THE SECURITIES LITIGATION REVIEW

Seventh Edition

Editor
William Savitt

THE LAWREVIEWS

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SEVENTH EDITION

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PREFACE

This seventh edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions such as Sweden, where private securities litigation is narrowly circumscribed by statute and practice, and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort now disrupted by the departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing substantive investment rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies –

stock exchanges, quasi-governmental organisations, and trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction reported an across-the-board uptick in securities litigation activity – an increase that has been recapitulated by the covid-19 pandemic roiling society and the global economy. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as a new normal has set in for the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. There appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Litigation Review*: to reflect annually where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both convergence and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and the United Kingdom that produced a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work with one another in the field of securities regulation, will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this seventh edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions,

both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
May 2021

Chapter 3

BULGARIA

Nikolay Bebov, Damyan Leshev and Petar Ivanov[1]

I OVERVIEW

i Sources of law

Securities laws and regulations in Bulgaria are the subject of a common trend – continuous increase in volume and detail of European Union rulemaking, with a gradual shift from directives, which are subject to national transposition, to directly applicable regulations.

Converse to this, there is an ongoing reduction in the amount of local rulemaking. But like elsewhere in the EU, certain aspects of securities laws and regulation are still of local design. This is particularly the case in matters of civil and criminal liability, and in matters of procedure. Bulgarian law also, in the case of debt capital markets, supplements the EU prospectus and listing rules with local requirements on bondholders trustees and bond security interest, and in the case of listed companies – specific corporate and corporate governance aspects.

The major EU regulations in the area, directly applicable in Bulgaria, include the Prospectus Regulation (Regulation (EU) 2017/1129) and the Market Abuse Regulation (Regulation (EU) 2014/596) (MAR). The major sources include:

a the Public Offering of Securities Act of 1999 (POSA), which transposes directives such as those on transparency and takeovers, but importantly lays down procedural and liability rules concerning the Prospectus Regulation;
b the Enforcement of Measures against the Market Abuse Act of 2016 (EMMAA);
c the Financial Supervision Commission Act of 2003 (FSCA);
d the Obligations and Contracts Act of 1950 (OCA);
e the Administrative Infringement and Penalties Act (AIPA);
f the Penal Code of 1968, dealing with criminal liability for breaches of the prospectus rules and to market abuse; and
g the Civil Procedure Code of 2007 (CPC).

The European Commission also lays down, by delegation from the European Parliament and Council, detailed rules for implementing regulations.

1 Nikolay Bebov is a managing partner, Damyan Leshev is a senior managing associate and Petar Ivanov is an associate at Tsvetkova Bebov Komarevski.

ii Regulatory authorities

The Financial Supervision Commission (FSC) is Bulgaria's competent authority for the regulation and supervision of capital markets and the insurance and pension insurance sectors. It also regulates banks as far as conduct of business rules relating to financial instruments (under MiFID II) are concerned, but banks (other lenders and payment businesses) are otherwise subject to prudential and conduct-of-business regulation and supervision by the Bulgarian National Bank.

The FSC is the key public agency enforcing securities law in Bulgaria. The FSC consists of a chairperson, three deputies and one more member. Each of the deputies is in charge of a given financial subsector. The deputy chairperson in charge of the supervision of the investment activities division plays a leading role in the public enforcement of securities regulations, and in many instances has direct powers to issue binding acts on supervised entities, notably to issue penal decrees. We generally refer in this chapter to the FSC, also keeping the deputy chairperson in mind.

Criminal enforcement of securities regulations is both a novelty, and a rarity in Bulgaria. The general prosecution authorities are responsible for the criminal prosecution of violations of the Penal Code's few relevant provisions. The prosecutors are assisted by investigators and the police authorities. There is no structure within these authorities, which specialise in the prosecution of securities law violations.

iii Common securities claims

Most commonly, securities claims in Bulgaria are brought in the form of FSC monetary sanctions against market participants, or their directors, for infringement of MAR. In particular, there is targeting of trade-based market manipulation (ie, stock price manipulation induced through trades on the country's sole regulated market, the Bulgarian Stock Exchange (BSE)), but also of violation of MAR's managers transactions disclosure rules or the unlawful disclosure of inside information.

This approach is likely rooted in two characteristic features of the Bulgarian capital market. First, local market participants have virtually no tradition of engaging in civil litigation for breaches of the securities regulations, which is understandable given the short history of Bulgaria's modern capital markets. With the lack of special private law claims, pursuing civil litigation based on general tort law is less appealing too. Another major factor for the prevalence of public enforcement of market abuse rules is the relatively lower liquidity of the BSE ever since the 2008 financial crisis. This makes it easier for the FSC to detect and sanction suspicious trades as they are more likely to cause clear and significant spikes in stock prices compared with abusive trades with highly liquid instruments on the biggest markets.

Enforcement in relation to the rules of prospectuses and financial reports, whether private or public, is rarer, including in the case of secondary civil liability of accountants and auditors for false or misleading data in the financial information included in prospectuses.[2]

Under Bulgarian administrative and criminal law, aiders and abettors, as well as persons who fail to prevent an offence while fully capable of this, are also liable. In the case of market

2 In contrast to accountants and auditors, lawyers and other consultants are not subject to statutory liability in relation to the drafting of prospectuses or tender offers. Lawyers may be subjected to general tort or contractual liability, for example, when providing expertised legal opinions referenced in a prospectus (e.g., status of real property) or in the context of transactional legal opinions, but the threshold and defences for such liability are yet to be tested.

abuse, this can include an investment firm executing abusive trading orders, or a financial analyst providing false information, which was then publicly disseminated. Still, establishing the wilful misconduct of a relevant third party, in a manner that meets the high standard of proof in administrative and criminal proceedings, is generally difficult. This is why Bulgarian public enforcement of securities regulations against such third parties is practically non-existent.

II PRIVATE ENFORCEMENT

i Forms of action

Under Bulgarian law, there are no special securities claims (except for one special rescission claim), whether rooted in wrongs relating to prospectuses, market abuse or other wrongs relating to securities. There is also a statutory clarification about certain aspects of tort claims relating to prospectuses and to disclosed regulatory reports.

The rescission claim (Article 89б(4) of POSA) is granted to good faith investors in a public offering, where:

a the issuer fails to publish a prospectus, or where applicable an offering circular;[3] or

b significant information in the prospectus (or offering circular) is incorrect or missing.

The essence of the claim is to request invalidation (rescission) of the subscription or purchase of a security. The investor may only exercise this right within three months of becoming aware of the defect in the public offering, and only within one year as of the end of the public offering. POSA is not express on the matter, but there is little doubt that the investor may join a tort damages claim to the rescission claim. In respect of the latter claim, POSA draws the scope of liable persons, as follows.

Article 89д(3) of POSA reads that the following persons[4] shall bear joint and several liability for damages resulting from incorrect, misleading or omitted information in a prospectus:[5]

a board members and special authorised senior officers;

b accounting personnel preparing the issuer's financial statements, who are liable only to the extent the defective information is set out in the financial statements;

c the issuer's auditors, liable only to the extent the defective information is set out in the audited financial statements incorporated in the prospectus;

d offerors of the securities (if different from the issuer);

e persons applying for the listing of the securities (if different from the issuer); and

f guarantors for the securities.

Once the securities are listed on a regulated market and the issuer's financial statements and other regulatory information is subject to ongoing disclosure under the transparency

3 Bulgaria's threshold for small offering exception from the prospectus requirement is €3 million, where an offering circular is required instead of a prospectus.

4 The above persons are required to state in the prospectus that the information in it is complete and correct. Their full names, positions, and (in the case of legal entities) addresses and seat must be stated in the prospectus.

5 A similar liability rule, Article 89г(8) of POSA, applies to offering circulars. Article 89д(4) of POSA further limits the liability where it arises only on the basis of a prospectus resume.

requirements, the first three categories of persons above ((a)–(c)) are also liable, to the same extent, if information set out in financial statements or other regulatory disclosures is incorrect, misleading or omitted.[6]

The CPC, in Article 379 and the following, sets out a general regime on joined (class) actions. It is doubtful, though, that the regime would be fit for securities class actions; to the authors' best knowledge, the regime has never been applied in that context.

Claims for damages are conducted as standard tort claims under the law of torts.

ii Procedure

As mentioned, Bulgarian law does not envisage a special or separate procedure for securities claims, individual or class. The general rules of procedure and evidence, which are set out in the CPC, apply. Securities claims undergo proceedings in up to three court instances, with the last one, the cassation instance, being subject to relatively high standards for certification.

Under the CPC, each party must establish the facts upon which its pleadings or replies are based. Where the claim arises from tort (as is often the case in securities claims) where the prohibited act is proven, fault of the defendant is presumed and the burden of proof is inverted. In general, the CPC does not set a definite standard of proof; the court assesses evidence and statements of the parties at its discretion but must explain its reasoning on evidentiary conclusions in the judgment.

iii Settlements

At any stage of a securities claim, the parties can agree to settle the dispute, partly or fully, through a court approved settlement. According to CPC's Article 234, the court may approve a settlement if it does not contradict the law or good morals. Court settlements have the force of a final judgment and cannot be appealed.

The parties to a securities claim can also negotiate an out-of-court settlement in accordance with Article 365 of the OCA, even while court proceedings are pending. In such instances, the court must consider the settlement and its contents when deciding the claim in the proceedings.

iv Damages and remedies

Assuming the typical civil action relating to prospectuses, financial statements of listed issuers or market abuse would be a type of tort claim, general tort law principles under the OCA would apply. The aggrieved investor must be made whole by the tortfeasor – namely, indemnified for all damages sustained, including lost profit.

Proving damages is often a challenge in terms of evidence. In particular, proving causality between tort and damages sustained can be quite difficult in cases of market abuse. However, the court has a certain amount of leeway in applying its judgment with regard to the amount of damages if the cause has been established but the plaintiff is unable to prove the full extent of damages sustained for reasons beyond her or his control.

Bulgarian law does not recognise the concept of punitive damages.

Bulgaria has yet to see a defining court judgment that gives guidance on the calculation of damages in securities claims.

6 Article 100м(3) of POSA.

As mentioned above, apart from damages in securities litigation, POSA provides for a special rescission claim. This would merely refund the purchase or subscription price to an investor in a public offering, but a damages claim must be included to entirely recompense the investor for any damages sustained.

III PUBLIC ENFORCEMENT

i Forms of action

Criminal enforcement

Despite the provisions laid down in the Penal Code, criminal prosecution for violation of securities regulations is practically non-existent in Bulgaria.

The few relevant provisions of the country's Penal Code include Article 313(4), which subjects to criminal prosecution individuals responsible for the intentional inclusion of false information in a prospectus or in an investor presentation for the public offering of securities; or for the omission of unfavourable information, which, if known by investors, would have significantly influenced their investment decision. The authors are not aware of criminal sanctions having been imposed or indictments made on the basis of that provision since its enactment in 1997.

In late 2017, the Penal Code was amended to include criminal sanctions for intentional market abuse in the form of engaging in insider trading; recommending, or inducing to insider trading; unlawful disclosure of inside information; and market manipulation (Article 260a through 260в of the Penal Code). These provisions serve the transposition of the Market Abuse Directive 2014/57/EU into Bulgarian law, which was also the first instance of EU law being used to compel Member States to introduce criminal sanctions into their national law. These provisions have not yet been tested in practice and it is not expected that they will play a significant role given their considerable overlapping with existing administrative offences, which enjoy priority as 'milder means' of enforcement.

Also, unlike in the case of administrative enforcement, Bulgarian criminal law allows for criminal enforcement against natural persons only, and not against public or private entities. Also, in the case of breaches of the securities laws, criminal sanctions may only be imposed for wilful, but not for negligent, conduct.

Administrative enforcement

Much more significant in practice are the regulatory actions undertaken by the FSC. The FSC exercises two major types of powers.[7]

One is the sanctioning power by way of imposing administrative monetary penalties. This is, essentially, imposing fines on bad actors for breach of the securities regulations. In the general context of Bulgarian law, these penalties are distinctly different from criminal penalties, although they also serve repressive purposes.

Administrative penal proceedings yield to criminal ones. As a result, if the FSC believes that an infringement it investigates amounts to a criminal offence, it must discontinue

7 The FSC is only theoretically empowered to join civil litigation to the benefit of investors or other aggrieved private parties, in limited circumstances. For example, the FSC is expressly empowered to claim invalidation of transactions carried out in contravention of POSA (cf. Article 13(1)(19) of the FSCA); the generality of the rule makes it difficult to draw the scope of this power.

administrative penal proceedings and hand over the dossier to the respective prosecutor's office. A criminal judgment bars the imposition of an administrative fine. Where there are doubts, such a scenario of transfer of the proceedings from the FSC is unlikely, because the cessation of the FSC's proceedings would risk the inability to resume any new administrative investigation, on account of the short prescription terms (see below).

The other type of power vested with the FSC is the power to impose coercive administrative measures on supervised entities and on persons associated with an infringement; these are, broadly, cease-and-desist measures, but could take the form of orders to undertake certain active actions to cure a breach. In essence, coercive administrative measures serve the preventive purpose of inhibiting securities law violations, but are part of public enforcement in a broader sense.

The above types of enforcement powers are discussed below under separate headings.

ii Procedure

Criminal penalties

Criminal penalties are imposed upon a final court judgment. In accordance with the due process rules of the Criminal Procedure Code, criminal proceedings are initiated by a competent prosecutor's office upon receipt of sufficient information regarding a crime that has been committed. The investigation is led by a prosecutor with the assistance of investigators and the police authorities. Article 15 of the FSCA requires the FSC's deputy chairperson in charge of the supervision of the investment activities division to cooperate with the prosecutor's office in investigating securities crimes.

The prosecutor's office indicts the defendant before the first instance court, the judgment of which is subject to appeal before the second instance, whose judgment in turn is subject to cassation appeal before the Supreme Court of Cassation. The appeal is as of right.

The defendant may be convicted of the crime only if the courts find 'beyond any doubt' that the act was committed, that the addressee is the person who committed it, that they have acted culpably and that the act represents a crime. All these matters are for the judges (or court) to determine.

No criminal judgment may be issued against a defendant if more than 10 years have elapsed since a market abuse offence was committed, or five years for a prospectus-related violation.

Administrative penalties

Unlike criminal proceedings, administrative penal proceedings initiated by the FSC are common. In 2020 alone, the FSC issued 570 acts of findings and imposed 386 administrative penalties for breach of securities legislation (including for offences made by market participants regarding the code of conduct requirements in their activities).

Proceedings on the imposition of administrative fines involve an investigation by the FSC that must commence within two years of the offence being committed. The defendant has the right to be heard. The investigation concludes with the issuance of an act of findings, which the FSC must issue within three months of becoming aware of the identity of the offender, or else the FSC is barred from imposing the sanction. The defendant is entitled to file a written objection to the act of findings. The FSC would either discontinue the investigation because of the objection or – as happens more often – disagree with the objection and issue

a penal decree, which describes in detail the infringement, sets the value of the fine and lists the appeal rights of the defendant. The FSC must issue the penal decree within six months of the issuance of the act of findings.

Penal decrees are issued by the FSC's deputy chairperson in charge of the supervision of the investment activities division. Penal decrees may be appealed before the lower-level district courts within seven days of service on the defendant (14 days as of 23 December 2021), the judgments of which are in turn subject to appeal, as of right, before the administrative courts. Decisions of the administrative courts upon appeal are final. Upon appeal, a penal decree can either be affirmed, modified or reversed.

The FSC may issue a penal decree if it has established 'beyond any doubt' that the offence was committed, that the addressee is the person who committed it and that they have acted culpably.

In the practice of the FSC, the most common type of enforcement action for breach of securities regulations is the sanctioning of market manipulation within the meaning of Articles 15 and 12 of MAR.

Market manipulation under MAR may be committed through various activities and can be divided into three groups that complement one another:[8]

a trade-based market manipulation;
b information-based market manipulation; and
c market manipulation through other kind of misleading activity or behaviour.

Article 12(1) of MAR contains broad definitions of each of these three types of market manipulation.

The definitions are further clarified with examples of practices constituting market manipulation in Article 12(2) of MAR, as well as with non-exhaustive lists of indicators for practices, which may amount to market manipulation, in Annex I to MAR and Annex II of Commission Delegated Regulation (EU) 2016/522.

In its regulatory practice, the FSC relies primarily on these 'indicators' of abusive behaviour to monitor the market, detect possible manipulation and issue penal decrees. The FSC has been most active in identifying and sanctioning cases of alleged trade-based market manipulation. From a comparative perspective, this may appear unusual as trade-based market manipulation is one of the more difficult forms of market abuse to identify, prove and penalise on large international stock exchanges. Nonetheless, as mentioned, the low liquidity on the Bulgarian capital market, coupled with the wide scope of the definition of market manipulation in Article 12(1)(a) of MAR, has enabled this development in local regulatory practice.

A typical example, leading to a penal decree, would involve trading behaviour, which prima facie fulfils one or more of the indicators for abusive behaviour mentioned above and which may coincide with significant changes in the market price of a security. These circumstances are deemed sufficient by the FSC to assume that trade-based market manipulation has been committed, in the form of entering into transactions that 'are likely to give false or misleading signals as to the supply, demand or price' of the underlying security.

Controversially, the FSC does not set strict requirements on hypothetical causality when determining whether certain trading behaviour is likely to give a manipulative market signal.

8 This categorisation is based on Allen, Gale, *The Review of Financial Studies*, Volume 5, 1992, p. 503–529.

Often, the coincidence between the execution of certain trades and a significant change in the market price of a security is considered as sufficient evidence that the trades were at least likely to influence the market in a manipulative manner.

This makes the defence against alleged stock price manipulation difficult, as defendants would generally not be able to prove that their trading behaviour was not likely to have manipulated the price of a security; for example, because they have sold a security while its price was, allegedly, falsely rising.

Bulgarian courts seem to accept this loose standard and generally confirm upon appeal the FSC's penal decrees for market manipulation.

Not requiring strict causality between trading behaviour and the formation of a manipulated stock price has further negative implications for the defence strategy of a defendant. Defendants are barred from claiming that their trading behaviour was 'insignificant', and are therefore not punishable due to the lack of a harmful result, namely, lack of a significant manipulative change in the stock price of a traded instrument. Market manipulation is seen by Bulgarian courts as a formal offence, meaning that the abstract possibility of causing a harmful result is sufficient to accept that a (significant) offence has been committed.

According to the 2019 'Annual Report on Administrative and Criminal Sanctions and Other Administrative Measures Under MAR', published by ESMA,[9] in 2018 the FSC issued 16 administrative sanctions for market manipulation for a total of 440,000 lev. As an absolute figure, this number of sanctions was second, in the entire EU, to the Swedish Financial Supervisory Authority, with 29 sanctions imposed. This tendency was discontinued in 2019. ESMA's 2020 'Report on Administrative and Criminal Sanctions and Other Administrative Measures Under MAR'[10] cited no sanctions for market abuse imposed in Bulgaria.

Coercive administrative measures

Another way for the FSC to enforce the securities regulations is by way of issuing coercive administrative measures. These are orders by the FSC to capital market actors (issuers, underwriters, their managers, auditors, investors) to cease illegal conduct, desist from such conduct in the future and stop disgorging illegally gained profits or otherwise remedying the results of infringements. Article 212a1 of POSA and Article 32 of the Prospectus Regulation go into detail about specific orders that the FSC may issue, including various prohibitions on the conduct of offerings and on advertising of offerings, instruction for the inclusion of information in prospectuses, suspension of public offerings, or trading on regulated markets, or advertisements, for up to 10 business days on each occasion. In the case of the EMMAA (Article 20) and MAR (Article 30), these measures also include public warnings, temporary bans on persons discharging managerial responsibilities in investment firms or other capital market participants to exercise their functions, orders on the disclosure of inside information by an issuer, and suspension of trading in financial instruments on a respective trading venue.

Coercive administrative measures are adopted by the FSC as a collegial body, upon motion by the deputy chairperson in charge of the supervision of the investment activities division.

9 Available under: https://www.esma.europa.eu/file/53819/download?token=QxAqUSB6.

10 Available under: esma70-156-3537_annual_report_on_mar_administrative_and_criminal_sanctions_2020.pdf (europa.eu).

An appeal from a coercive administrative measure may be lodged within seven days of notice to the defendant that the FSC has issued the measures. Appeals may be lodged exclusively before the Sofia Administrative Court, judgments of which may be appealed in turn, as of right, before the Supreme Administrative Court.

Notification of administrative penalties and coercive administrative measures

In line with the Prospectus Regulation and MAR, the FSC is empowered to publish on its website all the administrative penalties and coercive administrative measures – the 'naming and shaming' approach. The FSC may, however, defer such publication, or do so in an anonymised manner, to avoid disproportionate damage to the addressee of the penalties or measures.

iii Settlements

Criminal proceedings

Settlements in criminal proceedings can be negotiated in accordance with Chapter 29 of the Criminal Procedure Code.

A pretrial settlement can result in a reduced sentence of the investigated person, below the legal minimum for the alleged crime. The defendant must explicitly waive the right of examination of the case in court proceedings, in accordance with the general rules. The agreement is submitted by the prosecutor to the competent first instance court along with the case file. If the crime has caused property damage, the settlement may be approved only after their recovery or collateralisation. The court reviews the settlement in a single-judge panel and may propose changes to it. The court approves the settlement, if it is not contrary to the law or morals. The ruling of the court is final and the settlement has the effect of a sentence entered into force.

If the court does not approve the settlement, it returns the case file to the prosecutor. In this case, confessions and pleas of the accused person may not serve as evidence.

A settlement can also be reached, in accordance with the above procedure, before the first-instance court after institution of the court proceedings but prior to completion of the judicial trial.

Administrative penalties

Settlements in administrative penal proceeding are new (Article 58d of the AIPA) and are still not applicable; they will apply from 23 December 2021. They will be broadly similar to settlements in criminal proceedings. The possibility for a settlement must be indicated to the defendant, and the settlement offer may be proposed by either the FSC or the defendant, in the latter case within 14 days of the receipt of the act of findings. A settlement is not possible in the case of repeated infringements and in some other instances.

The defendant may be motivated to seek a settlement because this may automatically reduce their penalty (fine): to 70 per cent of the minimum amount set in the law, or (subject to the discretion of the FSC) to no more than 70 per cent of one half of the maximum amount if there is no minimum amount for the particular infringement.

The settlement is deemed to become effective only if the defendant pays the agreed fine with 14 days of the signing of the settlement.

If no settlement is reached or the settlement does not enter into force, the defendant's plea as to his or her responsibility for the infringement made when negotiating the settlement may not be used in the administrative penal or any other proceedings.

Coercive administrative measures

As is the case with administrative penalties, the FSC and the addressee of a potential coercive administrative measure may also settle. This can be done up to the time of issuance of the measure by the FSC or its appeal by the addressee of the measure (Article 20 of the Administrative Procedure Code). The FSC and the addressee of the measure may also settle before the administrative court hearing the appeal against the coercive administrative measure (Article 178 of the Administrative Procedure Code). The court must approve the settlement in this case. The settlement must not be in contravention of the substantive law being applied, for example, the Prospectus Regulation, MAR, POSA, EMMAA, etc.

The possibility for a settlement in the administrative phase – namely, before the coercive administrative measure has been issued or appealed – is relatively new; it came into existence on 1 January 2019. Regarding coercive administrative measures, the FSC and defendants do not appear to be resorting to settlements often.

iv Sentencing and liability

Criminal penalties

The criminal penalties for violating Article 313(4) of the Penal Code, in relation to statements and omissions in prospectuses and other offering documentation, are imprisonment of up to three years and a relatively small monetary fine.

The criminal sanctions for market abuse follow a differentiated approach, depending on the type of market abuse committed. In all cases the crime must have caused significant harm or, in the case of insider dealing or inducement thereto, must have been committed by a professional insider.

The maximum sanctions for market manipulation, insider dealing and the inducement thereto are imprisonment of up to four years, a monetary fine and deprivation of the right to hold (certain types of) public office and the right to exercise certain professions. In addition, the object of the crime or, where that is not possible, its value is to be confiscated in favour of the state. If an insider offence is committed by two or more people conspiring in advance, or in the context of organised crime, or the offence is repeated, the sanctions are imprisonment from two to five years and a higher monetary fine.

The maximum sanction for unlawful disclosure of inside information is imprisonment of up to two years.

In accordance with the Penal Code, the ultimate sanction for a crime is determined based on the degree of social danger of the crime and the offender, the offender's motives and other attenuating or aggravating circumstances.

Administrative penalties

Recent rule-making in the EU requires that penalty levels be harmonised across the Union as regards their lowest maximum values; this is irrespective of the level of economic development and relative wealth of any given Member State.

Thus, in the case of infringements on the prospectus regime, the Prospectus Regulation requires maximum administrative pecuniary sanctions to be set as the higher of:

a at least twice the amount of the profits gained or losses avoided because of the infringement where those can be determined;

b in the case of individual defendants, a value that is at least €700,000;

c for a legal person, a value that is at least €5,000,000; or

d for a legal person, 3 per cent of the total annual turnover of that person according to the last available financial statements approved by the management body (with modification for businesses producing consolidated accounts).

Similarly, the Market Abuse Regulation provides for penalties, the maximum values of which must be set as, for the most important infringements (insider dealing, recommendation and inducement thereto, unlawful disclosure of inside information, market manipulation):

a at least €5,000,000 for individuals; or

b for legal entities, at least €15,000,000 or 15 per cent of the total annual turnover according to the latest available management-approved accounts.

Bulgaria's POSA, and respectively EMMAA set half of the above amounts as caps for a first-time offence and set the above amounts as caps for a repeated offence, namely, an offence of the same type as a previously sanctioned one, committed within one year of the entry into force of the earlier administrative penal decree.

The penalty levels are set out in scrupulous detail depending on the particular infringement relating to prospectuses, with the highest penalty levels pertaining to the making of a public offering without an approved prospectus; respective insider dealing; improper disclosure of inside information and market manipulation; and a lower level for infringements of a more technical nature, such as to failure to publish a required notice at the start of a public offering.

POSA also lays out administrative penalties for infringements of the transparency requirements: on the ongoing disclosure of information by registered issuers of securities, or for infringements by tender offerors.

In its regulatory practice, the FSC imposes sanctions at or close to the statutory minimum amounts. The most widely imposed sanction for market abuse, that for market manipulation, is typically set at the statutory minimum of 20,000 lev.

By virtue of Article 31 of MAR, Article 39 of the Prospectus Regulation and Article 27(2) of the AIPA, when deciding on the level of the fine, the FSC, or on appeal the court, must take into account facts such as the gravity and duration of the infringement, degree of responsibility of the alleged perpetrator, their financial strength, impact of the infringement on retail investors, level of cooperation of the defendant with the FSC, previous infringements by the perpetrator, and not least that person's motivation to commit the offence.

Coercive administrative measures

When deciding on the exact type of measure, the FSC must consider the same factors as those discussed above with respect to the issuance of penal decrees (cf. Article 31 of MAR, Article 39 of the Prospectus Regulation).

Unless the settlement provides otherwise, once coercive administrative measures are issued they are subject to immediate enforcement, even if appealed.

IV CROSS-BORDER ISSUES

Hypothetical foreign issuers that offer their securities publicly in Bulgaria or whose securities are admitted to trading on a Bulgarian-regulated market will be subject to public enforcement in Bulgaria if it is their EU 'home Member State' according to the Prospectus Regulation, respectively the Transparency Directive (2004/109/EC). This prospect is highly unlikely in the case of equity securities, but possible in the case of bonds of issuers from other EU Member States, where their nominal value is €1,000 or more. Third-country issuers may be subject to public enforcement in the Republic of Bulgaria if they select Bulgaria as their EU home Member State, in which case the FSC will have the same powers as for of local issuers.

An interesting scenario is where a Bulgarian issuer is seeking a dual listing of its shares on the BSE and a foreign market. It will need to comply with the 'public company' regime under POSA (these rules generally consist of special requirements for convocation and holding of general meetings, shareholder pre-approval of certain significant transactions, additional requirements for secondary offerings, such as pre-emption rights, for distribution of dividends, etc). This triggers certain practical and other considerations in view of the way such issuer will provide foreign investors with a possibility to exercise their rights as shareholders in a Bulgarian public company.[11] Bulgarian law is not very clear on whether the 'public company' regime applies if a Bulgarian issuer considers listing only on a foreign regulated market, and not also on the BSE, a go-IPO transaction not yet tested in practice.

Cross-border issues may also arise with regard to market abuse. In particular, criminal and administrative enforcement is possible even in a cross-border context, where the infringement has been committed in relation to instruments (also) traded in Bulgaria. Furthermore, Bulgarian citizens can be subject to prosecution by the local authorities, even if they have committed an offence abroad or in respect of financial instruments traded in or otherwise related to other EEA states. For the time being, this terrain remains unknown, and issues with regard to cross-border cooperation in criminal and regulatory matters are likely to arise in practice.

V YEAR IN REVIEW

The high market expectations for 2020 were abruptly chilled in March, owing to the covid-19 pandemic. Some capital markets transactions managed to close; many others were deferred or cancelled. Thus, it was a largely uneventful year in terms of securities enforcement. The time was not wasted, though. The introduction of settlements in administrative penal proceedings (to apply as of late 2021) is a significant step forward in modernising enforcement practices, especially in view of the weight the FSC plays in enforcement of securities regulations.

11 In a reverse scenario that consists of a foreign issuer from the EU or a third-country listing in Bulgaria, such issuer will not be subject to the described special governance rules on public companies under Bulgarian law.

VI OUTLOOK AND CONCLUSIONS

Bulgaria has yet to see a landmark criminal judgment concerning a breach of the prospectus requirements, insider dealing or market manipulation. With the gradual evolution, growth and internationalisation of the local capital markets and the growing activity of local issuers, this will not take too much time. The same applies to significant actions for damages or other civil remedies.

The FSC's sanctioning practice, on the other hand, amasses precedents year by year. The authors expect that, in the near future, it will be the FSC, and the courts that control its sanctioning decisions, who will add guidance to market participants on approaches to securities regulations enforcement. Settlements with the FSC are also likely to become more frequent, but not the norm.

Appendix 1

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Nikolay Bebov, holder of LLM degrees from Columbia Law School in New York and the Sofia University Faculty of Law, has been leading Tsvetkova Bebov Komarevski's financial services law group since 2001. He is a renowned securities and capital markets practitioner in Bulgaria, recognised by *The Legal 500*, *IFLR1000*, *Best Lawyers* and *Chambers*. He regularly advises issuers or underwriters of debt and equity securities and parties to other capital markets transactions (e.g., mandatory tender offers). He also advises financial sector clients on matters of prudential regulation, dispute resolution, licensing and authorisations, derivatives transactions and conduct of business rules. Nikolay also practises in the areas of banking laws and regulations; fintech; DLT and crypto-assets; and financial sector M&A, such as the acquisition of banks. Nikolay has also contributed to many professional publications about Bulgaria's financial laws and regulations, including *International Banking Law & Regulation* and *International Capital Markets Law and Regulation*. He has been involved with the drafting of financial sector laws and regulations in Bulgaria and North Macedonia, recently regarding the transposition of the EU's Covered Bond Directive. He is qualified as attorney and counsellor at law in Bulgaria and the State of New York.

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Damyan Leshev, holder of an LLM degree and a bachelor's degree in economics from the University of National and World Economy, has extensive experience in equity capital markets, debt capital markets and banking transactions. Damyan regularly advises issuers and underwriters on the matters of Bulgarian and EU securities laws and regulations and is also a renowned expert in MiFID II. He also advises borrowers or lenders on the Bulgarian law aspects of banking and other financing transactions. Damyan co-leads the firm's financial services law group. He is a renowned legal expert and capital markets legal specialist, who is recognised by *Chambers*, *IFLR1000* and *The Legal 500*, among others. Damyan has contributed to many professional publications about Bulgaria's banking and securities legislation, including *International Banking Law & Regulation* and *International Capital Markets Law and Regulation*, and Bulgarian chapters of EPRA's and Wolters Kluwer's REITs review. He has been involved with the drafting of financial sector laws and regulations in Bulgaria and North Macedonia, including the transposition of the EU's Covered Bond Directive. He is a member of the Sofia Bar Association.

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Petar Ivanov, holder of a Dipl. iur. degree from the Ludwig Maximilian University of Munich, is a leading associate with TBK's financial services law group. Petar specialises in the field of capital markets and banking regulations and has provided large international and domestic clients with both transactional support and legal advice on a variety of topics, including debt and equity transactions, derivatives transactions, financing and collateralisation, market abuse prevention, conduct of business requirements for leading banks and investment firms. Petar has also advised clients in public enforcement proceedings related to market abuse. Petar Ivanov is a rising legal expert and is recognised in the *IFLR1000* legal rankings. He has authored and co-authored legal publications in Bulgarian, English and German. He has been involved with the drafting of financial sector laws and regulations in Bulgaria, including the transposition of the EU's Covered Bond Directive.

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