authorization granted to a market operator.

6. Listing of securities

Regulated markets list securities and other financial instruments based only on a prospectus drafted by the issuer and approved by the FSA.

An issuer whose securities are admitted on a regulated market must observe the market transparency requirements.

In order to be listed on a stock exchange, companies must fulfill basically the following minimal requirements:

(i) to have an anticipated stock exchange capitalization of a minimum of EUR 1,000,000, denominated in RON, or a share capital representing the RON equivalent of at least EUR 1,000,000, to the extent that the stock exchange capitalization value may not be anticipated;

(ii) to have operated during the latest 3 years prior to its listing, and to have published its annual financial reports for the same period;

(iii) at least 25% of its shares must be offered through the listing. In case the offering is of less than 25% of the company's shares, the normal functionality of the stock market must be ensured through a large number of offered shares and through a sufficient dispersion among the public.

7. Public offerings

Any public offering of securities must be authorized by the FSA prior to the publication of the announcement and/or the prospectus.

The valid term of a public offering is the one stipulated in the announcement and the prospectus, but may not exceed certain periods prescribed by law (ex: 12 months in case of the public sale offering). The law regulates the following types of public offerings:

(i) a public sale offering;

(ii) a public purchase offering (i.e. the offer of a person to purchase securities, publicly made to all existing shareholders);

(iii) a public voluntary takeover offering (i.e. the offer of a person who is not legally compelled to perform such an offer, which is made to all existing shareholders, for all their stock, with the purpose of acquiring more than 33% of the voting rights of a listed company);

(iv) a public compulsory takeover offering (i.e. the offer of a person who, subsequent to its prior acquiring operations, holds (directly or indirectly) more than 33% of the voting rights and must therefore launch a public offering to all existing shareholders for their entire stock, no later than 2 months after reaching the 33% threshold);

(v) a public offering made in order to allow the squeeze-out or sell-out of minority shareholders.

In a public voluntary takeover offering it is important to emphasize that, starting when the offeror's preliminary notice is received, the board of directors of the target company may not conclude any acts or deeds or take any measures that might materially affect the company's assets or the objectives of the takeover, except for acts in the ordinary course of the business, those expressly approved by the extraordinary general meeting of shareholders, and those resulting from obligations undertaken before the takeover notice was published.

8. Special governance rules for listed companies

In order to protect investors, the law sets up rules departing from the companies' customary legal framework, applicable to publicly owned companies, among which the following are the most important:

(i) shareholders holding individually or together with other persons at least 5% of the shares issued by the publicly owned companies may require the company's financial auditors to present reports on the company's management status and operations;

(ii) the general shareholders meeting of publicly owned companies is convened by publishing the convening notice, and by notifying both the FSA and the regulated market where the company is listed;

(iii) the members of the board of directors of publicly owned companies may be elected by cumulative voting. Upon the request of a significant shareholder, an election based on such a method is mandatory;

(iv) the auditors of publicly owned companies must supervise and check upon the company's bookkeeping as well as the accuracy and opportunity of the transactions or acts concluded by such a company, with its affiliated persons or persons involved therewith;

(v) the term for dividend payments to shareholders cannot exceed 6 months from the date when the general shareholder meeting establishes such dividends;

(vi) the decision of the general shareholder meeting for the establishment of dividends must be filed with the trade registry, for registration purposes, and published in the Official Gazette, Part IV. The decision shall constitute an enforceable title, based on which the shareholders may start forced execution proceedings against the company;

(vii) any acts meant to acquire, alienate, exchange or create encumbrances over fixed assets of the company, whose value exceeds either individually or cumulatively, throughout a financial year, 20% of the total fixed assets, except for receivables, can be concluded by the company's directors only based on the prior approval of the shareholders' extraordinary general meeting;

(viii) any increase of the company's share capital by new contributions, either in cash or in kind, should observe the preference right to all the company's shareholders.

9. Market transparency and investor equality

Investors have the right to access information that is accurate, sufficient and made public at the appropriate time on securities, their issuers and activity thereof, financial investment services companies, regulated markets, institutions and persons who are professionally involved in the securities business.

Publicly owned companies should draft and make available to the FSA, the market operator and the public quarter, biannual and annual reports. In the event of a material event, publicly owned companies must prepare current reports within 48 hours.

The law forbids any action meant to manipulate the market, and any transactions based on privileged information.

No holder of privileged information is allowed to acquire or transfer, for himself or for other persons, either directly or indirectly, securities or other related rights, on which he holds such privileged information, or to value such privileged information in any other way, or to transmit the same, or facilitate its publication for their personal benefit or for the benefit of any third party.

10. Investors' Compensation Fund

The Investors Compensation Fund (the "Fund") is a legal entity organized as a joint-stock company, based on a constitutive act approved by the former NSC.

The purpose of the Fund is to compensate investors in such cases when the financial investment services company is unable to return the proceeds or financial instruments owed to or belonging to the investors, which were managed in their name for financial investment services purposes.

11. Financial investment services companies

Financial investment services companies may provide, *inter alia*, the following services:

(i) Main services:

- sale or purchase of securities and other financial instruments, on the clients' account;
- sale or purchase of securities and other financial instruments on their own account;
- management of portfolios

(ii) Related services:

- holding funds and/or securities and other financial instruments;
- granting loans in cash or in financial instruments to investors;
- advisory services given in relation to capital structure, industrial strategy, mergers and takeovers.

The type of authorization issued by the FSA to the financial investment services company should expressly stipulate the financial investment services that the company can provide.

The minimum subscribed and paid-up capital of financial investment services companies varies depending on the category of services each company is authorized to provide.

Financial investment services companies carry out brokerage activity through individuals, employees or representatives, acting as financial investment agents.

An internal control department operates within each financial investment services company, whose personnel, authorized by the FSA, are responsible for compliance by the company and its employees with the law and capital market regulations, as well as with the company's internal regulations.

Financial investment services companies are bound to strictly observe market conduct rules, as required by law and the FSA regulations. To meet this goal, the companies and their agents should:

(i) act with due professional diligence and honesty in order to protect their clients' interests and market integrity;

(ii) develop all internal resources and procedures necessary to provide financial investment services;

(iii) require from their clients information on their financial status, investment expertise and specific objectives of the required service, in order to provide the best services possible;

(iv) in dealings with the clients, make adequate disclosure of all material information relevant for investment decisions;

(v) comply with all rules and customs applicable to the provision of financial investment services so as to protect the best interests of the clients and the integrity of the market;

(vi) avoid fulfilling their functions and powers in cases of conflict of interests as regards the clients.

Based on the freedom to provide services within the European Union, financial investment service companies headquartered in a Member State of European Union may provide financial investment services on Romanian territory, either directly under the free provision of services or through branches established for this purpose under the right of free establishment, within the limits of the authorization issued by the competent authority in the Member State of origin, with no prior authorization of the FSA required in this respect.

Under reciprocity conditions, by departure from the provisions of the existing legal framework, financial investment service companies headquartered outside the European Union may provide financial investment services on Romanian territory through subsidiaries established for this purpose. Nevertheless, the establishment of such subsidiaries is subject to the FSA's authorization.

12. Investment consultancy services

Investment consultancy services include, *inter alia*:

(i) analysis of financial instruments;

(ii) analysis of regulated markets;

(iii) consultancy services in relation to mergers, acquisitions, take-overs, capital structure, economic strategies, financing schemes and the like.

Professional investment consultancy services may be carried out by investment consultants, individuals or legal persons, only based on the FSA authorization.

13. The Central Depository

The Central Depository is a joint-stock company, authorized and acting under the supervision of the FSA, which performs securities transactions clearing and settlement operations, securities depositing operations, as well as other related operations.

The shareholders of the Central Depository are not allowed to hold each more than 5% of voting rights, except for market operators who may hold up to 75% of the voting rights. Each member of the market operator's board of directors must be validated by the FSA before entering office.

The Central Depository also serves as a vehicle for security interests.

Financial instrument accounts kept in open accounts by the Central Depository must be recorded in such a manner so as to clearly distinguish them from assets held by the Central Depository's own account, and cannot be subject to any claims made by the Central Depository's creditors.

14. Financial auditors

The financial and operational reports of each entity subject to FSA authorization, supervision and control must be prepared in accordance with the legal framework in force and the specific regulations issued by the Ministry of Public Finance and the FSA.

Financial reports will be audited and certified by duly authorized financial auditors, who are members of the Romanian Financial Auditors Chamber.

15. Undertakings for Collective Investments in Transferable Securities

Undertakings for collective investments in transferable securities are open-end investment funds and investment companies, which mainly direct their resources towards investments in securities.

These two types of bodies authorized and monitored by the FSA feature the following:

(i) have as a sole goal to mobilize collective savings through continuous public offering of participation titles, and to place such resources based on risk-diversification and prudential management principles;

(ii) ensure continuous direct or indirect redeemable status of the participation titles from the assets of such entities, upon the holders request.

An open-end investment fund is set up based on an association contract, and consists of all proceeds raised under a continuous public offering of fund units, of purchased assets and of benefits resulting from placing such resources in a diversified securities portfolio.

Open-end investment funds may not issue other financial instruments, except for fund units. Investors may subscribe to whole fund units or to fractions of them.

Investors may purchase fund units at the issuance price, computed against the net asset value and valid on the purchase day. Fund units are redeemed upon request against a price reflecting the value computed by the depository, with strict observance of the FSA regulations.

An investment company is set up as a joint stock company, acting solely to invest in securities of the financial resources obtained exclusively through issuance and sale of its own shares to the public.

Investment management companies, authorized by the FSA, act mainly to managr undertakings for collective investment in transferable securities established in Romania or in other Member States.

In addition to the management of undertakings for collective investment, the following activities may be carried out by investment management companies:

(i) individual portfolio management, including the management of those owned by pension funds, in accordance with mandates given by investors on a discretionary basis, where such portfolios include one or more financial instruments;

(ii) non-core services:

  (a) investment advice concerning one or more financial instruments;

  (b) safekeeping and management in relation to units of undertakings for collective investment.

The investment management company and the depository should act independently, and exclusively in the interest of the participation title holders.

Investment management companies must:

(i) operate with full professional diligence, correctness and transparency in the exclusive interest of the participation title holders;

(ii) organize so as to minimize the risk of conflict of interests, including conflicts between the various undertakings for collective investments in transferable securities under its management;

(iii) take steps for the protection of the participation title holder rights;

(iv) strictly comply with the prudential regulations issued by the FSA.

Depositories are credit institutions, authorized by the FSA, to whom are entrusted the assets of undertakings for collective investments in transferable securities, for their safekeeping and who oversee the operations of investment management companies.

A depository may be a Romanian banking company, or the branch of a European credit institution, providing that it displays sufficient professional guarantees, an adequate share capital and a management structure to carry out in proper conditions its depository activity in order to meet the commitments incumbent on it.

The depositories must:

(i) ensure that the sale, issue, repurchase, redemption and cancellation of units are effected on behalf of the undertaking for collective investment in transferable securities by an investment management company, or by another entity in accordance with the applicable legal provisions, and the constitutive acts of the investment company;

(ii) ensure that the value of the units is calculated in accordance with the fund rules/constitutive acts of the investment company and applicable legal provisions;

(iii) carry out the instructions of the investment management company or the self-managed investment company, unless they conflict with applicable law or the fund rules/ constitutive acts of the investment company;

(iv) ensure that in transactions involving assets of an undertaking for collective investment in transferable securities, any amount is paid within the established time limits;

(v) ensure that an undertaking for collective investment in transferable securities income is applied in accordance with the applicable laws and the fund rules/constitutive act of the investment company.

II. Commodities exchange

1. General

The legal framework enacted for the commodities exchange, in line with the specific transposed European regulations, reveals several resemblances with the legislation in the field of securities, regulated markets and financial investment services.

2. Main regulations

- Law No. 357/2005 regarding commodities exchanges, amended to date ("**Law No. 357/2005**");
- Law No. 297/2004 on the capital market, amended to date ("**Law No. 297/2004**");
- Bucharest Stock Exchange Code, amended to date ("**BSE Code**").

Since certain aspects related to commodities exchanges are also regulated under Law No. 297/2004 (*e.g.* traders and certain financial instruments subject to transactions on commodities exchanges) the regulatory authority of the capital market – the FSA – is, to a certain extent, involved in the application of Law No. 357/2005.

3. Main features of commodities exchanges

Commodities exchanges are organized as joint-stock companies and self-regulatory bodies and operate under the supervision of the Romanian Chamber of Commerce and Industry. The commodities exchanges purpose is to manage public interest markets, enabling their members and clients to perform commodities markets'

operations, ranging from transactions with certain goods, and warrants for the sale and purchase of commercial receivables.

Based on Law No. 357/2005, commodities exchanges enjoy self-regulatory powers, which issue internal regulations on what concerns managed markets, activities performed by their clients and members, as well as to their own enforcement means. The managing board of the Romanian Chamber of Commerce and Industry must review the draft regulations before adoption.

The share capital for a commodities exchange must represent the equivalent in RON of EUR 1,000,000 and must be subscribed and paid at the time of incorporation, in cash and integrally. Shareholders can be only legal entities.

The board of directors of a commodities exchange has broad powers, *inter alia*, consisting of:

(i) approving the internal regulations of managed markets and submitting thereof to the general shareholders meeting for approval;

(ii) setting the fees payable to the exchange for all registered offers and transactions;

(iii) supervising the conduct of exchange members;

(iv) suspending the transaction rights of exchange members;

(v) suspending or excluding brokers from performing transactions;

(vi) approving the attributes that the chairman of the board of directors of a commodities exchange may delegate.

4. Brokers and brokerage companies

Brokers are individuals, professionally certified by the board of directors of the commodities exchange, and employed by a brokerage company.

Brokerage companies, acting through their brokers, negotiate offers, perform transactions, conclude contracts and are liable for transmitting all information regarding commodities delivery and price payment.

5. Commodities exchange transactions

With a view to achieve their main goal, commodities exchanges develop spot markets and derivatives markets, wherein the following commodities are traded:

(i) tangible replaceable goods, such as: cereals, oil, metals, standardized services and other similar goods, approved by the board of directors of the commodities exchange;

(ii) derivatives, with goods as support assets, representative titles, financial assets and any other support assets approved by FSA;

(iii) commercial receivables.

5.1. Spot markets

Spot markets are exclusively developed by commodities exchanges.

The types of contracts traded on such markets are spot contracts and forward contracts with standardized clauses, and the price is the only negotiable element of these types of contracts.

5.2. Derivatives markets

Derivatives markets are specialized markets, operated by a commodities exchange, wherein derivatives are negotiated and traded in an organized and regulated manner.

The following items are deemed as derivatives: future contracts, option contracts, other similar instruments qualified as such by the FSA, whose support assets include goods, representative titles or financial assets.