

LAMFALUSSY PROCEDURE AND CRIMINAL LAW

A compatibility assessment focusing on the principle of legal certainty using the example of the reformed market abuse law

- Summary -

The dissertation examines to which extent the europeanised market abuse law, which is implemented through the Lamfalussy procedure, meet the constitutional requirement of legal certainty.

In response to the outbreak of the global financial crisis in 2008, the law on market abuse has been fundamentally reformed and europeanised. The result is, among others, the Market Abuse Regulation (MAR). At the same time, a directive (CRIM-MAD) has been issued, with first-time recourse to the competence rule of Art. 83 (2) TFEU, which lays down minimum requirements for the criminalisation of market manipulation and insider trading.

The four-stage Lamfalussy procedure is used to accelerate the legislative process in european market abuse law and to make it more flexible. The MAR is the basic act at the first stage of this procedure, to which the German criminal provision of § 119 WpHG refers. The MAR then makes reference to legal acts on the second and third level: At the second level, it refers to implementing and delegated acts according to Art. 290 f. TFEU, which are mainly adopted by the European Commission. The third stage consists of announcements by the European Securities and Markets Authority „ESMA“. Stage 4 is not part of the legislation itself; on this stage the Commission ensures the effective enforcement of the provisions.

After a presentation of the Lamfalussy procedure in the first chapter, the implications of the principle of legal certainty, which is based on the rule of law (Article 20 (3) of the constitution), are examined. Following *von Arnould's* presentation, the principle of legal certainty is divided into the aspects of recognisability, reliability and predictability of law. The third chapter examines the legal certainty in the reformed market abuse law on the basis of the parameters identified in the second chapter. In the context of recognizability, the compatibility with the rule of certainty of law under Article 103 (2) of the constitution is particularly relevant. The many references as well as the abundance of legal norms and the vague legal concepts in the European standards give rise to doubts as to whether the reformed market abuse law is compatible with the rule of certainty of law. The reliability of the law is also examined. A prerequisite for this aspect is in particular the acceptance of the law by the individual. Diverse procedural uncertainties which make the law non-transparent, as well as the extensive possibilities for the Commission and ESMA to exert influence (as bodies with little democratic legitimacy) give rise to doubts as to whether the reformed market abuse law is sufficiently reliable because it is not accepted by the individual.

Since the market abuse law adopted by means of the Lamfalussy procedure also indirectly influences criminal law, the requirements of the rule of law must be observed with particular rigour. In view of the many frictions with the institute of legal certainty it is advisable to fundamentally revise the Lamfalussy procedure.