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Angaben zur Veröffentlichung / Publication details:

Möllers, Thomas M. J. 2020. "Comment: market-conduct regulation in Germany and Europe." In *Legal certainty and fundamental rights: a cross-disciplinary approach to constitutional principles in German and South African law*, edited by Charl Francois Hugo and Thomas M. J. Möllers, 423–42. Baden-Baden, Claremont: Nomos, Juta.

Comment: Market-Conduct Regulation in Germany and Europe

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I. Introduction

The following notes reflect on the supervisory systems of Germany and Europe in the field of capital markets law. The developments over the last 10 years will not only be outlined, but also critically examined. The balance sheet scandal and insolvency of Wirecard in Summer 2020 demonstrates very well, that the German and European Capital Market Law still contain a lot of loopholes.[1]

II. The supervisory system in German capital markets law

1. The current position – a critical analysis

a) The BaFin

On 1 May 2002, the former supervisory institutions for banks, insurance companies and securities were merged into one authority, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – the BaFin).[2] Due to its wide-ranging responsibilities, it is sometimes referred to as a universal financial supervisory body (*Allfinanzaufsicht*). The rationale for this merger was that insurance companies offered financial services as well, so joint supervision was more sensible than allocating responsibilities to several different authorities.[3] However, there is no such universal financial supervisory authority at the European level.[4] The six stock markets in Germany are supervised by private trade-monitoring offices.[5] In addition, the public prosecutor's office has jurisdiction over cases

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1 For further reading cf. *Bundesministerium der Finanzen*, Sachstandbericht und Chronologie Wirecard v. 16.7.2020, https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Internationales_Finanzmarkt/Finanzmarktpolitik/2020-07-17-Sachstandsbericht-Wirecard.pdf?__blob=publicationFile&v=3 (last visited 7 Oct 2020).

2 In the past, there were the Federal Banking Supervisory Office (*Bundesaufsichtsamt für Kreditwesen* – BAKred), the Federal Securities Trading Supervisory Office (*Bundesaufsichtsamt für den Wertpapierhandel* – BAWe) and the Federal Insurance Office (*Bundesaufsichtsamt für das Versicherungswesen* – BAV).

3 *Buck-Heeb*, Kapitalmarktrecht (10th ed. 2018), para. 1192.

4 See below III.

5 See Section 7 Stock Exchange Act (*Börsengesetz* – BörsG). In Germany, there are six stock exchanges in Düsseldorf, Frankfurt am Main, Hamburg, Munich, Stuttgart and Berlin.

involving potential criminal offences. While the BaFin monitors compliance with market regulations, the Federal Bank of Germany is responsible for banking supervision, for example ensuring that the bank has sufficient capital.[6]

In accordance with the Freedom of Information Act (*Informationsfreiheitsgesetz* – IFG), any citizen can generally ask to inspect the BaFin's files. The BaFin has opposed this for a long time, as they regard the confidentiality of their cooperation with the investment service providers as being at risk.[7] However, professional secrecy can mitigate this claim. The European Court of Justice (ECJ) recently emphasised that professional secrecy can only be invoked as a restriction on the right to information if the interests of the person disclosing, or of a third person, are at risk.[8] Furthermore, a citizen cannot file a claim for damages if the BaFin breaches its supervisory duties. This is clear from Section 4(4) of the Act Establishing the Federal Financial Supervisory Authority (*Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht* – FinDAG), which stipulates that the BaFin only works in the public interest. The ECJ considered this to be compliant with European law.[9]

b) The relationship between supervisory authorities and the public prosecutor's office

European capital markets law has significantly tightened sanctions over the last couple of years, for example for the offence of market abuse.[10] Notably, market manipulation proceedings at the BaFin have been increasing for years. The number of proceedings handed over to the public prosecu-

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6 Cf. Section 5 Banking Act (*Kreditwesengesetz* – KWG); BVerfG, Judgment of 24 Jul 1962, 2 BvF 4/61 et al., BVerfGE 14, 197, 218.

7 To the previous legal situation see *Möllers* and *Wenninger*, 170 ZHR 2006, 455; BVerwG, Judgment of 24 May 2011, 7 C 6/10, ZIP 2011, 1313 – Auskunftsanspruch gegenüber BaFin; with comments *Möllers* and *Niedorf*, EWiR 2011, 569; ECJ, Judgment of 12 Nov 2014, C-140/13, ECLI:EU:C:2014:2362, para. 42 – Altmann et al. v. BaFin.

8 ECJ, Judgment of 19 Jun 2018, C-15/16, ECLI:EU:C:2018:464, para. 46 – BaFin v. Baumeister; to this *Herz*, NJW 2018, 2601 et seqq.; *Holzborn* and *Israel*, WM 2004, 1948, 1950.

9 ECJ, Judgment of 12 Oct 2004, C-222/02, ECLI:EU:C:2004:606, para. 30 – Paul et al.; BGH, Judgment of 20 Jan 2005, III ZR 48/01, BGHZ 162, 49 – Staatshaftung bei fehlerhafter Bankenaufsicht.

10 Council Directive 2014/57/EU of 16 Apr 2014 (market abuse directive).

tor's office have also increased significantly: from 22 proceedings in 2007 to 291 proceedings in 2015, and then to 300 proceedings in 2016.[11] However, in 2015 and 2016, more than 300 proceedings were closed, but only 6 and 10 respectively led to post-trial convictions. This is equivalent to only 2 to 3 % of proceedings.[12] In Germany, the public prosecutor's office is responsible for the crime scene according to Section 143 of the Courts Constitutional Act (*Gerichtsverfassungsgesetz* – GVG) read with Sections 7 et seq. of the Code of Criminal Procedure (*Strafprozessordnung* – StPO). This can be the crime scene itself, a place of residence, or the location or place of capture.[13] While greater expertise is available in larger cities and federal states, this does not apply to every public prosecutor's office in every federal state. Even in the larger public prosecutor's offices, it is openly acknowledged that know-how in the area of market manipulation is only partially available, and that reliance has to be placed on the BaFin's expertise. After all, criminal law only contemplates natural persons as offenders. There is no corporate criminal liability in Germany.[14] As long as it is not possible to attribute the conduct in question to an individual perpetrator, no conviction will follow.

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11 The BaFin annual reports are instructive here; for older figures see *Fleischer*, in: Fuchs (ed.), Wertpapierhandelsgesetz (2nd ed. 2016), vor § 20a, para. 38 et seqq.; *Mock*, in: Hirte and Möllers (eds.), Kölner Kommentar zum WpHG (2nd ed. 2014), § 20a, para. 73; *Maume*, 180 ZHR 2016, 358, 373 et seqq.

12 BaFin, Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht 2015 (2016), 232; BaFin, Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht 2016 (2017), 177 et seqq.

13 Critically already *Maume*, 180 ZHR 2016, 358, 392.

14 Regarding this discussion: legislation proposal of the state North Rhine-Westphalia – Gesetz zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=650FA1EF38D5AB386263C E7DD 6723AAA.ifxworker (last visited 7 Oct 2020); *Kempf* et al., Unternehmensstrafrecht (2012); *Pieth* and *Ivory*, Corporate Criminal Liability (2011); *Schmitt-Leonardy*, Unternehmenskriminalität ohne Strafrecht? (2013); *Tschierschke*, Die Sanktionierung des Unternehmensverbundes (2013); *Bosch*, Organisationsverschulden in Unternehmen (2002); *Kubiciel*, Kölner Papiere zur Kriminalpolitik 2/2014 (Feb 2014), https://assets.uni-augsburg.de/media/filer_public/59/a2/59a244cd-0ebf-43e7-a8a8-dc872607ebcd/02_2014_verbandsstrafe.pdf (last visited 7 Oct 2020).

2. Legal proposals

a) Establishing a Germany-wide public prosecutor's office for capital markets crimes

It is certainly not optimal that the supervision of stock-exchange members in Germany is divided between the BaFin, the local stock markets' trade-monitoring offices and the local public prosecutor's offices.[15] If the authorities require years to investigate before the proceedings are closed, punishable acts will not be sanctioned as they should. In concrete terms, only the company concerned can assess the extent to which the allegations made in a research report are accurate or not. In this respect, the supervisory authorities are also dependent on the know-how of the company concerned. Ideally, the BaFin, the trade-monitoring office and the company concerned would cooperate quickly so that trading on the stock exchange could also be suspended rapidly.

In addition, a more effective public prosecutor's office should be called for. It is unrealistic to expect 20 or 30 public prosecutor's offices throughout Germany to build up know-how in the area of market manipulation. It also makes less sense for the relevant public prosecutor's office to keep this know-how up to date if such an offence is prosecuted only once every few years. Several Higher Regional Courts in a federal state can already set up an Attorney General's Office pursuant to Section 143(4) GVG. It would be even more preferable if there were only one public prosecutor's office at the largest German stock exchange in Frankfurt, Germany.[16] Political endeavours in this direction have not yet been successful. However, when it comes to achieving parity of power in relation to organised crime, appropriate expertise will be needed. Alternatively, the Federal Prosecutor (who may even now assume responsibility) could take charge of such violations as state security offences or certain serious offences involving a foreign terrorist group (Sections 142a and 120 GVG).

15 However, the coordination among each other is described as good.

16 For the competent public prosecutor's office in Frankfurt am Main, see *Waßmer*, in: Fuchs (ed.), Wertpapierhandelsgesetz (2nd ed. 2016), vor §§ 38–40b, para. 63.

b) The right to implement regulatory sanctions

Another option would be to strengthen the BaFin's powers.[17] Specifically, the supervisory authority could be given the right to implement regulatory sanctions rather than handing the process over to the public prosecutor's office. In this way, the powers of intervention that the BaFin already has could also be used more efficiently.[18] Since the implementation of the Market Abuse Directive (*Marktmissbrauchsrichtlinie* – MAR), the Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG) has provided for heavy fines for market manipulation: up to EUR 15 million and 15 % of total sales.[19] If large fines were imposed on companies in accordance with Sections 30 and 130 of the Administrative Offences Act (*Ordnungswidrigkeitengesetz* – OWiG), the short-selling industry could be contained.

III. The supervisory system in European capital markets law

1. Harmonisation efforts over the past few decades

a) The Lamfalussy process

Since 1985, the European Commission (the Commission) has committed itself to the concept of minimum harmonisation.[20] Capital markets law was characterised by this general approach, and many legislative areas featured so-called minimum clauses that expressly allowed for stricter national law.[21] Thus, no level playing field could be established across Europe. Under the direction of Baron Alexander Lamfalussy, the Commission set up a Committee of Wise Men in July 2000, which investigated how the efficient and dynamic functioning of the securities market could

17 This is also the result of *Maume*, 180 ZHR 2016, 385, 394.

18 See Section 6 WpHG.

19 See Section 120(15) number 2 and (18) number 1 WpHG.

20 *Köndgen*, in: Basedow et al. (eds.), Economic Regulation and Competition of Services in the EU, Germany and Japan (2002), 27, 47 et seqq.; *Köndgen*, in: Everling and Roth (eds.), Mindestharmonisierung im Europäischen Binnenmarkt (1997), 111.

21 See Article 6 Council Directive 89/592/EEC of 13 Nov 1989 (no longer in force); recital 5 Council Directive 79/279/EEC of 5 Mar 1979; recital 3 and Article 11(1) of Council Directive 93/22/EEC of 10 May 1993. Further examples in *Möllers*, The Role of Law in European Integration (2003), 11 et seq.

be guaranteed by EU regulation.[22] This was first effected with the release of the four framework directives of the so-called Lamfalussy process: the Market Abuse Directive,[23] the Prospectus Directive,[24] the Misuse of Financial Instruments Directive (MiFID)[25] and the Transparency Directive.[26] To overcome the existing problems, the Committee suggested a four-stage process for creating European law in the area of financial services, which was ultimately based on the Comitology Decision of the Council of the European Union.[27] Two committees were set up: the European Securities Committee and the Committee of European Securities Regulators (the CESR).

At the third stage, the CESR had to specify the norms created at the first and second stages of the Lamfalussy process.[28] Its goal was to ensure that the Member States' national supervisory bodies transposed and implemented the norms, created during the first two stages of the process, in a harmonised way.[29] This took place by means of supposedly non-binding standards, guidelines and recommendations.[30] Guidelines tended to be oriented towards supervisory authorities and recommendations directly towards market participants.[31] In contrast to the WpHG, no duties were allocated to the CESR in any European framework directive. The directives only delegated to the CESR the interpretive authority regarding the norms created in the first two stages. The CESR was not permitted to undertake any activity that went beyond the objects of the framework and implementing directives. The work of the CESR at the third stage of the

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22 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (7 Oct 2020), https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf (last visited 7 Oct 2020).

23 Council Directive 2003/6/EC of 28 Jan 2003 (market abuse).

24 Council Directive 2003/71/EC of 4 Nov 2003.

25 Council Directive 2004/39/EC of 21 Apr 2004.

26 Council Directive 2004/109/EC of 15 Dec 2004.

27 Council Decision 1999/468/EC of 28 Jun 1999 (no longer in force); on this topic see *Karpf* et al., 3 Zeitschrift für Finanzmarktrecht 2007, 1, 6; *Schmolke*, 22 NZG 2005, 912.

28 CESR, The Role of CESR at 'Level 3' under the Lamfalussy process (Apr 2004), CESR/04–104b.

29 See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (15 Feb 2001), 46, https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf (last visited 7 Oct 2020).

30 *Ferran*, Building an EU Securities Market (2004), 104.

31 CESR, Publication and Consolidation of MiFID Market Transparency Data (Feb 2007), CESR/07–043, para. 1.14.

Lamfalussy process was, as such, already characterised as non-binding in the final report of the Committee of Wise Men.[32] This was also consistent with the the CESR's perception of itself, according to which recommendations did not constitute acts creating law and therefore did not require any national transposition.[33] The Lamfalussy process has since been extended from securities to banking,[34] insurance and pension funds,[35] and has seen committees created to improve the supervision of finance groups that offer services in banking, insurance and securities.[36]

b) *Larosière*: from the CESR to the ESMA

Following the Larosière Report[37], the European Commission proposed a supervisory scheme built around three European supervisory authorities.[38]

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32 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (15 Feb 2001), 38: "The outcome of this work would be non-binding although clearly it would carry considerable authority.".

33 CESR, The Role of CESR at 'Level 3' under the Lamfalussy process – Action Plan for 2005 (Oct 2004), CESR/04–527b, para. 2.3.9; CESR, Publication and Consolidation of MiFID Transparency Data (Feb 2007), CESR/07–043, para. 1.12: "The outcome of CESR's work is reflected in common guidelines and recommendations *which do not constitute European Union legislation and will not require national legislative action*" [emphasis added]. See also CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses No. 809/2004 (Jan 2005), CESR/05–054b, para. I.9.

34 For this purpose, the European Banking Committee (EBC) – Commission Decision 2004/10/EC of 5 Nov 2003 – and the Committee of European Banking Supervisors (CEBS) – Commission Decision 2004/5/EC of 5 Nov 2003 – were established.

35 A European Insurance and Occupational Pensions Committee (EIOPC) – Commission Decision 2004/9/EC of 5 Nov 2003 – and a Committee of European Insurance and Occupational Pensions Supervisors (*CEIOPS*) – Commission Decision 2004/6/EC of 5 Nov 2003 – were established.

36 The European Finance Conglomerate Committee (EFCC) based on Council Directive 2002/87/EC of 16 Dec 2002 was established.

37 Larosière Group, Report of the High-Level Group on Financial Supervision in the EU (25 Feb 2009), para. 67 and recommendation 3: "[...] within the EU, a strengthened CESR should be in charge of registering and supervising CRAs.", http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf (last visited 7 Oct 2020).

38 To the following see *Möllers*, 10 EBOR 2010, 379 et seqq.; *Ohler*, in: Derleder, Knops and Bamberger (eds.), Deutsches- und Europäisches Kapitalmarktrecht, (3rd ed. 2017), § 90, para. 23 et seqq.

The European system of supervision is based on two pillars: the macro- and micro-levels.[39] The macro-level supervises systemic risk through the European Systemic Risk Board (the ESRB).[40] The micro-level manages financial-market activities through the European System of Financial Supervision (the ESFS). The ESFS comprises national supervisory authorities in the Member States as well as three new European Supervisory Authorities (the ESAs). The ESAs are: a European Banking Authority (the EBA),[41] a European Insurance and Occupational Pensions Authority (the EIOPA),[42] and a European Securities and Markets Authority (the ESMA).[43] The ESMA cooperates with the ESRB.[44] The regulation expressly mentions Article 114 of the Treaty on the Functioning of the European Union (TFEU) as the source of the European legislature's authority.[45] In addition, there is the European Central Bank (ECB). The ECB has exclusive jurisdiction over the accreditation of all credit institutions. Furthermore, it supervises significant credit institutions.[46]

As the CESR has done in the past, the ESMA is to develop technical standards, guidelines and recommendations to facilitate the interpretation of harmonised EU legislation. So too, the ESMA is to create dispute resolution mechanisms and to ensure the consistent application of harmonised law through a peer-review procedure. The real innovations have remained rather hidden. They do, however, carry tremendous potential for debate as they significantly expand powers at the European level. To ensure the consistent application of EU rules, the proposal for a regulation establishing the ESMA also significantly expands supervisory powers over national authorities compared to the regulation on credit-rating agencies. It introduces a three-step mechanism.[47] First, the ESMA adopts a recommendation for action addressed to the national authority considered to be

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39 *Kalss*, in: Riesenhuber (ed.), European Legal Methodology (2017), § 19, para. 5.

40 Council Regulation (EU) No. 1092/2010 of 24 Nov 2010.

41 Council Regulation (EU) No. 1093/2010 of 24 Nov 2010.

42 Council Regulation (EU) No. 1094/2010 of 24 Nov 2010.

43 Council Regulation (EU) No. 1095/2010 of 24 Nov 2010.

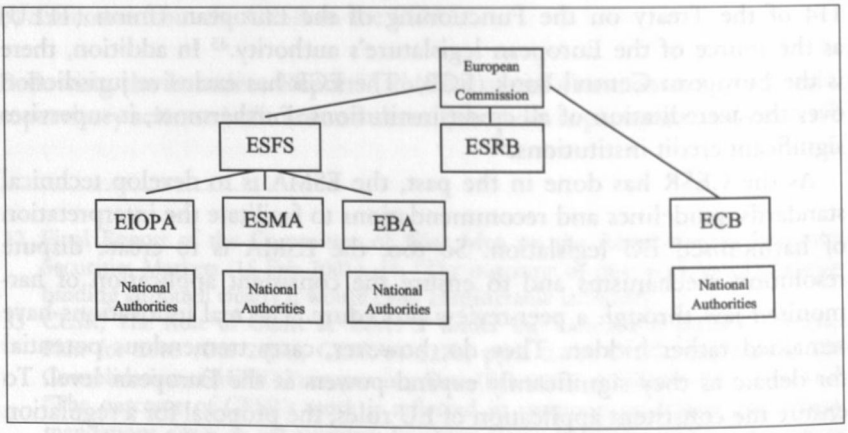
44 Ibid., Article 36.

45 Ibid., para. 17; reference is made to ECJ, Judgment of 2 May 2006, C-341/04, ECLI:EU:C:2006:281, para. 44 – United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union. Prior to this already European Commission, Communication from the European Commission on European financial supervision of 27 May 2009, COM(2009) 252, 8.

46 Articles 4 and 6(4) Council Regulation (EU) No. 1024/2013 of 15 Oct 2013.

47 Recital 28 and Article 39 Council Regulation (EU) No. 1095/2010 of 24 Nov 2010.

deviating from existing EU legislation. Secondly, if the recommendation is not complied with, the Commission may require the national supervisory authority to either take specific action or refrain from acting. Thirdly, the ESMA may, as a last resort, make a decision directed at financial institutions. To ensure healthy market competition, or to guarantee the functioning and integrity of the financial system, the ESMA must be able to intervene as quickly as possible.[48] However, the prerequisites for such an intervention are difficult to satisfy. The following diagram depicts the relationship between the relevant bodies:



2. Proposals with a view to future regulation

The European supervisory regime is not yet perfect. On the one hand, it is too weak and on the other it is exaggerated, and thus violates the principle of subsidiarity twice.

a) In favour of more: A European task force

It was correct to transfer to the ESMA authority for the areas immediately concerning the internal market. The ESMA had already been responsible

48 Recitals 29 et seq. and Article 17(3), (4) and (6) Council Regulation (EU) No. 1095/2010 of 24 Nov 2010.

for monitoring rating agencies,[49] especially in the areas of short-selling[50] and benchmarks.[51] Like the regulations for competition law, the responsibility of a European supervisory body for capital markets law should always be for *cross-border* cases, as these affect the internal market. The restructuring of European capital markets law has, at the very least, led to an upgrade in the powers of European authorities. In the past, Member States had had exclusive jurisdiction over capital markets law. The reformed Lamfalussy process changed this.

Even if Germany were to become more effective by way of an intervention force and a central public prosecutor's office, this would only be an important first step. With 28 Member States, however, short-sellers would still have an easy time avoiding stock exchanges in other Member States. Therefore, European action is required. Cooperation between national supervisory authorities and the ESMA was indeed contemplated in Articles 22–29 MAR.[52] The BaFin reports that it cooperates with 24 foreign supervisory authorities.[53] Nevertheless, requests for mutual assistance are time-consuming, cumbersome and rarely successful. However, the question is whether this is sufficient and thus establishes the necessary parity of power between the perpetrator and the enforcer.

The requirements of the subsidiarity test in Article 5(3) of the Treaty on the European Union (TEU) are clearly available: negatively speaking, the national authority cannot take sufficient action against these forms of market manipulation. If market manipulation is rightly penalised, then a sanction must also be possible. The inaction or ineffectiveness of the previous legislation damages confidence in capital markets. Ultimately, Article 12 MAR (formerly Section 20a WpHG) and the previous Section 88 of the Stock Exchange Act (*Börsengesetz* – BörsG) remain largely ineffective with regard to misleading research reports in cross-border situations.

European antitrust law has demonstrated its own effectiveness. Over the last 60 years, it has proved to be extremely effective against foreign com-

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49 Article 5b Council Regulation (EU) No. 1060/2009 of 19 Sept 2009.

50 Article 28 Council Regulation (EU) No. 236/2012 of 14 Mar 2012.

51 Article 37 et seqq. Council Regulation (EU) No. 2016/1011 of 8 Jun 2016; See *Brosig*, Benchmark-Manipulation – Eine Ökonomische und Regulatorische Analyse des Libor Manipulationsskandals (2018).

52 See *Thiele*, Finanzaufsicht (2014), 531 et seq.; *Grundmann*, in: Staub (fdr.), HGB, vol. 10 Bankvertragsrecht Teil 1 (5th ed. 2016), para. 297; *Zollner*, in: Ventoruzzo and Mock (eds.), Market Abuse Regulation (2017), B.24.01 et seqq.

53 BaFin, Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht 2016 (2017), 177.

panies illegally operating on the European market. Landmark claims have been filed against Microsoft, Google and, most recently, Qualcomm.[54] As in competition law, legislative power should always exist for cross-border cases[55] because these affect the internal market. Specifically, market participants enrich themselves at the expense of others through unlawful conduct when the stock price falls. A company is damaged by a lower stock price, but also by numerous – and possibly also professional – market participants if, for example, stop-loss prices are triggered. The reliability and truth of pricing is negatively affected, and confidence in integrity impaired.[56]

If European law is to be finally regulated through European regulations, appropriate powers of intervention are also required, at least in cross-border cases, to achieve the necessary parity of power in relation to this form of organised crime. As a first step, the ESMA's authority would have to be expanded significantly. The US Securities and Exchange Commission (SEC), which takes effective action against market manipulation, illustrates that things could be different.[57] Effective supervision was also demonstrated by the VW diesel scandal in the US. The US Department of Justice ordered the companies Bilfinger, Daimler, Siemens and Volkswagen to have a monitor supervising the companies and reporting back to the Department.[58]

An intervention force like this would require the further expansion of authority at the European level for such serious cases. There is already a Directorate-General (DG) for Financial Stability, Financial Services and Capital Markets Union.[59] Not least the Wirecard scandal has fuelled the political demand for a superordinate European supervisory authority based on the model of the US Securities and Exchange Commission.[60]

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54 European Commission, "Antitrust: Commission fines Qualcomm €997 million for abuse of dominant market position" (24 Jan 2018), http://europa.eu/rapid/press-release_IP-18-421_int.htm (last visited 7 Oct 2020).

55 See Articles 101(1), 102(1) TFEU.

56 See Council Regulation (EU) No. 596/2014 of 16 Apr 2014, recital.

57 See *Möllers*, 53 International Lawyer 2020 (in printing).

58 See *Zwiebel* and *Lohmeier*, Compliance-Berater 2016, 250 et seqq.; *Schneider*, Compliance-Berater 2017, 441 et seqq.; *Freytag*, FAZ of 10 Feb 2018, 19.

59 For their responsibilities see European Commission, "Financial Stability, Financial Services and Capital Markets Union", https://ec.europa.eu/info/departments/financial-stability-financial-services-and-capital-markets-union_de#responsibilities (last visited 7 Oct 2020). About ESMA competencies, see Articles 8 et seq. Council Regulation (EU) No. 1095/2010 of 24 Nov 2010.

60 Cf. https://boerse.ard.de/aktien/bafin-chef-weist-vorwuerfe-zurueck100.html.

In addition, for reasons of general prevention, consideration should be given to extending authority, and specifically to how the DG Competition could be given the means to intervene. A European ministry of justice would probably be more effective than a local public prosecutor's office. Furthermore, the involvement of the judicial branch could be extended by setting up of a court of first instance for competition matters and one for capital markets.

b) In favour of less: devolving authority on the basis of irrelevance to the internal market

aa) The principles of conferral of powers and subsidiarity derived from Article 5 TEU oppose the automatic urge to regulate through the European institutions. Furthermore, the obligation to justify legislative acts according to Article 296(2) TFEU must additionally secure and provide a basis for this. Apart from this, a regulatory reasoning burden can be demonstrated as the legislative body is obliged to prove the need for the regulation.[61] Fortunately, despite the abovementioned flood of regulations, the EU has withdrawn harmonising regulations over the past few years and therefore devolved authority over these areas to the Member States. Initially, a quarterly-information obligation should also support alignment with US regulations, as they have been demanding these reports since 1946.[62] The introduction of this quarterly-reporting duty was quite controversial because of the significant costs and the influence of special seasonal factors.[63] The requirement for interim reports, in which companies had to disclose certain financial information for the first and third quarters of the financial year (Article 6(1) 2004/109/EEC old version), was again limited by the Transparency Harmonisation Directive (Directive 2013/50/EU). The aim was to reduce the administrative burden on small- and medium-sized businesses, to encourage long-term thinking on the part of the companies

61 Hereto *Montesquieu*, De l'esprit de lois (1748), vol. 2, book 29, chapter 16, translated from French: "When there is no necessity for exceptions and limitations in a law, it is much better to omit them"; cf. *Fleischer*, 37 ZGR 2008, 185, 190.

62 Explanatory Memorandum of the Commission of the European Communities for a Directive on the harmonization of transparency, COM(2003) 138, 16, 20; see also *Merkt* and *Göthel*, RIW 2003, 23 et seqq.

63 The Porsche AG, for example, had left the M-DAX, see for example *Scherff*, FAZ of 8 Aug 2001, 23.

obliged to report, and to condemn the flood of information to investors.[64] The stock markets' private standards can still demand quarterly reports for certain market segments – every Member State can define these for itself.[65] Initially, the EU wanted all publications under corporate and capital markets law (for example, *ad hoc* announcements, directors' dealing announcements, annual financial statements, and interim reports) to be listed in one annual report at the end of a business year. The legislature introduced a disclosure obligation for listed stock corporations through the Securities Prospectus Act (*Wertpapierprospektgesetz* – WpPG), which came into effect on 1 July 2005. However, this information was already available to the capital markets after being published, which meant that, apart from giving rise to additional costs, the annual report did not add any value. This is a perfect example of information overload.[66] Justifiably, the European legislature repealed this act.[67]

bb) It does not serve the purpose of helping the consumer if transactional costs rise to such a degree that banks stop counselling investors. In my opinion, the principles of Article 11 of the directive on investment services in the securities field (Council Directive 93/22/EEC) were sufficient to enable a European standard to be developed. Apart from this, the German courts have developed comprehensive obligations in the area of counselling by banks.[68] The legislative history of MiFiD II, in which Great Britain's fee-based advice and Germany's commission-based advice clashed, demonstrates that harmonisation is often impossible.[69] Instead of favouring one over the other, each Member State should experiment for itself if it would like to delight its banking clients with a consultation protocol, a product-information sheet, extensive requirements for commission

64 *Seibt* and *Wollenschläger*, ZIP 2014, 545, 546; in England and France, the obligation to report quarterly had already been lifted again previously, *Buchheim*, *Hossfeld* and *Schmidt*, WPg 2016, 1347, 1350, 1352.

65 On the Frankfurt Stock Exchange, for example, Section 53 Stock Exchange regulations for the Frankfurt Stock Exchange (*Börsenordnung der Frankfurter Wertpapierbörse* – BörsO FWB) requires a so-called "quarterly report" for companies in the "Prime Standard". This is an abbreviated form of the previous quarterly report. Companies in the "General Standard" are exempt from this requirement.

66 *Möllers*, Juristische Methodenlehre (2nd ed. 2019), § 5, para. 148 et seq.

67 Section 10 WpHG has been deleted by the Act Implementing Directive 2010/73/EU and Amending the Stock Exchange Act of 26 Jun 2012, Federal Law Gazette (BGBl.) of 29 Jun 2012, part I, 1375.

68 Hereto *Möllers* and *Leisch*, in: Gerke and Steiner (eds.), Handwörterbuch des Bank- und Finanzwesens, (3rd ed. 2001), 311 et seqq.

69 In detail *Möllers*, ZEuP 2016, 325, 341 et seqq.

reimbursements (kick-backs) or a complaint register. These requirements are not relevant to the internal market.

c) Realising European legal principles and regulatory objectives under capital markets law

Such a horizontal division of labour relevant to the internal market would also take the principle of subsidiarity under Article 5(3) TEU seriously. Market manipulation meets the requirements of the subsidiarity test in favour of the EU. If the test is viewed negatively, it concludes that the Member State cannot resolve the problem sufficiently, which is why the EU (as a more effective entity) is required to take action against cross-border market manipulation. Ultimately, Article 12 MAR will have no effect in cross-border cases involving misleading Research Reports, just as the previous Sections 20a WpHG and 88 BörsG did not. However, the ineffectiveness of capital markets law also damages trust in capital markets, which is why European enforcement of the law is necessary.

This also applies in the opposite case: if the famous "Lieschen Müller of the Raiffeisenbank Buxtehude"[70] purchases a bond for EUR 1,000, this is neither system-relevant nor does one need a European regulation or directive. But the principle of subsidiarity demands that authority must remain on the lower level if this level can better resolve the problem. This gives rise to a comparison with the ECJ's *Keck* case. The fact that English pubs still serve beer after 10 p.m., or German shops are closed on Sundays, does not affect the internal market and these are only sales-related measures, and as such not protected by the free movement of goods.[71] This is why, in the field of investment-counselling, every Member State should be able to determine itself under which conditions such counselling is permissible.

In addition, the positive and negative sides of the subsidiarity principle would increase efficiency on two fronts: On the one hand, European intervention would assist in those cases in which national authorities are overwhelmed. On the other hand, resources and transactional expenses

70 "Lieschen Müller" is a German placeholder name, referring to the everyman citizen and is often portrayed as being naïve.

71 Essentially ECJ, Judgment of 24 Nov 1993, C-267/91 et al., ECLI:EU:C:1993:905, para. 16 – Criminal proceedings against Keck and Mithouard. See *W. Schroeder* in: Streinz (ed.), EUV/AEUV (3rd ed. 2018), Article 34 TFEU, paras. 41 et seqq., 45; *Kingreen*, in: Callies and Ruffert (eds.), EUV/AEUV (5th ed. 2016), Articles 34–36 TFEU, paras. 49 et seqq.

could be saved if national or local action is sufficient. The European legislature would not weaken the competitiveness of companies and banks in relation to US and Chinese competitors, but strengthen it through clever deregulation.[72] At the same time, with Brexit on the doorstep, it would be possible to demonstrate what a future-oriented Europe might look like.

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72 To the level playing field see *Hopt* and *Voigt*, in: Hopt and Voigt (eds.), Prospekt- und Kapitalmarktinformationshaftung (2004), 1, 2 et seqq.; rapporteur *Edgardo Maria Iozia* in his opinion of the European Economic and Social Committee, Proposal for a regulation of the European Parliament and the Council on key information documents for investment products, COM(2012) 352, para. 3.4.

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