

Romanian parliament -

Law no. 210/2017

laying down measures for the implementation of Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4th of July 2012 on OTC derivative financial instruments, central counterparties and trade repositories

In force since November 17, 2017

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The Romanian Parliament adopts this law

CHAPTER I

General provisions

Art. 1. - This Law lays down the measures necessary for the implementation at national level of the provisions of Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4th of July 2012 on OTC derivative financial instruments, central counterparties and trade repositories, hereinafter referred to as Regulation (EU) No. No 648/2012 as regards the determination of the competent authority and the rules on penalties applicable to infringements of dispositions of Title II and Art. 87 of Regulation (EU) No. 648/2012 in order to ensure the protection of the rights of system vendors providing guarantees to other system operators where they are subject to insolvency proceedings.

Art. 2. - The terms and expressions used in this Law have the meanings provided for in Regulation (EU) No. 648/2012.

Art. 3. - The following categories of persons are subject to this law:

a) credit institutions, as well as any of the responsible natural persons referred to in art. 108 par. (1) of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments and completions by Law no. 227/2007, as subsequently amended and supplemented, as the case may be;

b) financial investment companies and investment management companies and alternative investment fund managers, as well as any of the natural persons in charge of the board of directors / supervisory board, director / member of the directorate, respectively representative of the department of their internal control, as appropriate;

c) insurance and reinsurance companies, as well as any of the natural persons responsible in the capacity of member of the board of directors / supervisory board, director / member of the directorate, respectively representative of their internal control department, as the case may be;

d) administrators of privately managed pension funds and / or voluntary pension funds, as well as natural persons as members of the board of directors / supervisory board, director / member of the directorate, respectively representative of their internal control department, as the case may be;

e) central counterparties, as well as any of the natural persons referred to in art. 2 points 27-29 of Regulation (EU) No. 648/2012, respectively representatives of the conformity compartment, where responsibility lies with them, as the case may be;

f) the market / system operators managing trading venues, as well as the responsible natural persons as a member of the board of directors / supervisory board, director / member of the directorate, respectively representative of their internal control department, as the case may be;

g) non-financial counterparties as well as natural persons in charge as a member of the board of directors / supervisory board, director / member of their directorate, as the case may be.

Art. 4. - (1) In the application of art. 12 of Regulation (EU) No. 648/2012, the National Bank of Romania, respectively the Financial Supervisory Authority, shall exercise the powers and make available the necessary measures as the competent authority responsible for supervising compliance by the persons stipulated in art. 3 letter (a) to (f) of their obligations under the provisions of Title II of Regulation (EU) No. 648/2012, as follows:

a) The National Bank of Romania, as regards the persons referred to in art. 3 letter a);

b) The Financial Supervisory Authority, in respect of the persons referred to in art. 3 letter b) -d) and f).

(2) Regarding the persons stipulated in art. 3 letter g), the Financial Supervisory Authority is the competent authority, according to the provisions of art. 2 par. (8) of Government Emergency Ordinance no. 93/2012 on the establishment, organization and functioning of the Financial Supervisory Authority, approved with amendments and completions by Law no. 113/2013, as amended and supplemented. Regarding the persons stipulated in art. 3 letter e), the Financial Supervisory Authority is the competent authority, according to the provisions of art. 157 par. (2) of the Law no. 297/2004 regarding the capital market, with subsequent amendments and completions

Art. 5. - (1) In exercising the powers provided by the present law, the National Bank of Romania and the Financial Supervision Authority shall request and process any relevant data and information, including those of a personal nature, regarding the operations covered by Regulation (EU) no. 648/2012.

(2) For the purpose of the present law, the processing of personal data is carried out in accordance with the provisions of Law no. 677/2001 on the Protection of Individuals regarding the Processing of Personal Data and the Free Movement of such Data, as subsequently amended and supplemented.

CHAPTER II

Administrative measures and administrative penalties

Art. 6. - The National Bank of Romania, respectively the Financial Supervisory Authority, shall determine the necessary measures and / or apply the sanctions provided by the present law, in case it finds that any of the persons mentioned in art. 3 is guilty of the following deeds:

a) non-compliance by the financial and non-financial counterparties with the obligation to clear all OTC derivative contracts belonging to a class of OTC derivative financial instruments designated as being subject to the clearing obligation under Art. 4 and art. 5 par. (2) of Regulation (EU) No. 648/2012;

b) non-compliance by central counterparties with the obligation to accept to clear OTC derivative contracts in a non-discriminatory and transparent way, irrespective of the trading venue, according to Art. 7 par. (1) of Regulation (EU) No. 648/2012;

c) non-compliance by the central counterparties with the 3-month period provided for in art. 7 par. (2) of Regulation (EU) No. 648/2012 for the submission of a reply to a request for access, officially formulated by a trading venue, as well as the refusal of access within 3 months after the favourable resolution of such a request, according to the provisions of art. 7 par. (4) of Regulation (EU) No. 648/2012;

d) non-compliance by the central counterparties with the obligation to fully justify the rejection, in the case of a request for access made by a trading venue, according to the provisions of Art. 7 par. (3) of Regulation (EU) No. 648/2012;

e) the failure by market / system operators managing the trading venues authorized and supervised by the Financial Supervisory Authority to provide transparent and non-discriminatory transaction information to any central counterparty that has been authorized to clear OTC derivative contracts traded on that trading venue, according to the provisions of art. 8 par. (1) of Regulation (EU) No. 648/2012;

f) non-compliance by the market / system operators managing the trading venues, authorized and supervised by the Financial Supervisory Authority, of the 3-month deadline stipulated in art. 8 par. (2) of Regulation (EU) No. 648/2012, as well as the rejection of access within 3 months after the favourable resolution of such request, under the conditions provided by art. 8 par. (4) of Regulation (EU) No. 648/2012;

g) non-compliance by the market / system operators managing the trading venue with the obligation to fully justify the rejection in the case of a formal request for access made by a central counterparty in accordance with the provisions of Art. 8 par. (3) of Regulation (EU) No. 648/2012;

h) non-compliance by financial counterparties, non-financial counterparties and central counterparties with the obligation to report to a trade repository the information relating to any concluded derivative contract and any modification or termination of the contract, in accordance with the provisions of Art. 9 par. (1) of Regulation (EU) No. 648/2012;

i) non-compliance by financial counterparties and non-financial counterparties with the obligation to keep records of all derivative contracts that they have concluded and of all their amendments for a minimum period of 5 years after the termination of the contract, 9 par. (2) of Regulation (EU) No. 648/2012;

j) non-compliance by financial counterparties, non-financial counterparties and central counterparties with the obligation to transmit to the European Securities and Markets Authority information regarding a derivative contract, in accordance with the provisions of Art. 9 par. (3) of Regulation (EU) No. 648/2012;

k) non-compliance by non-financial counterparties with the obligations arising from the provisions of Art. 10 par. (1) and (3) of Regulation (EU) No. 648/2012 on specific clearing obligations for non-financial counterparties;

l) non-compliance by financial counterparties with the exception of credit institutions and financial investment services companies, as well as of the non-financial counterparties with the obligations arising from the provisions of Art. 11 par. (1) to (3) of Regulation (EU) No. 648/2012 on the existence of adequate procedures and mechanisms for measurement, monitoring and mitigation of operational risk and counterparty risk, at the daily market evaluation of the value of ongoing contracts, namely the provision of risk management procedures requiring exchange of guarantees, fairly and segregated accordingly;

m) non-compliance by the financial counterparties, except for credit institutions and financial investment services companies, of the obligations set out in art. 11 par. (4) of Regulation (EU) No. 648/2012 on the holding of an adequate and proportionate amount of capital to manage uncovered risk through an adequate exchange of guarantees;

n) the refusal of any person referred to in art. 3 to respond to the requests of the National Bank of Romania, respectively the Financial Supervisory Authority, in order to exercise their attributions according to the present law.

Art. 7. - The National Bank of Romania, respectively the Financial Supervisory Authority, shall decide the necessary measures and / or apply the sanctions provided by the present law for the acts stipulated in art. 6 as well as for non-compliance with the delegated acts of the European Commission adopted on the basis of art. 4, 5 and art. 7 to 11 of Regulation (EU) No. 648/2012.

Art. 8. - For the acts provided in art. 6, the National Bank of Romania, respectively the Financial Supervisory Authority may impose one of the following measures:

a) order to terminate the unlawful conduct of the natural or legal person and to refrain from repeating it;

b) the temporary prohibition or, for serious or repeated violations, the permanent prohibition to exercise the functions provided in art. 3 letter a) -g), against any natural person who performs such functions;

c) the withdrawal of the authorization granted under the law, as the case may be, to the financial counterparty or to the central counterparty.

Art. 9. - For the acts provided in art. 6, the National Bank of Romania, respectively the Financial Supervisory Authority, shall apply one of the following administrative sanctions:

a) written warning;

b) a public warning stating the responsible person or legal person and the deed committed;

c) fine applicable to the legal entity, up to 10% of the total net value of the turnover achieved in the preceding business year;

d) a fine applicable to the individual, up to the equivalent of RON 5 million in RON, calculated at the exchange rate communicated by the National Bank of Romania, at the date of entry into force of this law;

e) fine up to twice the value of the benefit obtained by committing the deed, if it can be determined;

f) the withdrawal of approval, authorization or validation, as the case may be, granted to the natural persons referred to in art. 3 letter a) - f) for the purpose of exercising their powers.

Art. 10. - Failure by credit institutions or financial investment services companies to comply with their obligations under Art. 11 par. (1) to (4) of Regulation (EU) No. 648/2012 on the existence of adequate procedures and corresponding mechanisms for measurement, monitoring and mitigation of operational risk and counterparty risk, at the daily valuation at market price of the value of the on-going contracts, at the arrangement of risk management procedures requiring a prompt, fair and segregated accordingly exchange of guarantees, respectively at the holding of an adequate and proportionate amount of capital to manage the uncovered risk by an appropriate exchange of guarantees, shall be sanctioned by the National Bank of Romania, respectively the Financial Supervisory Authority, according to the provisions of the Ordinance Government Emergency no. 99/2006, approved with amendments and completions by Law no. 227/2007, as subsequently amended and supplemented by the necessary measures provided for in art. 226 and / or the sanctions and sanctioning measures provided for in Art. 229 of the respective normative act

Art. 11. - **(1)** The measures and sanctions ordered under the present law must be effective, proportionate to the facts and deficiencies found and likely to have a deterrent effect.

(2) According to the provisions of par. (1), when determining the measure and / or the sanction and, where appropriate, the amount of the pecuniary sanction, the competent authority shall take into account all relevant circumstances, including, as appropriate:

a) the severity and duration of the act;

b) the form of guilt of the natural or legal person responsible for the infringement;

c) the financial soundness of the person responsible for the infringement by taking into account factors such as the total turnover of the legal person or the annual income of the individual;

d) the amount of profits or losses avoided by the responsible person, to the extent that they can be determined;

e) the cooperation of the natural or legal person responsible with the competent authority;

f) violations previously committed by the responsible person;

g) measures taken by the person responsible to prevent the repetition of the facts;

h) any potentially systemic consequences of the deed.

Art. 12. - **(1)** In applying the provisions of art. 12 par. (2) of Regulation (EU) No. 648/2012, the competent authority under this law publishes any sanction applied under this law, the manner of publication being determined by each competent authority.

(2) Exemption from the provisions of paragraph (1) where disclosure would jeopardize the financial markets or cause disproportionate damage to the parties involved, the considerations of opportunity underlying a possible decision not to publish the sanction shall be at the sole discretion of the competent authority.

(3) The National Bank of Romania and the Financial Supervisory Authority shall prepare annual reports assessing the effectiveness of the sanction regimes enforced under this law, which they shall send to the Ministry of Public Finance by 31st of March of the following year for publication of an evaluation report at national level, according to art. 12 par. (2) of Regulation (EU) No. 648/2012. The information contained in the national evaluation report given to the public will not contain personal data.

Art. 13. - **(1)** Acts of enforcement of the fine shall be enforceable titles. The fines received are paid to the state budget.

(2) Applying sanctions does not remove civil or criminal liability, as the case may be.

(3) The application of the measures and sanctions provided in art. 9 shall be prescribed within one year from the date of the finding, but not more than 3 years from the date of its origination.

(4) The sanctions provided in art. 9 may be applied concurrently with the arrangement of the measures provided for in art. 8 or independently thereof.

Art. 14. - In the event of the finding of committing two or more deeds financially sanctioned in accordance with the provisions of art. 9 letter c), d) or e) the highest sanction applies, increased by up to 50%, as the case may be.

Art. 15. - Establishing the facts provided in art. (6) shall be carried out by representatives of the competent authority empowered to do so in the course of inspections or investigations carried out under the conditions provided in Regulation (EU) No. 648/2012 or on the basis of notifications, reports, information submitted to the competent authority in the performance of its duties and / or on the basis of the data and information at its disposal in any other way.

Art. 16. - **(1)** The acts through which the measures or the sanctions imposed under this law are issued as follows:

a) in the case of the persons referred to in art. 3 letter a) by the governor, the first deputy governor or deputy governor of the National Bank of Romania, according to its internal regulations, except for the measures provided by art. 8 letter b) and c), which are within the competence of the Board of Directors of the National Bank of Romania;

b) in the case of the persons referred to in art. 3 letter b) -g) by the Council, the President or Vice-Chairmen of the Financial Supervisory Authority, according to its internal decisions.

(2) The acts provided for in paragraph (1) must include at least the elements of identification of the person at fault, the description of the deed and its circumstances and the legal basis for the dispensing of the measure or, as the case may be, the application of the sanction.

Art. 17. - **(1).** The acts adopted by the National Bank of Romania pursuant to this law may be appealed in accordance with the provisions of art. 275-277 of Government Emergency Ordinance no. 99/2006, approved with amendments and completions by Law no. 227/2007, as amended and supplemented.

(2) The acts adopted by the Financial Supervisory Authority according to the present law may be appealed under the conditions provided by art. 21³ of the Government Emergency Ordinance no. 93/2012, approved with amendments and completions by Law no. 113/2013, as amended and supplemented.

CHAPTER III Final provisions

Art. 18. - After paragraph (2) of Article 9 of Law no. 253/2004 on the definitive nature of the settlement in payment and financial instrument transactions systems, published in the Official Gazette of Romania, Part I, no. 566 of 28th of June 2004, as subsequently amended and supplemented, a new paragraph, paragraph 3, shall be inserted, with the following content:

" **(3)** Where a system vendor has lodged a guarantee in favour of another system operator in relation to an interoperable system, the rights which the system operator which has lodged the guarantee has over that security shall not be affected by the opening of the insolvency proceedings against the system operator benefiting from the guarantee. "

Art. 19. - The provisions of art. 9 par. (3) of the Law no. 253/2004, as subsequently amended and supplemented, shall not apply to insolvency proceedings pending on the date of entry into force of this law.

Art. 20. - **(1)** In exercising the powers established by this law, the National Bank of Romania and the Financial Supervisory Authority may issue regulations to ensure the implementation of the provisions of

Regulation (EU) no. 648/2012, of the regulatory or implementing technical standards adopted by the European Commission on the basis of the powers conferred on it and, where appropriate, of the guidelines or recommendations issued by the European Securities and Markets Authority.

(2) Regulations issued in accordance with paragraph (1) shall be published in the Official Gazette of Romania, Part I.

Art. 21. - This law enters into force 10 days after its publication in the Official Gazette of Romania, Part I.

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This law transposes art. 9 par. (1) of the Directive no. 98/26 / EC of the European Parliament and of the Council of 19th of May 1998 on the definitive nature of the settlement in payment and securities systems, published in the Official Gazette of the European Communities (JOCE), L series, no. 166 of 11th of June 1998.

This law was adopted by the Romanian Parliament, in compliance with the provisions of art. 75 and art. 76 par. (2) of the Constitution of Romania, republished.

DEPUTY CHAMBER PRESIDENT

PETRU-GABRIEL VLASE

SENATE PRESIDENT

CĂLIN-CONSTANTIN-ANTON POPESCU-TĂRICEANU

Bucharest, 3rd of November 2017.

No. 210.