



DOI: 10.22363/2313-2337-2019-23-4-533-545

Research Article

PUBLIC SECURITIES AND DERIVATIVES LAW AS BRANCH OF THE FINANCIAL LAW

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The article is devoted to financial law issues on securities and derivatives market regulations. The article deals with the financial law nature of the relations that are emerging in the securities and derivatives markets through a review of methods and techniques of securities and derivatives market regulation.

The author considers the public interest in the regulation of the securities and derivatives markets, as well as differences between different parts of securities and derivatives markets. The article contains the review of regulatory, compensatory and redistributive functions of the securities and derivatives markets.

The author states that control of the securities and derivatives market has to be considered as independent type of state financial control in the Russian Federation. In addition, the securities and derivatives law have to be considered as a branch of financial law.

The legal relations arising in course of issuance and circulation of state securities and entering into derivatives deals are separately reviewed and analyzed. It is proved that the basis for recognition of the securities and derivatives market as the financial law categories is similar to reasons proving the existence of public banking law, namely, stock market and derivatives as an integral parts of any financial market system, the presence of public interest in the regulation of relations in the securities and derivatives markets, the existence of a mandatory subject of legal relations, having a public authority (the Bank of Russia), the existence of subordination between the Bank of Russia and professional participants of the securities market where the Bank of Russia acts as a regulator and supervisory authority and wide scope of public law methods used for securities and derivatives market regulations.

Key words: securities, securities markets, financial law, the Bank of Russia, the initial public offering, the financial markets, derivatives

INTRODUCTION

The relations between the authorized bodies of the state, legal entities and individuals on the issue, circulation and redemption of securities, constitute securities market. Meanwhile the relations between the authorized bodies of the state, legal entities and individuals constitute the derivative market which is not less important than

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securities market. In terms of types of financial instruments, the derivative market is even more complex and may lead to negative consequences to the whole financial market and the national economy. The bright example is the world economic crisis of 2018. The derivatives may be a trigger of financial crises. Warren Buffett called them weapons of mass destruction (Kazantsev, 2009:156–161).

Both are integral and material parts of the modern financial market, which also includes money market (purchase and sale of non-cash currency), the foreign exchange market (foreign exchange purchase and sale).

It is necessary to distinguish the organized and unorganized securities markets, a significant difference between the organized market is that transactions and securities transactions carried out by professional participants of the securities market, acting on the basis of licenses issued by the Bank of Russia. Such distinguish makes sense for the derivative market because there are some specific regulations are linked with type of the market. For instance, individuals are entitled to enter into derivative transactions on the organised market only. Otherwise such derivative transaction is void. Hence the unorganised (OTC market) is a trading place for qualified investors and professional participants on securities market having the professional licenses for trading activity.

Previously, these licenses were issued now abolished Federal Service for Financial Markets. An example of an organized market may make securities trading on the stock exchange (for example, JSC “Moscow Exchange”), and OTC market — buying securities through entering into written agreements between legal entities and individuals. OTC market for derivatives transaction consists of Bank of Russia, professional participants on securities market and qualified investors. Such difference in composition of the participants is explained by more complexity of derivative market and intention of the Russian authorities to protect individuals.

However, access to organized securities and derivative markets individuals and non-professional market participants receive by way of entering brokerage contracts, contracts of asset (securities) management with professional participants on securities markets (brokers, asset management companies).

The permanent development of electronic and hardware on securities and derivatives market led to reduction of brokers’ involvement in client trading. The most part of professional participants on securities market activity is to ensure the technical access to the organized securities and derivatives market and carry out a number of public functions, such as monitoring transactions and operations for anti-money laundering and terrorist financing, the manipulation of prices of securities and other financial products, misuse of insider information. It worth noting that the securities market is considered as a place between the river and the cemetery by (Lewis, 1989:2–6).

Also it is necessary to allocate primary and secondary securities market. Thus, the primary securities market is transactions between the issuer and the acquirer of the primary mediating the initial issuance of securities. In the secondary market trading of securities there are securities sale and purchase transactions and other transactions be-

tween the primary purchaser of the securities and the rest of the securities market participants. The secondary securities market includes redemption of securities and buy-back of the securities by the issuer of the securities.

There is a distinguish between an initial public offering (initial public offering (IPO)) and secondary public offering (secondary public offering (SPO)). During the initial public offering of securities for the first time offered on the organized market of an indefinite number of persons, while at the secondary public offering earlier placed securities are also available to the public of the organized market of one or more of the owners of securities.

Meanwhile, the separation on primary and secondary market is not relevant to the derivative market.

However, the issue arises about the legal nature of regulations covering relations in the securities and derivatives market. At present, the Russian legal regulation of the securities and derivative markets is represented by a multi-colored palette of financial law and civil law.

The existence of different points of view on public law and private law elements in the securities and derivatives market regulation suggests the possibility of selection of institutions of public and private securities and derivatives law, where a public securities law is the institute of financial law, regulating relations arising in the sphere of state regulation and supervision conducted by the Bank of Russia in the securities and derivatives market.

In spite of the fact that it is possible to continue to argue concerning a substantial component of financial law regulation in the securities market, there is no doubt that as A.O. Pristupko (Pristupko, 2006:41-43) emphasizes, "the role in legislative ensuring of infrastructure of the securities market will be played by the financial law. This situation needs to be "legalized", i.e. officially recognize financial law as the basic area of legal support of the stock market".

As S. V. Zapolsky (Zapolsky, 2008:150-151) rightly notes, "the implementation of its norms and legal structures (financial law — approx. it is a question of the functioning of the securities market as part of the financial market and financial and legal means of regulating this market". In addition, S.V. Zapolsky (Zapolsky, 2010:352–353) considers the securities transactions as a part of emission law.

G. A. Tosunyan and A. Yu. Vikulin (Tosunyan, Vikulin, 2003:15–19) distinguish securities law as a structural element of the financial law system.

The public law component is pointed out By I. V. Getman-Pavlova (Getman-Pavlova, 2007:2–5), who defines international stock law as a complex polysystem legal institution; its normative structure is composed of public law norms (approx. highlighted by the author) with private law effect, contractual substantive and conflict of laws rules of private international law, *Lex mercatoria* prescriptions.

As E. A. Andreeva (Andreeva, 2014:11–15) points out, the rules on securities are contained in the sources of various branches of law. First of all, it is administrative, civil, financial and even criminal law.

E. Y. Kovalkova (Kovalkova, 2017:32) says that the legislation on the securities market is a large array of regulations, including the norms of various branches of law.

E. E. Emirsultanova (Emirsultanova, 2005:39) notes that financial and legal stock relations arise in connection with: the issue of securities (accumulation of funds); investment in securities (distribution and use of funds); regulation of the securities market and the implementation of stock control.

S. S. Tropskaya (Tropskaya, 2013:12) adheres to a similar position, noting that the concept of “public financial activity” also includes management activities of public authorities on state regulation and control of financial markets.

A.B. Gabov (Gabov, 2011:19) highlights state regulation of the securities market as a type of relations on the securities market.

K.S. Belsky (Tsendiliani, 2016:45) states that there is a legal institute of the securities market of the financial law.

As a resume, it can be stated that the general scientific approach is to recognize the securities market as a material part of the financial market, from the one side, and from the other side, financial law as one of the law branches covering securities market activity.

Supporting the abovementioned statements of the scientists it is important to highlight that their views are limited by only one type of financial instruments. It is securities. However, even Russian financial legislation (article 2 of Federal law № 39-FZ dated on 26 of April 1996 “On securities market”) sets out that the financial instruments consist of securities and derivatives².

Having the detailed legal definition (article 2 of Federal law № 39-FZ dated on 26 of April 1996 “On securities market” in the abovementioned federal law the latter can be defined as an agreement stating the obligation of the counterparties to pay money depending on volatility of financial and commodity prices or on events which occurrence in future is unknown (Krasnov, Alexandrov, 2010:159).

Therefore, it is reasonable to consider the securities and derivatives markets regulations based on following grounds.

Both are financial instruments from economic and legal perspectives. It should be stressed that some foreign scientists even determine the derivatives as a type of securities. For instance, B. Solnik (Solnik, 1996:435–436) determines the derivatives as “securities bearing a contractual relation to some underlying asset or rate”.

Both are covered by the same normative acts. In general, the composition of the participants of these markets are pretty the same.

Both have the same supervisory authority. The supervisory authorities for securities and derivatives transactions is Bank of Russia.

² *Sobranie zakonodatel'stva Rossiiskoi Federatsii* [Collection of legislation of the Russian Federation] (1996). (17), Art. 1918

In addition, I.M. Livshits (Livshits, 2012:189–190) mentions that convergence of the regulations of the securities and derivatives markets is a trend of European regulations.

The public financial law component in regulation of securities and derivatives market is justified by the functions of the securities and derivatives markets.

Firstly, the securities and derivatives markets perform a regulatory function, which ensures the creation and enforcement of rules of trade in securities and derivatives, dispute resolution between securities market participants, Bank of Russia and non-professional participants: legal entities and individuals.

Secondly, allocation function, which is expressed in the allocation of monetary funds between households and different sectors of the national economy.

Thirdly, the compensation function means the financing of the budget deficit at different levels of the budget system of the Russian Federation on non-inflationary basis, ie without the issuance and circulation of extra cash.

Fourthly, derivative market carries out the hedging function allowing the derivative market participants to manage and limit their financial risks.

In our opinion, there is no doubt that these functions justify public law component of the securities market, as economic agents are less interested in the implementation of these functions. In addition, the implementation of these functions is possible only in the presence of state influence, which is expressed primarily through the issuance of regulations covering securities and derivatives market.

The main participants of securities and derivatives market are the Bank of Russia, the professional participants of the securities market. At the same time, it is important to highlight state corporations, investment companies, insurance companies, private (non-state) pension funds, asset management companies, investment funds.

The Bank of Russia performs regulatory and supervisory functions on the securities and derivatives markets. Moreover, the Central Bank of Russian Federation acts as an ordinary participant by way of securities and derivatives trading on the stock market: issues securities (the Bank of Russia bonds), a service agent for government securities, enter into sales transactions, repo transactions with securities.

By the professional participants of the securities and derivatives market include the following types of entities: brokers, dealers, trust managers, depositories, registrars, FX dealers, repositories. The stock exchange is not a professional participant of the securities market, but it has an important role in set up of the organized securities and derivatives markets. The Moscow Exchange has both organised securities and derivatives markets³. The arranging of trading on the securities market provides for the rendering of services for the organized trading on the securities market on the basis of license of exchange trading system.

³ Official website of Moscow Exchange, available at: <https://www.moex.com/s4> (Accessed 22 September 2019).

There are self-regulatory organization of professional securities market participants in the securities and derivatives markets. They are a voluntary association of professional participants of securities and derivatives market, functioning on the principles of non-profit organizations.

In 2016 the professional participants have to become member of one of the self-regulatory organisation (SRO). The membership in the self-regulatory organisation leads to obligation of the members of SROs to adhere professional securities market standards adopted by relevant SROs.

Self-regulatory organizations of professional securities market participants are to ensure the conditions of professional activity of financial market participants, compliance with standards of professional ethics in the financial market, protect the interests of holders of securities and other clients of professional participants of securities and derivative market, are members of the self-regulatory organization, the establishment of rules and standards of securities and derivatives transactions, ensuring effective operation of the securities and derivative market.

Self-regulatory organizations are entitled: to receive information on the results of inspections of its members carried out by the Bank of Russia; to approve the rules and standards of the professional activities of its members, including securities transactions and operations related to entering into and execution of agreements being derivative financial instruments; to control over compliance with its members approved self-regulatory organization rules and standards of the profession; and finally, to carry out the training of individuals in the sphere of professional activity at the securities market. If a self-regulatory organization is accredited by the Bank of Russia, taking qualification exams and issue qualification certificates.

The purpose of state regulation of securities and derivatives markets to ensure the formation of an efficient market with a developed infrastructure and financial market institutions, ensuring the implementation of the unified state monetary and credit policy, the formation of a reliable source of investment for both qualified and non-qualified investors, protecting the rights of investors in the securities and derivatives market.

The main two elements of the government securities and derivatives market regulation of securities should be classified as: the state authority performing regulation and supervision functions and regulation of the securities market.

The legal framework of securities and derivatives market consists of financial law and civil law provisions, covering relations of securities market participants, related to the issue, circulation and redemption of securities and entering and execution of the derivative contracts, as well as regulation and supervision conducted by state authorities (Bank of Russia).

The civil law framework stands for public relations arising, change, and terminate on the basis of transactions and operations with securities and derivatives covering the purchase and sale agreements, pledge, exchange. An essential feature of these relations is that they are carried out on the basis of equality, autonomy of the wills of

the parties, property independence. In turn, financial (public) regulation is presented by state authorities' activity on securities market, in particular, regulation and supervision on securities market participants.

The collaboration between financial law and civil law regulations on securities and derivatives market was explained by N. Kazantsev (Kazantsev, 2009:305): “The nature of modern money and derivative financial instruments is that they are both under the overall responsibility of the state and the individuals who have them”.

As highlighted above, the main normative legal act in the securities market, especially the market of mass-issued securities and derivative financial instruments are the Federal Law № 39-FZ of April 22, 1996 “On the Securities Market”⁴. A significant part of securities market regulations is the regulations of the Federal Service for Financial Markets, as well as its successor — the Bank of Russia.

Licensing of the professional securities market participants; registration of offering circulars and issue of securities, asset management rules for collective investment; the adoption of rules of professional activities, supervision and control over issuer's activities, professional securities market participants, collective investment funds, all of them have financial law nature, despite the fact that the transactions between themselves are covered by civil law regulated contracts.

By default, the state is interested into the effective organization and functioning of the securities and derivative markets. It is worth mentioning that the world financial crisis in 2008 was initiated by US securities and derivatives markets.

In addition, it is appropriate to draw a parallel with the banking and insurance laws, where the purposes and objectives of the state on the banking and securities markets determine and justify the financial law nature of banking and insurance relationships, regardless of the fact that the banking or insurance transactions are covered by civil law governed agreements.

Therefore, the public nature of the regulation determines the purposes of financial and legal nature of financial relationships in the securities and derivative markets.

A. Nowakowski (Krasnov, Alexandrov, 2010:13) states that the state establishes the principles and purposes of regulation, it can only create the structure of market regulation: directly set limits on the possible use of other forms of regulation, to determine their significance for the market.

However, the connection with the financial activity of the state should not be considered as a mandatory feature of assigning a number of relations in the securities market to the financial law relationships. We stipulate that the market of government securities as a sector of securities market is inherently considered as part of financial activity of the state.

We agree with S. Zapolsky (Zapolsky, 2010:150), emphasizing that “the implementation of its norms and legal structures (financial law) can take place without

⁴ Sobranie zakonodatel'stva Rossiiskoi Federatsii [Collection of legislation of the Russian Federation] (1996). (17), Art. 1918

any accumulation and use of public financial funds ... It's about the securities market functioning as part of the financial market and the financial and legal means of regulating the market”.

Adheres to this point of view, I. Koch (Orlova, Shavaleeva, 2012:494), considering the aspects of state financial control in the securities market and asserts that, by virtue of mass and large-scale nature of the operations in the securities market, a significant impact on the state of the financial system and the economy as a whole, the possibility of using the securities market for illegal purposes, “the state does not have a right to be eliminated from the organization of financial supervision in the market”.

It should be noted that in a number of manuals, which rightly emphasizes the financial law component in the regulation of securities market, unfairly forgotten about the state financial supervision in the securities and derivative markets, which is standalone and different from other types of state financial control, including banking and insurance supervision.

We think that it is reasonable to consider the control over securities and derivatives market as a separate type of state financial control in the Russian Federation. Otherwise, a situation where part of the financial law governed relationships is not subject to state financial control, is unacceptable from theoretical and practical points of view.

Separately it is necessary to consider the legal relations arising from the issuance and circulation of state securities. Despite the fact that the basis of government bond as a debt security is a civil loan contract, the procedure of issuance and servicing government securities is regulated by the financial law, including Budget Code of the Russian Federation.

At present, the legal status of the Bank of Russia as mega regulator of the financial market will allow to unify the rules of financial market regulation for all participants, systematically assess the various risks, including legal and regulatory risks. The fact of the creation of a mega-regulator on the financial market proves the state's interest in the comprehensive implementation of common goals and objectives of financial market regulation, which is also one of the world trends in the development of financial markets.

The Bank of Russia is the authority in charge of regulation and supervision of the securities market. The implementation of these functions is carried out through a permanent body — the Financial Supervision Committee, which decides on key regulatory issues, control and supervision of the financial markets.

The main objectives of the Bank of Russia activities in the securities and derivatives market are: sustainable development of Russian financial market; effective management of risks arising in the financial markets, including the rapid detection and reaction to crisis; protection of rights and interests of investors in the financial market.

The Bank of Russia in cooperation with the Government of the Russian Federation develops and implements policy development and ensures the stability of the Russian financial market, including the stock market.

As a successor of the Federal Service for Financial Markets the Bank of Russia performs the following functions regulated by financial law. As noted by A. Bylya (Gracheva, 2014:589), just in the methods and control methods shown regulating effect of the financial rules of the right to the main securities market institutions.

The functions of the Bank of Russia also are state regulation of securities and derivatives market, including the adoption of standards and rules of professional activity on securities market, the standards of disclosure of information on securities and derivatives market.

One of the important functions of the Russian securities market regulator is licensing of the activity of professional participants of securities market by way of issue of the broker, dealer, asset management, depository and other licenses after check of compliance by the applicant with licensing requirements, which ensures the stability of the securities market and approved business participants.

The state registration of issuance of mass-issued securities and offering circular of securities, reports on results of issuance of securities, rules of management of mutual funds, private pension funds are also a function of the Bank of Russia as securities market regulator.

The adoption of mandatory standards, including adequacy of own funds of professional participants of securities market as a function of the Bank of Russia is similar to public law governed function of adoption of banking rules for credit institutions.

In addition, Bank of Russia carries out supervision of the activities of professional securities market participants, issuers, investment funds and private pension funds and other non-credit financial institutions.

The Bank of Russia conducts inspections based on legal entities and individuals' complaints of a possible violation of the securities and derivatives law and routine inspections of the professional securities market participants, and other non-credit financial institutions.

The Bank of Russia has a right to issue mandatory prescriptions and censures and submit applications to the court to liquidate legal entities carrying out professional activities in the securities market, to invalidate transactions, to cancel issuance of the securities in order to protect state and public interests in the securities market.

The Russian securities regulator imposes administrative liability to individuals and legal entities in cases of administrative offences considered during administrative cases initiated by the Bank of Russia.

Based on abovementioned authorities of the Bank of Russia, it should be stressed that all of them have public law nature and provide for vertical, public-legal relations in the securities market, where one of the mandatory participants — the supervisory body with public authority.

CONCLUSION

Thus, the financial law nature of securities and derivatives market regulation is based on the similar legal grounds justifying the existence of public banking law: securities and derivatives markets are integral parts of any financial market, the presence of the public interest in the regulation of relations in the securities market, the existence of a mandatory participant of such relations, which has public authority (the Bank of Russia), the existence of subordination between the Bank of Russia as a regulator and supervisory authority and the professional securities market participants, public law means of securities and derivatives market regulation. Making parallels with public banking law as branch of financial law was an object of research by T.E. Rozhdestvenskaya and A.G. (Rozhdestvenskaya, Guznov, 2014:6–17) we can state that public securities and derivatives regulations can be considered as a standalone branch of financial law as well.

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For citation:

Proshunin, M.M. (2019) Public securities and derivatives law as branch of the financial law. *RUDN Journal of Law*. 23(4), pp. 533–545. DOI: 10.22363/2313-2337-2019-23-4-533-545.

Article received September 02, 2019

Article accepted October 15, 2019

Научная статья

ПУБЛИЧНОЕ ФОНДОВОЕ И ДЕРИВАТИВНОЕ ПРАВО КАК ИНСТИТУТ ФИНАНСОВОГО ПРАВА

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Настоящая статья посвящена вопросам финансово-правового регулирования рынка ценных бумаг и деривативов. В статье рассматривается финансово-правовая природа отношений, возникающих на рынке ценных бумаг и производных финансовых инструментов на основе обзора методов и приемов регулирования рынка ценных бумаг и деривативов.

Автор рассматривает общественный интерес к регулированию рынков ценных бумаг и деривативов, а также различия между первичным и вторичным рынком ценных бумаг. Статья содержит обзор регуляторных, компенсационных и перераспределительных функций рынков ценных бумаг и деривативов.

Автор констатирует, что контроль на рынке ценных бумаг и деривативов должен рассматриваться как самостоятельный вид государственного финансового контроля в Российской Федерации, а публичное фондовое и деривативное право должны рассматриваться как институт финансового права.

Отдельно рассматриваются и анализируются правоотношения, возникающие при выпуске и обращении государственных ценных бумаг и заключении сделок с производными финансовыми инструментами. Обосновано, что основанием для признания рынка ценных бумаг и деривативов категориями финансового права являются аналогичные основания, доказывающие существование публичного банковского права, а именно: фондовый рынок и деривативы как составные части любой системы финансового рынка, наличие публичного интереса в регулировании отношений на рынке ценных бумаг и деривативов, наличие обязательного субъекта правоотношений, имеющего государственный орган (Банк России), наличие субординации между Банком России и профессиональными участниками рынка ценных бумаг, где Банк России выступает в качестве регулятора и контролирующего органа, а также широкий спектр публично-правовых методов регулирования рынка ценных бумаг и деривативов.

Ключевые слова: ценные бумаги, рынки ценных бумаг, финансовое право, Банк России, публичное размещение акций, финансовые рынки, дериватив

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Для цитирования:

Прошунин М.М. Публичное фондовое и деривативное право как институт финансового права // Вестник Российского университета дружбы народов. Серия: Юридические науки. 2019. Т. 23 № 4. С. 533–545. DOI: 10.22363/2313-2337-2019-23-4-533-545.

Дата поступления в редакцию: 02 сентября 2019 г.

Дата принятия к печати: 15 октября 2019 г.