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**Trade-Based Market Fraud (Manipulation)  
Crime in Turkish Law**

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### **Abstract**

Capital markets play an important role for the national economy because companies can grow by making new investments with the funds they obtain from these markets. Due to this importance, maintaining investors' confidence in the capital market is crucial. In order to preserve this confidence, manipulations leading to artificially determined stock prices should be prevented. In Turkish law, the crime of manipulation is regulated under the name of 'Market Fraud' in Article 107 of the Capital Market Law No. 6362. This crime is regulated in the Law with a dual distinction as 'trade-based market fraud' and 'information-based market fraud'. In our study, we will only examine the crime of trade-based market fraud. This crime may be committed through certain transactions that appear lawful but aim to deceive investors by manipulating prices.

**Key Words:** Capital market, investors' confidence, manipulation, market fraud, stock prices.

## Introduction

Manipulation is a word of French origin, and in French, meaning manual routing or manual shaping. While it was initially a name given to the act of puppetry, it was later used to disseminate untrue information to manipulate the masses<sup>1</sup>.

The capital market is essentially a platform where expectations about the future are traded. In such a market, a rational investor considers macroeconomic developments and the financial situation of enterprises when making decisions.

Changes in the prices of capital market instruments are among the factors followed by investors. There is no doubt that interventions on these factors may mislead investors and thus have a negative impact on the efficiency and reliability of the market<sup>2</sup>.

Manipulating security prices causes redistribution of economic value and wealth among market participants and this makes advantage to the party undertaking the manipulation<sup>3</sup>. Capital market investors trade on the stock exchange believing that transactions are real and that prices are formed by real supply and demand. If the information affecting the value of the market instrument and investment decisions is misleading and if there are

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- <sup>1</sup> Faruk Bostancı and Eyüp Kadioğlu, "Sermaye Piyasası Suçları (Manipülasyon ve İçerden Öğrenenlerin Ticareti)" *Standart Dergisi* 48, no. 564 (2009): 99, [https://www.researchgate.net/publication/281446781\\_Sermaye\\_Piyasasi\\_Suclari\\_Manipulasyon\\_ve\\_Icerden\\_Ogrenenlerin\\_Ticareti](https://www.researchgate.net/publication/281446781_Sermaye_Piyasasi_Suclari_Manipulasyon_ve_Icerden_Ogrenenlerin_Ticareti); Çağlar Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, (Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2008), 7-8.
- <sup>2</sup> Carole Comerton-Forde and Talis J. Putnins, "Stock Price Manipulation: Prevalence and Determinants", *Review of Finance* 18, no. 1 (2014): 23, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1243042](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1243042); Syed Qasim Shah, Izlin Ismail and Aidil Rizal bin Shahrin, "Stock Market Manipulation: A Comparative Analysis of East Asian Emerging and Developed Financial Markets", *Management Science Letters*, no. 9 (2019): 184, <https://doi.org/10.5267/j.msl.2018.10.006>.
- <sup>3</sup> Chester Spatt, "Security Market Manipulation", *Annual Review of Financial Economics*, no. 6 (2014): 406, <https://www.jstor.org/stable/44864088>.

artificial transactions that intentionally make the prices appear different from what they are, i.e. manipulation situations, investors' confidence in the market is shaken. An investor whose confidence is shaken will move away from the market. Therefore, the trust of investors should also be protected by the legal order.

In this study, while examining the elements of the crime, we have taken the method of crime examination in the Turkish penal law doctrine as a basis.

### **1. The Short History of The Crime in Turkish Law**

In Turkey, deceptive acts against capital market instruments were criminalized under the Turkish Penal Code (TPC) No. 765 of 1926, which was based on the Italian Penal Code of 1889. This is a general regulation that penalizes deceptive acts with respect to several objects, including capital market instruments.

The first specific regulations on capital markets were made in the Capital Market Law (CML) No. 2499 dated 1981. The first specific regulations on the crime of manipulation were also introduced in this law. Subsequently, a new CML came into effect in 2012 and remains in force today. The crime of manipulation was regulated under the name "manipulation" in the 1981 Law, but the name of the crime was changed to "market fraud" in the 2012 Law.

Capital market crimes are regulated under Articles 106 to 116 of the 2012 Law, with market fraud specifically addressed in Article 107. The crime is regulated in both laws with a binary distinction between trade-based and knowledge-based. In this study we will only examine the trade-based one.

### **2. Types of Manipulation in American Law**

It is stated that there is no legislative definition of manipulation in American law, but various definitions are proposed in court decisions and doctrine. While defining the concept of manipulation in American law, misleading people or deliberate and artificial interventions in the supply and demand of stock prices are

emphasised<sup>4</sup>. At the same time, in American law, manipulation is seen as an act similar to fraud that harms individuals and society<sup>5</sup>.

In American law, manipulative capital market transactions are generally categorized into three types: 1) Wash sales, 2) Cornering, and 3) Front running<sup>6</sup>.

### 1.1. Wash Sales

Manipulators use wash trades to artificially increase the daily volume of a stock in order to mislead investors by creating the appearance of a liquid market. Because many investors see this increase in liquidity as a positive indicator for the stock<sup>7</sup>.

The manipulator tries to raise the price of the stock and then make a profit by selling it at a higher price. This can be done in various ways. For example, the manipulator may take certain actions to increase the stock price, such as spreading rumours or engaging in wash sales. Although this activity is generally prohibited by law, it constitutes most cases of stock price manipulation observed<sup>8</sup>.

It is well known that large block trades can influence prices. For example, an investor may buy a large number of stocks, causing the price of the stock to increase. If the investor can then sell these shares at a high price, he can make a profit<sup>9</sup>.

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<sup>4</sup> Daniel R. Fischel and David J. Ross, "Should the Law Prohibit 'Manipulation' in Financial Markets?", *Harvard Law Review*, 105, no. 2 (1991): 507, <https://doi.org/10.2307/1341697>; Spatt, "Security Market Manipulation," 406.

<sup>5</sup> Stephen Mark Bainbridge, "Insider Trading: An Overview", *Encyclopedia of Law and Economics*, (2000): 791, <https://dx.doi.org/10.2139/ssrn.132529>

<sup>6</sup> Tom C. W. Lin, "The New Market Manipulation", *Emory Law Journal* 66, 6 (2017): 1281, <https://scholarlycommons.law.emory.edu/elj/vol66/iss6/1>.

<sup>7</sup> Serkan Imisiker and Bedri Kamil Onur Tas, "Wash Trades as a Stock Market Manipulation Tool", *Journal of Behavioral and Experimental Finance* 20, (2018): 93, <https://doi.org/10.1016/j.jbef.2018.08.004>.

<sup>8</sup> Rajesh K. Aggarwal and Guojun Wu, "Stock Market Manipulations", *Journal of Business* 79, 4(2006): 1921, <https://doi.org/10.1086/503652>.

<sup>9</sup> Aggarwal and Wu, "Stock Market Manipulations", 1916.

## 1.2. Cornering

Cornering usually occurs as follows: One or more traders capture the entire supply of a financial instrument or commodity and then manipulate the natural price formation of the market by fixing the market price of that instrument or commodity<sup>10</sup>.

## 1.3. Front Running

Front running is a manipulative order in which a party, often a broker, executes a trade knowing that a market-moving trade in the same or a related financial instrument is imminent. In this system, the broker, in breach of the duty he owes to his clients, puts his own trading ahead of market behaviour in order to benefit himself<sup>11</sup>.

## 2. The Elements of The Crime<sup>12</sup>

### 2.1. Subject of the Crime

The subject of this crime is capital market instruments such as shares. In other words, this crime is committed by trading on capital market instruments.

Article 107 of the CML, which regulates the crime of trade-based market fraud, does not regulate the capital market instruments that are the subject of this crime. The definition of capital market instruments is generally defined in Article 3 of the Law. According to this article, capital market instruments are securities, derivative instruments and other capital market instruments determined by the Capital Market Board to be within this scope, including investment contracts.

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<sup>10</sup> Lin, "The New Market Manipulation", 1281-1282.

<sup>11</sup> Lin, "The New Market Manipulation", 1283.

<sup>12</sup> In Turkish penal law, it is accepted that there are two main elements of crime: typicality and illegality. The element of typicality contains the elements included in the legal definition of the crime. The typicality element includes the material and moral elements of the crime. Material elements are action, consequence, causal link, subject of the crime, perpetrator and victim. Moral elements are intent and negligence. In the concrete case, the absence of one of these prevents the crime from occurring. This formulation is made in a similar way in German penal law, which is considered to be the main source of the current Turkish Penal Code.

## 2.2. Perpetrator

The perpetrators of this crime are natural persons who execute buying or selling transactions defined as the material elements of the crime in the law. This crime is not specific in terms of the perpetrator, it can be committed by anyone<sup>13</sup>. This crime can be committed by a single person or by more than one person.

According to the generally accepted view in Turkish law and the understanding that dominates the law, only natural persons can be perpetrators, legal entities cannot be perpetrators<sup>14</sup>. If the crime is committed within the scope of the activity of a legal entity, the perpetrator will be the official or officials of that legal entity who perform the act.

The perpetrator of this crime is a person who trades, places orders, cancels orders, changes orders or performs account transactions in order to create a false or misleading impression regarding the prices, price changes, supply and demand of capital market instruments. In the abrogated CML (1981), only the person who conducts the trading was regulated as the perpetrator of this crime.

## 2.3. Victim

The legal value intended to be protected by this crime is the trust in the capital market and the protection of the national economy, and these values concern the whole society. So the victim of this crime is not a specific person or persons, but all members of society. Although every crime in Turkish penal law has a victim, some crimes do not have a specific victim. Such crimes are called "crimes with uncertain victims". In crimes with an indeterminate victim, everyone in society is considered a victim. However, if a specific person or persons are harmed as a result of the commission of this crime, they may also be considered victims.

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<sup>13</sup> Axel-Dirk Blumenberg, *Marktmanipulation und Compliance: Eine Untersuchung unter Berücksichtigung des deutschen und des spanischen Rechts* (Universität Passau 2016), 32.

<sup>14</sup> Mehmet Emin Artuk, Ahmet Gökçen, Mehmet Emin Alşahin and Kerim Çakır, *Ceza Hukuku Genel Hükümler* (Adalet Yayınevi 2022), 383.

## 2.4. Actions

The action element of the crime of trade-based market fraud consists of purchases and sales, orders and account movements, which normally appear to be lawful individually, but cause market fraud when they are carried out in co-operation for a specific purpose.

These are regulated in the law as follows: Buying or selling, placing orders, cancelling orders, changing orders, performing account transactions. These types of acts are regulated as optional in the law. In other words, for the crime it is sufficient that one of them be committed by the perpetrator. The perpetrator may have committed all of these acts in the same incident. In this case, only one crime is considered to have been committed.

### 2.4.1. Buying or Selling

According to Turkish capital market law, individuals are not authorised to trade directly in the stock exchange. In order to trade shares, a framework contract must be signed between the investor and the intermediary institution<sup>15</sup>. Thanks to this framework contract, trading transactions can be carried out without the need to conclude a specific contract for each brokerage activity.

A normal buy-sell transaction takes place as follows: The investor gives an order to the intermediary institution for the buying or selling of the security, this order is transmitted to the exchange system by the intermediary institution and the transaction is executed when the order matches with the counterparty's buy or sell order within the framework of free market rules.

If the investor performs the buying or selling transaction with the aim of creating a false or misleading impression regarding the prices, price changes, supply and demand of capital market instruments, the action element of this crime is realised.

### 2.4.2. Placing Orders

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<sup>15</sup> Tekin Memiş and Gökçen Turan, *Sermaye Piyasası Hukuku* (Seçkin Yayınları, 2016), 158.



As we have mentioned before, traders cannot trade directly in the stock exchange, they can trade through intermediary institutions. The trader first transmits the trade order to the intermediary institution, and the intermediary institution transmits this order to the exchange system.

The order transmitted by the customer to the intermediary institution is called customer order. The order transmitted by the intermediary institution to the exchange is an exchange order.

Order types are divided into normal orders and conditional orders. Normal order types are as follows: Limit price orders, market orders, market to limit orders and balancing orders. Conditional orders are as follows: Quantity conditional orders, price conditional orders, time conditional orders and partial appearance conditional orders<sup>16</sup>.

An example of placing order is 'improper matched orders'. In this order type, transactions where both buy and sell orders are usually entered at the same time, with the exact same price and quantity by different but colluding parties<sup>17</sup>.

#### **2.4.3. Cancelling Orders**

It is a fact that orders transmitted to the exchange and waiting to be executed have an impact on trading volume and price formation. In this context, the most frequently used order type in terms of trade-based market fraud is the so-called 'cancel remainder' order. This order type allows you to enter an order regardless of the limit on order quantity. Any unfulfilled portion of the order is automatically cancelled. This order type is the ideal way to create

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<sup>16</sup> Arzu Balan, *Ekonomik Bir Suç Olarak Sermaye Piyasası Kanununda Düzenlenen İşleme Dayalı Piyasa Dolandırıcılığı Suçu* (On İki Levha Yayıncılık, 2019), 138.

<sup>17</sup> Jose Joy Thoppan, M. Punniyamoorthy, K. Ganesh and Sanjay Mohapatra, *Developing an Effective Model for Detecting Trade-based Market Manipulation* (Emerald Publishing Limited, 2021), 87, <https://doi.org/10.1108/978-1-80117-396-420211022>.

the impression of intense supply and demand mobility, as there is no quantity limit<sup>18</sup>.

The Flash Crash, the stock market crisis that took place in the USA on 6 May 2010, was caused by an order cancellation transaction. In the incident, Navinder Sarao, an investor, entered a large amount of sell orders into the system by spoofing (misleading signal – order entry without real trading intention) and caused the prices to fall. Then he bought this capital market instruments at low prices and cancelled his previous sell orders. The perpetrator profited from a market shaped according to his own will<sup>19</sup>.

#### 2.4.4. Changing Orders

In addition to the cancelling the order, changing the order is also regulated among the optional acts of this crime in the Law. Investors can change their orders before they are transmitted to the exchange. Unfulfilled orders and unfulfilled parts of partially fulfilled orders can be changed.

Changing order is one of the types of transaction that provides a conducive environment for committing the crime of trade-based market fraud. For example, it is possible for a group of investors, acting together, to create a volume of trading in stocks by causing prices to rise or fall, and then to profit from market movements by changing orders<sup>20</sup>.

#### 2.4.5. Performing Account Transactions

The Law refers to the transfers between accounts with the phrase “performing account transactions”. The continuous transfer of securities or money to the accounts of the investor in different brokerage houses or to the accounts of other persons may be considered suspicious in some cases. The Law aims to achieve the following with this regulation: To prevent the use of the accounts of

<sup>18</sup> Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, 95.

<sup>19</sup> <https://bbc.com/news/explainers-51265169> (Hound of Hounslow: Who is Navinder Sarao, the 'flash crash trader'?), access 21.11.2024.

<sup>20</sup> Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, 96.

other persons to whom transfers are made or to prevent transfers between their own accounts for the purpose of committing the crime of trade-based market fraud<sup>21</sup>.

### 3. Consequence

In Turkish penal law, if the consequence of a crime is clearly stated in the law, that crime is a crime with consequence. Otherwise, it is called a conduct crime. In other words, some crimes may not have any consequences, only the act is considered sufficient for the crime to be committed<sup>22</sup>.

It is seen that the legal definition of the trade-based market fraud crime does not include a consequence. The performance of the optional acts listed in the Law (Art. 107/1 of the CML) is sufficient for the crime to occur. Therefore, this crime is regulated as a mere act crime in the Law.

While the Capital Market Law requires the perpetrator to obtain a benefit for the information-based market fraud crime, no such condition is required for the trade-based market fraud crime.

### 4. Causal Link

The existence of a causal link is not investigated in conduct crimes. Therefore, there is no need to examine the causal link for this crime.

### 5. Moral Element of the Crime

According to the Law, in order for this crime to occur, it is not enough for the perpetrator to act with general intent, specific intent is also required. Again, according to the Law, this specific intent is to create a false or misleading impression regarding the prices, price changes, supply and demand of capital market instruments. The perpetrator's intention may cover all of these or only one of them is sufficient for the crime to occur.

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<sup>21</sup> Balan, *Ekonomik Bir Suç Olarak Sermaye Piyasası Kanununda Düzenlenen İşleme Dayalı Piyasa Dolandırıcılığı Suçu*, 147-148.

<sup>22</sup> Mahmut Koca and İlhan Üzülmöz, *Türk Ceza Hukuku Genel Hükümler* (Seçkin Yayınları, 2015), 118.

The main reason why the legislator does not consider general intent sufficient for the formation of the crime and seeks specific intent is that the purpose of the perpetrator must be considered in order to distinguish between trading transactions in accordance with the rules and trading transactions that are in the nature of manipulation. Thus, it will be easier to distinguish between the honest investor who trades in a way that can be effective in the market and the perpetrator who aims to make manipulative transactions.

In order for the crime of market fraud to occur, the perpetrator must also have the intention to intervene in the market in order to create a false or misleading impression<sup>23</sup>. To explain the issue through an example; the crime of market fraud based on transaction will not occur if the actions stipulated in the Law are made in order to enable a company traded on the stock exchange to obtain a low-interest loan from the bank, without any intention to affect the prices of capital market instruments or the formation of supply and demand<sup>24</sup>.

## 6. Illegality

In Turkish penal law, illegality is also considered as one of the elements of the crime. The presumption is that the acts constituting the crime are unlawful. The existence of a cause of justification such as legitimate defence eliminates the illegality of the act.

### 6.1. In European Union Law

The reasons for justification regulated in Article 1 of the EU Directive 2014/57/EU, named “Market Abuse Directive”, which entered into force in 2014, are as follows: Compliance with accepted market rules, price stability operations and stock buy-back programmes.

According to this Directive, except for transactions that are apparently or obviously fraudulent, a cause of justification may be

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<sup>23</sup> Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, 11.

<sup>24</sup> Ahmet Emrah Geçer, “Sermaye Piyasası Hukukunda Piyasa Dolandırıcılığı Suçu”, *Gazi Üniversitesi Hukuk Fakültesi Dergisi* XXI, 2 (2017): 257.

mentioned if the person making a transaction has legitimate reasons even if it causes an artificial or abnormal change in the price of a capital market instrument and if this transaction is in accordance with accepted market rules. For a market rule to be recognised as an accepted market rule, it must be applicable in one or more financial markets and it must have been adopted by the market authority in accordance with the guidelines issued by the European Commission<sup>25</sup>.

Price stabilisation transactions enable price formation through an intervention other than supply and demand, which are formed under the market's own conditions, in order to prevent the reflection of the unfavourable conditions that may occur in the market on the price. Due to this feature, these transactions are essentially manipulative; however, they are permitted under certain conditions since they have the function of regulating the market in periods when supply and demand are unstable and there are uncertainties about the price, and therefore they aim to protect issuers and investors<sup>26</sup>.

Stock buy-back programmes are transactions in which the issuer buys back its own stocks within the scope of a programme with certain characteristics. Buy-back programmes, like price stabilisation transactions, are essentially manipulative transactions since they may directly affect the stock price and may cause issuers to gain profit by artificially affecting the prices. The scope of authorised buy-back programmes includes only stocks among capital market instruments. In order for these transactions to be considered justified, they must be carried out in order to fulfil certain obligations of the issuer, such as reducing the capital of the issuer and distributing shares to the employees of the issuer or its stockholders<sup>27</sup>.

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<sup>25</sup> Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, 42-43.

<sup>26</sup> Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, 46.

<sup>27</sup> Manavgat, *Sermaye Piyasasında İşleme Dayalı Manipülasyon ve Özel Hukuk Bakımından Sonuçları*, 44-45.

## 6.2. In Turkish Law

In Turkish law, Article 108 of the Capital Market Law titled 'Circumstances not considered as Information Fraud and Market Abuse' is regulated in parallel with the European Union Directive. This Article 108 includes the reasons for compliance with the law specific to the capital market.

The first one is monetary policy and financial stabilisation operations. The main institution authorised to carry out such transactions in Turkey is the Central Bank of the Republic of Turkey (TCMB). According to the Law on the Central Bank of the Republic of Turkey, the Central Bank directly determines the monetary policy to be implemented and the monetary policy instruments to be used in order to ensure price stability. In the Law, 'open market operations' are listed first and foremost in the list of the Bank's main duties. According to the same law, open market operations are generally transactions related to the purchase and sale of securities.

The second one is stock buy-back programmes. The Capital Market Law stipulates that transactions made within the scope of buy-back and share acquisition programmes shall not constitute the crime of trade-based market fraud. The general assembly must authorise the board of directors in order for companies to make buy-backs. The board of directors, which is authorised by the approval of the buy-back programme at the general assembly meeting, may delegate this authority to real or legal persons to be determined by it. The transactions carried out by the board of directors of the company or the real or legal persons to whom it delegates its authority within the scope of this programme will not constitute the crime of trade-based market fraud.

The third type of transaction, which is a justification cause, is price stabilisation transactions. In order for these transactions not to constitute a crime, they must be carried out in accordance with the regulations of the Capital Market Board regarding price stabilisation transactions and market making, and they must be carried out specifically for the purpose of supporting the prices of certain capital market instruments, limited to a predetermined period of time. After the shares start to be traded on the stock

exchange, the intermediary institution intermediating the sale in the public offering or the leading intermediary institution in case the public offering is carried out through a consortium may purchase shares for the purpose of price stabilisation.

## **7. The Sanctions of The Crime**

The sanction of this crime is regulated in two types in the law: Criminal sanction and administrative sanction.

### **7.1. The Criminal Sanction**

In the Turkish penal law system, the sanctions imposed for crimes are penalties and security measures. Penalties are divided into two as prison sentences and judicial fines. Under the Capital Market Law, both trade-based and information-based market fraud crimes are punishable by imprisonment and judicial fine.

According to the first paragraph of Article 107 of the Capital Market Law, the sanction for the trade-based market fraud crime is imprisonment from three years to five years and a judicial fine from five thousand days to ten thousand days. However, according to the continuation of the same paragraph, the amount of the judicial fine to be imposed for this crime cannot be less than the benefit obtained by committing the crime.

As can be seen, the law has preferred to regulate imprisonment and judicial fine together in relation to this crime. The perpetrator convicted for this crime shall be sentenced to a judicial fine as well as imprisonment.

Although the amount of imprisonment is the same for both crimes, the amount of judicial fine is regulated differently. The judicial fine for the information-based market fraud crime is up to five thousand days (CML art. 107/2)<sup>28</sup>.

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<sup>28</sup> According to the Turkish Penal Code (art. 52), in cases where the lower limit of the judicial fine is not explicitly stated in the law, the lower limit shall be at least five days.

According to Article 114 of the Capital Market Law, if this crime is committed for the benefit of a legal entity, security measures such as confiscation will be decided on that legal entity.

## **7.2. The Administrative Sanctions**

The administrative measures to be applied by the Capital Market Board against those who are reasonably suspected of committing the crime of market fraud are regulated under Article 101 of the Capital Market Law. These measures are regulated by sampling method in the law. In other words, the Board may decide on other measures in addition to these measures. The measures regulated under the Law are as follows: Temporarily or permanently prohibiting trading on exchanges; changing settlement methods; imposing limitations on credit purchase, short selling, borrowing and lending transactions; imposing or changing collateral obligation; trading in different stock exchanges or markets or determining different trading principles; limiting the scope of distribution of market data and imposing transaction or position limits.

The general principles regarding the situations requiring the imposition of administrative fines by the Board are regulated under Article 103 of the Law. Pursuant to the first paragraph of the aforementioned provision, 'The Board shall impose an administrative fine from twenty thousand Turkish Liras to two hundred and fifty thousand Turkish Liras on the persons who act contrary to the regulations made pursuant to this Law, the standards and forms determined and the general and specific decisions taken by the Board. However, in the event that a benefit is obtained due to the breach of the obligation, the amount of the administrative fine to be imposed shall not be less than twice the amount of this benefit.'

However, the provision regulated under Article 104 of the Law concerning market disruptive acts and the sanctions to be imposed in return is the provision that concerns us the most. According to Article 104 of the CML, 'Acts and transactions that cannot be explained with a reasonable economic or financial justification, and that may disrupt the operation of the stock exchange and other



organised markets in confidence, clarity and stability, shall be deemed as market disruptive acts, unless they constitute a crime. Persons who commit market disruptive acts determined by the Board shall be imposed an administrative fine from twenty thousand Turkish Liras to five hundred thousand Turkish Liras by the Board. However, in the event that a benefit is obtained in this way, the amount of the administrative fine to be imposed shall not be less than twice the amount of this benefit.'

As can be clearly understood from the wording of the provision, in order for an act to be qualified as a market distorting act, it should not be covered by any crime. Otherwise, only the provisions regarding the crime will be applied, and the provision regarding market distorting acts will not be applied.

## 8. The Effective Remorse

In Turkish penal law, effective remorse constitutes a type of personal reason that removes or reduces the penalty after the crime has been committed. In order for effective remorse to be applied, it must be specifically regulated in the law for a specific crime.

CML No. 6362 includes effective remorse provisions exclusively for the crimes of trade-based market fraud and breach of trust. Effective remorse in the crime of trade-based market fraud is regulated in paragraph 3 of Article 107 of the CML: *"The person who has committed the crime, by showing remorse, shall pay to the Treasury a sum of money, not less than five hundred thousand Turkish Liras, equal to twice the amount of the benefit he has obtained or caused to be obtained;*

*a) If he pays this amount before the investigation starts, no penalty shall be imposed on him.*

*b) If he pays during the investigation phase, the penalty to be imposed shall be reduced by half.*

*c) If he pays during the prosecution phase until the judgement is rendered, the penalty to be imposed shall be reduced by one third."*

The law does not require the perpetrator to obtain a benefit as a condition for the occurrence of this crime. In other words, even if the perpetrator who committed this crime has not obtained any

benefit, he/she must pay at least five hundred thousand Lira in order to benefit from effective remorse. This can be criticised in the sense that this amount of money is seen as an additional penalty by the law.

### 9. The Investigation Requirement

Pursuant to Article 105 of the Capital Market Law, the investigation and prosecution of capital market crimes are subject to the Board's written application to the Chief Public Prosecutor's Office. In other words, capital market crimes defined in the CML cannot be investigated *ex officio* by the public prosecutor. This application of the Board is referred to as 'Written Application' in the Law.

In cases where the public prosecutor's office receives direct information that capital market crimes have been committed, the public prosecutor's office will not be able to initiate an investigation on its own, but will notify the Board. The Board will decide whether or not to file a written application after its investigations.

One of the purposes of regulating the written application requirement for capital market crimes is to protect the sensitive balances of the capital market and to protect the confidence in the market. The fact that any allegation that the crimes defined in the law have been committed is investigated directly by the public prosecutor's office without conducting the necessary technical examination, and then a lawsuit is filed, may adversely affect the reliability of the market, even if an acquittal decision is ultimately rendered<sup>29</sup>.

### Conclusion

The Law categorizes trade-based market fraud into two distinct forms of commission. One of these is information-based market fraud and the other is trade-based market fraud. Information-based market fraud generally uses information or rumours, while trade-based market fraud uses stock exchange transactions such as buying

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<sup>29</sup> Selman Dursun, *Sermaye Piyasasında Gerçeğe Aykırılıktan Doğan Suçlar*, (On İki Levha Yayıncılık, 2010), 147-148.

and selling. Information-based market fraud aims to influence the prices of stocks or the decisions of investors, while trade-based market fraud aims to create a misleading impression of prices or supply and demand.

While the perpetrator must obtain a benefit in order to be punished for information-based market fraud, no such condition is required for punishment for trade-based market fraud. We find it correct that such a benefit is not required for the crime of trade-based market fraud.

As one of the action types of this crime, the action of 'performing account transactions', which is regulated in the law, may be somewhat ambiguous compared to other action types. However, in our opinion, one of the issues aimed by regulating account transactions within the element of actions in the Law is to prevent those who participate in the crime of market fraud from going unpunished in some cases. In some cases, persons may allow their accounts to be used for market fraud by other persons who are banned from trading in the stock exchange. In these cases, we believe that this optional action has been added to the Law in order to eliminate the problems that may arise in proving the will to participate.

Effective remorse is regulated in the law in relation to trade-based market fraud, but there is no such regulation in relation to information-based market fraud. In my opinion, it is not correct to make such a distinction between the two crimes in terms of benefiting from effective remorse.

According to the Law, the public prosecutor cannot directly initiate an investigation for both types of market fraud. In order to initiate an investigation, the Capital Market Board must conduct an investigation and, if deemed necessary, apply to the public prosecutor's office in writing.

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