

# Comments on the criminal protection of the capital market in Poland

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## I. Introduction

As the Polish capital market is developing it faces various risks. One of the most significant is the risk of violations in the principles of its functioning. Criminal law protects not only the accuracy and reliability of the functioning of the capital market, but also protects the interests of participants in trading in financial instruments.

This paper tries to give an answer to the question as to whether criminal law regulations governing the Polish capital market fulfil their protective function correctly. Apparently it might seem that criminal law in some way restricts the freedom of undertaken investments. However, the protection of criminal law is used when other means of legal responses are not able to guarantee the proper protection of legal interests. In general, the most significant function of criminal law is to protect the legal interests of society.

## II. The protective function of criminal law

The most important function of criminal law is evidently a protective function. Generally, the primary task of criminal law is to protect society and the legal interests of entities against conduct designated as

crimes. Social harmony and individual protection of legal interests is essential<sup>1</sup>. The essence and importance of criminal law's protective function is expressed in the protection of legal interests from attacks leading to the breach of the law or exposure of them to danger<sup>2</sup>. Every criminal law norm is designed to protect these legal interests. The protective function of criminal law is carried out in three dimensions. The first one is known as criminalization of certain conduct affecting socially important legal goods. The second dimension is reduced to punish the perpetrators of such behavior with penalties, punitive measures or protective measures. The third plane is associated with performance penalties, punitive measures and security measures ordered by the court<sup>3</sup>.

The theory of criminal law refers to the three components of criminal justice practice, i.e.: criminalization, enforcement and punishment<sup>4</sup>. According to Daryl K. Brown, Anglo-American codes over-criminalize, meaning that statutes label conduct as criminal that should not be so labeled, because the conduct is not sufficiently harmful and wrongful, and committing it does not manifest culpability<sup>5</sup>. In Poland these three components are significant as well. Criminalization is defined as the recognition of a specific act as a crime, which can be done by both creating new prohibitions by the legislature and maintaining existing ones. Enforcement is known as the act of compelling the observance of or compliance with the law. Last but not least — punishment is known as the infliction or imposition of a penalty as retribution for an offence. The issue of over-criminalization of illegal conduct occurs also in the Polish legal system, especially in the area of white-collar crimes and capital market offences. One of the most significant capital market offences is insider trading. In both, Polish doctrine and practice opinions on decriminalization of confidential information regimes occurs. However, most of other

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<sup>1</sup> A. Marek, [in:] idem (ed.), *System Prawa Karnego, Zagadnienia ogólne*, vol. I, Warszawa 2010, p. 12.

<sup>2</sup> J. Giezek, [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2012, p. 27.

<sup>3</sup> (n 2) 13.

<sup>4</sup> D.K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 Am. Crim. L. Rev. 72, 2012, p. 74.

<sup>5</sup> Ibid., p. 78.

conducts prohibited by the Act on Trading in Financial Instruments of July 29th 2005<sup>6</sup> are threatened with administrative sanctions. Although the unequal treatment of legal violations can cause controversy, it should be noted that illegal conduct involving the use or disclosure of confidential information or professional secrecy requires special legal protection, because of the impact on the fundamental principles of the capital market's functioning. Furthermore, it should be noted that administrative proceedings, as opposed to criminal proceedings, do not provide procedural safeguards to a person suspected of committing an offence. Judicial proceedings is in fact one of the fundamental guarantees of lawfulness<sup>7</sup>.

There is no doubt that any violation of the capital market, including disclosure of confidential information and professional secrecy, have a clear negative impact on the market and society, which reflects, *inter alia*, the proper and fair financial instruments trading. Moreover, it affects potential investors' reliance on the capital market. Culpability of this type of conduct is extremely important due to its impact on the capital market's credibility and functioning of its institutions. Consequently it affects the economic condition of the country in general. Therefore protection of the capital market by criminal means is essential, since it is the most repressive response for reprehensible conduct<sup>8</sup>.

### III. Polish capital market overview

The European market for listings is more fragmented than the U.S. market but it is growing to the size of it. The increasing integration of the EU has changed this landscape, resulting in a wave of consolidation among the European exchanges<sup>9</sup>. Evolution of the Polish capital market has had a significant impact on today's economy.

There are three main institutions of the Polish capital market. The first one is the Warsaw Stock Exchange (WSE), which organizes the trad-

<sup>6</sup> Journal of Laws of 2005, No 183, item 1538 as amended.

<sup>7</sup> A. Płońska, *Karnoprawna ochrona informacji na rynku kapitałowym*, Wrocław 2012, p. 323.

<sup>8</sup> *Ibid.*, p. 324.

<sup>9</sup> S.M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. Rev. 89, 2007–2008, pp. 103–104.

ing in financial instruments. The second is the National Depository for Securities (NDS), which handles the clearing and settlement of transactions, processes corporate actions and provides safekeeping of financial instruments. The third are brokerage houses, which serve as intermediaries in transactions. Supervision over the whole capital market is effected by the Polish Financial Supervision Authority (PFSA)<sup>10</sup>.

In the creation of the modern Polish capital market, the experiences of other countries, particularly the US and France, were taken into account. One of the most significant capital market's purposes is to assure full transparency in trading on the Warsaw Stock Exchange (WSE) enforced by a strongly supervised full disclosure of the market. The model for the legal framework concerning public trading in securities is based on standards set by US law and regulations and by European Union Directives<sup>11</sup>.

In October 1994, the WSE became a full member of the International Federation of Stock Exchanges (FIBV) and of the Federation of European Stock Exchanges (FESE). A situation welcomed by the NYSE and by Deutsche Bourse, since membership in the FIBV requires that the approach to enforcement of the rules are such as to guarantee safe and orderly trading<sup>12</sup>. A membership of The World Federation of Exchanges (former FIBV) identifies an exchange as having assumed the commitment to prescribed business standards, recognized as such by members, owners, and users of exchanges, as well as by regulators and supervisory bodies.

The legal rules governing the Polish capital market have considerably changed since May 1, 2004 when Poland joined the European Union. "The harmonization of the domestic law with the EU directives aims *inter alia* at enabling all companies registered in one member state

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<sup>10</sup> *Fact Book 2012*, WSE, Warsaw 2012, p. 7.

<sup>11</sup> *Aspects of the Organization of the Polish Financial Market, The Polish Capital Market*, [http://www.kpwig.gov.pl/f1b2\\_ang.htm](http://www.kpwig.gov.pl/f1b2_ang.htm), (access: 12.01.2013).

<sup>12</sup> T.J. Berman, *International Capital Markets and Securities Regulation*, database updated December 2006, APPENDIX PO-4. Poland Document 4: Description of the Warsaw Stock Exchange, 10G Int'l Cap. Markets & Sec. Reg. Appendix PO-4.

to operate, and to put capital to profit in all members' states according to the unified rules and without any barriers<sup>13</sup>".

Members of the WSE are subject to WSE supervision. Violation of WSE rules by a member subjects the member to a reprimand or fine. Very serious violations of WSE rules may result in suspension or even a ban from the WSE<sup>14</sup>. In order to have hearings and determinations, the WSE created an Exchange Court<sup>15</sup> to settle disputes between the WSE and its members.

Issuers of listed financial instruments traded on the WSE are also required to comply with WSE rules. Violations by such issuers of the WSE rules subjects them to reprimands and fines as well. Predominantly violations occur with regard to a failure to meet the disclosure requirements of the WSE rules. Although such failures are often punished by a reprimand or a fine, the WSE has the power to punish an issuer by suspending trading in its securities, preventing publication of quotations and, in appropriate circumstances, delisting the securities. In addition to the powers of the WSE to deal with violators of its rules, the Chairperson of the FSA's has the powers of a prosecutor under the provisions of the Code of Civil Procedure of November 17th 1964<sup>16</sup> to bring civil actions for violations of WSE rules. Such actions would be based on the relationship between participants trading on the capital market, or created by virtue of the securities of an entity granted trading privileges on the WSE. Regarding cases related to offences pertaining to any conduct aimed against the interest of market participants and committed in connection with activities of the entities operating on that market, the FSA Chairperson can claim to be vested with the injured party's rights when intervening in criminal

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<sup>13</sup> *Annual Report 2005 of the Polish SEC, The European Union and International Cooperation*, [www.kpwig.gov.pl/raportroczny2005/teksty/annualReport/eu.html](http://www.kpwig.gov.pl/raportroczny2005/teksty/annualReport/eu.html), (access: 12.01.2013).

<sup>14</sup> *The Polish Capital Market*, The Fact Book 2011, <http://www.gpw.com.pl/zrodla/gpw/pdf/rocznik2011/3.pdf>, accessed: 20.02.2013.

<sup>15</sup> The Exchange Court was established by the WSE. Consolidated by Exchange Management Board resolution No. 260/2000 of 14 June 2000, (see Rules of The Exchange Court, Warsaw Stock Exchange, translation by Ernst & Young S.A.).

<sup>16</sup> Journal of Laws of 1964, No. 43, item 296, as amended.

proceedings<sup>17</sup>. This means that the FSA's Chairperson or its representative counselors at law can actively participate in criminal proceedings as an auxiliary prosecutor.

The provisions of the Act of July 21st 2006 on Financial Market Supervision<sup>18</sup> require that supervision by the FSA and by the WSE shall cover the Polish capital markets governed by the three acts passed by the Polish Parliament on July 29th 2005: the Act of Trading in Financial Instruments of July 29th 2005<sup>19</sup>, the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Public Companies<sup>20</sup> and the Act on Capital Market Supervision<sup>21</sup>. These Acts came into force on October 24th 2005, and, together with other statutes<sup>22</sup>, became the new constitution of the Polish capital market.

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<sup>17</sup> Article 6, points 1 and 2 of the Act of July 21st 2006 on Financial Market Supervision states that: "1. In civil-law cases arising from the relationships entered into in connection with participation in trading on the banking, pension, insurance or capital market, or relating to entities operating on those markets, the FSA's Chairperson shall have the powers of a prosecutor ensuing from the provisions of the Code of Civil Procedure of November 17th 1964 (Journal of Laws No. 43, item 296, as amended). In cases relating to the offences: 1) specified in Banking Law, the Act on the Organization and Operation of Pension Funds of August 28th 1997, the Act on Occupational Pension Programs of April 20th 2004, the Act on Personal Pension Accounts of April 20th 2004, the Act on Insurance Activity, the Act on Insurance Intermediation of May 22nd 2003, the Act on Trading in Financial Instruments of July 29th 2005, the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Public Companies dated July 29th 2005, the Act on Investment Funds, the Act on Commodity Exchanges of October 26th 2000, and the Electronic Payment Instruments Act of September 12th 2002, 2) pertaining to any acts aimed against the interests of the market participants, committed in connection with the activities of the entities operating on that market — the FSA's Chairperson, upon his (her) petition, shall be vested with an injured party's rights in criminal proceedings".

<sup>18</sup> Journal of Laws of 2006, No. 157, item 1119, as amended.

<sup>19</sup> Journal of Laws of 2005, No. 183, item 1538, as amended.

<sup>20</sup> Journal of Laws of 2005, No. 184, item 1539, as amended.

<sup>21</sup> Journal of Laws of 2005, No. 183, item 1537, as amended.

<sup>22</sup> The Act on Investment Funds of May 27th 2004 (Journal of Laws of 2004, No. 146, item 1546, as amended). Amendments to the Act were promulgated in the Journal of Laws of 2005, No. 183, item 1537 and item 1538, and No. 184, item 1539); the Act on Commodity Exchanges of October 26th 2000 (Journal of Laws, of 2005, No. 121, item 1019 and No. 183, item 1537 and 1538); the Banking Law of August 29th 1997 (Journal of Laws of 2002, No. 72, item 665, as amended), the Act on the National Bank of Poland

One of the major purposes of this legislation is to achieve harmonization with EU Directives and regulations<sup>23</sup>.

of August 29th 1997 (Journal of Laws of 2005, No. 1, item 2 and No. 167, item 1398); the Act on the Operation of Cooperative Banks, Their Associations and Associating Banks dated December 7th 2000 (Journal of Laws No. 119, item 1252, as amended); the Act on the Organization and Operation of Pension Funds of August 28th 1997 (Journal of Laws of 2004, No. 159, item 1667, as amended), the Act on Occupational Pension Programs of April 20th 2004 (Journal of Laws No. 116, item 1207 and Journal of Laws of 2005, No. 143, item 1202), the Act on Personal Pension Accounts of April 20th 2004 (Journal of Laws No. 116, item 1205 and Journal of Laws of 2005, No. 183, item 1538) and the Act on Insurance and Pension Fund Supervision and the Insurance Ombudsman dated May 22nd 2003 (Journal of Laws No. 124, item 1153, as amended); the Act on Insurance Activity of May 22nd 2003 (Journal of Laws No. 124, item 1151, as amended), the Act on Insurance Intermediation of May 22nd 2003 (Journal of Laws No. 124, item 1154, as amended), the Act on Insurance and Pension Funds Supervision and the Insurance Ombudsman dated May 22nd 2003 and the Act on Premium Subsidies for Farm Crops and Livestock Insurance dated July 7th 2005 (Journal of Laws No. 150, item 1249 and Journal of Laws of 2006, No. 120, item 825); the Act on Trading in Financial Instruments of July 29th 2005 (Journal of Laws No. 183, item 1538 and Journal of Laws of 2006, No. 104, item 708), the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Public Companies dated July 29th 2005 (Journal of Laws No. 184, item 1539), the Act on Investment Funds of May 27th 2004 (Journal of Laws No. 146, item 1546, as amended), the Act on Commodity Exchanges of October 26th 2000 (Journal of Laws of 2005, No. 121, item 1019 and No. 183, item 1537 and 1538); the Act on Capital Market Supervision of July 29th 2005 (Journal of Laws No. 183, item 1537); the Electronic Payment Instruments Act of September 12th 2002 (Journal of Laws No. 169, item 1385 and Journal of Laws of 2004, No. 91, item 870 and No. 96, item 959); and the Act on Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate dated April 15th 2005 (Journal of Laws No. 83, item 719).

<sup>23</sup> 1) Council Directive 93/6/EEC of March 15th 1993 on the capital adequacy of investment firms and credit institutions (OJ L141, 11.06.1993), 2) Council Directive 93/22/EEC of May 10th 1993 on investment services in the securities field (OJ L141, 11.06.1993; L168, 18.07.1995; L290, 17.11.2000; and L35, 11.02.2003), 3) Directive 2000/64/EC of the European Parliament and of the Council of November 7th 2000 amending Directives 85/611/EEC, 92/49/EEC, 92/96/EEC and 93/22/EEC as regards exchange of information with third countries (OJ L290, 17.11.2000), 4) Directive 2003/6/EC of the European Parliament and of the Council of January 28th 2003 on insider dealing and market manipulation (market abuse) (OJ L96, 12.04.2003), 5) Directive 2002/87/EC of the European Parliament and of the Council of December 16th 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC,

In order to provide for competency of securities intermediaries and to protect the Polish capital market, according to Article 178 of the Act on Trading in Financial Instruments it is a violation of the law for a person to engage in trading in financial instruments as a broker without having the required license to do so. Such a violation is punished with a fine of up to PLN 5 million. Capital market supervision is regulated by a statute seeking to deal with offences affecting stock exchanges, primarily the WSE<sup>24</sup>. For example, Article 45 of the Capital Market Supervision Act provides that a person, “who, acting in the name of or in the interest of a regulated entity, fails to fulfill his or her obligation to block [the] account [of a person alleged to have violated a market rule] shall be liable to a fine of up to PLN 1 million or imprisonment for up to two years, or both<sup>25</sup>”.

The Capital Markets Supervision Act of July 29th 2005<sup>26</sup> and its companion Acts<sup>27</sup>, is fundamental to the regulation of Polish capital mar-

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92/49/EEC, 92/96/EEC, 93/6/EEC, 93/22/EEC and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L35, 11.02.2003), 6) Directive 2003/71/EC of the European Parliament and of the Council of November 4th 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L345, 31.12.2003), 7) Commission Directive 2004/72/EC of April 29th 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ L162, 30.04.2004).

<sup>24</sup> The Act on Capital Market Supervision of July 29th 2005 (Journal of Laws of 2005, No. 183, item 1537).

<sup>25</sup> According to Article 39 of the Act on Capital Market Supervision of July 29th 2005 (Journal of Laws of 2005, No. 183, item 1537). If the obtained information justifying the suspicion of the offence referred to in article 181–183 of the Act on Trading in Financial Instruments suggests that a transaction which has been or is to be executed may be connected with such offence, the Chairman of the Commission or its deputy may send a written notice to the regulated entity requesting such an entity to block: 1) a securities account, 2) other account in which financial instruments other than securities are registered, 3) a cash account auxiliary to the account specified in Art. 39.1.1 or 39.2).

<sup>26</sup> Journal of Laws of 2005, No. 183, item 1537.

<sup>27</sup> Note the Capital Market Supervision Act, Articles 45–47, the Act on Public Offerings, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Public Companies, Articles 99–104, and the Act on Trading in Financial Instruments, Articles 178–184.



kets. Emerging from a centrally controlled economy to a market economy, a cultural reaction to capitalism as a hindrance of individual equality had to be overcome. Polish modern market developments seek to prevent excesses by persons taking advantage of inside information and call for transparency. These statutes provide legal regulations governing public offerings and the introduction of financial instruments into organized markets. They require public companies wishing to acquire capital to further their business to indicate clearly their purpose for offering the public the opportunity to participate in their endeavors, i.e. they call for transparency.

In an interview Poland's General Prosecutor Attorney confirmed that securities frauds affecting Polish stock markets are very profitable<sup>28</sup>. The most essential problem is the fact that offenders violating Polish capital market rules feel that the chance of gaining illicit profits is greater than the likelihood of prosecution liability. In the US, offences affecting the capital market, which undoubtedly has an impact on the economy, has led to more rigorous prosecutions of such violations<sup>29</sup>. It must also be realized that by considering securities law and regulations to be for the protection of the investor, US courts have allowed for private causes of action<sup>30</sup> which caused investors to be considered as "private attorney generals"<sup>31</sup>, albeit that this power has been severely limited in recent

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<sup>28</sup> A. Piński, J. Piński, *Warszawski indeks (poza)gieldowy*, Wprost No. 1242, October 1st 2006.

<sup>29</sup> Note the ability of the courts to impose civil penalties for violations of the prohibition on insider trading. Such a civil penalty can be imposed for up to \$ 1,000,000.00 representing triple the amount of profits made by means of insider trading. Securities Exchange Act of 1934, § 21A, 15 U.S.C.A. § 78u-1.

<sup>30</sup> The approach of the US federal courts interpreting statutory law as allowing for a private cause of action even though the statute is silent as to standing to sue has been based on a fourfold test: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law. See *Cort v. Ash*, 422 US. 66 (1975).

<sup>31</sup> Justice Clark in *J.I. Case Co. v. Borak*, 377 US. 426 (1964).

years<sup>32</sup>. The effect of the threat of a private action by an investor harmed by a violation of securities law had an impact by supporting transparency and making violations not necessarily lucrative to an offender<sup>33</sup>.

The capital market is supervised by the Polish Financial Supervision Authority (PFSA). The supervision over the capital market, ensured by the PFSA is intended to ensure universal access to reliable information on the securities market and observance of fair trading and competition rules by entities operating in that market. The PFSA is also responsible for the drafting of legal acts concerning the capital market and disseminating knowledge about that market<sup>34</sup>.

#### IV. Criminal liability for breaches of capital market regulations

Although the WSE is becoming respected among European stock exchanges, it still does not have enough protection against unlawful behavior, such as manipulation, insider trading or other law violations. WSE profits lost by informing investors appear to be much higher than estimates reported for mature markets.

Recent statutes governing the Polish capital market are aimed at compliance with EU Directives required as a result of Poland's admission to the European Union. Membership in the EU requires the law of a member State to be compatible with the minimum standards set forth in EU Directives. One such Directive is the EU Prospectus Directive. By virtue of the EEC Treaty, a prospectus, held to be in compliance with the requirements of the applicable authority of a member State where the issuer is located, requires acceptance across national borders. This acceptance is based on the Prospectus Directive harmonizing the demand for information and supporting documentation. Compliance with the Pro-

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<sup>32</sup> See for example the Private Securities Litigation Reform Act of 1995, codified in the Securities Exchange Act of 1934 § 21D, 15 U.S.C.A. § 78u-4.

<sup>33</sup> Note also the development of private actions using the Racketeer Influenced and Corrupt Organizations Act, (Civil RICO), 18 U.S.C.A. §§ 1961–1968, to extract triple damages from a wrongdoer, albeit the application of this Act has been challenged on the question of what constitutes a “corrupt organization”.

<sup>34</sup> (n 11) 8.

spectus Directive is required from all offerers, whether or not the offerer is a EU entity. A non-EU issuer has to get permission to circulate its prospectus from the securities authorities of the member states where the issuer intends to offer its securities. In addition to any statutory requirements modeled on the EU Directive, each member state may have implementing regulations, which have to be taken into account by both EU and non-EU issuers. In Poland an issuer will have to obtain permission to circulate a prospectus from the FSA.

The EU in promulgating a directive dealing with insider dealing and market abuse, recognized that market abuse is a flexible term encompassing a wide area of wrongdoing<sup>35</sup>. It may arise in circumstances where investors have been unreasonably disadvantaged, directly or indirectly by others who have used information which is not publicly available, as is referred to as insider trading. Such activity distorts the price-setting mechanism of financial instruments and results in the dissemination of false or misleading information. Such conduct undermines the general principle that all investors must be placed on an equal footing<sup>36</sup>. It also results in market manipulation which the EU Ddirective defined as “a transaction or order to trade: (1) which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of one or several financial instruments, or (2) which secures, to a person, or persons acting in consort, the price of one or several financial instruments at an abnormal or artificial price level, unless the person who entered into the transactions or issued the orders to trade conforms to accepted market practices of the regulated market concerned”, i.e., actions having a deleterious impact on market efficiency<sup>37</sup>.

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<sup>35</sup> EU Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Official Journal L 96 of 12.04.2003.

<sup>36</sup> Article 39 of Act of July 29th 2005 on Trading in Financial Instruments, Journal of Laws of 2005, No. 183, item 1538 and Journal of Laws of 2006, No. 104, item 708, and see *Activities of the European Union, Summaries of Legislation, Transactions in securities, Market Abuse*, <http://europa.eu/scadplus/leg/en/lvb/124035.htm>, (access: 13.01.2013).

<sup>37</sup> EU Directive 2003/6/EC, Article 1(2)(a) of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Official Journal L 96 of 12.04.2003.

After Poland adopted the EU Market Abuse Directive, the Act on Trading in Financial Instruments increased the penalties for the commission of market manipulation. In addition to administrative sanctions, an offender can be fined up to PLN 5 million, imprisoned for up to five years, or both. The Act on Trading in Financial Instruments also started a partial depenalization of manipulation of financial instruments. The change was aimed achieving a more effective and faster resolution of conflicts for the interests of the Polish capital market in general, and also for consistency in determinations of administrative proceedings<sup>38</sup>. One effect was to provide that in accordance with WSE Regulations, trading will be suspended whenever the price of a security varies more than ten percent from the standard trading price<sup>39</sup>.

The Polish Penal Code of June 6, 1997<sup>40</sup>, has a strong impact on stock market protection. Articles 310–315 criminalize offences against trading in currencies and securities, which are: counterfeiting Polish or foreign currency, other legal tender or a document giving the right to obtain a sum of money or containing an obligation to pay capital, interest or share of profits (Article 310), spreading false information or concealing information (Article 311), trading in counterfeit or altered currency, other means of payment or the document (Article 312), counterfeiting or altering an official mark of value or official mark (Article 313–314) and tampering with measuring devices (Article 315). According to confidential information, Article 266 § 1 of the Polish Penal Code stays, that “anyone, who, in violence of the law or an obligation accepted, discloses or uses information learned with in connection with the function or work performed, or public, social, economic or scientific activity pursued is liable to a fine, the restriction of liberty or imprisonment for up to two years”.

The Polish Penal Code is not the only act which provides criminal liability for prohibited acts. There is a broad spectrum of specified acts, which also contain criminal provisions. The Act on Trading in Financial Instruments provides criminal liability for several acts violating

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<sup>38</sup> *New law on the Polish capital market — major changes and market impact*, The Polish SEC 2005, page 19, <http://www.kpwig.gov.pl/komunikaty/noweprawo.pdf>, access: 13.01.2013.

<sup>39</sup> Regulations of the Warsaw Stock Exchange § 142 (1)–(5) (Feb. 24, 2004).

<sup>40</sup> Journal of Laws of 1997, No. 88, item 553.

capital market operating principles. According to this Act, criminal liability threatens the conduct of “trading in financial instruments without the required license or authorization provided for in other regulations, or any other statutory authorization” (Article 178); “bounding by the professional secrecy obligation and who discloses or uses information covered by such obligation in securities trading” (Article 179); “disclosing inside information” (Article 180); “using inside information” (Article 181); “issuing a recommendation or induces another person to acquire or dispose of financial instruments to which inside information relates” (Article 182); “market manipulation” (Article 183); “acting in the name or interest of a legal person or an organizational unit without legal personality” (Article 184). Insider trading is one of the most serious capital market offences, which can be punished by a fine of up to PLN 5 million or imprisonment of up to five years. Additionally, whenever the PFSA suspects trading on inside information to have occurred, it can freeze the account of a person suspected of having committed insider trading. Insider trading leads to a significant reduction of investor confidence in the market. In many instances, such unfair behavior by some stock exchange participants has also resulted in potential contributors to withdrawing capital from the securities market.

The Act on Capital Market Supervision provides criminal liability for acting on behalf or in the interests of a supervised entity and failing to fulfill its obligation to block an account (Article 45), which is liable to a fine of up to PLN 1,000,000 or a penalty of imprisonment of up to three years, or both these penalties jointly. This Act also provides liability for the minor offence of preventing or obstructing the activities performed in the court of audit, administrative or explanatory proceedings (Article 46), which is liable to a fine.

The last of the most significant Polish capital market regulations, The Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies provide criminal liability for several prohibited acts. One of those is e.g. publicly proposing acquisition of securities without the statutorily required approval of an issue prospectus or information memorandum or statement of equivalence of information contained in an information memorandum with information required in the issue prospectus, or mak-

ing an issue prospectus information memorandum available to the public or to interested investors (Article 99 par. 1), which is liable to a fine of up to PLN 1,000,000 or a penalty of imprisonment of up to two years, or both these penalties jointly. The other offence is delivering untrue data or suppressing true data, thus materially affecting specified information (Article 100), which is liable to a fine of up to PLN 5,000,000 or a penalty of imprisonment from six months up to five years, or both these penalties jointly. Due to criminal protection of inside information, also delivering to the PFSA untrue data or suppressing true data, thus materially affecting such information are liable to a fine of up to PLN 2,000,000 (Article 101).

Offenses affecting the capital market are difficult to detect and to prove, therefore they emphasize the need for legal protection of the stock market, investors, and of the operations connected with securities trading.

## V. Conclusion

The development of a capital market in Poland requires the highest level of legal protection. Only with constant adaptation to new economic, technical and developmental circumstances can this protection be optimally effective. Regulations, especially those which protect investors against violations of law and recovery of loss, require the courts to take into consideration, among others, the organization of the capital market, intermediation between investors in transactions, as well as facilitating the investment of the decision-making process.

On the other hand, it can be supposed that the neglect of securities frauds is due to Poland's ambiguous definitions contained in its securities regulations. In the legal sense, if something is not defined comprehensively enough, it cannot be considered as a legal violation. Although, in recent years, Polish law was continuously amended to take into account new developments, no statute classified all capital market violations. Moreover, nowadays, despite well — prepared regulations patterned after the European Union, weak enforcement of these laws and regulations powers the effectiveness of prosecution and leads to a disregard of the problem by Poland's prosecution agency. Consequently, investors and

other entities participating in securities trading are induced to take the risk accompanying violations to attain a fast and illegal profit, generally believing that they would be immune, because of an exemption from punishment. However, the failure of Polish prosecutors to bring charges against manipulators has hindered efforts to establish a “fair and orderly” capital market.

Polish regulators should train Polish prosecutors to prosecute more effectively the conduct specified in Directive 2003/6/EC and in the most recent amendment to the Polish securities law. An examination of the legal enforcements in the US is most important to the Polish authorities enabling them to be focused on the principle of making securities offences affecting the stock exchange unprofitable. This can be the most effective way to prevent illegal conduct in the Polish capital market.

### Summary

The development of the capital market in Poland in recent years is also associated with various types of prohibited acts that threaten both individual and general public legal interests. The importance of criminal protection of the capital market is essential when other means of legal responses are not effective. The author indicates the protective function of criminal law as the most significant. Then the author presents an overview of the Polish capital market and criminal liability for the majority of capital market offences.

**Keywords:** white-collar crimes, capital market, criminal liability, stock market offences.