

# Market Manipulation and Compliance

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**Abstract** Criminal conduct related to financial markets is one of the key issues of modern business crime. Market manipulation is paradigmatic for a new regulatory model that challenges the frontiers of Criminal Law. Compliance in banks and finance offers a detailed and highly regulated organizational model that can be used as an example for compliance programs in general. Financial intermediaries face obligations to report transactions of their clients that are suspicious of market manipulation. These obligations of private entities to collaborate with public authorities in order to fight financial crime show the risks of the privatization of criminal proceedings.

## 1 Introduction

### 1.1 *Challenges for Criminal Law*

The financial crisis has shown the importance of the integrity of financial markets. Recent scandals like the LIBOR manipulation have focused public attention on market manipulation and its implications to our economy. These cases are paradigmatic for the challenges of white collar crime in a transnational context, as Professor Dr. *Vogel* described it.<sup>1</sup> The regulation of financial markets, including the prohibition of market manipulation has to keep pace with fast developing

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<sup>1</sup> Vogel (2007), p. 731. Professor Vogel has been, without doubt, one of the most outstanding experts on criminal law related to financial markets. His scientific contributions have deeply influenced the perception of market manipulation.

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technical and financial innovations, for example computer based trading and new financial products.<sup>2</sup> Financial regulation highlights general tendencies of new regulatory mechanisms based on self-regulatory approaches.<sup>3</sup> The regulatory environment of financial markets is continuously changing at a much faster rate than other regulatory environments.<sup>4</sup> This development also raises fundamental questions on Compliance and Criminal Law.<sup>5</sup> The quality of the regulatory environment will decide if investments are made in one financial market or another. As a consequence, the possibility to adapt the regulatory environment of the markets turns out to be a key factor. Developments in financial markets in the US shape developments in European financial markets, and for European companies. One of the most recent examples is the Dodd-Frank Act, aimed to improve financial integrity.<sup>6</sup>

In order to create a legislative procedure at the EU level which is capable to adjust dynamically to the needs of financial regulation there has been set up the so-called *Lamfalussy* process.<sup>7</sup> This process consists of a separation of basic decisions on the first and second level—which are taken by the European Parliament and the Council—and technical regulations taken on a third level by experts, in this case the European Securities Markets Authority.<sup>8</sup> This regulatory model has proven so effective that it has been adapted to the banking, the insurance and the occupational pensions sector.

## 2 Market Abuse

### 2.1 *Financial Markets and Investor Confidence*

A famous quote of the U.S. Court of Appeals for the Eighth Circuit says “The methods and techniques of manipulation are limited only by the ingenuity of man.”<sup>9</sup>

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<sup>2</sup> See Wymeersch (2001), pp. 189ff.

<sup>3</sup> Nieto (2008b), pp. 485ff.; Nieto (2013a, b), pp. 11ff.; Sieber (2008), pp. 475ff.

<sup>4</sup> For more information, please see Blachnio-Parzych, in this volume, pp. 145ff.; Ayres and Braithwaite (1992). See also Sieber (2010), pp. 1ff.

<sup>5</sup> See Kuhlen (2013), pp. 1ff.; Nieto (2013a), p. 27.

<sup>6</sup> See Schemmel et al. (2012), pp. 183ff.

<sup>7</sup> This proceeding has been named after the chairman of the Commission of wise men in charge of making the European financial markets more competitive, Baron Alexandre de Lamfalussy. For more details see, for example, Avgouleas (2005), p. 246.

<sup>8</sup> One of the achievements of the reformation of the institutional framework of the European Union on Financial Supervision has been the fact that the decisions taken by the European Securities Markets Authorities are binding compared to the non-binding character of its antecessor the Commission of European Securities Regulators. For a detailed overview see Ferran (2006), pp. 579ff.

<sup>9</sup> See, for example, Mock et al. (2007), § 20a at 5.

But the understanding of market manipulation goes further than stock prices. It focuses on the protection on financial markets integrity.

The financial crisis has shown the importance of protecting the integrity of financial markets. The systemic failures of the financial markets and the enormous efforts to avoid a complete collapse of the financial markets have led to increased attention to the importance of integer securities markets. Market manipulation puts at risk market integrity and investor confidence. Investor confidence is an important asset for private pension schemes, which gain importance as public support for pensions is decreasing continuously.<sup>10</sup>

Financial markets are based on anonymity and a high velocity of transaction rates. Both have economic advantages, but complicate the prevention and detection of market manipulation. The international expansion of financial markets makes addressing financial crimes even more difficult, as market manipulation in one country's market can have a strong impact on another country's market. The strong internationalization and high speed technical and financial development require a strong and coherent supervisory answer. National approaches—coordinated formerly at the EU level by the *Committee of European Securities Regulators* (CESR)—have proven to be insufficient to avoid the systemic failure of the financial markets, as they still allowed for diverging national regulations and supervision practices. For this reason, the European supervisory framework has been changed radically, and the European Systemic Risk Board has been installed.<sup>11</sup> This supervisory body centers on the European Securities Markets Authority (ESMA) responsible for the financial markets and therefore for the supervision of market manipulation, the European Supervisory Authorities competent in the field of banking (EBA), and insurance and occupational pensions (EIOPA).<sup>12</sup>

The field of securities regulation is changing in a fast way; new regulatory approaches face developments like *high frequency*- and *algotrading*, which implies computer based trading.<sup>13</sup> The organizational requirements for compliance in banks consider the risks of algotrading facilities for market manipulation.

Market manipulation is a key issue for corporate criminal liability and compliance. These crimes can be committed in companies, for example by false or misleading ad-hoc- releases in order to influence the company's stock price. In the context of corporate crime and corporate criminal liability, we face one of the

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<sup>10</sup> Schröder (2010), p. 373.

<sup>11</sup> Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24/11/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

<sup>12</sup> <http://www.esma.europa.eu/page/esma-short> (12.2.2014).

<sup>13</sup> See the alternative market IEX that offers equal opportunities to all investors. <http://www.iextrading.com> (11.5.2014).

few cases where we can find a perfectly codified model for compliance organization that could give orientation for the design of other compliance programs.<sup>14</sup> Therefore, compliance in banks and financial institutions has some kind of a role model character. While the compliance discussion in criminal law—at least in the German debate—is a quite recent development,<sup>15</sup> the compliance-debate in banks and financial Institutions dates back almost 30 years now. From the 1990s, banks were looking at self-regulation and industry standards that later on have been detailed, for example, by the *Basel Committee on Banking Supervision*,<sup>16</sup> other important aspects such as internal investigations have been pushed forward by the SEC in the financial sector in the early 1960.<sup>17</sup>

Banks and intermediaries face the obligation to implement organizational measures in order to comply with financial and stock market regulations and therefore as well as with the prohibition of market abuse due to organizational requirements of banking and securities laws. Banks and intermediaries also face obligations to report suspicious transactions and are therefore a key element in the fight against economic crime. The increasing importance of market manipulation is reflected in increasing enforcement, for example in Germany: the financial supervisory authority BaFin reported on an increasing number of cases of market manipulation compared to investigations of insider trading.<sup>18</sup>

Market manipulation is an important issue for corporate criminal liability. Companies face risks of trade-based manipulation and information-based manipulation in their day to day business. Many jurisdictions include market manipulation in their lists of corporate crime. One recent example is the Spanish Criminal Code.<sup>19</sup> Market abuse is considered by Art. 284, 288, 31 bis y and can lead to a criminal conviction against a company in case of market manipulation in benefit of the company.

## 2.2 *Challenges of International Criminal Law*

Market manipulation is paradigmatic for white collar crime: It is a fast developing crime; financial markets and transactions have lost all national boundaries and

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<sup>14</sup> See for example the requirements defined by Chapter §8B2.1. of the US Sentencing Guidelines Manual.

<sup>15</sup> See Selvaggi (2012), pp. 601ff.; for a comparative study between Germany and the US, see Engelhart (2012), pp. 522ff.

<sup>16</sup> See Basel Committee on Banking Supervision (2005).

<sup>17</sup> See Nestler (2013), Chap. 1 at 5.

<sup>18</sup> Szesny (2013), Chap. 30 at 148.

<sup>19</sup> For details about criminal liability of legal entities in Spain, see Nieto (2012), pp. 181ff.

can be committed from almost any geographic point across different markets. Classical regulatory approaches face their limits as well.<sup>20</sup> Legislation procedures have to be able to adapt to fast-changing requirements of financial markets. Once the state was in charge to regulate financial markets, in nowadays it seems almost that financial markets control single state, for example in relation to public debt.

Financial markets face new regulatory requirement. The EU is currently changing the landmarks of financial markets with regulatory approaches like EMIR, MiFIR and MiFIDII. In addition, there are new requirements for banks and financial institutions defined in Basel III or CRD IV and in regulatory approaches like the US Dodd-Frank-Act. Tougher regulation and a more proactive criminal law seem like the only alternative in recent criminal policy. The consequences are increasing compliance efforts—and costs!<sup>21</sup>—for companies, and correspondingly increasing risks.

Criminal law related to capital markets is—as professor *Vogel* pointed out brilliantly—is one of the most exciting and interesting areas of economic criminal law.<sup>22</sup> It is influenced by an Anglo-Saxon understanding of Criminal law—utilitarianism and pragmatism—and by an economic theory of law.<sup>23</sup>

### 2.3 *The “Mechanics” of Market Manipulation*

But what is market manipulation?<sup>24</sup> Market manipulation constitutes, together with the abuse of insider trading, the concept of market abuse. While the prohibition of insider trading focuses on the prohibition of an informational advantage—for example anticipating the impact of an ad-hoc release by buying shares before the information gets public to the markets—, market manipulation influences the price building mechanism in financial markets directly.<sup>25</sup> Market manipulation is possible because of an asymmetric distribution of information.<sup>26</sup> Even though information is transmitted within the markets in microseconds and market participants react immediately, not all investors have access to the same information. Manipulators are using these information asymmetries in order to influence stock-prices.

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<sup>20</sup> Fundamental Ayres and Braithwaite (1992).

<sup>21</sup> For an analysis of economic costs of compliance programs in Germany see Görtz and Roßkopf (2010).

<sup>22</sup> Vogel (2007), p. 731.

<sup>23</sup> Vogel (2007), p. 731.

<sup>24</sup> The expression “mechanics” is used in this context by Thel (1994) and Avgouleas (2005).

<sup>25</sup> See Aggarwal and Wu (2006); Allen and Gale (1992); Hazen (2009), pp. 432ff.; Loss and Seligman (2004), pp. 1119ff.; Thel (1994).

<sup>26</sup> Fama (1970) and Fama (1998). See also Gilson and Kraakman (2006), pp. 29ff.

Market manipulation and insider-trading do not exclude each other, but in many cases do occur jointly.<sup>27</sup>

The economic theory divides market manipulation into three categories<sup>28</sup>: trade-based, information-based and action-based. The clearest example is an information-based manipulation, like rumors on the Internet in order to influence a company's stock price. Trade-based manipulation can reach a higher degree of complexity but, in general it is about transactions in financial markets without economic purposes, put only in order to mislead other investors. An example for trade-based manipulation are *circular trading* where different market participants buy and sell securities among themselves in order to drive up stock prices, or *marking the close* where the manipulator places an order near market close in order to manipulate reference prices. Action based market manipulation involve cases like poisoning products of a food company in order to drive down the company's stock price. Market manipulation schemes can be enhanced by the use of financial instruments, for example stock options. A derivate has a leverage effect and retraces small price movements of the underlying financial asset disproportionately.

Market manipulation does not only affect stock exchanges, but also alternative markets (e.g. Multilateral Trading Facilities), energy markets or even indices (e.g. LIBOR). The regulation of market manipulation is a challenge to criminal law. As investments are changing globally in no time, national approaches to regulate market manipulation face technical and geographical limits, and new supranational regulatory approaches and agencies like the European Securities and Markets Authority enter. Nevertheless, market manipulation is not at all a new invention: As soon as the first stock exchange opened in Amsterdam, clever brokers found out that they could manipulate stock-prices by using false rumors and collusive trading techniques.<sup>29</sup>

### 3 Compliance

#### 3.1 Compliance in Banks & Financial Institutions

In the context of market manipulation, compliance in banks and financial intermediaries are a key question, because they enable the access of their customers to financial markets and therefore face specific duties to collaborate with market authorities. Banks and financial institutions offer also a highly regulated compliance model that can serve as orientation for compliance programs in general.<sup>30</sup>

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<sup>27</sup> Fuchs (2009), Vor §20a at 8, 10. The Spanish Criminal Code prohibits in art. 284.3 trade based manipulation *using* insider information.

<sup>28</sup> Allen and Gale (1992), pp. 503ff.

<sup>29</sup> See De la Vega (1688).

<sup>30</sup> See Basel Committee on Banking Supervision (2005). For the German regulation see Blumenberg, A.D. (2014), p. 85ff.

These institutions play a key role in the fight against market manipulation. Banks and financial institutions have to detect suspicious transactions of their customers and report them to market authorities, (see for example Sec. 10 of the German Securities Act). These obligations of private companies to report their clients to authorities are rare exceptions in Criminal Law.<sup>31</sup>

From a technical point of view, most cases of market manipulation leave a special “fingerprint”, a specific transactional profile. Market manipulation can be detected by specific indicators that show an abnormal transaction, for example an unusual amount of transactions or transactions near to specific moments, for example market close, that are susceptible for market manipulation.

The Committee of European Securities Regulators—now the European Securities Markets Authority—has given a list of indicators for market manipulation.<sup>32</sup> Banks and other financial intermediaries have to monitor their clients’ transaction and report suspicious transaction to the authorities. Suspicious transactions include insider trading, market abuse but also short selling.

Banks and financial intermediaries have to complete a report form and submit data about the person responsible for the transaction, the transaction and the reasons for the suspicion. Financial intermediaries that do not comply with those obligations can be highly fined. Usually, the compliance department is in charge of the suspicious transaction reports, and it uses special methods of analysis of the transaction that shows control mechanism are comparable to anti-money laundering compliance.

Suspicious transactions reports can lead to a criminal prosecution, because financial supervisors have to inform state prosecution authorities about criminal conduct like market manipulation. The obligation to report suspicious transactions does not only affect banks and other financial institutions, but also the market supervision unit of financial markets. By that means, market manipulation schemes—for example to influence the offer on one market in order to manipulate stock prices on another—can be detected.

This is one of the few examples where corporations are held responsible for duties of crime prevention that originally are public duties.<sup>33</sup>

In banks and financial institutions there exists a clearly defined profile of the compliance officer, see Sec. 33 German Securities Exchange Act. In addition to the law, the German Financial Supervisor *BaFin* published guidelines on minimal requirements on compliance. These guidelines define the status of the compliance officer in banks and other financial institutions. There are detailed provisions on the organization of the compliance function.<sup>34</sup> These provisions consider the

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<sup>31</sup> Vogel (2012), § 10 nm 7.

<sup>32</sup> For an overview, please see <http://www.esma.europa.eu/page/Market-abuse> (12.2.2014).

<sup>33</sup> Vogel (2007), p. 742.

<sup>34</sup> See Engelhart (2010), pp. 1832ff; Blumenberg (2014), p. 93–99.

organization of the compliance function. There are similar provision for risk management in banks and finance (MaRisk), and there will be a criminal sanction introduced for failures in risk management.<sup>35</sup> In these areas, self-regulation has been changed to very detailed and comprehensive legal requirements. These organizational requirements on banks and financial institutions can be transferred to other business areas, and provide a model for the organization of compliance functions in companies.

### 3.2 *Compliance in Companies*

Companies listed in stock markets have to comply with numerous legal obligations. Compliance with all regulatory requirements includes, of course, the prohibition of market manipulation. Market manipulation and compliance is also an important issue for companies, especially as many jurisdictions have corporate criminal liability for economic crimes. A recent example is the Spanish legislation that has introduced corporate criminal liability with the law 05/2010 which also applies in case of market manipulation.<sup>36</sup>

As companies can be held liable for market manipulation, for listed companies the risks for market manipulation arise mainly in two areas: Ad-hoc releases and financial information as well as stabilisation and share buyback measures. False or misleading ad-hoc-releases are a prototypic case of information-based market manipulation. In many cases, companies use false ad-hoc releases to avoiding price-drops. The cases are combined usually with top-management insider trading, as shows the following example: A listed companies faces harsh economic problems in one of its branches abroad. In an ad-hoc release the company publishes the statement that the problems of this branch are less than reported by media and that there are no existential problems. This false ad-hoc release enables the stock price to maintain an artificial level, while top management sells its own shares, committing insider trading. A short time later, the real situation is known, and the stock price drops.

Another important issue is stabilization and share buyback measures.<sup>37</sup> These measures are allowed exceptions from the prohibition of market manipulation. Therefore, it is important to comply with all requirements and to avoid, for example, buy-back prices that largely exceed market prices or the execution of stabilization measures near to market close.

Prevention and detection of market manipulation are a core issue of compliance programs. In order to create an effective company- or group-wide compliance

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<sup>35</sup> See Richter, in this volume, pp. 321ff.

<sup>36</sup> The Spanish system is about to be reformed during 2014. The proposal includes a detailed regulation of organizational requirements for compliance programs.

<sup>37</sup> Vogel (2003), pp. 2437ff.



program, prevention and detection of market manipulation has to be integrated in a coherent and broad Compliance system. Compliance systems are based on a series of core elements, for example<sup>38</sup>:

- Tone from the top
- Code of conduct
- Procedures
- Controls
- Whistleblowing
- Training
- Monitoring & Review

In order to prevent and detect risks of market manipulation, these general principles are completed with specific elements, for example a Code of Conduct related to financial markets or specific controls, for example to guarantee the integrity of information made public. Another specific aspect is management compensation.<sup>39</sup> For example, a compensation scheme based on options bears the risk that managers manipulate company results in order to achieve a higher stock price—and therefore a higher compensation. This example shows that in many cases market manipulation in companies is linked to other economic crimes like fraudulent financial reporting.

As market manipulation is in many cases information-based, information management inside the company is a key issue to prevent and detect risks of market manipulation. In order to comply with duties related to ad-hoc releases, companies use information management systems in order to identify all relevant information that could require an ad-hoc release.<sup>40</sup>

Measures to prevent and to detect market abuse in companies should be integrated into the compliance program. The company's Code of Ethics should include the prohibition of market manipulation, for example integrated with mentioning the company's integrity related to financial markets. The general Code of Ethics is usually supplemented by provisions of a special code of conduct related to capital markets. These provisions include detailed rules on the prohibition of use of insider information, but also provisions concerning market abuse, for example price limits in order to not exceed average market prices beyond reasonable limits, or rules prohibiting day trading.

Another key element of the prevention of market abuse is training for personnel in order to comply with the prohibition of market abuse. Training should focus on legal requirements, case studies about frequent cases of market manipulation and how to react in case of possible compliance risks. Training measures should focus

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<sup>38</sup> For more details, see Nieto (2008a), pp. 215ff.; Sieber (2008), pp. 458ff. Fundamentally Moosmayer (2012).

<sup>39</sup> On this aspect, see Lehmann (2012), pp. 55ff.

<sup>40</sup> See Schröder (2010), p. 181ff, 389–391, for risks related to Roadshows or Investor Relations, p. 400–401.

especially on persons that have access to relevant information—for example due to ad-hoc releases—or buy back measures. From an institutional point of view, it is important to bundle all company units that could be in touch with possible compliance and regulatory risks, for example legal, internal audit, communication but also specific units like investor relations.

## 4 Conclusions

One important issue is the regulatory and supervisory aspects of financial markets integrity. As the financial crisis has shown, the system of supervision has failed to detect systemic failures of the financial system. As an answer to this, the supervision of the financial markets has been reformed and a new administrative structure has been implemented with the European Systemic Risk Board and the European Securities Markets Authority.

Compliance in banks and financial institutions offer, as we have seen, a highly regulated compliance model that can serve as orientation for compliance programs in general, but banks and financial intermediaries play a key role in the fight against market manipulation, for example by suspicious transactions reports to financial supervisors.

The context of market manipulation shows the tendencies of the actual developments of criminal policy: The privatization of the state-own duties of criminal prevention in order to control the untamed financial markets,<sup>41</sup> and the expansion of criminal law. As penalists we have to give answers to the challenges of globalization. But we have to be aware of the risks for the core principles of criminal law!

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<sup>41</sup> See Vogel (2012), § 10 at 5ff. with additional references.

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