

# THE LINK BETWEEN MANIPULATION WITH ACCOUNTING: LEARNING FROM THE ECONOMIC EFFICIENCY COUPLED WITH THE SETTING OF FINANCIAL LEGISLATION\*

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## ABSTRACT

It is well known that the commitment of manipulation act which is one of the factors significantly worsening the impairment of the corporate financial (mis)reporting process through the impairment of the market efficiency has strong accounting, financial, legal and economic linkages altogether. However, these linkages or ties have not yet attained the attention it deserves in the literature. This paper mainly aims to theoretically investigate the interplay among the cited disciplines and to lay it out on a more solid ground. In so doing, it strives to cover up this directed loophole the extant literature features to a reasonably certain degree, through crystallizing the significance and context of manipulation. This paper clearly documents that there is a need to broaden the definition of manipulation concept in a way to encompass financial statements for the *bona fide* investors or users of corporate financial information may not be harmed by the (public) companies to commit such offenses around. In other words, this study shows that comprehensive financial regulations to better address the current needs that will bring together much better accounting practices as well as economic and financial system.

**Keywords:** International Accounting Standards; Corporate Financial Reporting; Financial Statement Presentation; Economic Efficiency; Fair Value; Fair Value (Mark-to-Market) Accounting (FVA); Manipulation; Capital Markets Legislation.

**JEL Codes:** G14, G18, G28, K42, M40, M41, M48.

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## MUHASEBE VE MANİPÜLASYON ARASINDAKİ BAĞLANTI: FİNANSAL DÜZENLEMELER ÇERÇEVESİNDE EKONOMİK ETKİNLİK NOSYONUNDAN ÖĞRENME

### ÖZ

Piyasa etkinliğini bozmak suretiyle finansal raporlama sürecinde yıpranmasına ciddi anlamda etki eden manipülasyon eylemi suçunun sağlam muhasebe, finansal, hukuki ve ekonomik bağlantılarının olduğu ziyadesiyle bilinmektedir. Ancak bu bağlantılar literatürde hakkettiği ilgiyi yeterince görememiştir. Bu çalışmanın temel amacı bahsi geçen disiplinler arasındaki bağlantıyı teorik olarak irdelemek ve daha somut bir çerçeveye oturtmaktır. Bunu yaparken, ekonomik etkinlik ve var olan finansal düzenlemelerden hareketle manipülasyonun anlam ve kapsamı netleştirilerek muhasebe dünyası ve global uygulamaları anlamak açısından literatürdeki boşluğun doldurulmasına bir nebze olsa katkıda bulunmak hedeflenmektedir. Bu çalışma, iyi niyetli yatırımcıların veya finansal bilgi kullanıcılarının manipülasyon suçunu isleyen (halka acık) şirketlerden zarar görmelerinin engellenmesi için manipülasyon tanımının finansal tabloları da içine alacak şekilde geliştirilmesine ihtiyaç olduğunu net bir şekilde göstermektedir. Diğer bir deyişle, çalışma günümüz ihtiyaçlarına daha iyi cevap verecek kapsamlı finansal düzenlemelerin çok daha doğru muhasebe uygulamalarını ve daha iyi bir ekonomik ve finansal sistemi beraberinde getireceğini göstermektedir.

**Anahtar Sözcükler:** Uluslararası Muhasebe Standartları; Finansal Raporlama; Mali Tablo Sunumu; Ekonomik Etkinlik; Gerçeğe Uygun Değer; Gerçeğe Uygun Değer Muhasebesi (GUDM); Manipülasyon; Sermaye Piyasası Mevzuatı.

**JEL Kodları:** G14, G18, G28, K42, M40, M41, M48.

### 1. INTRODUCTION

The speculative nature of equity (stocks) and debt (bonds) markets, as the places where the demanders for and the suppliers of funds meet each other, besides their vagueness they have already bore in their bones concerning the future may indeed cause the economies diverge from efficiency. This divergence also includes such issues as manipulation or affiliated market imperfections. The impacts of these processes have already been started to be discussed as stock market fraud on legal grounds for a while. Manipulation tends to make the financial information fragile, discrete and thereby less reliable or at least useful while inducing the financial markets to be opaque, impaired, volatile, and therefore anomalous.

The literature on accounting, economics and finance has been debating, over a century, the fact whether the efficiency has indeed been satisfied on the markets where supply and demand meet each other. It is well known that the commitment of manipulation (offense) which is one of the significant factors contributing to the impairment of the corporate financial (mis)reporting through the impairment of the market efficiency and therefore the fair value (formerly mark-to-market value) and the valuation

process itself has strong accounting, financial, legal and economic linkages altogether. However, these linkages or ties have not yet attained the attention it is supposed to well deserve in our own literature nor elsewhere quite much.

Among the others, the global financial crisis happening back in 2008 and 2009 also however created a market inefficiency problem in many ways, including the imposition of illiquidity occasion as an extension of weak (half-strong at best) form efficiency. Financial institutions were well-aware that the credit derivatives they were holding in their balance sheets as part of their (toxic) assets were indeed empty shells, i.e. financial statement misrepresentation issue. Nonetheless, they kept on even marketing and selling them to each other back-to-back while also offering to grant (subprime) mortgage loans to households with bad or no credit history at all. Corporate financial statements that were misrepresented especially by the public companies (e.g. banks, some special financial institutions etc.) through the incongruent corporate valuation (e.g. incorrect fair value) and financial reporting process (e.g. financial statement (mis)presentation) have manipulated the entire financial system and posed a systemic disease around. When the resulting asset bubble burst, the impact was magnificently horrendous, not only on financial companies, but also on non-financial companies, households or individuals otherwise.

Fair value has been incorporated as an integral part of the accounting and financial reporting standards and has started to be implemented right away in the U.S. as laid out in FAS 157 by FASB (Financial Accounting Standards Board), or in the European Union (EU) Member Countries as laid out in IFRS 13 by IASB (International Accounting Standards Board) that leads the international accounting and financial reporting standards, including the countries that are seeking accession to the EU Membership to involve Turkey and many other countries where multinational companies need to report their financial statements and to have those audited worldwide. The global financial crisis outcasted the fair value as one of the most debated and hot issues to negatively impact the quality of corporate financial reporting and financial statements. This led to the redundantly harsh critique of the fair value by the international standard-setters and especially by the global implementers to a large extent.

We know however that it was not indeed the fair value (rather than historical cost accounting or reporting) to blame, but the *poor management* and the *greed for lucrative profits* of the financial institutions (e.g. Credit Default Swaps, (Subprime) Mortgage-Based Securities etc.) that bursted the asset bubble, emerged and exacerbated the crisis in a way to fast engulf the entire world [e.g. Barth (1994, pp. 1-25); Leuz and Scott (2008); Ball

(2008); Pozen (2009); Laux and Leuz (2010, pp. 93-118); Tama-Sweet and Zhang (2015, pp. 11-24), etc.]. In other words, the reason why the situation was awfully epidemic was not because fair value accounting was a bad idea, but because the implementation was not right at all.

We show that manipulation can occur in various forms, whether in the form of *information-based manipulation* (e.g. financial statement misrepresentation, earnings manipulation, practice of unacceptable make-up techniques, earnings strip etc.) by the companies, or in the form of *transaction-based manipulation* (e.g. transactions initiated by individual or corporate investors to artificially establish or distort the value of a commodity being a traded capital market instrument etc.). We argue that the impact on the market (efficiency) in addition to on the users of the financial information is comparable and therefore, the consequences deserve comparable measures and sanctions. Please remember that should the market efficiency be damaged, impaired, or disputed, the information market data (e.g. fair value coming out as a part of corporate valuation) might provide would not be reliable any longer. Therefore, it would not be useful nor relevant to any decision making process by any party, meaning individual and/or corporate establishment (e.g. financial statement misrepresentation problem).

Acknowledging the above-revealed points, this paper syntesizes the interplay between accounting, finance, economics and law, while striving to significantly cover up this directed loophole the extant literature features to a reasonably certain degree. This paper gives a particular focus to economic efficiency in the world of accounting and its transnational implementation, borrowing the prospects from such cross-fields as economics, finance and legal discipline offer up, to date.

In the first part of our study, the repurcussions of the concept of the efficiency on the science of finance and economics while in its second part, the reflections of the manipulation offense on the Capial Market Law shall be mentioned. Though the name of the manipulation in the economics literature is widely used, the new Capital Market Law has preferred it as the “Stock Market Fraud” instead of *manipulation*. For this reason, both denotations are interchangably used in our study as synonyms. Hence the remainder of this paper which is comprised of four sections is organized as follows. The next section, **Section Two**, reviews the efficiency problem existing in the capital markets. **Section Three** explores the place of the manipulation offense in the applicable capital market laws. **Section Four**,

being the last chapter, concludes this paper with some remarks and policy recommendations.<sup>c</sup>

## 2. THE EFFICIENCY PROBLEM IN THE CAPITAL MARKETS

The outgrowth of making manipulation in the markets is the decrease of the stock market efficiency by the disruption of the resource allocation. For this reason; efficiency concept, efficiency types, the premises lying beneath the efficiency hypothesis, subject of the deviation from the rationality, and the economic definition of manipulation shall be dealt with in the given order as the following.

### 2.1. Efficiency Concept

The efficiency concept in the modern sense may be extended back till Louis Bachelier who was doing his doctorate in the early 1900s. The subject of his thesis was the fluctuation of the stocks in Paris stock market. This thesis, besides being the beginning of the modern finance, constitutes the fundamental of the information efficiency. In his doctorate thesis, Bachelier stated that there were so many reasons determining the fluctuation in the stocks, and their reduced states of the past, current and future events were reflected in the market prices, although their effects on their price changes were generally uncertain, the economical, financial or the political factors made the prices move naturally as well as the price movements that might occur due to artificial reasons (e.g. as the stocks move by themselves). (Walter, 2000, pp. 5-7).

Hayek in his manuscript, named as “The use of knowledge in society” which he had published in the year of 1945; as saying “if we want to understand what is the real function of the price system, we have to regard it as a mechanism which provides the information communication”, he brings the informational role of the prices to the fore (Hayek, 1945, pp. 519-530).

This idea was developed within the process of time. For example, Cootner said in the manuscript in the year of 1962, “The stock market is a highly competitive and well-organized market. Let us assume this market as excellent for ease of use. The price changes occur shall be sourced from the new information. The changes that occur in the stock from time to time shall be random as they are independent of each other completely, because there is no reason to expect the information in the occurrence of the changes not to be random.” (Cootner, 1967).

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Fama after saying that “in a more radical point of view; the consecutive price changes of the ... stocks after the consecutive parts of the new information shall extend over a period of time as independent to each other,” (Fama, 1965: 37) in a more radical point of view, he made this definition which may be thought as the main definition; “a market is named as “effective” under the assumption that the security prices of ... reflect all the current information “completely.” (Fama, 1970, p. 383).

The markets’ being effective means that the investors may not be earning more than the market yield as the result of the information they obtained by analyzing the stock information (Dunbar and Heller, 2003, pp. 455-532). In an effective market, it is not possible to guess the price movements as relying upon the public information (Mullainathan and Thaler, 2000, pp. 6-9).

With regard to economics, this paradigm is related to the economic balance idea. In the most general sense, the effective capital market theory is nothing more than the application of the competitive balance theory<sup>d</sup> to the financial asset market (Walter, 2000).

If the quoted market prices reflect the economic reality outrightly (perfectly) and may provide a reliable benefit in the subject of the investors or the asset managers to make a decision, it means that they have “market efficiency.” In other words, should the information which is required or buffered for another transaction be incorporated to the price correctly, this market which may be thought as a changing mechanism may also be qualified as “efficient” (Walter, 2000).

The agents in a standard asset pricing model are rational and they are informed outrightly concerning the pricing. Also, the equilibrium prices reflect the real (intrinsic)-corrected-risk value. Otherwise, as some investors are obliged to keep the bad portfolios in their hands, this behavior shall not be optimal. The validity of the efficient markets hypothesis may not be based upon the assumption of all the investors’ being rational. The prominent issue is that the behavior maximizing the income of the investing

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<sup>d</sup> **Competitive/Contestant Equilibrium Theory:** It is the traditional economic equilibrium concept. It is suitable for the analyses of the flexible prices and the commodity markets in which a great deal of traders may be found and is used as the indicator (benchmark) of the efficiency in the economic analysis. In the hand of the traders, there is so less of the trading goods in the market and it is based upon the assumption that it has no impact on the personal transaction. The contestant markets are an ideal/standard and the other market structures shall be assessed according to this. As the **social benefit** sourced from a commodity and the **social cost** endured for the production of this commodity are strictly equal under the competitive equilibrium, the allocative efficiency as per the definition is restored.

professionals and the other informed investors' being gets realized as selling the overvalued securities while buying the undervalued securities (Dunbar and Heller, 2003, pp. 455-532).

It is mainly possible to collect the methods used in measuring the market efficiency in two separate frameworks (strands). One of them may be the methods which consider the adjustability speed of the prices, the other one may be the methods which take the disappearance of the arbitrage as a basis. In the first type methods, the adjustability speed of the prices to the efficient levels are taken into consideration, however, the writers who share this view have to fix what the efficient price is, as well. This also requires the efficient employment of a benchmark model. Just like Fama has also stated, two tests should be done concurrently, meaning that: the first one is the speed of the price adaptation and the second one is the fixation of the price levels by the benchmark model.

In the second type methods, a correlation should be performed between the disappearance time of the arbitrage opportunities and the market efficiency. The investors use the arbitrage opportunities despite the fundamental or main risk<sup>e</sup>, noise trade risk, transaction cost, and short sale restrictions.

## 2.2. Efficiency Types

Two types of efficiency may be mentioned according to the elements which are involved in the formation of the stock prices; Information efficiency and Main efficiency.<sup>f</sup> As the data corroborating the Random Walk Theory<sup>g</sup> are

<sup>e</sup> The events which influence a big group of people or firms (a) such natural disasters as earthquake, flood, storm etc. (b) the state of being vulnerable to making losses due to the events that are sourced from the social states such as the inflation, unemployment or war. *Businessdictionary.com* (2014).

<sup>f</sup> In literature, different classifications are mentioned. **Operating efficiency:** It refers to the cost which the buyers and the sellers are encountered with during the transfer of the securities. It is demanded from the market to realize the operations in the lowest possible costs. This case may be encouraged by high competition between the market maker and its mediators. Thus, while they are generating normal profits, they may not generate too much profit though. **Informational efficiency:** It comes to the meaning of the capital markets's reflecting all the current information to the investors. **Allocative efficiency:** It rises from the process of the companies' finding funds, which provides the highest yield ratio in economics. The allocation efficiency comes to the meaning that the more productive companies may find capital in lower costs compared to the less productive companies. Thus, the capital markets provide the investment funds that are required by the companies and the direct funds to the companies who will use them most efficiently (McGowan, 2008, pp. 79-86).

The efficiencies in the capital markets in the classification which Tobin made; **Functional efficiency:** It states that the money has a value in social meaning and the services produced in the sytem are not low-cost, great activities also require a considerable resource allocation. **Information arbitrage efficiency:** It generally expresses that money cannot be

stacked up, it was started to dwell upon the reasons of these results. Fama made the first modern definition of the information efficiency in his work in 1970. Fama, in this study of him, argued that the main role of the capital market was the capital stock allocation which the economy owns (Fama, 1970, p. 383).

The markets in which even an uninformed investor possesses a rate of return as much as that of a specialist (well-informed) investor and has bought a portfolio wherein the prices reflect all the disclosed information precisely and the risks are spreaded around may be regarded as the markets where the information efficiency is provided at. In case of a literally real market inefficiency, there should be an exploitable opportunity. If there is a situation which enables the investors to exploit systematically, it is so hard then to defend that the information is embedded (priced or incorporated) into the stocks appropriately.” (Malkiel, 2003, pp. 59-82).

If the market is not efficient, some investor groups – like the arbitragists – may show high performance continuously with only the information which is disseminated to the market. This concept is referred to as information efficiency (Dunbar and Heller, 2003, pp. 455-532).

In case of the objectively (unbiasedly) determined stock value’s being equal to the discounted present value of the expected future dividends, the “occurrence of the main efficiency” may be generally accepted. In other words, if the market reflects all the current information correctly and equals the security price to the objectively determined value, this market may be labelled fundamentally efficient (Gilson and Kraakman, 2003, pp. 1-47).

If there happen to be the prices or the price behavior, recorded to be incompatible with the intrinsic or fundamental value of the stock, the efficient market hypothesis may be rejected. Behavioral finance recognized

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earned systematically over the information which is open to public. **Fundamental valuation efficiency:** It states that the financial asset prices should not necessarily reflect the rational expectations concerning the return that the asset shall provide in the future. **Technical efficiency:** It is the method in which the producing the same production by using less factors is not possible (Buiter, 2003, pp. 33-35).

<sup>8</sup> **Random walk model:** In the earlier studies concerning the Efficient Market Hypothesis (EMH), in an expression of the current price concerning a security “reflects the current information precisely”, it is assumed that the consecutive price changes work independent of the consecutive period profits. These two hypotheses together form the “Random Walk” model. In short, given that the prices reflect all the accruing information are independent of each other, the consecutive price changes exhibit an identical distribution. The EMH which is accepted as a version of Random Walk Theory examines the effect of all the information on the price changes of the securities (Berk, 2007, p. 450).

some instances where there may be information efficiency but main efficiency (Dunbar and Heller, 2003, pp. 455-532).

### **2.3. The Premises Which Lie Beneath The Efficient Markets Hypothesis And The Levels Of The Efficiency**

In the real life, the information which relays to the market is not reflected on the price simultaneously. Everybody's not possessing the same information under the same conditions causes the occurrence of the market efficiency in quite various ways. Hence, the markets are dealt in three different levels as: weak, semi-strong and strong according to the state of the information which the investors obtain or have access to.

**Weak form:** The information set in the form of weak efficiency constitutes only all the old recorded prices of the market (Fama, 1970, p. 383). The usage of the past data in the developed time series analyses that are used for analysing the efficiency by the investor does not provide the opportunity to the investor obtaining much more profit from the market (Dunbar and Heller, 2003, pp. 455-532).

**Half-strong form:** In this efficient form, the information set involves the firm financial data as well as the past period (historical) prices (Fama, 1970, p. 383). The analysts shall make a fundemantal analysis (e.g. firm, its markets, macro economic terms etc.) while trying to obtain much more profit by using all the information open to the public (Dunbar and Heller, 2003, pp. 455-532). Namely, after the announcement of the mentioned information to the public, it may cause the investor to derive a (abnormal) profit over the normal level by creating significant changes in the stock prices (Kıyılar, 1997, p. 52).

**Strong form:** It is assumed that all the current information, no matter whether open to public or not, is reflected in the prices. The extant research on the subject of this form contends that some groups (e.g. such as the portfolio managers, investment analysts, the insiders) shall obtain such an amount of profit more than the others thanks to the information they have access to. However, the results are mixed and in practice, these persons earn only a little more from the market (industry) average (Dunbar and Heller, 2003, pp. 455-532). In other words, none of the professional managers may indeed obtain profit any more than the market average over the long run even though they might be too much talented for some reason (Fama, 1970, p. 383).

In the efficient market testings that have been done as for the Istanbul Stock Exchange Market (ISE or Borsa Istanbul now) as the sample setting, varying (mixed) inferences have been suggested. While in some studies some random walk may be encountered in stock prices, in some other

studies, findings show that high profits may indeed be obtained through price forecasts using the historical data. Among some of the studies made is Balaban (1995, pp. 39-67) for instance. Balaban tested the efficient market hypothesis in weak and semi-strong forms sampling the period ranging from the 4<sup>th</sup> January, 1988 through 5<sup>th</sup> August, 1994 by capturing ISE's daily composite index. He found that the stock prices did follow the random walk, suggesting that ISE was not an efficient market.

Balaban *et al.* (1996, pp. 353-377) obtained meaningful deviations from the efficient market hypothesis. Namely, they detected robust evidences in the direction of the market efficiency's being not present. In the study performed by Taner and Kayalidere (2002, pp. 1-24) and made on the industrial enterprises who traded between the years of 1995-2000 in ISE and whose accounting periods ended in 31<sup>st</sup> December, it was shown that in the event of creating portfolio according to its market value, a profit over normal level cannot be obtained considering the examined period and the applied model. Kahraman and Erkan (2005, pp. 11-24) applied a serial correlation test to ISE 100 Index' closing prices covering the 01.01.1996 - 27.10.2004 and no random walk was encountered. Namely, he conjectured that the weak type efficiency was not the case. In their examination, *Atan et al.* (2006) found that there was a weak type of efficiency in ISE. Kasman and Kırkulak (2007, pp. 68-78) also investigated ISE's efficiency sampling for the period of 1988-2005 by using the weekly data and concluded that it was revealing a weak form efficient market along with persistent random walk (Çevik and Erdoğan, 2009).

#### 2.4. Deviations From The Rationality

Earlier models which relax the strict assumption of the investors' rationality were grounded on the findings of the psychologists exploring the preference behavior. (Çevik and Erdoğan, 2009). An example of this was the study of " The noise trader risk in the financial markets " which De Long *et al.* (1990, pp. 703-738) made over decades ago. In this investigation, it was recognized that the noise traders bore random beliefs concerning the prices of the risky assets. Besides these beliefs' being random, they used to also entail such an expected price being incorrect in some instances. These assumptions concerning the noise traders involved an information process though being loose, to include in the wrong interpretations of the phony signals that came from the technical analysts and brokers (De Long *et al.*, 1990, pp. 703-738).

Behavioral finance academicians have benefited from the decision-making psychology in defining the irrationality since the middle of the 1990s (Rubinstein, 2000, pp. 1-24). The empirical examinations in this vein offer direct evidences in the context of systematic deviation from the rationality,

for example, like T. Odean's showing that the "winner" stocks are sold immediately, while the "loser" stocks are kept for a longer time (Odean, 1993, pp. 1-21).

The deviations from rationality may occur due to (a) the inadequacy of the ex ante predicted resource allocation, (b) the market deficiencies/irrationality, or (c) due to the differences in the beliefs emanating from the lacking monitoring (Dunbar and Heller, 2003, pp. 455-532). One of the imperfections of the market is undoubtedly the manipulation.

## 2.5. Economic Definition Of The Manipulation

In the economics literature, the value and the price concepts are perceived as different from each other. Namely, while the value expresses a concept concerning the essence, the price however states the generally accepted cost to be paid to a commodity given the importance attributed to this commodity and the needs for it. For this reason, as the value and the price are different concepts, they may not always tally with each other. One of the factors which prevents the value of the securities to be incorporated into their prices is the manipulation (Yüce, 2012, pp. 363-365)<sup>h</sup>.

The manipulation is given as the set of behaviors or acts oriented towards directing people by deceiving them to buying or selling a security or keeping the price of a security in an artificial level. There may also exist some definitions which are given to refer manipulation to as the deliberate prevention of the process towards determining the prices by the confrontation of the supply and demand freely in the security markets. According to these definitions; acts such as (1) to interfere the price settlement processes by influencing the (freely-ought to be happening) meeting of supply with demand, (2) to encourage people to do investment

<sup>h</sup> Though the name of "financial information manipulation" may be attributed to the deceiving of the investors by manipulating the information inside the company, these issues in the accountancy literature do rather match the concepts such as the accountancy fraud and the insider trading. Non-reflection of the true financial states of the companies and the financial results to the financial information users due to the financial manipulation, on one hand, causes the investors who make investments to the securities of these companies to incur loss and to losing their confidence in the system, while on the other hand, the allocation of the resources geared towards the wrong and unproductive fields due to both the investment decisions taken in the companies given the wrong information and buying-and-selling decisions of the investors causes an additional cost (burden) to the economy, as well.

All the transactions and the implementations which result in presenting information concerning the financial status, activities and activity results of the company to those concerned (relevant stakeholders) or to the financial information users against the reality *and* may come in the form of profit management, stabilization of the profit, creative accounting applications, aggressive accounting, clean-up accounting, fraudulent financial reporting and accounting mistakes and irregularities are considered as the financial information manipulation (Küçüksözen and Küçükkocaoglu, pp. 3-6).

transactions on a particular security by deceiving them, and/or (3) to maintain the price of a certain security at a certain level for a while would be considered as Manipulative Acts (The Securities and Exchange Commission (SEC) of Turkey, 2003). The next section explores the place of the manipulation practice (offense) in the applicable capital market laws.

### 3. THE MANIPULATION PRACTICE (OFFENSE) IN THE APPLICABLE CAPITAL MARKET LAWS

In the Article 167 of our Constitution, the task which is given to the State for the economy to work in a viable fashion is expressed in this way: “The State takes the promotional measures providing the money, credit, capital, commodity and service markets to operate vibrantly and smoothly.” As grounding on this governing law of the Constitution, the purpose of the legislation in the Capital Market Law (Article 1) which aims at the operation of the capital markets in a healthy way is stated as follows: “The purpose of this Law is providing the operation and development of the capital market in a reliable, transparent, effective, stable, equitable and competitive environment, organization and auditing of the capital market for protecting the rights and the benefits of the investors.”

As the victim number is high and dimension of the harm’ being ambiguous which may occur when the manipulation offense is compared to the typical fraud crime, the Legislator preferred to make a separate regulation in the Capital Market Law.

#### 3.1. The Legal Definition Of The Manipulation

In the old Capital Market Law with No. 2499 the issue of what the manipulation is was contained, however no specific naming for it was done back then. In the new Capital Market Law with No. 6362, the name of the “market fraud” this time was started to be pronounced to refer to the “manipulation” concept. In the second part of the Capital Market Law with No. 6362, the phrase “Market Fraud” was involved as a wording under the topic of the Capital Market Offenses<sup>ij</sup>. The Market Fraud there has been

<sup>i</sup> There are some deeds, although they might distort the price-value relationship in the capital markets; which cannot be said to bear the goal of deriving profit from the probable price changes by affecting the prices of the capital market wrongfully and illegally, most of which are considered legally by the legal orders and are not subjected to any kind of sanctions (Yüce, 2012, pp. 363-365).

Some specific transactions which may not be regarded as manipulation as being closely related with the constraints that the working dimension brings, but may resemble manipulation as follows: Speculation, Repurchase Programs (e.g. capital market instruments that the issuers buyback, capital that the issuers offer to public etc.), Price Stabilization Transactions, Green Shoe, The Transactions to Providing The Price Stability After The Public Offer, Short Sale, The Buying-Selling of The Securities With a Promise To Buy and Sell (e.g. repo or reverse repo).

subjected to a dual separation as information-based and transaction-based in itself.

### 3.1.1. Information-Based Manipulation

We argue that financial statement misrepresentation, earnings manipulation, practice of unacceptable make-up techniques, earnings strip and similar wrongdoings or malpractices may be considered among the varying extensions of information-based manipulation. When there happens an information-based manipulation, markets will not function as efficiently as before and therefore the information market data presents will not be reliable nor useful to any financial decision makers, and more importantly, to all the relevant stakeholders. This also implies that financial reporting conducted or financial presentations made by the accountable (especially public) companies will not be value-relevant any longer since the embedded information content will be distorted [e.g. (Beaver, 1968, pp. 67-92); (Ball and Brown, 1968, pp. 159-178); (Bernard *et al.*, 1995, pp. 1-32), etc.].

In the Article 107/2 of the Capital Market Law, the deeds (acts) which are regarded as the information-based market fraud are regarded as “giving lie, wrong or misleading information, rumouring, informing, making interpretation or preparing reports or disseminating them to manipulate the prices or values of the capital market instruments<sup>k</sup> and/or the decisions of the investors” and the ones who commit these are said to be “punished with prison sentence from one year to five years and a punitive (judicial) fine up to five thousand days.” This suggests that information-based manipulation requires a felony, not a misdemeanor.

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<sup>j</sup> The issues which are not regarded as manipulation may be listed as follows: “The below states are not regarded as information abuse or market fraud: a) Making transactions with the intention of exercising the money, exchange rate, public debt administration policies, or of ensuring the financial stability by the Central Bank of Turkish Republic or by other authorized official institutions or the persons who act on behalf of them, b) The repurchase programs applied as per the board regulations, the employee stock ownership programs, or some other form of share distribution towards the employees of the issuer or its affiliate (subsidiary) company, c) Provided that making or giving orders or cancelling the order of the buying-or-selling of the capital market instruments with the objective of supporting exclusively the market price of these instruments determined previously in compliance with the Board’s ensuring the price stability within the scope of this Law, or the regulations concerning the market maker” (Capital Market Law with No. 6362 Article 108/1).

<sup>k</sup> **Securities:** Except for the money, check, policy and promissory note; 1) The Depository certificates concerning the shares, other assets similar to shares and the mentioned shares, 2) The depository certificates concerning the debt instruments or the securitized asset and the debt instruments based on the revenues and the mentioned assets; **Capital market instruments:** The other instruments that may be determined to be in this scope by the Board, including the securities, derivative instruments, and the investment agreements (Capital Market Law, Article 3).

The mentioned act should be “servicable”; namely, should be in such a measure which could affect the prices, values of the capital market instruments, or the decisions of the investors. For the creation of the material element, the information, rumour, news, interpretation or the report should “lie, wrong or misleading.” In the lie, wrong or misleading news, information, rumor or report, there exists a piece of truth unlike the ‘lie’. However, the style of giving the news or the information or the manner of making the interpretation is presented in the way of causing the other to fall into a mistake here. Especially in the information, news and the report’s being exaggerated, the rumor and the interpretation’s being in the quality to drive someone to wrong results, this is the case (The Securities and Exchange Commission of Turkey)<sup>1</sup>.

In the information-based market fraud offense, the deed’s affecting the prices, values of the stock market instruments or the decisions of the investors, in other words the realization of the result is not a required but a self-sufficient condition for the establishment of the offense. The deed in the 107/2 provision of the Capital Market Law was stated as a “hazard (endangerment) offense or crime”. In hazard crimes, arising of a direct harm is not a condition and the hazardous behaviors that are defined as the subject of the offense are punished. Thus, the deed is not required to be in the character to be finally realized, but to have the potential to be realized. As another extension of the offense’s being a hazard offense, it is not a necessary condition to obtain a benefit at the end of the transactions made, as well (The Securities and Exchange Commission of Turkey). Therefore, one can see that the definition of manipulation in the sphere of information-based manipulation is unarguably and practically broad.

The 47/I.A-3 provision of the Old Capital Market Law regards these deeds’ being in the quality of affecting the capital market instruments’ values sufficient for the occurrence of the offense, by stating the deed of information-based market manipulation in a more general way. Hence, the information’s being “capable of influencing the value” is deemed as adequate regardless of the intention or aim of the person who spreads the information. In the 107/2 provision of the New Capital Market Law, these deeds are listed in a more detailed way, however, for the occurrence of the

<sup>1</sup> The information-based manipulation act (offense) is criticised as per the 25th and the 26th articles of the Constitution. In the 25th article of the Constitution, it is stated that “Everybody has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reasons or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions. In the 26/1 Article, it is stated that “Everyone has the right to express and disseminate his/her thoughts by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities...”

offense, the proof that shows that the accused persons spread these information have acted “with the aim of affecting the prices of the capital market, instruments, values and the decisions of the investors”, meaning their private wrongful intentions, are made obligatory to be obtained.<sup>m</sup>

It is out of the question that the ones who committed the crime of transaction-based market fraud from the effective repentance law. There is no regulation in the Law in this subject-matter (Şensoy, 2013, p. 392). Because, in the Article, it is said that, “In case that the person who commits the crime which is defined in the first clause, pays the double amount which he has obtained or caused to be obtained as being showing repentance, not being less than five hundred thousands Turkish Liras to the Treasury; a) In case of his paying prior to the enquiry (investigation) starts, no penalty is made against him. b) In case of his paying it in the enquiry state, the penalty that shall be given is reduced at the rate of its half. c) In case of his paying it in the trial stage till the adjudication, the penalty that shall be given is reduced at the rate of its one third.” (The Capital Market Law, Article. 107/3).

### 3.1.2. Transaction-Based Manipulation

The material element of the offense in the provision of the 107/1 Article of the Capital Market Law is included as “making, buying-and-selling, giving orders, cancelling the orders, changing orders or realizing the account activities via the capital market instruments.” It is said that, the ones who do these, “are punished with a prison sentence from two years to five years besides a punitive fine lasting from five hundred days to ten thousand days.” Any buying and/or selling, giving orders, the cancellation, changing of the orders given, or the realization of the account activities, which prevents the formation of the supply and demand within the economy rules in the determination of the capital market instruments’ prices, may be qualified as “creating a false or misleading impression” within the market rules.

<sup>m</sup> The provision of the Article 107/2 of the New Capital Market Law is in the character of providing more degree of freedom opportunity to the market interpretators who are bonafide parties and have no doubt about their intentions. Including some statements which were not entailed in the old regulation does not mean the scope of the offense’s being extended in the new regulation. Because the statements of “rumoring”, “preparing report”, “spreading these rumors” bear the objective of the deed’s being listed more clearly are mainly the examples which cannot be considered as a new deed. On the other hand, in the case of proving these deeds to be committed by a person with the intentions pronounced in the article, it should be accepted that these types of deeds should be prosecuted for the sake of protecting the market and the investors. Considering that a similar regulation was indeed enacted in the “Market Abuse Directive 2003/6/EC” of the European Union, this provision of the Capital Market Law may be considered to be more objective and clear, compared to the related provision of the old SEC. (SEC, The Explanation Concerning the Regulation of Information-Based Market Fraud in the New Capital Market Law).

The mentioned transactions should be “servicable” namely, be in the quality of providing the false or misleading impressions in the prices of the capital market instruments, in price changes and in supplies and demands. That the buying-and-selling may be artificial or fraudulent would affect the existence of the material element (The Securities and Exchange Commission of Turkey).

Nonetheless the wash sales or the transactions that are realized as a result of the simultaneously-entered-orders by the agreement of the parties before the transaction at the same price and amount are the classical methods for the market fraud, transactions which are geared towards cheating the market are not limited to these (old school) transactions. When the realized transactions may be directed to the cited objectives in the provision of the article though they may not be fraudulent in the listed two types, the material element of the offense shall still occur. When the material element of the offense which solely has a legal appearance but is realized for a certain objective in coordination may occur buyings and sellings, cancelled orders, changed orders or some realized account transactions that may cause the market fraud (The Securities and Exchange Commission of Turkey)<sup>n</sup>.

On the other hand, there is no lower or higher limit (bound) in the subject of the transaction volume which leaves lie or false impression. As the amount necessary for a stock market towards establishing price dominance by providing the control in the related share (of stock) market may be too big; yet for the determination of the closing price of the share, transactions on buying one piece of share of stock being the minimum transaction amount in the equity market may also be in the quality which may cause the market fraud as well (The Securities and Exchange Commission of Turkey).

One immediate result of the transaction-based market fraud offense rests with the hazard of the price of the capital market instruments' being affected. The provision of the 107/1 of the Capital Market Law does not stipulate the realization of the result by means of regulating a deed as a “hazard offense.” The resulting outcome of the transaction-based market fraud is the danger of influencing the price of the capital market instruments. In the hazard offenses, while the rising of a direct damage is not a necessity, the hazardous behaviors defined as the subject-matter of the offense are indeed punished. The aim of the law-maker who defines the offense of the market fraud as a hazard offense is to punish the parties who make transactions towards the prices of the capital market instruments, price

<sup>n</sup>Among some examples on the transaction-based manipulation are: wash sales, matched (planned) orders, the transaction done with the intention of determining the opening and closing prices of the trading sessions, intensive transactions, share accumulation by using imaginary (fictive) accounts, supply restriction, violation of the short sale rules etc.

changes and the supply and demands' being affected in a way to give a false or misleading impression.

Besides the offense's being a hazard offense, in the event of the doer's providing a benefit as the result of the transactions he has made, as per the 107. Article, first clause stipulates that "the amount of punitive fine given because of this crime may not be less than the benefit obtained by committing this crime." Another point which is important and should be emphasized with regard to the mentioned provision is the consideration of an increase in the doer's estate (property holding) as well as protection from a damage (loss) as a "benefit." (The Securities and Exchange Commission of Turkey).

In these regulations, the conjecture that both points are wrong with regard to crime and punishment policy may be reached. Firstly, should the doer have made a loss following the transactions he made, how shall he be acted? Secondly, the Effective Repentance Law provision is dealt with the provisions in the character of "not being less than five hundred thousand liras" or "the multiples of the obtained benefit" regardless of the existence of a final imprisonment verdict which is still in the enquiry stage. In fact, the main logic of the repentance provisions is to eliminate the loss that he made by his behavior, this time by his own will. Though delayed, this behavior of the person which is directed towards returning from the road to the crime is awarded. Whenas, the provisions of the Capital Market Law concerning the effective repentance make the doer obliged to do more than the damage he revealed, as such that this case reflects the aim of punishing rather than the effective repentance (Yenidünya).

Moreover, the scope of the obtained benefit is one of the important problems in defining the manipulation offense. Because, in the manipulation offense, on one hand the obtained benefit, on the other hand the losses of the other investors though an open benefit is not received, due to these transactions, come into question.

The Supreme Court of Appeal in one of its decisions: "... As is known, some losses reduce the net amount of the property holding, and some prevent the increase of this estate. From these, the first type is called the *actual loss*, the second one is called the *deprived profit* (Lucrum Cessans). In the deprived profit, there is no change between the state of the estate before and after the event. However, (in here the understanding is that) it is doubtless that if that damaging event has not have occurred, generally there would have been an increase in the property holding. It should be stated that deprived profit should be relied on an imaginary account..." (Supreme Court of Appeal, Assembly of Civil Chambers (ACC), 12.06.1996). It goes on to say:

“...Here, the loss constitutes the difference between the state of the estate after the event and the imaginary state of the estate where a likelihood to multiply came true (Tandoğan, 1961: 1-538). In the concrete case, as the defendant with his one-sided declaration of intent 13 months 20 days prior to its period and as there is no conflict of interest in which he cancelled the agreement without leaning upon a justification, he should pay compensation to the plaintiff as a rule...” (Supreme Court of Appeal, Assembly of Civil Chambers (ACC), 12.06.1996). It goes on to say:

“...However, determining this compensation in the meaning of the prevention of the increase in the creditor’s estate is a task the judge may call for. According to the last item of the Code of Obligations and as per the 98<sup>th</sup> item of the 42. article of the Code of Obligations, the judge must search and fix the amount and scope of the loss directly (ex-officio). While fixing this loss, besides the routine occurrence of the state, he should also consider the precautions he has taken or he shall have to take for reducing the aggrieved party’s loss and preventing its consolidation and when necessary, he shall apply the 44<sup>th</sup> Article of the Code of Obligations. It is not right to limit the plaintiff’s loss of profit to Three months alone, relying upon the expert report which has not a preamble (justification), without making any research in the direction of these principles which are pleaded by the court...” (Supreme Court of Appeal, Assembly of Civil Chambers (ACC), 12.06.1996).

### **3.2. Obligation Of Notification In Manipulation And The Precautions To Apply**

The Capital Market Law with No. 6362, in case of a reasonable manipulation doubt, entitles the Board with broad authorities concerning the real (natural) or juristic (legal) persons and the authorized (designated) officials of the juristic persons as well as the capital market instruments. (Article 101/1).<sup>op</sup>

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- <sup>o</sup> a) Banning of making transitory and continuous transactions in the stock exchanges  
 b) Changing of the bartering methods  
 c) Putting limitations concerning the margin trading, short selling, borrowing and loaning transactions  
 ç) Imposing or changing the collateral obligation  
 d) Trading in different markets and quotations or determination of the principles governing different transactions  
 e) Limitation of the distribution scope of the market data  
 f) Transaction or position limiting.  
 included in all the above, it is authorized to take all the necessary measures for providing the efficient and vibrant functioning of the market and to determine the procedures and the principles concerning the application of these measures.

The Board has the authority and the responsibility of fixing the committed crime as well as making a denunciation. Referring to this subject-matter, one of the decisions given by the Supreme Court of Appeal was as such that: "... Making an investigation due to the offenses which are included in the scope of the 49. Article titled as "Procedural Provisions" of the Capital Market Law with No. 2499; " (As amended: 29/04/1992 - 3794/36 Article.; As amended: 23.01.2008-5728 S.K./374. Article) 47.Article, depends upon the Board's submitting written petition to the Public Prosecution Office. With this application, the Board also earns the title of the partaker. The Public Prosecutors who get the information that the deeds were committed against this Law may want the examination of the case by informing the Board.." (Supreme Court of Appeal, 11. CD, 12.03.2010). It goes on to say:

"...Should the Public Prosecutors give the decision of non-prosecution, the Board is in the state of "authorized to object against this decision which is notified to themselves as per the Code of Criminal Procedure", if the Public Prosecutors give the decision of making investigation due to the proposed crimes in the 47. Article of the same Law, but it is possible with the written application of the Securities and Exchange Commission of Turkey or SEC (i.e. literally referred to as Capital Markets Board of Turkey or CMB in short as laid out in Turkey), and it is not possible for the Board's audit reports' generating the provision of the 49<sup>th</sup> Article by themselves, prepared for presenting to the approval of the decision making body... as the deeds and the responsibilities of the defendants were fixed in the related Audit Reports of the Securities and Exchange Commission, within this framework,

<sup>P</sup> In cases where capital market institutions are detected to be engaged in such activities contrary to the legislation, the standards determined by the Board, the articles of association, the provisions of the fund rules; the Board is authorized to request the related parties to resolve the contradictions within the period determined by the Board and to provide the compliance to the law, the purpose and principles of the enterprise; or to restrict directly the scope of the activities of these institutions or to suspend their activities temporarily, or to cancel their licences fully or cancel by certain capital market activities, or take all kinds of other measures that the Board would deem necessary. " (Capital Market Law No. 6362, Article 96/1)

"The Board is authorized to cancel temporarily or permanently the licenses held by managers and employees who have been determined to be responsible for such illegal activities or transactions; to restrict or cancel their authorities to sign, starting from the date when it has been decided to make an indictment about them until the trial is finalized; to discharge members of the board of directors from the office found responsible for illegal activities or transactions with a court decision and to assign new ones in place of them until the first general assembly meeting to be held. Before taking a measure in the direction of discharging the members of the Board of Directors of a bank, the Banking Regulation and Supervision Agency shall be consulted (Capital Market Law with No. 6362, Article 96/2).

"In case where one of the delinquencies defined in this Law is offended more than once until the decision of administrative fine has been made, then according to the related provision, the related real person or legal entity shall be imposed an administrative fine which shall be increased twice. However, in cases where a benefit has been obtained by means of this delinquency or a loss has been borne, the amount of the administrative fine to be imposed cannot be less than three folds of this benefit or loss (Capital Market Law with No. 6362, Article 105/2).

the event and the doer related to the offense and the criminal complaints made by the Board were reflected to the judicial authorities, as the application condition, included in the 49. Article was realized...” (Supreme Court of Appeal, 11. CD, 12.03.2010).

The Capital Market Law with No. 6362 loads the intermediary institutions a special charge on the issue of informing the manipulation. Namely, in the 101/1 Article of the Law: “...In case there is a matter implying any information or doubt that a transaction constitutes the crimes enumerated in Articles .... and the 107, the investment firms and the capital market institutions to be determined by the Board are obliged to notify this situation to the Board or to other institutions and organizations to be determined by the Board. The Board shall determine the principles and procedures of the obligation of notification...”

Referring to the above Article, The Securities and Exchange Commission of Turkey stated the preamble and the application of the intermediary institutions as follows: The intermediary institutions must care to some certain issues in the transactions made by the parties known as “player”, “manipulator” or “speculator” in the market. The intermediary institutions have to take the necessary measures for preventing the market fraudulent transactions, providing the assurance of trust of the savers back to the market, the enhancement of the prestige of the market before the domestic and foreign, all the investors, thus for the expansion of the market, in the prevention of the practices and attitudes which have the transactions easier in the meaning of market fraud.<sup>9</sup>

<sup>9</sup> Major issues which the intermediary institutions should pay attention to are stated as the following: 1. Keeping the voice records regularly concerning the transactions made; 2. Registering the orders to the customer order form and session follow-up form regularly; 3. Informing our Board about the transactions which are suspected of being market fraud; 4. Complying with the principles as regards to making interpretations and advices; 5. Prevention of making transactions over the accounts opened in the name of others; 6. Showing special care to the accounts which are managed by proxy; 7. Rule of Knowing Your Customer (Besides the identity card information to whom an account is opened, his experience on the markets, his financial strength, his investment choices etc. should be known by the intermediary institutions. Also, prior to accepting the buying and/or selling orders of the intermediary institutions, foreign banks, receiving a letter of undertaking concerning that the release of the identity information of the customer in whose account a transaction shall be made); 8. Giving non-proportional orders to the financial position of the customer (Out of the customer’s account: since giving orders with big amounts attracting attention, make loan available, as giving guarantee for the loan made available by a third party is accepted as a doubtful transaction, monitoring and follow-ups of these transactions be performed by the intermediary institutions’s auditors and informing the Board about the subject-matter); 9. The transactions which cannot be done by the knowledge and the experience of the customer (Similarly, giving orders and realizing transactions which may not be possible with the experience and knowledge of the customer about the market); 10. Securities and/or cash virement-transfers (Receiving instructions concerning the securities and/or cash virement continuously to the accounts opened in the name of the customer before various intermediary institutions or to the accounts of other people should also be seen as doubtful transactions); 11. The

Considering the fact that there may be some issues in the Capital Market Law which does not resemble the definition of the manipulation offense exactly, another definition under the title of “predatory practice to distort the market” was made. In the Article it is said that “Actions and transactions which cannot be explained with a reasonable economic or financial justification, which are of a nature deteriorating the functioning of exchanges and other organized markets in credibility, transparency and stability, shall be regarded as market abuse actions, provided that they do not constitute a crime. An administrative fine ranging from twenty thousand Turkish Liras up to five hundred thousand Turkish Liras shall be released to those who perform the market abuse actions determined by the Board. However, in case when a benefit has been procured by these means, the amount of the administrative fine to be given cannot be less than twice of this interest.” (Capital Market Law with No. 6362, Article 104).

### **3.3. The Securities And Exchange Commission’s Applications And Some Sample Judicial Decisions**

According to the 2012 Activity Report of the Securities and Exchange Commission of Turkey, the Board carried 82 items of manipulation offenses within the period of 2010-2012 to the legal basis. Of course, in the formation of this statistics, the lifting of the bans of the expurgatories with the resolution of the Securities and Exchange Commission of Turkey with No. 22/678, dated as 30.07.2010 has been instrumental.

In this decision it is said in brief as follows: “... At the end of the revision that was made in the Resolution of our Board’s Decision Making Body with No. 35/1022, dated as 28.09.2007, concerning the ban of making transaction transitory or continuously in the ... stock exchanges and other organized markets; B) With the aim of preventing the predatory transactions in their formation phases by both making the momentarily follow-up of the markets and effective observation of the market, as per the decision dated 23.07.2010, through both the changes made in the organization structure of our Board and the new regulations which shall be brought to the working principles of the ISE stock market, it was decided that .... to lift the mentioned bans of all real or legal entities about whom transaction bans are introduced by our Board as of the date of 01.10.2010 by considering that the market structure shall change and shall be structured in a way that the manipulative transactions shall be minimized (The Securities and Exchange Commission of Turkey).

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Cash Virements-Transfers made by using cash and bank accounts (Capital Market Law, “The Market Fraud in the Capital Market (Manipulation) (The Responsibilities of the Intermediary Institutions)”).

**Table-1: SEC 2012 Activity Report**

	Made by SEC		Opened Against The Board Decisions		
	Number of the Criminal Complaints	Manipulation Offense	Number of Cases	Punitive Fine	Transaction Ban
2010	69	53	80	6	16
2011	21	11	38	1	0
2012	29	18	37	0	1
TOTAL:	119	82	145	7	17

**Source:** SEC (2012) "Activity Report".

When the State Council Decisions concerning the subject are examined, the judicatory disputes will be seen that they rather develop on whether the Securities and Exchange Commission of Turkey is authorized on the subject of administrative measures such as the resolutions or temporary transaction bans or not. For instance, it is mentioned that:

"...From the examination of the resolutions with no. 11/249 and dated as 28.2.2001 and with no. 16/436 and dated as 28.3.2002 which are the subject matters of the action and published in the Weekly Bulletin, as it is understood that these had no aspect surpassing the legal framework against the law in which the procedures and principles were determined in detail concerning the persons and the institutions about whom transaction bans were introduced to their securities and the operation of their accounts in the intermediary institutions before Takasbank (Bank of Settlement) and taking the decision and application of the transaction ban, no contradiction to law in the mentioned resolutions was noticed..." (State of Council 13. C, 17.03.2006). It goes on to say:

"...With reference to the transaction as for introducing the plaintiff a ban of making transaction in the stock exchanges and the organized markets and delisting of the stocks which he owns from the Board registry... due to the plaintiff's deeds registered in the Audit Report dated as 26.05.2003 and with no. XVII-20/10-b, introducing a temporary transaction ban about the plaintiff and in the part of the established transaction, concerning the introduction of a temporary transaction ban and the delisting of the stocks from the board registry as of the date when the ban is introduced as per the 46/i article of the Law with No. 2499, there is no contrariety to the law and the legislation..." (State of Council 13. C, 17.03.2006). It goes on to say:

“...As this regulation in the 1. Clause of the (i) item of the 46<sup>th</sup> Article of this Law No. 2499 determines and requires a new penal sanction, in which it is adjudicated that the real or legal entitites, stock exchanges and other organized markets are authorized to take measures for assuring the prevention of making such transactions temporarily or continuously, on the contrary to as it gives authority to the Board to apply the administrative measures towards those concerned temporarily or continuously making transactions in the stock exchange, with the aim of preventing the ones who committed or participated (aided) in the deeds in the character of crime which are listed in the (A) item of the 47. Article of the Law previously, to give harm to the market and the other investors by continuing making transactions...” (State of Council 13.C., 07.10.2005). It goes further on to say:

“...It is understood that the buying-and-selling transactions which the .... Industry Inc. made, these transactions had not revealed the share of these transactions to the Istanbul Stock Exchange buying-and-selling transaction volumes, the plaintiff’s claim of his being acted with the investor group was based on the reason of the plaintiff’s acting together with an investor group in the manipulative transactions realized in the stock. Within the framework of these data, as the amount of the transactions of the plaintiff in the examined period and his being acted together with an investor group could not have been understood from the file ...(State of Council 13.C, 24.05.2011) .

When the Supreme Court of Appeal decision concerning the subject are examined, it is generally seen that a lawsuit is filed on claiming that the fixation of whether the manipulation offense occurs or not, does not been made salubriously. For instance, it is mentioned that:

“...As a public case was initiated concerning the defendants who caused the prices to inflate extraordinarily by making the buying-and-selling of the shares of the i... Holding in regular intervals which trades in the ISE between the dates of 7.2.1995 and 4.8.1995 systematically and intentionally, and as the lawsuit was filed and during the trial, an irrefutable opinion had not been informed by the experts committee, by having a re-examination by the experts from the Universities who are specialized in this subject-matter, the amount of the buyings-and-sellings of the defendant in the stated periods corresponding to the company capital...” (Supreme Court of Appeal 7. PC, 24.11.1999). It is further mentioned that:

“...Whether the connection between the defendants whose existence is claimed among them established intentionally or not, whether these buyings-and-sellings fall in the ratio of affecting the supply and demand in the market or not and is it obtaining a promissory note with the objective of

making saving or making profit in the way an ordinary investor realizes, or else the occurrence of a manipulation in such a degree to influence the market, hence concerning the subject-matter of whether the elements of the offense stipulated in the law were formed or not; according to the resulting outcome by having the documents from ISE and the intermediary institutions, not paying regard to the need of determining and appreciation of the offense classification and the legal conditions of the defendants...” (Supreme Court of Appeal 7. PC, 24.11.1999).

The Supreme Court of Appeal decision states also that: “... To what objective the transactions made by the defendants within day time with short time intervals were directed towards, whether the transactions they made by using different intermediary institutions may be accepted as routine or not, the detection of whether they had acted together or not, in case of identifying that they had acted together, instead of having a report taken from an expert committee on the subject of the capital market law in the direction of whether those actions were deeds forming an artificial market price and market or not, ..... not leaning on concrete determination and investigation.” (Supreme Court of Appeal 7. PC, 14.02.2008). Further, it is stressed that:

“ ... As per the scope of the file, in the event that the defendants, by the buying-and-selling transactions that they had made on the.... stocks in the Istanbul Stock Exchange, affecting the supply and demand of the capital market instruments, by giving the impression of the existence of an active market, by means of engaging in the transaction-based manipulative activities in the way of keeping the prices at the same level, levelling them up or down, between the dates of 26.03.2003-10.04.2003, in which they obtained a 19,3 billion profit of Turkish Lira... it is said that “out of the loss which happens to be one of the objective conditions of the deferment of the announcement of the verdict, is meant to be the material loss, in the cases where no technical information is needed in determining this loss, the judge should determine the loss by making a simple reseach which helps to form an opinion...” in the event which is the subject-matter of the action, as there is no loss in which its victim has been determined as the result of committing the attributed deed or a concrete loss occurred in public sense, as the caveat content of the Supreme Court’s Chief Public Prosecutor Office’s Appeal For the Sake of Law has not been found proper, to its refusal... (Supreme Court of Appeal 7. PC, 06.02.2012).

### 3.4. Similar Offenses That Are Worded In The Turkish Criminal (Penal) Code

#### 3.4.1. The Offense Of Fraud

In the fraud crime which is stated in the 157. Article of the Turkish Penal Code (TPC) with No. 5237, it is said that, “Any person who deceives another person through fraud or secures benefit both for himself and the others by giving damage to the victim is punished with imprisonment from one year to five years and imposed punitive fine up to five thousand days.”

In the preamble of the mentioned article, it is provisioned that: “In the text of the Article the offense of fraud is defined. Fraud is cheating a person with fraudulent behaviors, the person’s providing benefit to himself or to another person to the disadvantage of that person or another. In this respect, the offense of fraud, is an offense which is committed against the estate of the persons. With the mentioned offense definition, the protection of the estate (ownership or property right) right is targeted to be achieved. Also, during the committing of this crime, the parties are cheated by fraudulent behaviors (Capital Market Law No. 5237, Article 157).

It is further stated that “...the good intention (bona fide) and the trust which should exist among the parties may be violated by such deeds which bear a deceptive character by nature. The person’s freedom of will is affected in this way and his freedom of will is violated. With regard to the formation of the offense of fraud which has an offense image with many deeds, the realization of the deeds more than one is needed. The deceit constitutes the first of these deeds... The offense of fraud is a crime which can be committed deliberately. The mentioned intention here expresses that all the material elements of the offense of fraud be known by the doer. Most of the time, the amount of the benefit obtained by means of committing the offense of fraud cannot be determined precisely. By taking such cases into consideration, besides the prison sentence due to the offense of fraud, a punitive fine is also envisaged...”<sup>1</sup>.

In the fraud, that a deceptive behavior on a certain person is realized and that as the result of this behavior to his peril and benefiting from an unfairly-obtained-estate to the advantage of the doer is required. Yet, in the manipulation deed, regarding the capital market instrument whose supply and demand are affected artificially, the persons who make transactions while leaning on this artificial image happen not to be certain persons. It is very hard to prove this kind of anonymous fraud (Yenidünya).

<sup>1</sup> The preamble of the Article 157 of the Law with No. 5237.

The Supreme Court of Appeal also sees the offense's being directed towards certain persons for the formation of the offense of fraud: "...the cheating of the real person by directing the fraud in the character of deceiving and as the result of these transactions providing an unfair benefit to the advantage of the one who commits the deed, or to the disadvantage (expense) of him (deceived real person) or another person; in the concrete event; according to the claimed and accepted that by encrypting the defendants information, they procured the foreign credit cards which were produced as being fake and passed them through the P.O.S. device in the member workplace which they owned, and though they are not real transactions, provided unfair benefit by submitting the slips which were produced as contrary to facts, as there were not any fraud found pointed to the real person....." (Supreme Court 11. PC, 07.04.2010).

Though a general-special norm relationship is observed between the offense of fraud and the transaction-based manipulation, the manipulation offenses' being of a hazard offense; for the completion of the offense of fraud, the occurrence of a loss' being obligatory, if it is taken into consideration that no loss occurred so that the deed remains in the attempt phase, the manipulation offense's being enacted as separate from the Capital Market Law may be thought of being more positive and sagacious with regard to capital market law (Kütük, 2010).

### **3.4.2. The Offense Of Declaring Incorrect Information About The Company Or Cooperatives**

In the offense of declaring incorrect information about company or cooperatives, in the 164. Article of the TPC with No. 5237, it is mentioned that, " In case of furnishing incorrect information by the founders, partners, directors, managers, representatives, or members of Board of Directors, Supervisory Board, or persons carrying the title of liquidator in the declarations made to public authorities, or in the reports or recommendations submitted to the general assembly in such a way to mislead the concerned parties, those who are responsible from such act are punished with imprisonment from six months to three years, or imposed punitive fine."

In the preamble of this Article, it is stated that: "With the article, a sanction is introduced which shall prevent the deception of the public or the general councils of the mentioned institutions, general councils in the field of the company or cooperatives. Giving false information intentionally by the persons mentioned in the article has been rendered to be an offense. The purpose "from the declaration made to the public" is addressing to uncertain persons by means of sending prospectuses through media organs or via mail and giving wrong information to them. Including such

information in the reports, proposals that are presented to the general council is deemed an offense; making wrong balance-sheets, for example, such as mentioning the profits contrary to facts. However, showing all these as correct as knowing all these are wrong is obligatory for the formation of the offense.”

### 3.4.3. The Offense Of Affecting The Prices

In the offense of affecting the prices which is stated in the 237. Article of the TPC with No. 5237, it is stipulated that, “ (1) Any person who spreads deceitful information or news or gets involved in fraudulent acts in such a way to cause decrease or increase of wages or prices of foodstuff or goods is punished with imprisonment from three months to two years and also imposed punitive fine. (2) Punishment to be imposed is increased by one third if the prices of foodstuff or other goods, or wages of the workers are decreased or increased as a consequence of this act. (3) Punishment is additionally increased by one eighth if the offender happens to be a licensed agent or stock exchange broker.”

In the preamble of this article it is said that, “The article punishes the publication of false news or rumors with the aim of increase and decrease of mainly the wages of the workers, or the values of the foodstuff or other goods, or applying to other fraudulent ways with the same intention. Thus, the legal benefit which the article wants to preserve basically prevents the derogatory actions in the determination of the prices within the framework of free competition terms. As the deeds such as giving lie, false, misleading, baseless information which may affect the capital market instruments concerning the documents and the commercial papers that are accepted in the stock exchanges were enacted in the 3. item of the first clause of the 47<sup>th</sup> Article of the Capital Market Law, dated as 28.7.1981 and with No.2499, titled as the “Criminal Liability”, are punished, no separate provision has been enacted on the subject of affecting the prices of the commercial papers...”

As it is given in the 139. Article of the (New) Capital Market Law with No. 6362 which repealed the (Old) Capital Market Law with No. 2499, “the Capital Market Law dated as 28/7/1981 and with No. 2499 was repealed. As it is said in the legislation, the references made to the provisions of the Law with No. 2499 are deemed to be made to the related provisions of this Law,” the Law mentioned in the above article, should be accepted as the new Capital Market Law with No. 6362. The next section concludes this paper.

#### 4. CONCLUSION

The presupposition of the agents who make decisions economically are rational is one of fundamental elements involved in the economics doctrine. As the natural result of the rationality, it is assumed that economic agents may make mistake, however, they shall not insist on the state of making a mistake. In other words, economic agents make decisions by using the current information and by not repeating the economic mistakes they might have done previously. Otherwise, since the resources in the economy may not then be used efficiently, an economic waste shall occur, the irrational distribution of the economic resources shall take the lead in giving a rise to the socioeconomic results.

One of the market imperfections which decision making agents may be exposed to together with the current uncertainties is the manipulation. Economically, manipulation may be defined as the set of behaviors geared towards buying or selling a security by deceiving people or striving to keeping the price of the security at an artificial level.

The literature on accounting, economics and finance has been debating, over a century, the fact whether the efficiency has indeed been satisfied on the markets where supply and demand meet each other. It is well known that the commitment of manipulation (offense) which is one of the significant factors contributing to the impairment of the corporate financial (mis)reporting through the impairment of the market efficiency and therefore the fair value (formerly mark-to-market value) and the valuation process itself has strong accounting, financial, legal and economic linkages altogether.

However, these linkages or ties have not yet attained the attention it is supposed to well deserve in our own literature nor elsewhere quite much. Acknowledging this, this paper has theoretically investigated the interplay among the aforementioned disciplines and to lay it out on a more solid ground. In so doing, it has strived to cover up this directed loophole the extant literature features to a reasonably certain degree, through crystallizing the significance and context of manipulation. It has given a particular focus to economic efficiency in the world of accounting and its transnational implementation, borrowing the prospects from such cross-fields as economics, finance and legal discipline offer up, to date.

A direct definition of the manipulation is not made in the Capital Market Law, instead it is mentioned that some of the listed actions and transactions may constitute the manipulation offense. According to the 2012 activity report of the Capital Market, it is observed that within the period of 2010-2012, the Board made to ascertain 82 items of manipulation offense. When

the court decisions are reviewed, administrative controversies or conflicts may be seen to rather center around the resolutions that the Securities and Exchange Commission of Turkey has taken or around the failed administrative measures while the judicial conflicts center around proving that the deeds constitute the type of the offense.

Albeit a general-special norm relationship may be observed between *the offense of fraud* and *the transaction-based manipulation*; considering that (a) the manipulation offenses are of a hazard offense; (b) for the completion of the offense of fraud, the occurrence of a loss is a must, or (c) should there occur no loss, the deed would remain in the attempt phase only, the manipulation offense's being enacted as separate in the Capital Market Law independent of the TPC is considered to be more positive and plausible with regard to applicable capital market law.

We have shown that manipulation can indeed occur in various forms, whether in the form of *information-based manipulation* (e.g. financial statement misrepresentation, earnings manipulation, practice of unacceptable make-up techniques, earnings strip etc.) by the companies, or in the form of *transaction-based manipulation* (e.g. transactions initiated by individual or corporate investors to artificially establish or distort the value of a commodity being a traded capital market instrument etc.). Given this, should the market efficiency be damaged, impaired, or disputed, the information market data (e.g. fair value coming out as a part of corporate valuation) might provide would not be reliable any longer. Therefore, it would not be useful nor relevant to any decision making process by any party, meaning individual and/or corporate establishment (e.g. financial statement misrepresentation problem). This implies that the impact on the market (efficiency) in addition to on the users of the financial information is comparable and therefore, the consequences deserve comparable measures and sanctions.

In conclusion, it has been documented that comprehensive financial regulations to better address to the current needs will bring together much better accounting practices. In particular, it has been documented that there is a need to clearly conceive such reporting malpractices like financial statement misrepresentations as information-based manipulation and incorporate that understanding to the wordings of the Capital Market Laws and Turkish Penal Code besides the transaction-based manipulation. In other words, the definition of manipulation has been shown to be in need of getting broadened so that the investors or the users of the financial information may not be harmed by the companies that might commit such offenses.

In return for this, market efficiency would be enhanced up to some more reasonable extent as the provided financial information (micro-level) will be reliable and useful then while financial markets and the system (macro-level) will be transparent, viable, and robust. In other words, comprehensive financial regulations to better address to the current needs also imply a more decent economic and financial system.

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