THE LEGAL STATUS OF THE SHARES TRADED ON RASDAQ MARKET

Cristian GHEORGHE*

Abstract

RASDAQ Market was launched in Romania in 1996, appeared as a mirroring of the well-established American market NASDAQ (which stood for National Association of Securities Dealers Automated Quotations). The role designated for RASDAQ was as platform for valuing papers issued in the privatization program in Romania (mass privatization process - MPP). In fact the participating companies to MPP had the legal obligation, under first Romanian Capital Market Law, No 52/1194, to be listed on a stock exchange.

Although it attended a US regulatory model, RASDAQ had to adapt to European rules with the accession of Romania to the European Union. The relevant EU rules (i.e., Directive 2004/39/EC on markets in financial instruments – MiFID, about to be replaced by Directive 2014/65/EU – MiFID II) provide for only two types of trading systems, i.e. regulated markets and multilateral trading facilities (MTF), while the RASDAQ Market securities fall under none of these two trading systems regulated by MiFID1.

After an entire decade of uncertainty concerning the status of the RASDAQ, Romanian legislator settled the situation of shares traded on this market. This regulation means the end for RASDAQ. Law No. 151/2014 provides that the RASDAQ Market is to be closed within twelve months as of the effective date of such law (October 27, 2014). To this end companies listed on the RASDAQ Market will have to opt for listing on a regulated market or on a MTF or for becoming private companies. Such option rests on the hands of shareholders. Going private asks for shareholders' rights protection so Romanian Financial Supervisory Authority (FSA) provides a procedure implementing the right to withdraw from the company of the dissenting shareholders and for computing compensation for their shares (FSA Regulation No. 17/2014).

Keywords: *capital market, investments, RASDAQ, multilateral trading facility (MTF), regulated market, shareholders protection.*

1. Introduction

RASDAQ Market was launched in Romania in 1996, with the support of the well-established American market NASDAQ. The role designated for RASDAQ was as platform for valuing papers issued in the privatization program in Romania (mass privatization process - MPP). In fact the participating companies to MPP had the legal obligation, under first Romanian Capital Market Law, No 52/1194, to be listed on a stock exchange, so that most of them got listed on the RASDAQ Market. Subsequently, in 1999, there were about 5,500 Romanian companies listed on RASDAQ making it the European market with the most issuers.

As the mother platform, NASDAQ, evolved from an OTC legal status (over-the-

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

counter or off-exchange trading is done directly between two parties, without any supervision) to a regulated exchange (in 2006, the status of NASDAQ was changed from a stock market to a licensed national securities exchange), RASDAQ itself faced a long time of ambiguities regarded its legal status.

Therefore RASDAQ Market started trading in 1996 under the initial name Electronic Exchange RASDAQ, as a trading platform for shares in state owned companies converted into public companies under the mass privatization program. That market was authorised by decision of the National Securities Commission (CNVM, now become ASF – Financial Supervisory Authority) of 27 August 1996 and thus was regarded as a market organised and regulated by the Romanian competent authorities.

On 1 December 2005, Electronic Exchange RASDAQ merged with Bucharest Stock Exchange, the former being incorporated into the latter as a distinct section. The legal person resulting from that merger, Bucharest Stock Exchange Company (public limited liability company), operated two different markets: the regulated market (Bursa de Valori Bucureşti – Bucharest Stock Exchange) and the RASDAQ Market. The first market (BSE) was then authorised by the competent authority of the market (NSC at that time). That authority, under its statutory powers, also controls and regulates the functioning of the RASDAQ Market, but the latter has not been included in any of the categories of negotiating platforms European rules provided for[1]. Such irregularities were the starting point for long term controversy about the legal status of shares traded on RASDAQ Market. As important rules, i.e. the compulsory offers or market abuse offences, were to be applied on regulated market only, the status of RASDAQ Market knew various interpretations. Even the European Court of Justice was asked to deliver a preliminary ruling regarding the regulated market concept and its meaning.

Although it attended a US regulatory model, RASDAQ had to adapt to European rules with the accession of Romania to the European Union. The relevant EU rules (i.e., Directive 2004/39/EC on markets in financial instruments – MiFID, about to be replaced by Directive 2014/65/EU – MiFID II) provide for only two types of trading systems, i.e. regulated markets and multilateral trading facilities (MTF), while the RASDAQ securities market fall under none of these two trading systems regulated by MiFID1[2].

The judgement of the European Court stated that a market in financial instruments which does not satisfy the requirements laid down by Directive (Title III Directive 2004/29/CE, MiFID 1) does not fall within the concept of 'regulated market', as defined in that provision, notwithstanding the fact that its operator merged with the operator of such a regulated market[3].

In last year was set out the legal procedure to be followed for the clarification of the situation of the shares traded on RASDAQ Market (and of the shares traded

[1] CJEU, C-248/11 Para (19), (20).

[2] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 34-39.

[3] Judgment of the Court of Justice of the European Union (second chamber) in case C-248/11, Criminal proceedings against Rareş Doralin Nilaş and Others, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dbd281f1af23294c8cb5a9a432709a697a.e34kaxilc3qmb40rch0saxukahn0?text=&docid=120763&pageindex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=263962

on the unlisted shares market too)[4]. The assumed purpose of the law is to align the RASDAQ market with Capital Market Law No. 297/2004 and European Law[5].

2. Legal solution. Cessation of the activity of RASDAQ Market.

After an entire decade of uncertainty concerning the status of the RASDAQ, Romanian legislator settled the situation of shares traded on this market. This regulation means the end for RASDAQ. Law No. 151/2014 provides that the RASDAQ market is to be closed within twelve months as of the effective date of such law (October 27, 2014). To this end companies listed on the RASDAQ market will have to opt for listing on a regulated market or, as the case may be, on a MTF or for becoming private companies. Such option stays on shareholders' hands. Going private asks for shareholders' right protection so Financial Supervisory Authority (FSA) provides a procedure implementing the right to withdraw from the company of the dissenting shareholders and for computing compensation for their shares (FSA Regulation No. 17/2014).

3. Shareholders decision

Cessation of activity of RASDAQ Market rise to shareholders decision on the future fate of their company: it will remain on the exchange floor or it will exit the public area and will go private.

The shareholders shall debate on the status of the company as RASDAQ Market wasn't licensed for future operation. They shall make a decision regarding the legal actions to be taken by the company required for the admission to trading of the shares issued by the company. Future trading implies admission on a regulated market or trading within an alternative trading system (ATS or MTF), based on the provision of Capital Market Law No. 297/2004 and regulations issued by the Financial Supervisory Authority (FSA)[6].

In the absence of such a decision for market admission or subsequent to an explicit decision, the company will exit the trading floor and it will go private.

4. Shareholders rights.

The shareholders shall have the right to withdraw from the company if the General Meeting of shareholders resolves that the company takes no legal actions required for the admission to trading of the shares issued by the company on a regulated market or trading thereof within an alternative trading system (ATS)[7]. The same right is recognized if the shareholders decision is not accomplished by any cause.

Right to withdraw is subject to the conditions of Company Law No. 31/1990, as subsequently amended and supplemented[8]. This law recognizes such a right of

[4] Law No. 151/2014 on the clarification of the legal status of the shares traded on RASDAQ Market or on the unquoted securities market.

[5] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

[6] FSA Regulation No. 17/2014 on the legal status of the shares traded on RASDAQ market or on the unquoted securities market, Law No. 151/2014, Art. 2.

[7] Law No. 151/2014, Art. 3.

[8] Cristian Gheorghe, *Romanian Commercial Law*, Bucharest: C.H. Beck, 2013, p. 421.

dissenting shareholders in the case of articles of incorporation alteration if such alterations change the initial incorporation of the joint stock company in an essential manner. Thus the shareholders who do not agree with the decisions of the General Meeting regarding the changing of the main object or the legal form of the company, the moving abroad of the registered office, have the right to withdraw from the company and to receive from the company consideration for the shares they possess, at the average value determined by an authorized expert, by using at least two methods of assessment recognized by the European Assessment Standards[9].

5. **Procedure**

Convening the General Meeting. The board of directors of the companies whose shares are traded on RASDAQ Market must call and take all necessary arrangements for holding the Extraordinary General Meetings of shareholders within 120 days after the entry into force of Law No. 151/2014[10]. All these actions are subject to the conditions of Company Law No. 31/1990[11].

The shareholders debate on the situation created by the extinction of RASDAQ Market and they decide further actions within the new legal framework.

In order to timely and thoroughly inform the shareholders the company's board of directors shall draw up and provide shareholders with a report in accordance with Art. 117^2 of Company Law No. 31/1990 .The report shall comprise at least the legal framework applicable to trading shares on a regulated market or within a multilateral trading facility and a presentation of regulated markets and multilateral trading facilities (ATS) on which the companies' shares may be traded[12].

If the decision taken asks for listing on a regulated market or multilateral trading facility company must follow the steps imposed by such a procedure. Capital Market Law No. 297/2004 and NSC (now FSA) Regulation No. 1/2006 provides an exhaustive set of instructions for admission to a stock exchange. As a result, the company, after the date of adoption of the resolution of the General Meeting of shareholders, shall send FSA the prospectus for the admission to trading, drawn up in accordance with the legal provisions laid down for this procedure[13].

Admission to regulated market. The Extraordinary General Meeting of shareholders may decide the admission to trading on a regulated market. In this situation the company the shares of which are traded now on RASDAQ Market shall fill with the Financial Supervisory Authority (FSA) the request for approval of the prospectus for the admission to trading on a regulated market. Such request shall be submitted within 90 days after the date of adoption of the resolution of the General Meeting of shareholders, in compliance with the regulations[14].

The prospectus for the admission to trading on a regulated market shall be drawn

[9] Company Law No. 31/1990, Art. 134.
[10] Law No. 151/2014, Art. 2 Para (1).
[11] St. D. Cărpenaru, *Romanian Commercial Law Treaty*, Bucharest: Universul Juridic, 2014; Cristian Gheorghe, *Romanian Commercial Law*, Bucharest: C.H. Beck, 2013, p. 361.
[12] Law No. 151/2014, Art. 2 Para (2).
[13] Law No. 151/2014, Art. 6 Para (1).
[14] FSA Regulation No. 17/2014, Art. 3 Para (1), NSC Regulation No. 1/2006, on issuers and operations with securities, as subsequently amended and supplemented, Art. 89 Para (6).

up in accordance with the provisions of Law No. 297/2004 and European Regulation[15].

The company shall also submit to the market operator which runs the regulated market the company intends to be admitted to, a request for admission to trading[16].

The company requesting admission to trading shall send FSA the decision of the market operator regarding the agreement in principle on the admission to trading of securities on the regulated market managed by such market operator. After its analysis of the request for approval of the prospectus, FSA may approve (or refuse) the admission to trading of the shares in accordance with the provisions of Law No. 297/2004[17].

Admission to a Multilateral Trading Facility. The procedure for admission to a trading facility (alternative trading) is very similar to admission to a regulated market. In such case the provisions the company have to comply with are less than in the case of admitting to a regulated market.

The Extraordinary General Meeting of shareholders may decide the initiation of the process for trading the company's shares in a multilateral trading facility (or alternative trading system in American view). In this case the company shall submit to FSA the request for trading in such trading facility (alternative system) together with the system operator's agreement (in principle) on the trading of the shares in the alternative system managed by it.

FSA's decision for admission to trading or refusal of the request for admission to trading in an alternative trading system shall be made based on the regulations applied to alternative trading system[18].

Right to withdrawal. Right to withdraw from the company is recognized for shareholders if the company the shares of which are traded on RASDAQ market is not to be traded on a regulated market or on any alternative trading system once RASDAQ ceases to exist. The term within which shareholders may exercise their withdrawal right is 90 days after the publication of the resolution of the General Meeting of Shareholders in the manner prescribed by the law.

In order to establish the price to be paid by the company for the shares held by the shareholders having exercised their right to withdraw, the board of directors shall request the Office of the Trade Register to appoint an independent authorised expert. This request shall be submitted to the Office within five days following the day of receiving by the company of the first request for withdrawal from shareholders.

The report drawn up by independent expert should be prepared within 30 days after expert appointment and should contain the modalities whereby the shareholders may consult the report and also the price computed by the appointed expert for a share[19].

The company shall inform FSA and the Bucharest Stock Exchange (BSE) through the submission of current reports about all relevant aspects regarding withdrawal procedure, as follows: the registration of the first request for withdrawal, the appointment (by the Office

[15] Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/CE of the European Parliament and of the Council as regards the information contained in prospectuses, as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

[16] FSA Regulation No. 17/2014, Art. 3 Para (3), NSC Regulation No. 1/2006, Art. 94 Para (1).

[17] FSA Regulation No. 17/2014, Art. 3 Para (4), Law No. 297/2004, Art. 214, and Art. 217 Para (3).

[18] FSA Regulation No. 17/2014, Art. 4 Para (1), (2).

[19] FSA Regulation No. 17/2014, Art. 6.

of the Trade Register of the independent expert; the price for one share to be paid to the shareholders intending to withdraw from the company; the deadline for shareholders for submission of the requests for withdrawal from the company.[20]

De-registration with FSA. The company the shares of which are traded on RASDAQ market may decide to go private or fails to complete the procedure for the admission to a regulated market or trading facility. In this case the shares traded on RASDAQ Market shall be withdrawn from trading and deregistered from FSA. The withdrawal rights of the shareholders have to be satisfied first.

De-registering with FSA is the proof that the company is not a subject of Capital Market regulations any longer.

There are many cases, under Law no. 151/2014, when the company the shares of which are traded on RASDAQ Market fails to be admitted to a stock exchange: the companies did not take the actions necessary for holding the Extraordinary General Meeting of shareholders within the 120 days' term laid down by Law No. 151/2014; companies did not hold the Extraordinary General Meeting of shareholders due to the failure to fulfil the legal quorum; the companies did not adopt any decision in the Extraordinary General Meeting of shareholders due to the failure to fulfil the legal majority rules; the companies adopted in the Extraordinary General Meeting of shareholders the decision that the company takes no legal actions necessary for the admission to trading of the shares issued by the company on the regulated market or in an MTF (ATS); companies' request for admission of the shares issued by it on a regulated market or MTF (ATS) was rejected by FSA[21].

Obviously, in all these cases the right of withdrawal of the shareholder is granted in accordance with the provisions of Law No. 151/2014 and the company have to conduct the procedure for withdrawal of the shareholders from the company.

The shares traded on RASDAQ Market shall be withdrawn from trading and deregistered from FSA's records, in the case of the companies which conducted the withdrawal procedure or did not receive any request from the shareholders for withdrawal from the company in all those abovementioned cases.

6. Conclusions

The regulation of RASDAQ Market situation is a radical one. Between the choice of adapting the market in order to fit within the limits of present normative framework and its abolition, with the related options for companies, the legislator chose the last option. The alternative for the companies that are still looking for a trading floor is to apply for admission to established markets that already existed.

Basically the choice is not that difficult: regulated markets in Romania are: Bucharest Stock Exchange (BSE) administrated by the BSE Company (market operator) and SIBEX managed by SIBEX Company (administrator of the market). Alternative trading systems (or MTF) are managed by the same two companies (BVB and SIBEX as system operators).

The chosen normative solution involves carrying out from zero the procedure for admission to trading for companies that decide to follow this path (prospectus for admission to trading, ASF's decision after the approval in principle of the operator concerned). This option involves an

[20] FSA Regulation No. 17/2014, Art. 8.
[21] FSA Regulation No. 17/2014, Art. 9.

administrative effort large enough for the company... And against its inertia: companies need to follow this procedure voluntary, but as the reward is. Besides the benefits of trading usually recognized (visibility, access to a cheaper financial market, secure and easy transfer of ownership of shares, etc.) admission to trading floor allows the company to avoid payment of shareholders' withdrawal rights.

Refusal of admission to trading or failure to complete the procedure draws a considerable burden for the company: obligation to pay the shareholders' withdrawal rights which shall become due once the company behaves in this manner (explicit decision of non-admission, failure of deliberation in assembly, failure of the process of admission to trading).

Although the decision of non-admission to trading belongs to the shareholders majority, not on them press the burden of claims (as in squeeze out/sell-out procedure[22]) but on company. These claims consist in withdrawal rights and they imply on the one hand the uncertainty of determining their fair value (independent evaluation should be performed) and on the other hand, are subject to economic pressure on the company. In fact the impossibility of their payments calls an insolvency procedure so that company may face the dissolution. Even the majority shareholders' may decide to exercise these rights, in such a case the company will cease definitely to exist.

We consider the solution of placing the burden of these rights on the shareholders who decide to keep the company out of the trading market, instead on company itself, would have been fairer. Last but not least, the legislator's intervention is disproportionate as long as the authority (FSA) was able to solve RASDAQ legal status through administrative arrangements. The pendant solution may be qualifying (and authorizing) RASDAQ Market as Multilateral Trading Facility (MTF) with the recognition of a general and time-limited withdrawal procedure from trading together with the recognition of a right of withdrawal from the company for the shareholders in this case. Indecision (perpetuated at least ten years) shown by the FSA has led to present disproportionate legal solution that effectively discourages companies from remaining to trading floor: cessation of the activity of RASDAQ.

References:

- St. D. Cărpenaru, *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2014.
- St. D. Cărpenaru et al., *Legea societăților. Comentariu pe articole. Ed. 5*, Bucharest: C.H. Beck, 2014.
- C. Duțescu, *Legea privind piata de capital. Comentariu pe articole*, Bucharest: C.H. Beck, 2007.
- Francisc Deak, *Tratat de drept civil. Contracte speciale*, vol III, 4th Edition, Bucharest: Universul Juridic, 2007.
- 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.

[22] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 242-247.

- C. Hamangiu, I.Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român,* Bucharest: All, 1996.
- N.K. Kubasek şi a., *The legal environment of business*, Prentice Hall, Upper Saddle River, New Jersey, 1996.
- O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003.
- T. Prescure, N. Călin, D. Călin, *Legea pieţei de capital, Comentarii şi explicaţii*, Bucharest: C.H. Beck, 2008.
- M. Şcheaua, *Legea societăţilor comerciale nr. 31/1990, comentată şi adnotată*, Bucharest: Rosetti, 2002.
- I. Turcu, *Teoria şi practica dreptului comercial român,* Bucharest: Lumina Lex, 1997.