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Prospectus Liability v. Criminal Punishment:

The Case of Public v. Private (But without Enforcement)

1. Introduction

In an analysis conducted by the Estonian Ministry of Justice, a clear conclusion was drawn that both the sanctions laid down by the Securities Market Act*[1] (SMA) for misdemeanours in the financial sector and also the case law on sanctioning left Estonia in the bottom tier amongst EU member states with respect to the punishments prescribed and also to actual case law on punishment. Fines imposed by Estonian courts on juridical persons are rather small; one can fine a company for a misdemeanour in the financial sector to a maximum of only 32,000 EUR.*[2] Although this is not stated by the author of the analysis, Estonia—at least where punishments are concerned—could be regarded as a safe harbour for financial crime if compared to other Member States. Such a tendency puts much pressure on the shoulders of the regulator—introduction of larger punishments and/or broader wording of offences in the law may follow as political pressure outstrips dogmatic considerations.

The stipulations regarding investment fraud in §211 of the Penal Code*[3] (PC) are aimed at giving incentive to issuers not to proffer false information during offer of securities—i.e., addressing the ‘promoter’s problem’ (the risk that corporate issuers sell bad securities to the public).*[4] Prospectus liability (in its widest sense, including also grey capital markets*[5]) and disclosure requirements (either during initial offering or in post-listing) are aimed at solving the same problem.

The broad, whether either intentionally or unintentionally, wording of §211 compels one to ask whether the legislator has gone too far in nourishing public enforcement through the means of criminal liability instead of letting market participants resolve possible issues through private litigation (i.e., via private enforcement). The present article concentrates on answering this question by first giving an overview of the theoretical discussion in the literature regarding the use of public enforcement instead of market participants’ regulation of the market through private litigation, then comparing prerequisites for liability

1 Väärtpaberituru seadus. – RT I 2001, 89, 532; RT I, 28.6.2012, 5 (in Estonian). English text available via http://www.legaltext.ee/.

2 A. Ahven. Finantsalaste rikkumiste eest kohaldatavad sanktsioonid Euroopa Liidu riikides (Sanctions Imposed for Financial Misdemeanours in EU Member States). Tallinn 2011 (in Estonian, not publicly distributed).

3 Karistusseadustik. – RT I 2001, 61, 364; RT I, 4.4.2012, 3 (in Estonian). English text available via http://www.legaltext.ee/.

4 R. La Porta, F. López de Silanes, A. Schleifer. What works in securities laws? – Journal of Finance 2006 (61), p. 2. Available at http://www.afajof.org/afa/forthcoming/laporta.pdf; D. Schiele. Über den Haftungsfreiraum bei prognostischer Publizität am Kapitalmarkt. Baden-Baden 2011, pp. 28–34.

5 See Subsection 3.2 for definition of the concept.

under civil law for giving of false information during offer of securities with the liability framework established by §211 of the PC.

2. The race between public and private enforcement

The promoter's problem at the time of either making a public offering or then disclosing information after an offering could, in principle, be regulated in three ways:

1) Provision of grounds for civil-law claims for the investors harmed (as §25 of the SMA does) against issuers.
2) Disclosure obligations imposed by public law: both disclosure requirements regarding prospectuses established under Directive 2003/71/EC[*6] ('the Prospectus Directive') and Commission Regulation 809/2004[*7] and then disclosure requirements for securities admitted to trading on regulated markets within the framework imposed by Directive 2004/109/EC[*8] ('the Transparency Directive').
3) Specification of provision of false information in either prospectuses or other information given to investors as a criminal offence.[*9]

If one is to follow the principle of *ultima ratio*, the last listed should be the final means and hence applied only if express need can be justified.[*10] Disclosure requirements (backed by administrative means) and/or private litigation should provide enough incentive for the issuers to act honestly when facing the promoter's problem.

The discussion of whether one should emphasise the role of public or private enforcement in capital markets law was stimulated greatly in pre-crisis academic literature.[*11] Discussion cooled down after the turmoil on stock exchanges throughout the world in 2009–2010. In the aftermath, many regulators opted for an *ex post* approach and rediscovered the criminal sanctions long in force from their law books.[*12] This draws attention to the fact that one has to draw a clear line between enforcement and rules in a law book—the existence of detailed mechanisms of disclosure, rights of a financial supervision authority (FSA) (such as that of conducting search), or any specific sanctions does not mean that they are actively used.

The discussion comes down to the question of whether any one case demands public interference from the market supervisor and, if so, to what extent. The answer to the first part of this question is quite obvious—securities markets (and probably the financial sector as a whole) would be untenable without some rules enabling the regulator to interfere.[*13] The answer to the second half of the question is more complicated. According to R. La Porta *et al.*, strong public enforcement is needed only in emerging markets but no significant link seems to be evident between overall market growth and strong public enforcement: 'Public enforcement plays, at best, a modest role in the development of stock markets. In contrast, the development of stock markets is strongly associated with extensive disclosure requirements and a relatively low burden of proof on investors seeking to recover damages resulting from omissions of material information from the prospectus. Risk of private investor claims, reputation risk and so on provide sufficient pressure to act honestly.'[*14] It is questionable whether criminal rules provide sufficient means at all: 'Criminal deterrence

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6 OJ L 345, 31.12.2003, p. 64.

7 OJ L 149, 30.4.2004, p. 1.

8 OJ L 390, 31.12.2004, p. 38.

9 H. Aschenbach. Zur Aktuelle Lage des Wirtschaftsstrafrechts in Deutschland. Goldtdammer's Archiv für Strafrecht 2004, p. 562.

10 *Ibid.*

11 For an overview, see H.E. Jackson, M.J. Roe. Public and private enforcement of securities laws: Resource-based evidence. – Journal of Financial Economics 2009 (93). Also published in H.E Jackson, M.J. Roe. Public and private enforcement of securities laws: Resource-based evidence. – Harvard Public Law Working Paper No. 0-28; Harvard Law and Economics Discussion Paper No. 638, pp. 5–8. Available at http://ssrn.com/abstract=1000086.

12 Pre-crisis literature emphasised that strong public enforcement was more intrinsic of the US SEC. See J.C. Coffee. Law and the market: The impact of enforcement. – Columbia Law and Economics Working Paper No. 304, pp. 16 *ff*.

13 Jackson, Roe (see Note 11), pp. 23 *ff*.

14 La Porta, López de Silanes, Schleifer (see Note 4), pp. 16–19.

may be ineffective because proving criminal intent of directors, distributors, or accountants in omitting information from the prospectus is difficult.'[*15]

Such an approach has been attacked with claims that private litigation is too expensive; outcomes are not predictable. M.J. Roe and H.E. Jackson are the frontrunners in the academic literature[*16]:

– 'There's no significant evidence here that liability standards play a role in developing financial markets.'[*17]
– *Ex post* private litigation is unpredictable, ineffective, and dependent on whether mass lawsuits are endorsed by civil procedure, and they may in many cases mean, at base, damage payments between the major and minor shareholders as issuers and investors.

If one is to take the viewpoint of La Porta *et al.*, the issue between the need of an active public enforcement would be evident only in the case of disclosure during public offerings (or then post-listing reporting). Promoting less public enforcement is needed only in the cases where the promoter's problem arises most evidently—public offerings or during post-listing reporting. At the same time no one could imagine acts such as market manipulation or insider trading to be left without a strong public enforcement mechanism.[*18] Hence the question whether nourishing criminal liability to solve the promoter's problem must be analysed.

3. Private litigation: Regulated markets v. grey capital markets

3.1. Prospectus liability under §25 (1) of the SMA

As already indicated, the promoter's problem is intrinsic to initial offering of securities but also to periodic or *ad hoc* disclosure arising from the Transparency Directive (see also §§ 184^{10}–184^{13} of the SMA). This article does not concentrate on liability for false post-listing disclosure. The question of what the grounds for civil liability are would be subject to a separate analysis, as it is somewhat unclear whether liability would have a contractual basis (issuer disclosing false information to the owner of a bond as creditor or a shareholder) or whether it is liability based on delict[*19], and to what extent damage should be remedied (it is questionable whether the 'fraud on the market theory', originating from the US, also now clearly recognised by Section 90A of the UK Financial Services and Markets Act 2000[*20], should be endorsed).[*21]

According to §25 (1) of the SMA, if the prospectus (or the summary of the prospectus if the summary is misleading, inaccurate, or inconsistent when read in connection with the other parts of the prospectus) contains information that is significant for the purpose of assessment of the value of the securities and said information proves to deviate from the actual circumstances, the issuer shall compensate the owner of the security for damage sustained thereby due to the difference between the actual circumstances and the information presented in the prospectus, provided that the issuer was or should have been aware of said difference. The provision applies also if the prospectus is incomplete on account of omission of relevant facts, provided that the incompleteness of the prospectus results from the issuer or the offeror hiding the facts.

Subsection 25 (1) of the SMA provides a separate basis for a claim for damage under §3 of the Law of Obligations Act[*22] (LOA). As there is close to no publicly available case law—a mere 26 prospectuses have

15 *Ibid.*, pp. 16–19.

16 This approach seems to be preferred by the UK government as well, as the 2007 analysis by P. Davies, emphasising public enforcement, was accepted by that government. See P. Davies. Davies Review of Issuer Liability: Final Report (June 2007) (especially paragraph 18). Available at http://www.hm-treasury.gov.uk/d/issuerliability_170708.pdf.

17 Jackson, Roe (see Note 11), p. 28.

18 *Ibid.*, pp. 27–34.

19 See this overview of the issues that have arisen in German law: A. Hellgardt. Kapitalmarktdeliktsrecht. Tübingen 2008, pp. 28–32.

20 Available at http://www.legislation.gov.uk/ukpga/2000/8/contents.

21 H. Tijo. Enforcing corporate disclosure. – Singapore Journal of Legal Studies 2009, p. 335. On the problems in the area between liability for disclosure and enforcement matters, consult M. Fox. Why civil liability for disclosure violations when issuers do not trade. – Wisconsin Law Review 2009, pp. 297–319.

22 Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 8.7.2011, 6 (in Estonian). English text available via http://www.legaltext.ee/.

been approved by the Estonian Financial Supervision Authority (EFSA) under the prospectus directive*23—one can only give theoretical guidelines as to how the elements laid down in §25 (1) should be interpreted. The objective elements of the claim should be as follows*24:

– **False information or omission of facts**: Both clear-cut facts ought to be covered. False information regarding accounting information is a clear matter. Case law has to establish a clear-cut rule as to whether any prognosis shall be handled as false and, if so, which prognosis and in which cases.*25 In sum, German literature has concluded that false disclosure can reveal itself in the following fundamental distinct forms: incorrect fact, incorrect general impression, and provision of incomplete data.*26
– **Significance requirement (with the wording 'significant meaning')**: The notion seems to exclude obvious mistakes in balance sheets that have no significance to the overall outcome or mistakes that are clearly understandable.*27 It is unclear whether data prescribed by the Prospectus Directive are *ipso jure* significant.*28
– **Unawareness on the part of the person claiming damage as to the false information or omission**: According to §26 (2) of the SMA, an issuer or offeror shall not have the obligation to compensate for damage if the person who sustained the damage was aware (or, in the case of a qualified investor, should have realised at the moment of acquiring the security and by exercising due care in its activities, except when the issuer's intent can be established), at the moment of acquiring the security, that the prospectus serving as the basis for the offer was incomplete or contained inaccurate information.

The issuer shall be liable if negligence can be proved (see §25 (1) of the SMA). One must take into account that §25 (1) specifically allows claims only by the owner of the security; hence, investors suffering damages from having to sell the security at a lower price because of the defects in the prospectus cannot claim damages on the basis of §25 (1) of the SMA.*29

3.2. 'Prospectus liability' in cases where there is no prospectus within the meaning of the Prospectus Directive

With the introduction of Alternative Investment Markets (AIMs) and Multi Trading Facilities (MTFs), the classical notion of the grey capital market as a blanket market offer of securities not handled as securities under the Prospectus Directive (and subsequently §2 of the SMA) or then not listed on regulated markets cannot be applied.*30 The notion of grey capital markets (in German, *Grauer Kapitalmarkt**31; in Estonian, *hall kapitaliturg*) or unregulated markets has been used to describe this. Hence, a grey capital market is a

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23 Application of §25 (1) of the SMA is hindered by the low volume of prospectuses being filed for submission before the EFSA. In all, 26 prospectuses have been approved by the EFSA since 20 November 2005, according to the FSA Web site (see http://www.fi.ee/index.php?id=14925). Still more importantly, as recent tendencies show, issuers are more eager to list their prospectuses in nearby regulated markets such as Warsaw or Helsinki, The main issue here seems to be which law one should apply if false information has been given in a prospectus submitted before the Estonian FSA but presented for listing before OMX Warsaw. See S. Jäger. Das Prospekthaftungsstatut. Baden-Baden 2007, pp. 99 *ff* for insight into the issues of cross-border claims under the German law of conflicts.

24 Because of lack of case law, no attempt is made in this article to give a comprehensive overview of the prerequisites for the claim and is aimed only at addressing basic elements to be dealt with in future case law. See the list, based on the example of German law, of typical cases of false/misleading information in prospectuses, from H. Keunecke. Prospekte im Kapitalmarkt. Anforderungen, Prospekthaftung bei geschlossenen Fonds, Investmentfonds, Wertpapieren und Übernahmeangeboten, 2nd edition. Berlin 2009, pp. 448–453.

25 German case law on §44 of the Börsengesetz seems to take into account the notion of the average investor. For an overview of the discussion, consult Jäger (see Note 23), pp. 56–57.

26 Case law has to establish whether failures with respect to errors in formal or substantive matters shall be considered misleading as well, as has been mentioned in the German literature. See C. Brandt. Prospekthaftung. Anlegerschutz durch Prospektpublizität. Taunusstein 2005, pp. 105–110.

27 Jäger (see Note 23), pp. 54–56.

28 S. Kümpel, A. Wittig. Bank- und Kapitalmarktrecht, 4th edition. Cologne 2011, pp. 1804–1805; Brandt (see Note 26), p. 1975.

29 In contrast, the interpretation of §44 of the Börsengesetz affirms such claims of persons not holding the security. Jäger (see Note 23), pp. 63–64.

30 Kümpel, Wittig (see Note 28), pp. 1804–1805; Brandt (see Note 26), pp. 167–170.

31 M.H. Hagemann. 'Grauer Kapitalmarkt' und Strafrecht. Göttingen 2005, pp. 63–147.

market wherein no significant obligations apply as to disclosure obligations and no strong supervision by an FSA exists.*[32]

Section 12 of the SMA nationally enacts the exemptions of Article 3 (2) of the Prospectus Directive. A prospectus is not demanded if the security offered is not a security in the meaning of §2 of the SMA or if an offer of securities is addressed solely to qualified investors, or fewer than 99 persons per contracting state who are other than qualified investors, or is addressed to investors who acquire securities for total consideration of at least 50,000 euros per investor, for each separate offer, or either an offer of securities with a nominal value or book value of at least 50,000 euros or an issue or offer of securities with a total consideration of less than 100,000 euros over a period of 12 months. Usually shorter placement documents are used instead of the prospectus in the case of the aforementioned securities (or securities not listed in §2 of SMA).

The notion of prospectus liability itself should also encompass liability for data disclosed in the offering of securities that fall outside the scope of §2 of the SMA. The theory of prospectus liability involving prospectus liability in a strict sense (§25 of SMA) and in a larger sense (all civil-law claims for disclosure of false information by the issuer, except under §25 of SMA) seems to be acknowledged in Estonian academic writing since 2011.*[33]

If false information is given or information is omitted, provisions of contract law apply, with *culpa in contrahendo* being the main basis for claims.*[34] Subsections 14 (1–2) of the LOA establishes the grounds for such a claim by obliging the parties engaging in pre-contractual negotiations or other preparations for entry into a contract to take reasonable account of one another's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate; each party is obliged to disclose information to the other party of all circumstances with regard to which that other party has, given the purpose of the contract, an identifiable essential interest. There is no obligation to inform the other party of circumstances of which the other party could not reasonably expect to be informed. The provision extends to offering of securities and written documents (and probably also correspondence) between the parties prior to subscription (although no actual negotiations regarding the terms of the securities take place).

Disclosure of false information by a party to the contract during the pre-contractual phase will become party warranties regarded as part of the contract.*[35] Hence, a breach of such warranties provides grounds for claims for breach of obligations between the issuer and the acquirer of the security. One may, however, question the extent to which the principle developed in German case law enabling claims against not only the issuer but persons linked with the provision of false information would be recognised by the SMA.*[36] As the claim is based on a sales agreement (offer of securities), the claim of a shareholder against the company as issuer ought to be affirmed.*[37]

According to general case law, the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose (§127 (2) of LOA), the causal link between the false information or omission of facts (§127 (4) of LOA), and the part of the aggrieved party in the damage (§139 of LOA) has to be considered in assessment of the damage claim.*[38]

32 *Ibid.*

33 U. Volens. Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid (Liability for Trust As an Independent System of Liability and Its Manifestations). Doctoral thesis. Tartu 2011, pp. 355–360 (in Estonian).

34 Brandt (see Note 26), pp. 49–71; Jäger (see Note 23), pp. 30–49, 81–91 (for a historical overview).

35 Supreme Court Civil Chamber decision of 19.11.2007, 3-2-1-111-07, paragraph 14 (in Estonian).

36 The theory was elaborated upon through some investment schemes used in Germany wherein the issuer itself was not a legal person and had no assets. Volens (see Note 33), pp. 356–358. It has been clearly called into question whether any claims can arise between the majority shareholder behind the issue of new shares and the acquirers of the shares. See M. Vutt. Aktsionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu (The Derivative Claim of the Shareholder As a Legal Remedy and Measure of Company Direction). Doctoral thesis. Tartu 2011, pp. 29–39 (in Estonian).

37 Vutt (see Note 36), p. 29.

38 Supreme Court Civil Chamber decision of 12.12.2007, 3-2-1-113-07 (in Estonian).

4. Section 211 of the Penal Code—investment fraud

4.1. Grounding values behind the existence of the offence

Article 25 (1) of the Prospectus Directive respects Member States' discretion for criminalising breaches of obligations arising from rules based on said directive. It only states that 'Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive'.

Section 211 of the PC is worded as follows:

> §211. Investment fraud
> (1) A person engaging in economic activities who receives an investment through presentation of false information in a prospectus or among other information addressed to the public shall be punished by a pecuniary punishment or up to 5 years' imprisonment.
> (2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.

Since 1 September 2002, Estonia has opted for criminalising misrepresentation given in documents aimed at gathering investments from either regulated (worded 'in a prospectus') or grey capital markets (with the language 'or among other information addressed to the public'). Section 211 was introduced together with the entry into force of the PC. Academic literature foresaw the protection of the ownership of investors[*39] and also the general functioning of the financial markets as the two grounding values behind the section.[*40] Such an approach is similar to the reasoning given for securities markets law: protection of functioning of the securities markets (or financial markets as a whole)—i.e., the public interest in well-functioning and effective markets—and protection of investors (provision of individual protection)[*41], concretised in rather poetic wording in §3 of the Financial Supervision Authority Act[*42], according to which financial supervision under the act is conducted in order to enhance the stability, reliability, transparency, and efficiency of the financial sector; to reduce systemic risks; and to promote prevention of the abuse of the financial sector for criminal purposes, with a view to protecting the interests of clients and investors by safeguarding their financial resources, and thereby supporting the stability of the Estonian monetary system.

This approach has been transposed to and applied for reasoning related to criminal offence in §211, largely on account of the word 'public' being used in the wording of §211 of the PC (and subsequently also §264a of the German *Strafgesetzbuch*[*43] (StGB), with the latter being a role model, if not the only role model, for §211 of the PC. Such an approach is problematic for the following reasons:

– **The aim of the offence's definition**: Endorsement of functionality of the financial system is rather more a consequence of providing protection to the proprietary interests of the investor—the goal of establishment of the offence is the protection of property; mistrust will be established after loss of property, not vice versa or concurrently.[*44]
– **The systematic argument**: Criminal law cannot be equated with securities market law. Hence, such transformation of values cannot be admitted.[*45] It is questionable whether such a notion of functioning of a branch of the economy is compatible with the theory of individual and collective values (the Estonian *õigushüve* or German *Rechtsgut*) recognised by Estonian criminal-law theory.[*46] Functionality as a value is highly debatable and hints at populist lawmaking rather than

39 To be fully exact, the value is freedom to dispose of assets. See T.H. Hild. Grenzen einer strafrechtlihen Regulierung des Kapitalmarktes. Frankfurt 2004, p. 93.

40 J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne (Criminal Code. Commented Edition). Tallinn 2009, §211 (comment 1.1); Aschenbach (see Note 9), pp. 562–565.

41 Kümpel, Wittig (see Note 28), pp. 1826–1836.

42 Finantsinspektsiooni seadus. – RT 2001, 48, 267; RT I, 29.3.2012, 4 (in Estonian). English text available via http://www.legaltext.ee/.

43 Strafgesetzbuch, 1.1.1871. BGBl. I S. 3322; B. Jähnke, H.-H. Laufhütte, W. Odersky (eds). Stragesetzbuch. Leipziger Kommentar. Grosskommentar, Band 7. Berlin 2005, §§ 264 bis 302., §264a, paragraph 13.

44 W. Graf von Schönborn. Kapitalanlagebetrug. – Eine analyse unter besonderer Berücksichtigung von 264a StGB. Cologne 2003, pp. 18–19.

45 On the problem of 'regulating securities markets through criminal law', see paragraph 5. See also Jähnke, Laufhütte, Odersky (Note 43), §264a, paragraph 13.

46 J. Sootak. Karistusõiguse alused (The Grounds of Criminal Law). Tallinn 2003, pp. 69–74 (in Estonian).

clear-cut values.[*47] Had the legislator wanted to broaden the offence to the overall protection of such broad values, the wording would have consisted only of a description such as ‘for deceiving investors’. This is not the case here.[*48]

– Such broadening of values would mean that any restrictive interpretation of the offence would be unthinkable (§211 of the PC in any case criminalises roughly every misstatement, no matter if significant or not).[*49]

Hence, the position expressed in the academic literature should be reconsidered thoroughly in order to avoid §211 becoming a catch-all provision (if it has not already become one).

4.2. Objective prerequisites

4.2.1. Misleading disclosure in a prospectus or other document

Information is false if it is untrue. Whether the criterion for information being revealed to be false is identical to that in §25 of the SMA or is different has not yet been established well enough in the literature and case law; therefore, no conclusions regarding the accessoriness of the offence can be drawn. As indicated above, if one is to consider the definition of the offence as having a broader aim than only the protection of proprietary interests of the investor (as is the aim of damage claims described in paragraph 3), any restrictive interpretation is problematic. The definition of the offence should also encompass prognosis and liquidity calculations if clearly unrealistic.[*50]

The Estonian wording for the offence uses the word ‘emissiooniprospekt’ for ‘prospectus’. Sadly, this word is not used in any other act—§14^1 (1) of the SMA and the translation of the Prospectus Directive uses the word ‘prospekt’. This leaves rather unclear what documents are actually covered by the notion, and, hence, the compatibility of such use of unclear terms with the principle of legal certainty[*51] is somewhat unclear.[*52] In the end, such analysis is rather pointless, as the second part of §211 encompasses any other information aimed at the public (incl. annual reports, *ad hoc* reports as long as they have been presented for purposes of gaining certain investments, etc.).[*53]

4.2.2. Lack of a significance requirement and the requirement to be engaged in economic activities

Obviously, the main contrast between §211 PC and the liability standards described in paragraph 3 lies in the lack of a requirement of significance of the false information. The reasoning behind this omission is at first glance rather hard to explain and was already clearly pointed out in early expert opinion on the draft of the PC.[*54] The requirement of significance is provided in §264a of the StGB, the alleged role model for §211. Lack of such a requirement would theoretically make possible rather strange situations wherein even fairly unimportant errors in prospectuses create grounds for criminal proceedings.

One may only claim that the significance requirement is enacted in §211 of the PC to some extent, even though it is not mentioned in the wording:

– Errors in unimportant data may not be intentional.[*55] According to §15 (1) of the PC, only intentional acts are punishable as criminal offences under the PC if no criminalisation of recklessness is foreseen. Section 211 criminalises only intentional acts.

47 Hild (see Note 39), pp. 94–95.

48 Graf von Schönborn (see Note 44), pp. 18–19.

49 *Ibid.*

50 Sootak, Pikamäe (see Note 40), §211 (comment 2.3.1).

51 The principle is derived from §10 of the Estonian Constitution. See Eesti Vabariigi Põhiseadus (The Constitution of the Republic of Estonia). – RT 1992, 26, 349; RT I, 27.4.2011, 1 (in Estonian). English text available via http://www.legaltext.ee/.

52 See also *Sunday Times v. UK*. Decision of 26.4.1979 – 2 EHRR 245.

53 Sootak. Pikamäe (see Note 40), §211 (comment 2.3.3).

54 W. Joecks. Majanduskriminaalõigus Saksamaal. Struktuurid ja probleemid (Economic Crime in Germany: Structures and Problems). – Õppematerjal kohtunike ja prokuröride järelkoolituse jaoks (Study Material for Follow-up Training of Judges and Prosecutors). Translated by O. Jaggo. Tallinn 2001 (dissemination material in manuscript form) (in Estonian).

55 C. Schröder. Handbuch Kapitalmarktsrafrecht, 2nd edition. Cologne 2010, p. 23.

– The misleading statement has to be causal to receipt of the investment. The prevailing position in the legal literature treats §211 not as a formal action offence criminalising disclosure of wrong information but as an offence that requires materialisation of a certain consequence—receiving of an investment (see the next section of the paper).*[56]

The broadness of the offence seems to have been limited somewhat by the requirement of the wrongdoer being involved in economic activities. The notion of economic activities has not been clarified in any legal act in Estonia. Hence, it is unclear whether the misrepresentation has to be somehow linked with the economic activities of the offender or the offender has to be engaged in some overall sphere of economic activity (i.e., exclusion of only some natural persons).

4.2.3. Receipt of an investment

The wording of §211 of the PC is constructed in such a way that the actual infringement seems not to be the disclosure itself but the receipt of the investment as a result of the disclosure. Section 211 is considered to involve two prerequisites: a) false disclosure and b) receipt of the investment. The offender is liable only for attempt until the investment is received.*[57] No relevant case law related to this matter can be discerned. This causes two problems even on a theoretical level:

– It is hard to imagine in what situation no investment would follow. Any absurd statements obviously not leading to an investment (as in most 'Nigerian scam' letters) may already make the issuers not liable for obviously being disclosed without serious intent (the issuer may claim that it knew such claims were so unrealistic that it never expected someone to believe them).
– According to §237^4, the SMA handles the following action as a misdemeanour: provision of incorrect or inaccurate information to possible investors in a prospectus or in any other manner by an offeror and violation of the requirement to inform all potential investors on equal terms during an offer of securities. As a prerequisite §3 (5) of the PC declared that any conduct punishable as a criminal act and a misdemeanour had to be considered to be a criminal act. The Estonian Supreme Court ruled in a quite recent judgement in the case 3-1-1-28-11 that in cases where it is clear that the language defining a misdemeanour is narrower, one must consider the act an intentional one by the regulator to treat such breaches as misdemeanours.*[58] Such a solution is still unclear, as one could claim that §237^4 of the SMA does not include receipt of investment. Hence, if one discloses false information in the prospectus and then receives an investment, one may still be liable under §211.

5. The post-crisis situation—pushing criminal interference?

The field of discussion has, as pointed out in Section 2, cooled down since the financial crisis—the importance of criminal-law sanctions seems to be growing in general. There has been a strong influence from the European Commission, pushing toward criminalising acts in securities markets related to market manipulation and insider trading*[59], as the Market Abuse Directive previously did not foresee any direct obligation to criminalise such deeds.*[60] A strong incentive to criminalise as much as possible is evident at EU level. In addition, in a judgement in late 2011, in *Soros v. France*, the ECHR did not regard the notion of insider dealing in the French Penal Code as a criminal offence in conflict with Article 6 of the Convention on Human Rights. By doing so, it pushed away all obstructions whereby highly abstract offences could undercut legal certainty as a sub-principle of rule of law.*[61]

56 Sootak, Pikamäe (see Note 40), §211 (comment 2.4.3).

57 *Ibid.*

58 Supreme Court Criminal Law Chamber decision of 2.6.2011, 3-1-1-28-11 (in Estonian).

59 The European Commission is proposing a market-abuse regulation foreseeing an obligation to criminalise market abuse. See the further list of recent developments from the EC as to market abuse, available at http://ec.europa.eu/internal_market/securities/abuse/index_en.htm.

60 See paragraph 34 of the preamble to 2003/61/EC.

61 See *Soros v. France*, 6.10.2011 (application no. 50425/06). As this judgment has not been translated from the French, the author has referred to the public announcements from the ECHR at http://www.echr.coe.int/echr/en/header/press/links/

The incentive to regulate the abuse of the situation in the promoter's problem through criminal law is tempting, as it is clearly the least expensive way to regulate certain problems.*[62] Regulation of capital markets through criminal law has been widely criticised for blurring the line between conduct needing to be criminally regulated and conduct subject to civil litigation.*[63] In addition, the rather broad wording of §211 (an issue seen also in §264a of the StGB) has brought special attention to whether giving incentive by providing some lack of clarity (problems with 'prospectus' and lack of a significance requirement) is justifiable*[64], and hence a clear contradiction with the principle of legal certainty encompassed in §10 of the Constitution can be shown. One can even go further and claim that the use of such broad meanings brings about the regulation of capital markets not through the PC but via the discretion of the ones applying the PC.*[65]

One should, nevertheless, refrain from grounding application of any definitions of criminal offences in considerations such as the overall need for protection of provision of sufficient general warning to persons disclosing false information during initial offering. The discussion of possible infringement of §10 of the Constitution comes down to the issue of the extent to which the investor acting outside regulated markets needs protection—instead of basing this on general values, one must assess the level of protection of each individual investor*[66]:

- The existence of §25 (1) of the SMA (together with overall requirements for a prospectus), alongside the existence of post-listing rules, should provide enough protection to an investor in regulated markets. The need for an additional broadly worded criminal sanction, as in §211 of the PC (especially the lack of significance requirement), is somewhat questionable. Although still unclear, recent case law*[67] may lead to a situation wherein §237[4] of the SMA prevails over §211 of the PC in any event and hence any criminal liability is precluded. Such an approach is dependent on whether one handles §211 of the PC as a formal delict or one requiring occurrence of a consequence—receipt of an investment. No clear grounds may be established, and the risk of criminal liability is evident. Therefore, case law may have resolved the issue, rather surprisingly, itself.
- In grey capital markets, damage claims may prove insufficient, as there is no control over the investor, misleading disclosure is usually already made in conjunction with a clear plan to escape damage claims, and usually the mechanisms used are so complicated and cross-border that it is impossible to collect evidence without a criminal-law procedure.*[68] Investors may be in a weaker position, so some level of measures akin to consumer protection has to be considered.*[69] As indicated above, the grounds for any claims are somewhat unclear and, therefore, civil claims as means for investor protection may prove to be somewhat impotent.

The offence is still justified when one considers the lack of any public-law disclosure requirements and also the conceptual lack of clarity in the claims for damages, as described in Subsection 3.2 with respect to grey capital markets. Investors need the protection provided by §211 of the PC. The question of whether any incentive is provided is linked with the issue of enforcement—quite clearly, that of case law addressing, firstly, criminal proceedings actually initiated and punishments imposed. As the statistics indicate beyond doubt, the punishments imposed (at least in relation to misdemeanours) may be so lenient that the incentive to refrain from false disclosure may prove insufficient. The existence of a §211 of the PC that provides for protection of investors in grey capital markets may be irrelevant, while the actual way in which the offence will be dealt with at the enforcement level (and which punishments will be applied) remains a question.

archived+news/archivesnews_2010.htm. See also the case law preceding *Soros in Sunday Times v. UK*, 26.4.1979, in 2 EHRR 245.

62 Aschenbach (see Note 9), p. 560.

63 S. Ransiek. Unternehmensstrafrecht. Strafrecht, Verfassungsrecht, Regelungsalternativen. Heidelberg 1996, p. 190.

64 Aschenbach (see Note 9), pp. 562–565.

65 See the criminological approach of H. Theile, for instance: H. Theile. Die Bedrohung prozessualer Freiheit durch materielles Wirtsschaftstrafrecht am Beispiel der § 264a, 265b StGB. Wistra 2004, p. 121.

66 Jähnke, Laufhütte, Odersky (see Note 43), §264a, paragraph 4.

67 Supreme Court Criminal Law Chamber decision of 2.6.2011, 3-1-1-28-11 (in Estonian).

68 Hagemann (see Note 31), pp. 49–50.

69 Jähnke, Laufhütte, Odersky (see Note 43), §264a, paragraph 4.