Market Manipulation: An International Comparison

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Market manipulation is a general term covering a number of practices deemed harmful to the capital markets. Conduct that can lead to a violation of the market manipulation provisions extends from active trading to merely spreading information about a particular security or company. Market manipulation comes in many forms, whose number is limited only by the ingenuity.

The concept of market manipulation is anchored in many legal systems in many forms. And yet, despite the convergence of capital markets, there is no consensus as to its definition, scope, application, manner of regulation, or even the need to regulate this real-life aspect of today’s financial markets. On the one hand, technology and globalization are forcing the harmonization and coordination of trading and financial practices. At the same time, regulators and enforcers are still faced with a patchwork of differing views with respect to, and tools to address, such issues. Market manipulation is merely one of these.

This paper examines the concept of market manipulation against the backdrop of today’s converging capital markets. The first part of the paper examines the abandoned merger of three major stock exchanges, which would have provided a testing ground for global securities market harmonization. The second part looks at the current market manipulation rules as applied in the three individual securities markets. The third part considers the various enforcement tools and penalties available to securities regulators and exchange authorities. The fourth part examines the possible approaches to regulatory enforcement of combined exchanges. The fifth part addresses the possible irrelevance, or need for modification, of the overall regulatory approach in light of new trading technology. Finally, the last part concludes that in order to ensure that the merger of exchanges will work in practice, new thinking on the part of the respective legislatures and regulators will be required.

A RELEVANT SETTING: IX

On 3rd May, 2000, a dramatic announcement regarding the international capital markets was made. The London Stock Exchange and the Deutsche Börse informed the world that they were planning a merger of the two exchanges which would be completed by the end of the year. On the same day, the Nasdaq announced a joint venture with the company which was to serve as the basis of the future merged Anglo-German exchange. The goal of the venture was to create a 24-hour seamless international platform for trading in the securities of all three exchanges. The move had been called for and discussed for years, but the speed and scope of the developments surprised even some of the most ardent supporter.

Critics, such as UK Parliamentarian Michael Portillo, were not so impressed by the announcement, claiming differences in structure, regulatory regime and tradition, inter alia, would make the merger unworkable in practice. Mr Dieter Posch, the Economic Minister of Hessen, who in his capacity as head of supervision over the Frankfurt exchange had a definite say in the matter, voiced his own concerns. Some commentators had even come to the conclusion that the envisaged merger would violate applicable statutory provisions. Whatever the legitimacy of these arguments, the merger still needed to be approved by the shareholders of both exchanges, who first considered the matter in extraordinary shareholder meetings on 14th September, 2000. At the end of the process, the opponents of the merger won out. The IX signage, which was visible at the Frankfurt exchange during the negotiations, is now nowhere to be found.

While the exchange’s marketing departments, the press, and some participants and observers were busy extolling the virtues of the venture, others were busy in the background working out the technicalities of how the envisaged merged exchange might operate in practice. The IX venture would have provided a perfect subject for analysing the differences and obstacles to exchange harmonisation, full or partial. Unfortunately, it will be necessary to wait until a similar merger is actually implemented to determine how some of the conflicts addressed herein might be resolved. Though this paper focuses on one particular aspect, namely market
manipulation, the lessons learned may be useful in relation to other integration issues.

**WHOSE RULES?**
A seamless trading platform, even in today’s cyber-environment, does not mean that the actual placing and execution of trades in financial instruments occur completely outside of the physical realm. Regulators, be they tax authorities or securities agencies, shall have their say. An important question for both the exchange participants and their regulators is which regulatory regime to apply to an integrated, global, exchange. For the iX-Nasdaq venture, three possible regimes could have been imagined: that of the UK, Germany, or the USA. Each regime’s view of market manipulation is addressed below. In order to highlight the sometimes subtle differences, the most relevant legislation is reproduced here.

**UK**
The general rule in the UK dealing with market manipulation is found in s. 47 of the Financial Services Act 1986. The first type of conduct covered relates to statements made (or concealed, despite an affirmative duty to reveal) and reads as follows:

‘(1) Any person who —
   a. makes a statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceals any material facts; or
   b. recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive, is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast was made or from whom the facts are concealed) to enter or offer to enter into, or refrain from entering into or offering to enter into, an investment agreement or to exercise, or refrain from exercising, any rights conferred by an investment.’

The second group refers to actual trading or other conduct and reads:

‘(2) Any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any investments is guilty of an offence if he does so for the purpose of creating that impression and thereby inducing another person to acquire, dispose of, subscribe for or underwrite those investments or to refrain from doing so or to exercise or refrain from exercising any rights conferred by those investments . . .’

Persons found guilty of either offence are confronted with the possibility of sanctions and will be held liable as follows:

‘(a) on conviction or indictment, to imprisonment for a term not exceeding seven years, or to a fine or both;
   (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or both.’

Further guidance is provided by the Financial Services Authority, which has published a Draft Code of Market Conduct which covers artificial transactions and price manipulation. Moreover, specific types of market conduct are deemed, or shall be deemed upon approval of the codes, by the FSA as running afoul of the statutory rules. This conduct includes abusive squeezes and demand side manipulation, as well as the dissemination of information. These draft codes give an indication of how the FSA interprets particular types of conduct in, and affecting, the market.

**Germany**
Up until 1st January, 1996, Germany’s capital markets were not subject to the strict, official regulation of a supervisory authority. Instead, market participants were expected to follow a voluntary industry code aimed at preventing abusive practices such as insider dealing. All that changed with the implementation of the Second Law for the Promotion of Capital Markets, which both established a regulatory authority responsible for supervision of the financial markets in Germany (the Bundesaufsichtsam für den Wertpapierhandel, abbreviated to BaWe), and also introduced provisions addressing violations and practices harmful to the financial markets. In relation to market manipulation, the relevant
rule is found in s. 88 of the Securities Exchange Law,\textsuperscript{15} which reads (author's translation):

'Whoever, with an aim of influencing the exchange or market price of securities, rights, foreign exchange, goods, investments which are entitled to a share of the profits of the company, or derivatives falling within the statutory scope:

(1) makes false claims concerning factors which are influential for the valuation of securities, rights, foreign exchange, goods, investments which are entitled to a share of the profits of the company, or derivatives falling within the statutory scope, or remains silent regarding such circumstances in violation of the existing legal provisions, or

(2) uses other means of deception, may be punished by a fine or by imprisonment of up to three years.'

This section is supplemented by s. 264a StGB, which makes it a criminal offence to make false or misleading statements in an offering document, prospectus, or other communication related to securities transactions. In either event, the authority for pursuing violations of either provision lies with the local prosecutor's office (eg at the location of the exchange). Alternatively, other provisions from civil law may be applied to conduct in this area.\textsuperscript{16} Thus a number of competing legal norms could be used to address market manipulation in Germany.

USA

The United States Securities and Exchange Commission has rather detailed rules regarding the most common types of conduct deemed to be harmful market manipulation. The most relevant provision is contained in s. 9(a) of the Securities Exchange Act of 1934, which reads:

'It shall be unlawful for any person, directly or indirectly [to use the mails, exchanges, other instrumentality] . . . for the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security.'

The statute expressly extends both to so-called 'wash sales', in which the ending ownership point is identical to the starting one,\textsuperscript{17} but through which the perception of increased activity in the underlying security is created, as well as to 'pre-arranged trades',\textsuperscript{18} through which orders in the same security are matched and netted, but similarly create a false impression regarding the activity in the underlying security. The statute also includes a general prohibition to cover trades not falling neatly within either of the above two categories.\textsuperscript{19}

In addition to the active-trading instances, the statute also focuses on any attempt to influence prices through information spreading in s. 9(a)(3), which makes it illegal for a broker or dealer or other person

'to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.'

Note that this provision is quite similar to the wording of Rule 10-b-5 (especially subsection (2)), which makes it unlawful:

'(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.'

Moreover, s. 9(a)(4) of the statute prohibits the 'talking up' or 'talking down' of share prices in an effort to capitalise on market reaction to false or misleading statements.\textsuperscript{20} This provision has taken on new meaning in the age of the Internet, given the countless chatrooms and bulletin boards, which now serve as information sources for both market players, investors, and fraudsters. Finally, market participants or observers (eg market reporters, financial journalists) are not supposed to take advantage of their special position of trust and responsibility by receiving compensation for spreading false information about securities.\textsuperscript{21} In an era of
countless investment-oriented cable and satellite television stations, radio programmes, and information via PC, laptop and mobile telephones, these previously rather sleepy provisions are receiving greater attention from both the regulators and the courts.

**WHOSE TOOLS?**
The respective regulatory agencies have various tools at their disposal for combating perceived abuses in the market. Those of the US Securities and Exchange Commission are perhaps the most far-reaching, including unannounced searches and seizures (upon presentation of a warrant) — the so-called ‘dawn raids’ — of the premises of potential violators. Such enforcement tools could run afoul of constitutional principles in Germany, for example (*Rechtsstaatsprinzip*). Such differences are often an obstacle for the cooperation between the regulatory authorities, which even in transnational cases are still bound by constitutional and legislative (eg data privacy laws) restrictions and their statutory remit as well as any limitations on enforcement inherent in the applicable procedural rules (eg availability of *ex parte* enforcement tools).

A common source of problems for bilateral cooperation between civil law based and common law based regulatory authorities is that the former do not always have the benefit of far-reaching criminal-based statutes (eg the Racketeer Influenced and Corrupt Organizations Act or RICO Act in the USA) or investigative tools contained in the latter. In cross-border cases, the framework for cooperation still does not remove the systemic enforcement limitations of the individual agencies. Though the US SEC and the German Securities Supervisory Authority have a memorandum of understanding to facilitate cooperation, local constraints imposed by national law limit the amount and type of assistance that the BaWe can offer.

For private plaintiffs, a similar problem arises in terms of the availability of a private cause of action based upon securities laws violations and different procedural tools (eg discovery or disclosure in the common law regimes as opposed to the civil law proceedings being very much conducted by the judge).

Although certain acts (eg wash sales or matched orders) fall within the scope of market manipulation in each of the three countries analysed here, the consequences differ depending upon under whose rules the conduct is judged. Table 1 outlines the possible penalties for a party found guilty of market manipulation.

From the above discussion, one might conclude that it is a bit premature to begin contemplating the consolidation of exchanges subject to independent regulatory regimes following different rules and procedures. Could the above differences induce a type of forum shopping for potential market manipulators? The statistics do not seem to bear this out, as the largest number of cases appears to arise from the US market, perceived by many to have the most stringent securities laws and the most active regulatory authority. In any event, if one follows the opinions of some observers (see the last part below, ‘Does it matter?’), none of this will matter, or at least not as much, in the near future.

**RACE TO THE TOP? LOWEST COMMON DENOMINATOR?**
Which securities law regime and administrative remedies would apply to a merged entity of national securities exchanges? According to the IX plans, the trading which was to be conducted in Germany was to be subject to the existing German regulations and BaWe supervision, while that in London would continue to be subject to the LSE regulations and FSA supervision. Technology stocks were to be listed in Frankfurt, while the standard industrial listings were to remain in London. Additionally, both now as in the future, multiple listings will make securities potentially subject to multiple regulatory regimes.

| Table 1: Possible Penalties for a Party Found Guilty of Market Manipulation |
|------------------|------------------|------------------|
| Relevant statutory norms | UK | Germany | USA |
| s. 47 FSA | s. 88 Börsengesetz | ss. 9 & 10 of the Securities Exchange Act 1934 |
| s. 264a Strafgesetzbuch | s. 4 Gesetz gegen Unlauterer Wettbewerb | |
| Civil penalties | Liable for civil damages | Liable for civil damages | Liable for civil damages |
| Criminal penalties | Imprisonment up to 7 years and/or fine | Imprisonment up to 3 years and/or fine | Imprisonment in accordance with sentencing guidelines |
Even if the participants were able to agree upon a division of authority, and consequently the applicable rules, one cannot simply ignore the impact of traditions and regulatory structures which have been in place for years. Are projects such as iX then, faced with an insoluble clash of civilisations? Or can market forces vitiate apparently negligible differences in legal norms and structures? An overview of the similarities and differences between the respective rules should provide a first step in addressing these questions.

Commonalities
In all three legal systems, market manipulation suffers from a degree of definitional vagueness. Terms such as ‘for the purpose of inducing’ (UK), ‘uses other means of deception’ (Germany) and ‘reasonable grounds to believe was so false or misleading’ (USA) leave much room for interpretation. Moreover, all of the statutory provisions overlap with other rules, such as those regarding insider trading. The following commonalities are found in the three regimes.

Certain specific practices in all three jurisdictions are deemed to constitute market manipulation in violation of the respective statute. In some, eg the USA, these practices are defined rather clearly in the statute as well as in the relevant case law. In others (eg Germany), the scope of the definition has resulted from the interpretation of the market manipulation provisions as reflected in the exchange trading rules. Across all three regimes, the following appear to violate the statute and are therefore illegal: washed sales, matched orders, pre-arranged trades, and cross-trades. And beyond the active-trading problem areas, there are similarities in the other practices potentially violative of the law. In general, the following conduct is deemed illegal, absent a defence or exception:

- dissemination of false or misleading factual information
- spreading of false rumours
- dissemination of incomplete information or the obfuscation of relevant facts
- opinions, predictions and evaluations of securities without substantiation.

Differences
The existence of the diverging views regarding market manipulation (as well as regarding other regulatory subject matter) has taken on increased importance in light of the prediction that within five to ten years, only three or four mega-exchanges will exist. The most obvious difference in comparing the statutory norms of relevance to the abandoned iX project is the fact that two are anchored in common law legal regimes, while the German provision is an element of a civil law system. Without wishing to open a debate on the comparative advantages or disadvantages of a code or case law regime, the systemic factors which contribute to the existence and development of legal norms in each system cannot be ignored. This fact must be kept in mind as one considers the major points of departure of the respective norms.

Subject matter scope and standards
Though the subject matter of the norms is for the most part the same, the standards applied to measure them are not. For example, the UK rule also contains a type of negligence liability (‘is reckless as to whether a statement may induce a reaction in the market’ — author’s paraphrasing) absent from either the German or American provisions. Also, the UK and the USA recognise stabilisation as an ‘acceptable’ type of market manipulation, whereas the German regime is silent on this point.

Intent requirement
All three regimes also contain a requirement of proving intent in order to prosecute/hold a defendant liable for a violation of the statute. However, as outlined below, the standards and procedural means for proving intent differ from system to system (eg to what extent intent can be proven by circumstantial evidence). This could partly explain the different levels of enforcement of market manipulation in the respective jurisdictions.

Geographic scope
In the UK, the statutory scope of s. 47(4) is expressly limited to situations where the statement or forecast is made (or concealed) in or from the UK, the person upon whom the inducement is intended to effect, or may have effected is in the UK, or if the agreement would be entered into, or rights exercised, in the UK. In other words, the UK statute restricts itself to acts or statements directed at persons or markets within the UK.

In Germany, s. 88 of the Stock Exchange Law does not expressly state whether the provision is applicable to trades conducted outside of the country. But in general, commentators are of the opinion that the German statute only applies to acts affecting domestic trading. In the USA, the Securities and Exchange
Commission has traditionally been known for its tendency towards extraterritorial application of US securities laws if the interests of US investors and the US capital markets are deemed affected. How are such widely divergent approaches to be harmonised?

**Flexibility in interpretation**

Just as with all legislation, the drafters are faced with the challenge of providing sufficient guidance to the public without unduly limiting the scope by enumerating all potentially violative practices. This is why, for example, the US statute contains a 'catch-all' provision to cover instances of market manipulation yet to be identified or defined. In general, regulating market practices means being confronted with the regulatory dialectic, i.e. that given an incentive to find a legal way around an existing statute or regulation, individuals will do so until that gap is closed. Here one can also run into issues of the authority of how widely courts may interpret legal provisions without offending principles of separation of powers. In general, common law institutions have a genuine tradition and authority of interpreting legal provisions, whereas their civil law counterparts are limited to a comparatively stricter adherence to the letter of the law (statute or regulation).

**DOES IT MATTER?**

In light of the above analysis, will issuers make listing decisions based upon even slight differences in market regulation, real or perceived? For a new issuer, to what extent will the place of listing even be noticeable, and if so, to what extent will it be a deciding factor?

**The technology paradox**

Even presuming the existence of an applicable norm that seems to guarantee us a sufficient degree of protection against manipulative practices, is that the end of the story? Probably not. For the same technology which is driving the globalisation and concentration of securities exchanges is changing the very environment in which securities trading takes place. These forces are dramatically altering buyer-seller relationships in general, and the securities markets are not immune from them. Retail investors now receive trading information and conditions once exclusively reserved to institutional investors. This empowerment of the buyer vis-à-vis the sellers undermines one of the traditional underpinnings of the securities laws — the need for investor protection, particularly for the small investor. In fact, some commentators have recommended that the levelling of the information and trading field for investors should lead to all such persons being deemed 'accredited investors'.

Moreover, it is predicted that in the near future the actual placers of trades will not be humans, but rather automated trading machines. Presuming their use is approved by regulators (and computerised trading has been in place for years), these software programs will be capable of scanning the global markets in seconds, evaluating various trading options in a more sophisticated manner than a human trader, and negotiating and concluding trades on their behalf.

An excerpt from a study of the effects of cyberspace on international legal systems sets the stage:

'Cyber-robots, or "BOTs", are an increasingly feasible technology that puts the buyer in charge of the buying decision. Such cyberagents with computerised artificial intelligence can be programmed with enormous amounts of information about the goods, preferences, attitudes and capabilities of their human "principals". They can roam in virtual space without human intervention, endowed with such information, and apply their artificial intelligence to conduct all manner of commercial, social and intellectual transactions with other BOTs. In turn, they can appoint sub-agents, capable of speaking in multiple languages or ultimately communicating through a universal "computer-speak".'

In relation to securities transactions, these BOTs will be empowered with detailed information about the financial background, assets, and investment preferences of their 'principals' and will also enjoy expert systems capable of analysing sophisticated trading strategies and alternative trading options within seconds. And if the prognosticators are correct, the investor's BOT is not likely to be transacting with human beings on the other side of the transaction, but rather with similarly sophisticated and capable sellers’ BOTs. In this context, trading will to a large extent take place outside of the influence of humans (the obvious exception being the need to program the automated trading systems).

For legal norms which have always focused, and still do, on the human element of securities trading, this is problematic. For example, how does one
measure the intent of an automated trading program? How will monitoring and proof be affected by the increased ability to disguise manipulation as legitimate trading (eg washed sales broken down into many trades involving several parties and/or jurisdictions)? Does incarcerating a BOT really serve much deterrence? Or to what extent can the 'principal' be held responsible for causing the BOT to commit acts falling within the statutory definition of securities law violations? And, who is the principal? The financial choreographer of the trading strategy, the programmer, both?

**Express choice of law as saviour?**

When faced with legal uncertainty, the instinct of the lawyer or regulator is to come up with a new rule. Thus, mandatory choice of law and forum clauses (eg by way of chickwrap licences) appear an attractive solution to an otherwise unmanageable matrix of possibilities. But while it is true that even cyberspace transactions can be made subject to applicable legal norms, even this may not be fully controlling — in the absence of mandatory regulation — underlying trades in securities. In fact, BOTs can be programmed to know the laws of jurisdictions that may be applied to a given transaction and respond accordingly. As the ABA report notes:

'If the securities laws of a jurisdiction are not commercially reasonable and fair, the BOTs will, everything else being equal, use their machine intelligence to avoid transactions that would call for the application of such laws. In other words, legal systems will ultimately be part of the overall auction evaluation, just as warranty terms are taken into account by first generation 'shopping BOTs'. This means that a weak legal system will result in loss of business to the forum.'

As applied to the envisaged iX venture, would a BOT prefer placing a trade on the US or German market, given the lower criminal penalties compared with those in the UK, all else being equal? And what about BOTs equipped with statistical information regarding how actively securities law violations are pursued by the respective regulator? Science fiction? Perhaps. But it is worth noting that the securities regulators are taking these developments seriously and evaluating the sufficiency of existing legal norms and tools.

**EPILOGUE**

The issues to be addressed by the exchange owners, participants, and regulators are legion and complex. The prospect of nuances introduced by imminent trading technology could probably make them throw in the towel. What is the ideal regime for a combination of exchanges previously subject to different regimes and cultures? One fairly simple solution might be the maintenance of the *status quo ante* in terms of regulation. While that might appease many of the critics, what would it do to the underlying logic of exchange mergers themselves?

**REFERENCES**


(7) 'Börsenübernahme durch London rechtswidrig', article by Professor Dr Uwe Schneider, Handelsblatt, 2nd August, 2000, p. 36.

(8) The proposals set out the details of the planned merger and provide some insight into just how this enormous undertaking might be carried out. Both are available online at www.londonexchange.com/ and www.exchange.de/.

(9) The Financial Services Authority, the German Securities Authority and the Ministry of Economics in Hessen have already established committees to investigate the issues posed by the merger. Deutsche Börse shareholder proposal, p. 25.

(10) 'A person should not enter into a transaction or series of transactions in any protected investment or any reference commodity that would reasonably appear to other market users — to involve a genuine change in at least one of the parties' interests in the investment or commodity; or — to have been effected under a market mechanism providing for price competition; when that is not in fact the case', FSA Draft Code of Market Conduct §3.1.

(11) Ibid. §4.3.

(12) Ibid. §4.6.

(13) Ibid. §5.

(14) Zweites Finanzmarktförderungsgesetz, BGBl.

(15) The actual German wording is as follows: §98 Börsengesetz — 'Wer zur Einwirkung auf den Börsen- oder Marktpreis von Wertpapieren, Bezugsrechten, ausländischen
Zahlungsmitteln, Waren, Anteilen, die eine Beteiligung am Ergebnis eines Unternehmens gewähren sollen, oder von Derivaten im Sinne von § 2 Abs. 2 des Wertpapierhandelsgesetzes 
1. unrichtige Angaben über Umstände macht, die für die Bewertung der Wertpapiere, Bezugserträge, ausländischen Zahlungsmitteln, Waren, Anteile oder Derivate erheblich sind, oder solche Umstände entgegen bestehenden Rechtsvorschriften verschweigt oder 
2. sonstige auf Täuschung berechtigte Mittel anwendet, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

(16) For example, § 4 of the Unfair Competition Act, which prohibits the intentional spreading of false or misleading information about goods or services, calls for imprisonment of up to two years or a fine.

(17) In the words of the statute 'to effect any transaction in such security which involves no change in the beneficial ownership thereof', SEA §9(g)(1)(A), leaving the detail to be provided by the SEC in their rule-making capacity. Further described in the statute as follows; 'entering' an order or orders for the purchase (or sale — Part C) of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale (or purchase — Part C) of any such security, has been or will be entered by or for the same or different parties'. SEA §9(g)(1)(B).

(18) In the words of the statute; to effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others'. SEA §50.

(19) It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

a. To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

b. To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.' SEA §50.

(20) The test of the statute reads: 'If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.'

(21) SEA §9 prohibits anyone: 'For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.'

(22) 18 USC §§1961–68.


(24) By way of comparison, the 1976 bilateral treaty between USA and Germany in anti-trust enforcement proceedings has a longer history and, as a treaty, a stronger legal basis for cooperation.


(26) This turned out to be one of the major points of contention in the project, with various interest groups believing that too much was being given away to the other side.

(27) See eg infra Part II, 3. One possible delineation of the two is that with market manipulation, the violator is actually creating the 'information' or 'situation' which could potentially affect the price one way or another.

(28) §38 of the Conditions of Trading on the Frankfurt Securities Exchange (Xetra). Of relevance to the planned IX trading platform, the requirements of admission to trading on Xetra also expressly prohibit pre-arranged trades and cross-trading.

(29) ABA Cyberlaw Report at p. 165.

(30) Statements from all three countries were provided at the symposium and can be obtained on request.

(31) §47(4)(a) FSA 1986.

(32) §47(4)(b) FSA 1986.

(33) §47(4)(c) FSA 1986.

(34) In all three legal systems there is a requirement of definiteness and clarity to the legislation in keeping with the principle of nulla poena sine lege.

(35) ABA Cyberlaw Report p. 35.

(36) See eg Johnson, P. (1997) 'The Virtual Investor, the Virtual Fiduciary: The Internet and Its Potential Impact on Investors', Annual Review of Banking Law, Vol. 16, pp. 431, 445. The term 'accredited investor' in American securities law parlance refers to an individual who on account of his or her wealth and/or experience as an investor does not require the broad protection of the securities laws which the average investor needs. The practical impact of the classification is that offerings of securities to accredited investors are not subject to the same prospectus and informational needs as when dealing with non-accredited ones.

(37) ABA Cyberlaw Report at p. 33.

(38) See eg SEC 1998 release on jurisdiction.

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