



**CRIMINALIZATION
OF MARKET ACTOR
BEHAVIOR AS
REGULATORY TOOL**

Samenvatting

Het onderzoek dat ten grondslag ligt aan dit artikel onderzoekt hoe de overheid markten reguleert voor (financiële) producten en diensten teneinde falen van de markt te voorkomen. Het behandelt specifiek EU Richtlijn 2014/57/EU betreffende strafrechtelijke sancties voor marktmisbruik en de implementatie daarvan in Nederland en opvolgend gebruik door het Openbaar Ministerie en Autoriteit Financiële Markten en hun Convenant ter voorkoming van ongeoorloofde samenloop van bestuurlijke en strafrechtelijke sancties. Het beantwoordt de vraag of deze richtlijn de ontwikkeling van effectief reguleren van de financiële markt bevordert of remt.

De slotsom ten aanzien van de implementatie van Richtlijn 2014/57/EU is – kort gezegd – dat “slechts” het aantal jaren gevangenisstraf voor handel met voorkennis en marktmisbruik van twee naar vier aangepast dient te worden. Het artikel concludeert tenslotte dat de huidige praktijk van het Convenant tussen OM en Autoriteit Financiële Markten kan blijven bestaan. De Autoriteit Financiële Markten kan haar inspanningen om haar toezicht verder in de geest van responsive regulation te verbeteren ongestoord door het OM voortzetten.

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CRIMINALIZATION OF MARKET ACTOR BEHAVIOR AS REGULATORY TOOL

The Implementation in the Netherlands of EU Directive 2014/57 (“MAD II”) on criminal sanctions for market abuse, and its effects on the cooperation between the Dutch Public Prosecutors Office (OM) and The Netherlands Authority for the Financial Markets (AFM)

I. Introduction

In this section, we deal with the context, main question and methodology of the research project that forms the basis of this article.

A. Context and main question

In early 2014, the European Parliament, European Commission and Council (of Ministers) agreed on a new directive¹ (“criminal sanctions directive”, “market abuse directive”, “MAD II”, or in Dutch: “richtlijn marktmisbruik”) to criminalize certain acts of (among others) bankers, which was promulgated on June 12, 2014² and must be implemented in the Member States by July 3, 2016³. It is a response⁴ to incidents in which employees of financial service providers traded with inside information or otherwise manipulated the market, thereby worsening the “financial crisis” and allegedly confirming the image of bankers as the cause of that crisis.

The European-wide harmonization of the criminalization of those wrongful acts – the first of its kind in this field – aims⁵ to strengthen the regulatory regime of financial service providers and is part of a major overhaul⁶ of the European regulatory regime in that market, based on the European Union’s Action Plan for Financial Services (FSAP)⁷ with, among others, the 2012/2013 start of the institutions of the European System of Financial Supervision (ESFS)⁸. Together with the criminal sanctions directive, a new regulation is promulgated, Regulation 596/2014, consolidating and renewing the existing framework to combat market abuse.⁹

In terms of regulatory science, the directive adds to the criminal sanction tools of the regulation of financial markets in Europe which exist alongside the administrative sanction tools like a warning letter, fine and license revocation. In regulatory science, it is argued¹⁰ that administrative sanctions are better tools for achieving effective and responsive regulation. The implementation of the directive could therefore be regarded as a step in the wrong direction. This article analyzes how the criminal sanctions directive affects the current cooperation between the Dutch Public Prosecutors Office (OM) and The Netherlands Authority for the Financial Markets (AFM) as laid down in a 2009 Covenant to avoid confluence of criminal and administrative sanctions¹¹ (Covenant).

The main question of this analysis is (1) how the Covenant should be interpreted in the light of regulatory science and, in particular, (2) how the regulatory and enforcement tasks of the Dutch OM and AFM are currently achieved with regard to the topics of the criminal sanctions directive, (3) how the Dutch OM and AFM, as well as (Dutch) regulators, anticipate

the criminal sanctions directive, (4) how that anticipation should be evaluated and/or what recommendations can be developed.

This article suggests that, after being implemented, the criminal sanctions directive should be interpreted with caution and in line with the latest innovations in the field of regulatory arrangements. The cooperation between OM and AFM need not change. The improvements of the regulatory arrangements in the Netherlands should continue to be based on innovations like “responsive regulation”.

This article therefore aims to be interesting from an academic and practical point of view. It puts the new European legislation into a scientific framework and creates links between various strands of literature in various disciplines of the social sciences. In offering an interpretation tool, it caters to the needs of the officers in the AFM and OM, as well as all the compliance officers in financial institutions currently working on implementing EU Directive 2014/57. The article especially intends to be useful for students taking courses like “Theory and practice of regulated markets”¹² and “Governance of industrial safety”¹³.

B. Methodology

The research project underlying this article is positioned within the tradition of empirical-normative legal research¹⁴. In this tradition, emphasis is placed on the actual data produced by legal professionals and others in society, such as legislation, executive orders and court judgments, as well as reports by experts appointed by governments and other authorities. The description and analysis of these data can be seen as empirical. In this research project, those data include the criminal sanction directive, the Dutch Covenant (2009) and related legal documents. These data are regarded as the “artificial mechanism”, as it is stated in one of the many definitions of law as “the artificial mechanism that channels human behavior into the direction society wants”¹⁵.

The subsequent normative aspect of this research tradition entails the review of the data in the light of other sources, linked to the part of the definition of law “direction society wants”. Sources that form the basis of this normative analysis include the work of scholars (legal and otherwise) on the topic and the rules of analytical logic as produced by those scholars and the author of this article. Part of the normative analysis is also the reviewing of the empirical data in the light of the normative choices by societies as expressed in legal sources produced by the United Nations, including Resolution 217/3¹⁶ and Resolution 2/55¹⁷, as well as produced by the G8¹⁸, including the statement on financial markets 2010¹⁹, and those produced by the EU, including Art. 169 of the TEU²⁰. The goal of this normative aspect is the potential influence the analysis may have on the application of law by adjudicators and others.²¹ In this context, the critical analysis posed in this article is aimed at guiding Dutch judges confronted with cases as discussed in this article, as well as guiding the Dutch OM and AFM in applying the law in concrete cases.

The downside of this multidisciplinary approach is that specialists in one area may not appreciate parts of this article on other specialisms. This is an accepted issue in literature on multidisciplinary research. Each reviewer is therefore invited to at least critically analyze the sections pertaining to his or her field. Moreover, the valorization of the research underlying

this article also focuses on students and others who have to learn to professionally perform around the regulatory function. This audience in particular benefits from the various perspectives of this article. The hope is that monistic specialists will be encouraged to widen their horizon and adopt certain perspectives in their solutions for the current issues in the regulatory states.

C. Wrongdoings (financial crimes) at stake

Before the theoretical aspects of the topic of this article are discussed, a practical description of the wrongdoings²² at stake, the financial crimes should be addressed. What are the acts of the financial institutions (and/or their employees) that are scrutinized by regulators and potentially punished for either criminal or administrative actions? What is the market failure and thus the damage caused to customers and the economy at large resulting from these actions? This article limits its scope to wrongdoings committed by regulatees of the regulated financial markets. In other words, wrongdoings committed by private individuals fall outside the scope of this article.

The financial crimes discussed in this article pertain to the trading of financial instruments. Other areas of the market of financial goods and services, such as money, consumer loans, mortgages, business loans, pensions or insurance, are not addressed by the main questions of this article. The general theories on regulatory arrangements discussed in this article do have a bearing on those other areas as well. More important, the trading of financial instruments does affect those other areas of the financial market. Financial instruments within the context of Directive 2014/57 are defined as transferable securities, money-market instruments, units in collective investment undertakings, etc.²³ Or, in other words, shares in companies and valuables (“options”, “futures”, “swaps”, “forward rate agreements” and other “derivative contracts” relating to shares, currencies, etc.) that are similar. For the sake of simplicity, this article uses the imprecise umbrella term “shares” as *pars pro toto* for all of those valuables. The importance of shares and, subsequently, the causal link between shares and the functioning of (financial) markets lies in the fact that most goods and services are provided by (financial) companies, the ownership of which is divided into (tradable) shares. Any negative fate of the value of those shares has a negative effect on the respective company. And negative effects on (the value of the) company have a direct negative effect on the goods and services provided by it. Wrongdoings involving shares thus constitute a direct threat to many crucial goods and services for consumers and, in particular, the services of banks and insurers, such as regular loans, mortgages, pensions and insurances, and are thus a direct threat to the economy at large, now that such goods and services are crucial in a capitalist market like the market of the EU and its Member States.

The context of the current article is also the recent financial crisis²⁴, which revealed a need to reform the regulation of financial markets, given their nature of being global, competitive, without barriers between products and entailing high compliance costs, all amplified by technology.²⁵ Such reform should balance the desire to allow enterprises to take risks, thereby innovating the economy, but to avoid system damage caused by a rescuing at the expense of the public of companies that are too large to fail.²⁶ This article hopes to contribute to such a balance.

1. Insider dealing (“insider trading”)

The definition of insider dealing is provided in Directive 2014/57.²⁷ It arises when a person possesses inside information and uses that information to acquire or dispose for their own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.²⁸ Inside information is defined in Regulation 596/2014.²⁹ It is information of a precise nature, which has not been made public, relating to one or more financial instruments and which, if it were to be made public, would likely have a significant effect on the prices of those financial instruments.³⁰ Or, in other words, insider dealing is the sale and purchase of shares in a company carried out by a person who is part of that company on the basis of having information that would have prevented the sale or purchase taking place if the other party of the sale or purchase would have had the same information. The damage caused by insider dealing includes financial loss on the part of the other contract party and a loss of trust in the system by traders. In the U.S., insider dealing is more often referred to as “insider trading”.

For example, if the insider knows of deteriorating circumstances within the company but nevertheless sells shares to another party who assumes that the company is still in good shape, this other party will buy shares that in time will be of less value than the purchase price. Or, conversely, if an insider in a small company, having knowledge of a major positive development, buys shares from another party who still thinks that the company is small and remains small (in value), the damage consists of financial loss on the part of the other party, who could have sold their shares for a higher price after the information of the growth of the company would have become public.

2. Unlawful disclosure of inside information

Like insider dealing above, the unlawful disclosure of inside information as a defined wrongful act in Directive 2014/57 also uses the definition of “inside information” of Regulation 596/2014 (Article 7 (1) sub (a)). So it is information about a company that has a significant effect on the prices of financial instruments.

Examples of this crime include a scenario in which an insider discloses inside information to a trader of financial instruments who is not part of the company. This third party could then use this information to cause a financial loss to trading parties, similar to and as if this third party is an insider as described above under insider dealing. The reason that an insider might disclose such inside information could be a benefit he or she receives from this third party. So the person who discloses the information is not trading him or herself, making it a distinctly different wrongful act than insider dealing.

3. Market manipulation

Market **manipulation** is the most diverse wrongful act out of the three acts dealt with in Directive 2014/57 and is analyzed in this article. As defined in the Directive³¹, it includes entering into transactions, as well as disseminating information with the goal of creating a false image about the attractiveness of financial instruments in terms of price, demand or ranking.³²

Examples of such trade-based manipulative behavior are transactions at the close of a market day with the effect of misleading investors acting on the basis of closing prices or securing

a dominant position over the supply of or demand for financial instruments. An example of information-based manipulative behavior is the dissemination of an opinion about a financial instrument or the company it is related to and then taking a position on that instrument, with the effect that others act on the basis of that opinion, increasing the value of that position. Persons working in opinion-making companies like benchmark companies are especially vulnerable to this wrongful act.

D. Overview sections

This article continues (in section II) with an overview of the developments involving governance and regulatory science in particular. It is argued that the European Union and all of its Member States should be viewed as “regulatory states” that steer the activities in a capitalist market but have independent commercial financial institutions provide the goods and services themselves (“row”). Subsequently (in section III), this article discusses the tension between criminal sanctions and administrative sanctions in the light of regulatory science, dealing with the part of the main question on how the Covenant should be interpreted. The next section (IV) discusses Directive 2014/57 in detail in the light of the part of the main question on the status quo of the interpretation and upcoming changes in the regulatory arrangements in the Netherlands pertaining to the financial crimes mentioned above. In that section, it is argued that further interpretative insights and tools are needed, now that the legal instruments do not provide solutions to the tension between criminal and administrative sanctions. The next section (V) presents possible solutions and provides such interpretation and tools. The conclusion (VI) summarizes the findings and concludes the article.

II. Dynamics of criminal sanctions and administrative sanctions within the perspective of a european regulatory state

In this section, criminal sanctions as a tool for regulatory activity are compared to tools of an administrative character and reviewed in the light of the current discussion in regulatory science, part of the thinking on (good) governance. This critical analysis of both types of punitive sanctions is preceded by a model for mapping the theory and practice of regulated markets.

A. Mapping the Theory and Practice of Regulated Markets³³

Mapping the theory and practice of regulated markets is understood as making a (pedagogical) tool that facilitates an integrative approach to the subject matter. The mapping of a theory and the practice of regulated markets that is presented in this sub-section takes a lifecycle approach, an approach in which the various elements of a regulated market are presented in chronological order.

In doing so, all regulation of a market starts with a form of market failure.³⁴ Market failure can be defined as poor products and services in terms of quality or price.³⁵ The behavior of the producer of the goods and services can also constitute market failure, as in harming the interests of consumers or other actors in the same market. In addition to harm to consumers and (competitor) producers, market failure can be present when the market as such does not function in terms of the non-presence³⁶ of the desired goods and services in an economy or harm to public interests³⁷. Non-presence means that goods and services are not produced or

not available in a market. Examples are complications in the supply of energy, water, waste disposal, mobile phone coverage, etc. Harm to public interests means an infringement on the fundamental rights of citizens like privacy rights or harm to the environment or other “commons”³⁸. The market failure that is the subject of this article represents a few of these types categorized above, including but not limited to the wrongful pricing of investment products, the loss of investment due to erroneous ratings, the potential of collapse of financial institutions like banks and insurers, with the consequential non-availability of the services of such institution, as well as harm to the “common” of a financial system, vital to any economy.

The chronological next step following market failure is the response to it. A distinction is made between public and private response. Private response consists of the decision of consumers to no longer buy the wrongful goods and services. This results in the disappearance of the wrongful goods and services, if and when the mechanism of capitalism, of offer and demand, is functioning. Alternatively, the private choice consists of legal action (tort) against the producer of the wrongful goods and service. Due to various causes like information dissymmetry and the long duration of civil litigation, private choices cannot solve all market failure by its own. This is especially true for failures of the type of non-presence of goods and services and harm to public interests. So, in that sense, public response to market failure is a logical possibility for combating market failure. Based on this reasoning, or alternative reasoning, public response is the central topic of this article and regulatory science in general.

The next step is the design of the public response to market failure. This is part of the concept of governance, as developed further below. Based on the principle of legality, such design starts with the development of a legal norm pertaining to the market failure. Such a norm consists of specific instructions for quality and/or the price of the goods and services, as well as specific instructions on the behavior of the producer. Examples are technical requirements for canned food or cars and standards for labeling canned food or sales methods for selling cars. In this article, the norms pertain to the behavior of the producer and employees within the producer’s organization involving the selling of shares, in particular norms for insider dealing, disclosure of inside information and market manipulation. In these instructions, or via these instructions, the infringement on public interests is also addressed. By setting norms on the behavior of employees of financial institutions, the public good of a financial market is secured, if and when those instructions are followed.

Compliance with the norms for goods and services and market behavior is the next step in the chronological description of the theory and practice of regulated markets. As with non-market rules, the design of this state function comes with actors that implement, monitor and enforce the rules. In the broadest sense, these actors are all regulators, understood as any state authority with the task of collecting information on whether goods and services and market behavior complies with the set legal norms, with the task of forming a legal opinion on that information, and the task to intervene, if relevant, in the market or against the non-complying market actor.³⁹ Alternative names for regulators are, for instance, “inspectorate” and “agency”; ministries or the equivalent European Commission also function as regulators. In this article, the relevant regulators are the Dutch financial market authority (AFM) and Dutch public prosecutor (OM), and their counterparts in other EU Member States.

The next chronological step is the translation of these legal norms into goods and services and the market behavior of a producer or market actor. This can be described by the term “compliance”. An employee tasked with this translation, the compliance officer, is also key to anticipating the actions of the regulator and communicating with this representative of the state in which the producer is active. Translation literally means the alignment of goods and services with the set legal rules in terms of design, production, transportation, functioning, etc. Design of behavior refers to the protocoling, training and assessment of the producer’s employees, with dismissal as internal sanction⁴⁰. The compliance relevant to this article focuses on the administrative, management and supervisory bodies of financial institutions⁴¹ and their advisors⁴², who have access to inside information and/or who could actually manipulate the financial market.

Despite *ex-ante* efforts to avoid market failure by setting legal rules for goods, services and market behavior, the subsequent set-up of the regulatory arrangement and steps taken by compliance officers to translate all into company practices, market failure can still occur. Part of the regulatory arrangement is the *ex-post* answer to such market failure by imposing sanctions on the market actor. Sanctions can be restorative or punitive in nature⁴³, aimed at restoring the errors or punishing the wrongdoer. In this article, punitive sanctions are at stake, available within the legal context of administrative law and criminal law (see below).

In a market with rule of law, judicial review is the next step in this theory on regulated markets. Judicial review is the phenomenon that an independent judicial body can be called upon to adjudicate on a sanction. In administrative law, such review takes place after the regulator has issued the sanction. One could consider it a type of appeal against the regulator, with the market actor as claimant or plaintive. In criminal law, the judge is the state representative who imposes the sanction, with the public prosecutor as claimant or “plaintiff”. Appeal is normally available within an appeal mechanism. In the light of this article, this difference in roles, timing and appeal mechanism is of utmost importance and one of the topics to analyze in order to answer the main questions of this article.

The last step of the lifecycle of a regulated market is the evaluation, assessment, scientific scrutiny and commercial response by the companies to this regulatory arrangement and sanction mechanism. This article is part of that phase and, together with colleague scholars, aims to change the regulatory arrangement. Market actors develop new goods and services, as well as new ways to behave in the market. The result of this phase is potential changes to the regulatory arrangement or new types of market failure, starting a new cycle of all of the steps described above.

The lifecycle phases of this theory on regulated markets can be depicted graphically as follows:

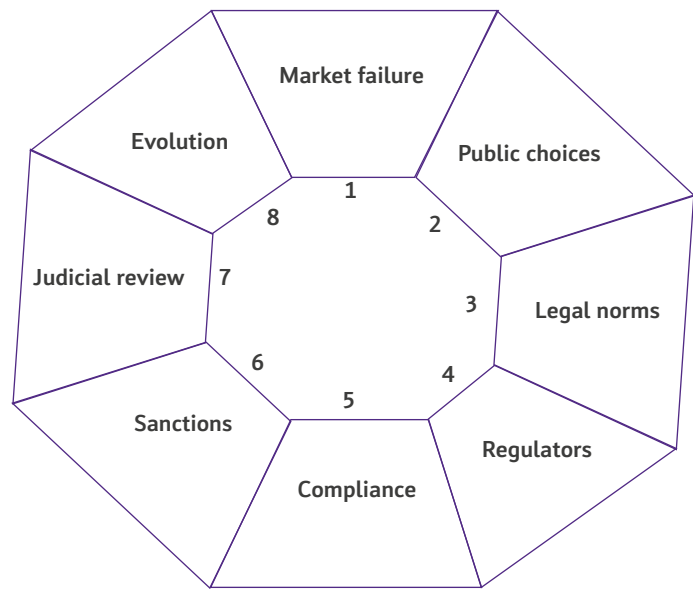


Figure 1: Lifecycle representation of a theory on regulated markets

Reference is made to these phases in the remainder of this article. The main questions of this article address phase 4, being the question as to which regulator (AFM or OM) should do what, as well as phase 6, being the question as to whether both administrative and criminal punitive sanctions are appropriate for avoiding market failure in financial markets. Phase 7 is also relevant, being the question as to how an adjudicator would rule on the claim of market actors that their compliance (phase 5) is in accordance with the law.

B. Regulatory State – (Good) Governance

One can introduce the concept of the Regulatory State in various ways. One approach would point at the use of the word “regulation” in various instruments on the international level of G20⁴⁴ or OECD⁴⁵ as a description of the main tool with which industrialized countries can control market failures and control the behavior of important economic actors like banks. In the years prior to the so-called economic crisis, world leaders aimed to create an equal level playing field in which market regulation was supposed to not hamper growth in that market.⁴⁶ After the financial crises, the tone changed to an appreciation of the regulation of markets and economic actors in order to get the crisis under control.⁴⁷

Another approach to introducing the concept of Regulatory State involves academia, in which theories are developed to describe the design of states. The regulatory arrangement introduced above is the result of the processes in a state that are the focal area of political sci-

tists and sociologists, alongside legal professionals. This article intends to contribute to four corresponding strands of literature.⁴⁸

In an effort to develop meaningful (scientific) statements on the processes of solving challenges in societies through policymaking and legislation, “governance” is introduced⁴⁹ as a useful umbrella term. Governance as a term within these social sciences is defined as all of the structures and processes needed to maintain a modicum of public order and movement towards the realization of collective goods⁵⁰. The “structures” within this definition can be seen as the constitutional framework of a state, translating the concept of *trias politica* into a system of checks and balances of state organs. The “processes” consist of the constitutional democratic processes, as well as all the alternative⁵¹ multi-layer, civil society and “nodal”⁵² structures resulting in decision-making in a state.

The “movement towards the realization of collective goods” can be achieved through the production of state goods and services, distribution of private goods and services and regulation. The production of goods and services by a state can be nicknamed⁵³ “rowing”.

Regulation within this context refers to the steering of the flow of events and behavior⁵⁴ of all stakeholders within a state. In the strictest sense of the word⁵⁵, regulation means the creation of authoritative rules accompanied by an agency or regulator for monitoring and enforcing compliance. In a less strict sense, regulation can mean the aggregate efforts of state agencies to steer the economy. In the broadest sense of the word, regulation means all mechanisms of social control. This article uses the word regulation in the strictest sense of the word. The regulation of others who produce goods and services can be nicknamed “steering”⁵⁶.

Looking at governance from a historical perspective, one can distinguish three phases in the recent past of our current “Western” capitalist economies and societies. In the first phase between 1800 and 1930, the state can be characterized as a “night watchman”, responsible for national security and limited other tasks.⁵⁷ In this “laissez-faire” capitalism, the market is both rowing and steering. After the first global financial crisis (from 1940 to 1980), the state undertook to provide goods and services and assume both rowing and steering. In the last phase, the state reassessed its role and strived through liberalization and privatization to shift the role of rowing to the market, while maintaining its steering role. This is dubbed regulatory capitalism, making the corresponding state a “regulatory state”⁵⁸.

	Laissez-Faire Capitalism (1800s-1930s)	Welfare Capitalism (1940s-1970s)	Regulatory Capitalism (1980s-)
Steering	Business	State	State
Rowing	Business	State	Business

Figure 2: Levi-Faur 2005 overview of different types of capitalism⁵⁹

Based on this overview, one can speak of the current states as regulatory states. Nation states in the EU have liberalized markets and privatized state companies. So the businesses are “rowing”. The nation states and the EU as supranational umbrella have developed many “authoritative

rules”, such as Directive 2014/57 in this article. In addition, agencies or regulators are established in connection with the rules, such as the Dutch OM and Dutch AFM in this article.

C. Typology of regulators

In regulatory science, a typology of regulators is used to identify the various forms in which a regulatory state arranges the regulatory function in terms of organs or state institutions.⁶⁰ In the following typology, the regulator is understood to be an organized entity of persons that fulfills one or more of the tasks of the regulatory function, being (1) the inquiry as to whether goods, services or market behavior comply with the set norms, (2) the development of a legal opinion on that information, and (3) any intervention.⁶¹ The setting of legal norms for goods, services or market behavior is not a core task of a regulator, although many regulators in the following typology do just that.⁶² Also, the settling of disputes in a market is not considered a core task of regulators, despite the fact that, again, some regulators do this.⁶³

A typology might examine the legal form in which this “organized entity of persons”, the regulator, is shaped, such as being part of the legal person of the state, a limited liability corporation, an association or a foundation (in Dutch: *stichting*). Such classification, however, would not reveal the highest order typology, now that, in regulatory states, the state is free to structure the regulatory function in these various forms. Even the fact as to whether the state is the owner of such an entity is not decisive for the question as to what type of regulator is at stake, now that independent companies can be a regulator (see below).

So from the perspective of the regulatory state, the criterion to create a useful typology is the level at which the state effectively effectuates control over the regulator. This is seen as a spectrum with full control on the one side and no control on the other, which can be labeled “self-regulation”. Obviously, in theory, the state has full control over everything in a society, including self-regulation. And state legislation often stands at the basis of self-regulation by, for instance, forcing market actors to participate in self-regulation. However, the typology presented in regulatory science aims to distinguish between a regulator that is fully bound by the principles of administrative (procedural) law, criminal (procedural) law and the vertical effects of human rights laws, and those regulators who are at best bound by the horizontal effects of human rights laws.

Based on this criterion, the five types of regulators are (Ia.) the public prosecutor, (Ib.) the executive branch itself (minister) or subordinate agency, (II.) the independent state-controlled authority⁶⁴, (III) the independent technical commission and (IV) industry self-regulation body. These types of regulators can be found on three different levels: the global level, the federal or supranational level, and the national or state level. An example of regulators on the international level is the Bank for International Settlements (“Basel III”).⁶⁵ An example of supranational regulators in the EU is the European Central Bank.⁶⁶ On the national Dutch level, the OM is an example of type Ia, while the Dutch AFM is an example of type II.

This typology of the OM and the AFM means that the discussion in this article on both organizations takes into account that the OM is controlled directly by the ministry (of justice) and that the AFM is not. Or, in other words, in the light of regulatory science, both organizations hold a different position in the regulatory arrangement of the regulation of the financial

market. This means that, if both organizations cooperate in the Covenant 2009, they do not have equal footing.

D. Restorative & Punitive Sanctions

Before we further elaborate on EU Directive 2014/57, a few introductory comments on sanctions are in order. In basic legal thinking, sanctions are a natural part of each legal norm. The assumption is that a sanction ensures compliance with such norm due to, among other things, deterrence.

Sanctions can be divided into restorative sanctions and punitive sanctions.⁶⁷ Restorative sanctions are imposed in order to restore a distorted situation to its original state.⁶⁸ The distortion is in this context the result of the breach of the legal norm to which the restorative sanction applies. Examples are the demolition of an illegally created building or the cleaning up of environmental pollution. Given the nature of the norm breaches of the subject matter of this article, Directive 2014/57, restorative sanctions will not be elaborated further.

Punitive sanctions, on the other hand, aim to harm the party that breaches the legal norm. The basis of this approach is criminal law and criminology and the thinking that such a sanction has various effects that taken together results in the legal norm not breached again and/or that satisfaction is given to a harmed society. These effects include that the actor is incapacitated to breach the legal norm again, that the actor is motivated to not breach the legal norm again and that other actors are motivated to not breach the legal norm.

From a legal point of view, punitive sanctions are traditionally located in the realm of criminal law. Decapacitation is achieved through incarceration. Influencing the motivation of an actor is achieved by imposing fines, among others. The key concept in this context is the centralization of the authority to punish exclusively within the state, counterbalanced by the existence of fundamental human rights to protect subjects against wrongful punishment by the state. This protection is enshrined in Art. 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and is discussed in more detail below. The state organ imposing the criminal law punitive sanctions is the judge. A specialized organ functions as plaintiff in these cases, representing the general interest of the state, being the prosecutor, the Dutch OM in this article. In the Netherlands, criminal punitive sanctions are (generally) regulated in Art. 9 of the Criminal Code and further legislation and case law.

The regulatory state has embraced another avenue in which punitive sanction are applied, being administrative law.⁶⁹ With the exception of incarceration, all types of punishment known in criminal law are now available in administrative law in most states, including fines. The state organ imposing the administrative punitive sanctions are the regulators of the category (I.), (II.) and sometimes even (III.) and (IV.). Protection against wrongful punishment is organized by way of “appeal” through ordinary judges and equivalent mechanisms.⁷⁰ In the Netherlands, administrative punitive sanctions are regulated in Art. 5:2 (1) sub c of the Administrative Law Act (AWB) and further legislation and case law.

The tension between those two systems is discussed below, following the presentation of further developments involving administrative punishments.

E. Alternative Governance Tools

The regulatory tool of a legal norm, backed by a sanction, is only one of the ways states can perform their regulatory role. Before this article discusses Directive 2014/57 in the light of the tension between criminal and administrative punitive sanctions, alternative ways of regulating markets should be presented. The reason for this is the tradition of policymakers and the like to resort to these alternatives.

The alternatives, modes or instruments of regulation can be divided in five keywords starting with the letter “c”, including regulation by means of a legal norm backed by a (punitive) sanction. The modes are command, competition, communication, consensus and code.⁷¹ Command is discussed above as the instrument of a legal norm, be it in codified form or through case law, in which a clear guideline for behavior is set, the breach of which may result in (punitive) sanction. All other instruments also involve the legislative branch, but not in the sense of sanctions, but as the principle of legitimacy, the goal being that all state actions are based on proper decision-making processes (legislative and otherwise). The first example are the rules on taxation, creating incentives for certain behavior by market actors, such as the (high) taxation of smoking products, stimulating producers to develop alternative leisure products that are less harmful to human health, or the (low) taxation of electric cars, stimulating the production and use of these cars that are considered less harmful to the environment than regular cars. The instrument of communication allows the state to inform producers and consumers about the potential hazards of goods and services. The state, in its role as educator, can perform this communication through regular media. In the Netherlands, this is done by means of the so-called “Postbus 51” adds, which now have the less catchy name “Informatie Rijksoverheid” (in English: State Information). The instrument of consensus is available for states to assume the role of facilitator of healthy markets by orchestrating talks among producers and between producers and consumers. These talks result in codes of conduct or the voluntary adoption of previously established technical norms by producers or groups of producers of goods and services. The last instrument, “code”, combats market failure by making it impossible for violations to occur, similar to speedbumps in traffic. This instrument involves the design or architecture of a certain market. In the light of Directive 2014/57, this could be an independent state agency rating financial institutions, making it impossible for market actors to harm the market through phony ratings. The state role would then entail the creation of such an agency or the equivalent architecture and subsequent.

These five instruments that a state has for regulating and, within the context of this article, combating market failure in the financial market are an abstraction⁷² to channel the discussion. Part of that discussion can be the approach that each instrument, in the opposite order, is a more intrusive version than the previous one. The ideal instrument would be a “code” that makes market failure impossible. The second best would be “communication”, inspiring market actors to behave in such a way that market failure does not occur. The “consensus” among producers would then be that certain behavior is out of bounds. Likewise, tax or other incentives can prompt proper market actor behavior. In such an incremental approach, the instrument of last resort would be “command”: the legal norm on goods and services backed by a (punitive) sanction.

a	Command	Legal Rule backed by sanction
b	Competition	Incentive through tax rules, etc.
c	Consensus	Inter-stakeholder agreement
d	Communication	Education through media
e	Code	“Speedbumps”

Figure 3: Morgan & Yeung five modes of intervention⁷³

This incremental approach could academically be categorized under behavioral psychology. It is connected to the “Pavlovian” approach to human behavior and assumes that the learning of such behavior is based on the praise or punishment connected to it. Here it is argued that this approach influences thinking in regulatory states when it comes to the regulation of markets (financial and otherwise). In the next section, this incremental approach is also found in various innovations involving the regulatory instruments or tools, most particularly in “responsive regulation”.

F. Innovative Regulatory Tools

The regulatory science context of the assessment of the criminalization in Directive 2014/57 as described above should be further discussed in the light of recent innovations in market regulation. Based on the tools discussed above, particularly the tools of administrative law, an elaborated spectrum of regulatory tools has been developed in most regulatory states. These tools are presented here as innovations, being the result of rigorous scientific research and systematic deliberations within the public bodies adopting them.

1. Responsive Regulation

An important innovation is responsive regulation.⁷⁴ This is an incremental approach to regulating markets based on that key assumption that market actors who wish to comply should be facilitated to do so, and those who do not should be punished. As a named concept, it was first developed for the Australian tax office and later published in mainstream regulatory science.⁷⁵ It was widely discussed⁷⁶ and subsequently used by many states to design regulatory arrangements⁷⁷. In a figurative sense, the concept of responsive regulation is represented by a pyramid, although the original scholar argues that it is much more than a pyramid⁷⁸. The basic pyramid represents a version of the five “c” approach above, starting with communication with market actors about the problem, communication with consumers about market actor’s inaction, introducing legal norms with sanctions for deterrence, actually impose sanctions up to the decapacitation of the market actor by revoking the business license.

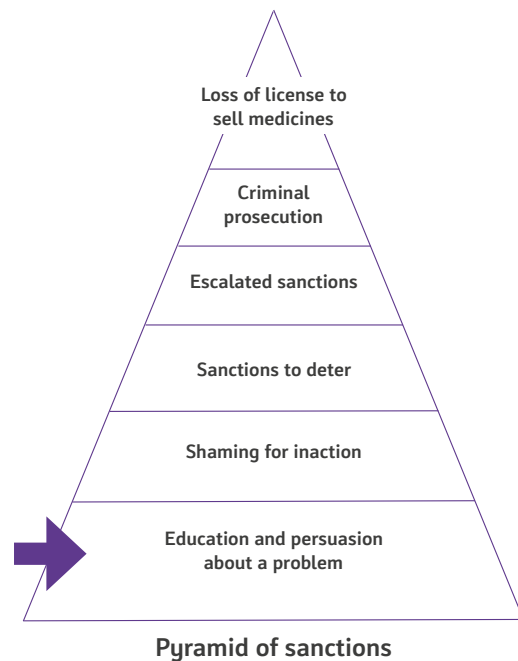


Figure 4: Braithwaite responsive regulation pyramid⁷⁹

The theories on responsive regulation are further expanded on the side of “communication” and “consensus” by emphasizing the importance of commitment and capacity on the part of the marker actor.⁸⁰ In the light of the discussion on Directive 2014/57, one can point at the positioning of that regulatory instrument at the top of the pyramid as a last-ditch effort to combat market failure. It comes as no surprise that many other efforts of the EFSB cover the other (lower) sections of the pyramid.

2. System Regulation and other Horizontal Approaches (in Dutch: *systeemtoezicht*)

Another innovation is system regulation or in Dutch, “systeemtoezicht”⁸¹; to be distinguished from the supervision of the financial sector as system. One can place this type of arrangement of market regulation in the category of “consensus” in combination with “command”. The mechanics involve a legal norm for goods, services or market behavior, the compliance of which is controlled by a state regulator.⁸² The regulator, however, is not executing its “job description” (see above) alone, but relies on the compliance control system of the regulatee. The regulator’s focus is not on actual compliance, but the system with which the regulatee controls its own compliance. The basis is the principle of trust and a focus on risks.⁸³

G. Dutch Regulatory State

The design of the regulation of the Dutch financial market has developed in keeping with the main trends in regulatory science over the last ten years and in conjunction with the development of a European regulatory state⁸⁴. The various Dutch governments have issued guiding documents describing the design and principles used. Part of this development is the intro-

duction of the “twin peaks” model of supervision of financial markets by the Dutch Central Bank and Dutch AFM in 2002.

An important document is the vision document on regulation in 2005, in Dutch: “Kaderstellende Visie op Toezicht II”⁸⁵, in which six principles are developed that until now have determined the design of regulators. According to these principles, each regulator should be (1) selective (in Dutch: “selectief”) in the cases it takes on, (2) effective (in Dutch: “slagvaardig”), as in not being a toothless tiger or as in having effective sanctions available; this second principle of an effective regulator comes with an explicit reference⁸⁶ to Braithwaith’s regulatory responsive regulation and corresponding pyramid; (3) cooperative (in Dutch: “samenwerkend”), as in dialog between the regulator and regulatee in standing committees and an ad hoc setting.

The remaining three principles have their origin in the 2001 predecessor to this guiding document and consist of (4) independent (in Dutch: “onafhankelijk”), as in not connected to market actors in the execution of its three main tasks [collection of information on compliance, assessing information and intervening], such as the government owning shares in market actors, (5) transparent (in Dutch: “transparant”), as in communicative on the applicable regulatory policies, imposed sanctions and overall governance, and (6) professional (in Dutch: “professioneel”), as in the standard that all officers of the regulator act in a professional manner fitting the tasks and operation of the regulator.

The graphic representation of these six principles guiding the Dutch regulators mentioned above is as follows:

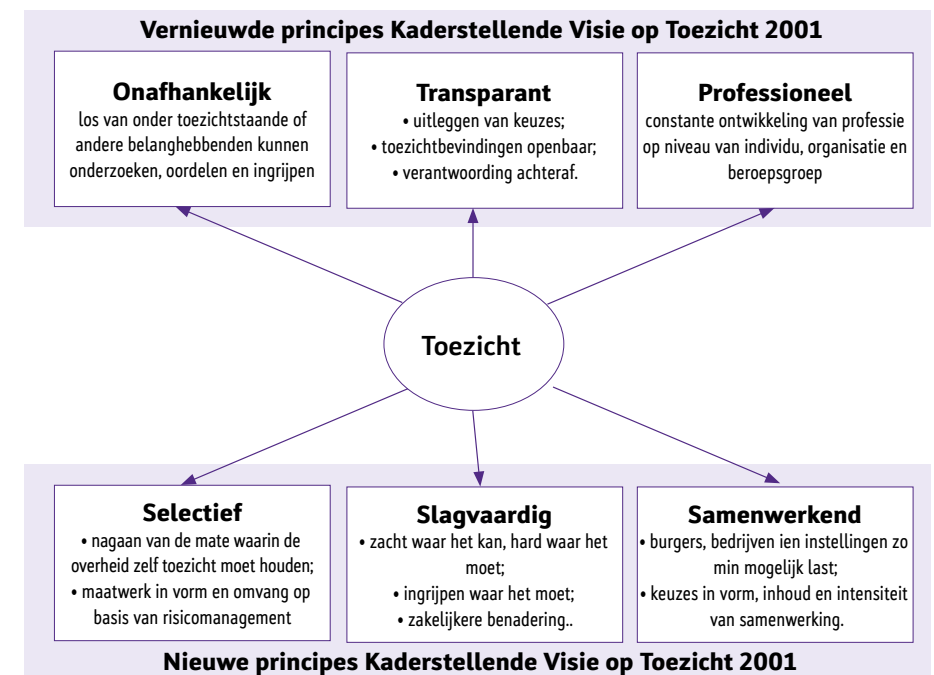


Figure 4: Six principles of Dutch regulatory design 2005 (2001)⁸⁷

The Dutch government also uses these principles to supervise the work of the regulators themselves, as is made clear in the 2011 vision document (in Dutch: “Kabinetsvisie op Toezicht op afstand”)⁸⁸ that articulates the current vision on the design of the regulatory function of the financial market in particular.

As the 2013 report⁸⁹ of the Dutch Scientific Council for Government Policy (in Dutch: “Wetenschappelijke Raad voor het Regeringsbeleid”, hereinafter referred to as “WRR”) points out, the current atmosphere in regulation is stricter than prior to the financial crisis, and other incidents prompting Dutch society and politicians call for a more sanctioning government. The existence of criminal sanctions is mentioned as a side note.

In reflecting on these developments, the WRR asks itself whether the focus on regulation as a positivistic execution of legal rules (in Dutch: “handhaving”) is not too one-dimensional; whether systemic problems not yet covered by legal norms will be missed.⁹⁰ This is in line with the concerns of Van Asselt, who, in her 2009 address, questioned the manner in which risks can be curbed by the current approach of a regulatory state.⁹¹ It is not argued that compliance with existing rules is wrong or that regulators should not be cost and effect-efficient. They should, argues the WRR.⁹² But as a paradigm, the WRR calls for greater focus on a regulatory design based on general governance principles.⁹³ It is argued that such an approach would mean a more horizontal positioning of the regulator, since a command-based or vertical positioning cannot produce the desired results.



Figure 6: Broadened perspective on regulation⁹⁴

H. Interim conclusions

In the section above, the governance aspects of combating market failure including financial crime are discussed. Such combating is placed in the light of the interaction between a state and corporate citizens, between the public spheres of international, regional (EU) and national governments, and the private spheres of businesses and consumers. A theory is presented with which this can be interpreted in terms of a lifecycle development and stages in which choices must be made. Directive 2014/57 is presented as one such choice for channeling human and corporate behavior into the direction desired by the public sphere. Furthermore, theories are presented on how choices and tools affect an integrative and effective regulatory arrangement. One of these theories, responsive regulation, is presented as the dominant thinking in this regard. The main regulator in responsive regulation is a state organ belonging to the executive branch of a state, using administrative legal sanctions as tools. This main regulator is not the public prosecutor using criminal legal sanctions. The tension between those administrative and criminal sanctions is discussed in the next section.

III. Tension between criminal sanctions and administrative sanctions

This section further discusses the tension between criminal sanctions and administrative sanctions. This tension lies in the different attitudes regulatees have vis-a-vis the regulator, depending on the criminal or administrative approach taken by the regulator. As a caricature, within an administrative approach, the regulatee is willing to cooperate with the regulator's more or less innovative regulatory tools described above, knowing that the risk is only a pecuniary punishment. This attitude is also triggered by legal obligations to cooperate with the regulator to disclose all relevant facts, including internal mishaps and employee misconduct. Within a criminal approach, as a caricature, regulatees do not cooperate, anxious for the criminal sanctions, which are perceived as the most intrusive. This evasive attitude of regulatees is also triggered by the fundamental rights that regulatees have in criminal law: to be informed about the prosecution, to remain silent, to be considered innocent until proven guilty, double jeopardy, etc. As such, this tension is subject to a scientific dialogue that does not enjoy consensus.⁹⁵ This article tries to contribute to that dialogue.

Further elaborating on this caricature, this section first deals with the tension between criminal and administrative sanctions from the judge's perspective, now that regulatory arrangements will ultimately be decided by judges. And this judge's perspective determines the perspective of both the jurists for the regulator preparing for task (A)⁹⁶ and the jurists for the regulatee involved in the compliance arrangements⁹⁷, being the leading judge's perspective in the legal profession⁹⁸. Subsequently, the fundamental rights are discussed and compared to the rights of the regulatee in administrative legal approaches.

From a European perspective, it is important to note that the ECHR has ruled on the interaction between administrative sanctions and criminal sanctions in the Grande Stevens vs. Italy Case.⁹⁹ However, the court did not develop a norm that is helpful in respect to the topic of this article.

A. Judge's perspective

The tension between administrative and criminal regulatory tools is thus of a technical and mental nature. It has to do with the perception of the severity of the context, as the consequence, such as the severity of the penalty, can be the same in both administrative sanctions and criminal sanctions.¹⁰⁰ Also, in the system in Article 6 of the ECHR, both are regarded as “criminal sanctions”, now that both administrative and criminal sanctions represent the punishing power of a state to which corporate and other citizens need to be protected.¹⁰¹

In the Dutch regulatory landscape, the judge may perform the role of reviewing an administrative sanction or imposing a criminal sanction. This sub-section discusses these two roles and their effects on the regulatory landscape.

1. Adjudication prior or after the sanction (“*ex-ante* /*ex-post*”)

Administrative sanctions are imposed by the regulator, such as the AFM in the Netherlands and in many other regulatory states. Consequently, the judge can only play a role if and when the regulatee decides to seek judicial review. Only in such administrative procedures can a judge test the sanction in the light of the applicable legal framework¹⁰² and fundamental rights¹⁰³ of the regulatee. This is called *ex-post* judicial review.

In the Netherlands, the court has special administrative chambers specialized in administrative law and administrative procedural law, primarily codified in the Dutch Code on Administrative Law (in Dutch: *Algemene Wet Bestuursrecht*, or AWB). The procedure starts with a complaint by the regulatee. The regulator is the defendant. The court can then confirm or annul the sanction. Appeal is possible to the Administrative Law Supreme Court (Administrative Jurisdiction Division¹⁰⁴ of the Council of State) (in Dutch: *Afdeling bestuursrechtspraak Raad van State*).

Criminal sanctions, on the other hand, are imposed by a criminal court at the request of a public prosecutor, the OM, in a procedure in which the regulatee is the defendant. This court¹⁰⁵ adjudicates the matter in full, reviewing evidence, hearing the defendant and witnesses, etc. It applies criminal procedural law and the applicable substantive legal norms, as the ones proposed by Directive 2014/57 (four years imprisonment for insider dealing and market abuse). These substantive rules are either codified in the general Criminal Code, the Economic Offences Act or other specialized laws. The stage in which the judge looks at the matter is labeled *ex-ante*, since the judge produces the sanction, not a regulator.

It should be noted that only a (criminal) court can impose the sanction of imprisonment. Implementation of Directive 2014/57 cannot therefore circumvent the criminal court or an “*ex-ante*” procedure to impose that sanction on a regulatee.

The difference between the administrative and criminal approach, or the *ex-post* or *ex-ante* approach, is that they result in completely different outcomes. An initial observation should be the fact that, in general, regulatees are not interested in (long) litigation. The damage resulting from non-compliance can better be controlled by moving on, with the acceptance of the administrative sanction. The costs are ultimately paid by the customers, who will pay higher prices for goods and services.

Subsequently, also in a criminal procedure, a regulatee has the choice to cooperate or to make full use of the fundamental rights. Cooperation is especially triggered in a system in which a deal¹⁰⁶ can be made with the public prosecutor. This would trigger the same observation on the fate of future customers, who will pay higher prices for goods and services to “compensate” the loss caused by the criminal sanction. Making use of the fundamental rights means not cooperating with the prosecutor and a full-blown defense. From a judge's perspective, such use would mean the obligation to test the facts of the case against the elements of those fundamental rights, discussed in more detail below.

2. Non-continuum

In the Netherlands and other regulatory states with a different administrative and criminal law system, the implementation of Directive 2014/57 means the creation of a sanction mechanism that no longer fits in one sanction pyramid, to use that concept of the theory of responsive regulation. This statement is true unless administrative sanctions will also be arranged by the public prosecutor and imposed by a (criminal) court. So, assuming that institutions like the AFM will continue to exist, the intensity of the possible sanctions is no longer a continuum.

Even worse, the state has to decide beforehand which avenue will be used to intervene in the market and to address potential non-compliance by the regulatee. This is the topic of the Covenant between AFM and OM discussed below. So the sanctions are not only no longer in a continuum, but the choice of administrative route excludes the possibility of criminal sanctions, and the choice of criminal route excludes all mild sanctions such as education and warning. This is at least the theory, and potentially future case law.

In practice, however, administrative regulators hand over a serious case to prosecutor regulators when a serious breach is discovered. This is also the underlying assumption of Directive 2014/57. In doing so, a continuum is created. This article poses the question as to whether that practice is in accordance with fundamental rights. The tensions between the two avenues is discussed further in the following sub-section.

B. Fundamental rights

The fundamental rights protecting the regulatee against wrongful state actions are the following. The consequence of any breach of these fundamental rights, at least when concluded by a judge, is the annulment of a sanction or declaration that the procedure is not valid, etc.

A discussion of fundamental rights of the regulatee sheds light on the practice described above of administrative regulators handing over “serious cases of non-compliance” to prosecutors, thereby establishing a continuum in the sanction pyramid. It also sheds light on the question as to what regulators have to do to avoid potential annulment in an “*ex-post*” administrative procedure. It is repeated that the fundamental rights are applicable in both administrative and criminal procedures, now that administrative sanctions are also considered “criminal charge” within the context of Article 6 of the ECHR.¹⁰⁷

1. Self-incrimination (*nemo tenetur se ipsum accusare*)

The right not to be forced to incriminate oneself is part of the fundamental rights landscape of the Member States of the European Union, being part of the standard interpretation of Article

6 of the ECHR and the respective national constitutions and/or criminal codes (and case law). Within the context of this article, potential self-incrimination starts during the first contact between a regulator (AFM or OM) and the regulatee, the financial institution or employee of the institution.

It is argued that, in the current atmosphere of responsive regulation and innovations in the regulatory arrangements, like self-regulation, the option not to answer to inquiries made by a regulator like AFM is not available, if not an outright example of non-compliance with substantive rules regulating the (financial) market.¹⁰⁸ This results in the risk of self-incrimination despite legislative assurances to the contrary.¹⁰⁹

2. Double jeopardy (*ne bis in idem*)

The second important principle of criminal law is double jeopardy, or *ne bis in idem* in legal Latin. According to this concept, a person may not be retried by a state for the same conduct. In Europe, this principle is regulated by Art. 4 of Protocol 7 to the ECHR and national legislation. The EU included the principle in Article 50 of the Charter as the more important source of law since many Member States had not implemented Protocol 7. Based on the Engel-principle¹¹⁰ in the case *Aklagaren vs. Hans Akerberg Fransson*¹¹¹, it was decided that (most) administrative sanctions count as criminal charge and that an administrative sanction blocks the issuing of a criminal sanction.¹¹²

Again, based on the two avenues, the regulatory state has to choose whether administrative or criminal procedures will be used. If not, the risk is that the second procedure will be not successful because of the protection of the regulatee against double jeopardy.

3. Presumption of innocence

As the last fundamental right relevant for this article, the presumption of innocence is also enshrined in Article 6 (2) of the ECHR and other sources, such as Article 48 of the EU Charter. It has an effect on the manner in which the sanction is imposed and the level of proof that is required.¹¹³ The proof that is provided for should be convincing in terms of the standards used by a criminal court, leading to an opinion beyond reasonable doubt about the facts and the appropriateness of the sanction.¹¹⁴

Also with regard to this point, the judge's perspective has the effect that a regulator should take notice of this fundamental right of a regulatee too and prepare each case in such a way that a sanction survives the ex-post judicial review. Given the more strict nature of criminal procedural law, the burden of proof to succeed with criminal sanctions is higher.¹¹⁵

C. Principles of administrative law

The state, i.e. regulators, are also accountable for their actions when applying administrative law and imposing administrative punitive sanctions.¹¹⁶ In administrative law, this is not called fundamental rights but principles of administrative law.¹¹⁷ These principles serve as measuring stick for administrative and other judges who assess the intervention of regulators into markets and behavior of regulatees. These principles are as follows.

1. Fundamental principles

Two fundamental principles form the basis of administrative law, legitimacy and non-discrimination.

a. Legitimacy

The principle of legitimacy is relatively unproblematic within the context of this article. It entails the goal (1) to have no government actions be against a higher law or right, (2) to have all government actions be based on a legal basis and (3) to have all government actions be executed by an organ that is properly authorized to do so.

b. Non-discrimination

The principle of non-discrimination, too, is fairly unproblematic within the context of this article. It prohibits any regulator from making a distinction in the actions they undertake on the basis of the characteristics of the regulatee.

2. Procedural principles

So-called procedural principles also form a framework in the light of which an administrative judge can determine whether the regulator's actions and sanctions are in keeping with the law. The following principles are described from the perspective of the Netherlands.

a. Consultation (ex-ante)

An administrative sanction is considered an administrative decision (in Dutch: "beschikking"). The preparation of such a decision should include the possibility to submit observations (in Dutch: "zienswijze") on the part of the regulatee. As a general rule, this is codified in Article 5:50 of the AWB. It is the administrative law equivalent of the equality of arms.

In practice, this right on the part of the regulatee is used to file fully fledged statements of defense, making this administrative procedure look like a regular court case. This in turn means that a court looking into the matter ex-post is in effect carrying out an appeal or second instance procedure. It is potentially an additional reason why regulatees do not address the courts after receiving a punitive sanction.

b. Transparency (grounds of decisions)

Above, the fundamental right of the presumption of innocence is placed in the light of a high burden of proof for the justification of punitive criminal sanctions. The administrative law equivalent is the principle of transparency and the concrete obligation to articulate the grounds of the decision. This obligation on the part of the regulator is codified in Article 3:46 of the AWB.

c. No breach of legitimate expectations

Communications from the regulator to regulatees can create justified expectations of the regulator's actions. The regulator is not free to breach those expectations. Conversely, regulators reserve their rights in their communication with regulatees. In the extreme, this can lead to a cat and mouse play. In the theory of responsive regulation, this principle is a cornerstone.

d. Abuse of power

A regulator is strictly confined by the tasks assigned to it by the relevant legislative framework. No regulator is allowed to use any power beyond its own legal basis. This is codified in Article 3:3 of the AWB.

e. Proportionality

A closing principle of administrative law is proportionality. Within the context of punitive sanctions, this means that the sanction should be in proportion to the wrongful acts, the characteristics of the regulatee and the impact of the damage on the protected interests. This principle is codified in general terms in Article 3:4 (2) of the AWB and ensures compliance with Article 6 of the ECHR.

D. Fundamental Observations pertaining to the use of criminal law

In the literature¹¹⁸, further deliberations are made on the nature of criminal law and its capacity to make a fruitful contribution to the fight against market failure. The general conclusion is that criminal law by nature is unfit to play a role in this respect. This article does not fully adopt the findings of this literature, but presents a number of highlights to substantiate its conclusion that criminal sanctions are not the best option for combating market failure due to insider dealing and market abuse.

This literature observes a steep increase in the use of criminal law to sanction all kinds of behavior, up to and including mistakes made in the labeling of canned food¹¹⁹ and not over-seeing an employee who ruptures a water pipe during construction work¹²⁰. The rejection of the overcriminalization of regulatory offenses in particular is based on philosophical typologies of criminal law as such, on the fact that those regulatory offenses are morally neutral, or on the fact that criminal law is not best equipped to prevent those offenses from happening.

This article is hesitant in following the typology of criminal law as being intrinsically akin to regulatory affairs.¹²¹ It is posed that criminal law as such has no intrinsic character, being part of the man-made artificial mechanism to channel human behavior in the direction society wants. However, if states wish to make an impression on citizens and want citizens to fear criminal law, overcriminalization could intensify this feeling.

This article is also hesitant to regard criminal sanctions in the field of regulated markets as morally neutral.¹²² As proposed in the literature, “real criminal law” is connected to behavior connected to religious doctrine or community-based moral norms. Financial crimes like insider dealing and market abuse do trigger severe sentiments in society and/or form part of strongly held doctrines on equality and the role of money. To those citizens, criminal law is a proper answer to regulatory offenses. Again, overcriminalization can lead to intensification. All in all, the literature of this sub-section is not convincing enough to argue that criminal sanctions should not play a role in the legal framework of regulated markets. It sheds doubts, however, on whether the choice for criminal sanctions is correctly made in Directive 2014/57.

E. Interim conclusion

The section above discusses the tension between criminal and administrative sanctions. Administrative sanctions are in principle best suited to fit in the regulatory arrangements

designed in line with theories like responsive regulation. They are the most scalable and lack the societal stigma of criminal sanctions. They are based on transparency and cooperation on the part of the regulatee. The scalability of the sanctions already requires a balancing act on the part of the regulator to execute all of its tasks, including sanctioning in a professional manner.¹²³

Criminal sanctions are the most severe sanctions a state can impose on citizens (corporate and otherwise). They therefore come with a stigma in society. As a reaction, regulatees are very cautious with such sanctions. That, in essence, is a good thing because the legal norm behind the sanction is supposed to be upheld. Financial crimes like insider dealing and market manipulation should not occur. And, if due to severe sanctions, financial institutions or their employees do not commit the crimes, both economy and society are better off.

But criminal sanctions come with the highest degree of legal protection of the suspect and corresponding legal assistance. Regulatees do not wish to be transparent and cooperative with regulators if and when criminal sanctions are an option. And the fundamental (human) rights of suspects forbid states from changing that. So any responsive regulation arrangement in parallel will no longer be effective.

The choice between criminal or administrative sanctions therefore appears to be a choice between an incidental successful intervention by a public prosecutor and the hope that all other potential suspects refrain from unlawful acts on the one hand, and a continuous, transparent and cooperative interaction between regulators and regulatees pursuing a shared interest of a non-failing (financial) market on the other.

The next section reviews whether Directive 2014/57 and the implementation in the Netherlands resolves this tension and, if not, what can be done to do so.

IV. Criminal sanctions in Directive 2014/57 and in the current cooperation between the dutch “OM” and the dutch “AFM”

This section discusses the current status quo of criminal sanctions as they appear in the criminal sanctions directive and in the current cooperation between the Dutch OM and AFM. An analysis is provided of the status of the decision-making process with regard to the directive, the status of the Cooperation Covenant between the Dutch OM and AFM, the current reflections on the word “criminal sanctions” in both the directive and Cooperation Covenant, as well as a summary comparative analysis of the same in three other EU Member States.

A. Status of EU Directive 2014/57

On April 16, 2014 the Council approved the proposal and finalized the decision-making process that started in 2011 with the 2011/297 Commission draft.¹²⁴ The directive was published in the Official Journal on June 12, 2014.¹²⁵

Directive 2014/57 is a new step in a long history of involvement of the EU in insider dealing and market abuse. Part of that history is the Insider Dealing Directive (85/592/EEC), the mar-

ket abuse directive (MAD) 2003/6/EC, the review of the effectiveness of both in the Larosere Report¹²⁶, the Regulation, as well as the new Regulation that is promulgated as European law on the same date as Directive 2014/57 as Regulation 596/2014.¹²⁷

The content of Directive 2014/57 is described above. It should also be noted that the Directive itself does not solve the tension between administrative sanctions and criminal sanctions. Member States have until mid-2016 to implement Directive 2014/57 and are free to decide on their own solution to the tension between administrative and criminal sanctions.

B. Status of the 2009 Covenant between OM and AFM

At the moment of writing this article, the cooperation agreement between the Dutch OM and AFM, the Covenant 2009¹²⁸, is still in force.

The Covenant is part of the regulatory arrangements in the Netherlands pertaining to the financial market in which other instruments form the basis, such as the Act on Financial Supervision (in Dutch: “Wet op het financieel toezicht”)¹²⁹, the Administrative Law Code (in Dutch: “Algemene wet bestuursrecht”)¹³⁰ and the Economic Offences Act (in Dutch: “Wet op de economische delicten”)¹³¹.

Within this regulatory arrangement, the Dutch AFM has the task of supervising actors in the financial market pertaining to, among others, insider dealing and market abuse. The legal basis is Article 5:56 of the WFT and Article 5:58 of the WFT, respectively. The AFM is considered part of the executive branch or part of the administration. It is a regulator of the category of independent regulator, as discussed above. The AFM has the full range of administrative sanctions, including punitive sanctions.

The Dutch OM has the task of prosecuting actors who commit insider dealing and market abuse. The legal basis is Article 5:56 of the WFT and Article 5:58 of the WFT, respectively. The OM is considered part of the judiciary. In regulatory science, such positioning is normally not seen as leading to the conclusion that the OM can be regarded as a regulator. But as stated above, for the purpose of this article, the OM is classified as a regulator. Not the least because, as part of their instruments, the OM can make deals with market actors, thus sanctioning market actors prior to the involvement of a judge, just like administrative regulators such as the AFM do. The OM has the full range of criminal sanctions, including imprisonment.

The Covenant addresses the fact that, according to general principles of law and Dutch law in particular, a market actor cannot be regulated or prosecuted by both regulators. The state has to choose which regulator is in charge. The Covenant ensures such a choice by instructing both the AFM and OM to inform each other of any intended investigation and agree on who will take the initiative.

Pertaining to the status of the Covenant, not much information is available. No data are available on the amount of cases discussed between the AFM and OM. Also, no data or literature is available on the question as to how the AFM and OM resolve the tension between administrative sanctions and criminal sanctions.

C. Criminal sanctions as a topic of the decision-making process

In the decision-making process of the legislative instruments, Directive 2014/57, criminal sanctions are discussed from two perspectives. The first perspective reviews criminal sanctions as a new tool in the hands of the European Union. The other perspective reviews the use of criminal sanctions to combat failures in the financial markets. Both perspectives are discussed below.

1. The authority of the EU to deal with criminal law – Art. 83 (2) of the TFEU

For student readers and readers from outside the EU, it should be noted that, until the Lisbon Treaty¹³², reforming the “constitutional” structure of the European Union, harmonizing criminal law of the Member States was only possible in exceptional cases.¹³³ In the new Article 83 (2) of the TFEU, the EU is given the authority to adopt minimum criminal sanctions when the approximation of the criminal laws of the Member States proves essential to ensuring the effective implementation of EU policies. The current Directive 2014/57 is the first use of that new authority and thereby a test as to whether the “essentiality standard” is correctly met.¹³⁴

Harmonization of the criminal laws of the Member States serves at least two goals. Criminal acts in Europe, especially cross-border crimes, can clearly harm the objectives of the EU, in particular frustrating the creation of a functioning internal market.¹³⁵ To fight those crimes, the Maastricht Treaty¹³⁶ introduced centralized organs like Europol and Eurojust, and principles and methods like mutual judicial recognition and harmonization of laws. With Art. 83 (2) of the TFEU, this approach is now positioned within the regular ordinary legislative procedure, building on the post-Maastricht developments¹³⁷ in this field. Harmonization initially aims to foster the mutual judicial recognition by stimulating the trust of the judicial authorities in each other’s legal systems.¹³⁸ If those legal systems have the same (minimum) criminal sanctions, it is easier to accept adjudicative rulings from each other. The other goal is to avoid “safe havens” in which criminals can hide, avoiding criminal sanctions they would be confronted with in another Member State.¹³⁹

Also within the context of this article, the key assessment of this legislative authority in the field of criminal law deals with the definition of the “effectiveness” of the implementation of EU policies, as well as the “essentiality” to support that effectiveness by means of criminal sanctions. When can it be concluded that the EU policy on combating insider dealing and market abuse is “effective”? And how can it be observed whether the harmonization of the criminal sanctions as proposed in Directive 2014/57 “essentially” ensures this effectiveness. Or, in other words, how can it be proven that harmonization ensures effective implementation of the anti-insider dealing and market abuse policy? No conclusive answer has been given by legislators, adjudicators or (legal) scholars yet.

The Commission itself tried to answer that question in 2011. In its Communication¹⁴⁰, it observes that criminal sanctions are intrusive and that the use of criminal law should be a measure of last resort. Pertaining to the legislative procedure to include criminal sanctions as a tool to ensure effective implementation of EU policies, the Commission has formulated the ambition¹⁴¹ to first analyze whether other measures, like administrative or civil law measures, cannot sufficiently ensure policy implementation. Such an analysis should be done in Impact Assessments. According to this ambition of the Commission, the criteria in such Impact As-

assessment are the severity and nature of the crime, the importance of emphasizing strong disapproval in order to ensure deterrence, the extent to which and the reasons why existing sanctions do not achieve the desired enforcement level, as well as the need to be able to rely on clear factual evidence in this respect. In other words, the Essentiality Standard is a variation on the more broad principle of “subsidiarity”¹⁴², as was also articulated in the Pre-Lisbon situation by the German Constitutional Court: “[it must be] demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by a threat of sanction”.¹⁴³ This view is also shared by Member State Parliaments, like in Germany, in its statement: “with regard to the principle of subsidiarity (Article 5(3) of the Treaty on the European Union), it should be noted that criminal law is closely linked with the sovereignty of the Member States. As a result, particularly strict requirements apply to the necessity of lawmaking at the EU level. This automatically demands a higher level of substantiation when explaining this necessity.”¹⁴⁴

Criminal sanctions are therefore not just another instrument in the toolbox of the EU legislator.¹⁴⁵ The following section focuses on the question as to whether this high standard of justification is met in the creation of Directive 2014/57, including the Impact Assessment of 2011¹⁴⁶, the deliberations in the European Parliament and Council.

2. Discussion within the legislative organs

After the outbreak of the financial crisis in 2008, stakeholders initially regarded criminal sanctions as inappropriate tools, given the slowness of criminal procedures¹⁴⁷. It was the Commission that cautiously proposed harmonizing criminal sanctions¹⁴⁸ after receiving the alarming report¹⁴⁹ by De Larosière on the divergence of the Member States’ landscape on regulating insider dealing and market abuse in the financial sector.

On October 20, 2011, the Commission submitted its Proposal for a Directive on criminal sanctions for insider trading and market manipulation. Article 6 was presented as follows:

Member States shall take the necessary measures to ensure that criminal offences referred to in Articles 3 to 5 are punishable by criminal sanctions which are effective, proportionate and dissuasive.

Accordingly, the original proposal was constituted by a single paragraph and referred to Articles 3, 4 and 5 for the purpose of determining criminal offenses. On July 25, 2012, the Commission submitted a proposal to include benchmark-related offenses within the scope of Articles 4 and 5, expanding the list of criminal offenses to the criminal sanctions which would apply under Article 6.

On October 19, 2012, the European Parliament submitted its first proposal of amendment to Article 6, referred to as “Amendments Proposal by the European Parliament to the Commission Proposal”. This constitutes the second proposal of the amendment concerning the Directive as a whole. The European Parliament proposed two amendments, both providing for a completely new paragraph to be added.

Under Amendment 14, the European Parliament suggested adding the following paragraph:

1a. Member States shall take the necessary measures to ensure that the criminal offences referred to in point (a) of Article 3 and points (a), (b) and (c) of Article 4 are punishable by a maximum term of imprisonment of at least five years.

Under Amendment 15, the European Parliament suggested adding the following paragraph:

1b. Member States shall take the necessary measures to ensure that the criminal offences referred to in points (b) and (ba) of Article 3 and in point (d) of Article 4 are punishable by a maximum term of imprisonment of at least two years.

The European Parliament provided justification for its decision to add the two paragraphs. The justification provided for each of the paragraphs is the same. The text is:

If the need for this legal instrument lies on the fact that Member States sanctioning regimes are in general weak and heterogeneous, sanctions should be to a certain extent harmonised.

Thus, two paragraphs are created to address different minimum terms of imprisonment in relation to the criminal offense committed. The justification provided by the European Parliament can be considered vague: “heterogeneous” and “weak” are used in general terms. The decision to provide harmonization to a certain degree through the imposition of standards on imprisonment terms is not substantiated further.

On December 19, 2013, the Council adopted a Final Compromise Text, consistent with the outcomes of the negotiations with the European Parliament. The contents of Article 6 under the compromise version are the following:

- 1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 5 are punishable by effective, proportionate and dissuasive criminal penalties.*
- 2. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by a maximum term of imprisonment of at least four years.*
- 3. Member States shall take the necessary measures to ensure that the offences referred to in Article 3a are punishable by a maximum term of imprisonment of at least two years.*

The text provides an integration of the terms suggested by the European Parliament. Nevertheless, a major amendment occurred: under Article 6(2), imprisonment has been established for at least four years rather than five, as suggested in Amendment 14 of the Amendment Proposal by the Parliament of October 19, 2012.

The last version is dated February 4, 2014. The European Parliament adopted a Legislative Resolution¹⁵⁰ in which the text of Article 6 is adopted exactly in the same terms as decided under the Final Compromise Text of December 19, 2013. Accordingly, there is no need to provide comments on this matter.

In the Final Compromise Text of December 19, 2013, an addition concerning the Recital (15a) is also included:

(15a) The obligations under Articles 6 and 8 do not exempt Member States from the obligation to provide in national law for administrative sanctions and measures for the breaches set out in Regulation [MAR] unless Member States have decided, in accordance with the provisions of Regulation [MAR], to lay down only criminal sanctions for such breaches in their national law.

On February 5, 2014, the Legislative Resolution adopted by the European Parliament provided for the adoption of the Recital added in the Final Compromise Text, only moved to paragraph (15b). The addition of the paragraph in the Recital is significant since it is consistent with one of the main scopes of the Directive: to oblige Member States to adopt enforcement measures in accordance with the text of the Market Abuse Regulation adopted in 2003. The Recital further confirms the main direction of current EU policies: extending the control of financial market abuse through the imposition of criminal sanctions. The European Parliament is the institution providing stronger support to this view. Nevertheless, the collective adoption of Recital (15a) under the Final Compromise Text confirms the consent of the other institutions to welcome this policy as a guideline for future measures on the subject.

One conclusion is justified: in the preparatory documents, no elaborate justification is given for the inclusion of criminal sanctions in Directive 2014/57. This seems to be inconsistent with the standards of Article 83 (2) of the TFEU in the light of the Essentiality Standard.

3. Criminal sanctions in the final version

In the final version of Directive 2014/57, three types of behavior are classified as criminal offenses: insider dealing, unlawful disclosure and market manipulation. An important element of each offense is the requirement of it being a serious case and the offenses being committed intentionally. Moreover, the directive orders Member States to make the offenses punishable by a maximum term of imprisonment of at least four years (insider dealing and market manipulation) or two years (unlawful disclosure).

The prison sanctions for natural persons are matched by additional sanctions for legal persons who are liable because they act as natural person in the boards of other legal persons or because of a lack of supervision on natural persons, enabling the wrongful acts of this natural person. Those sanctions include license revocation or the closure of establishments, similar to the administrative sanctions discussed in this article. This aspect of the directive will not be discussed further.

The criminal sanctions in the final version are the same as the text of the Final Compromise of December 19, 2013¹⁵¹, a compromise between the European Parliament and Council that goes back to Amendment 14 of the European Parliament in 2011¹⁵². In that compromise, the maximum sentence is set at four years; one year less than prescribed in the Amendment of the European Parliament.

4. Scholarly response

As indicated above, scholars¹⁵³ have criticized the lack of justification for introducing criminal

sanctions and have concluded that the Essentiality Standard is not met. If this criticism is valid, adjudicators dealing with the cases discussed in this article could consider the national norms based on Directive 2014/57 to not be binding, depending on the national legal system. Alternatively, legal action could be initiated to have the Directive be annulled by the European Court of Justice. This article does not elaborate on that option further.

Another response, although to the predecessor of Directive 2014/57, the monograph of Seredynska¹⁵⁴ argues that criminal sanctions are not the appropriate regulatory tool. This article follows her reasoning in that respect.

Most other responses observe the existence of the Directive 2015/57 without making a critical analysis. This is not entirely surprising, since the recent date of the final version of the Directive 2014/57 and the due date for implementation are, at the moment of writing of this article, “only” 18 months away. The current article aims to add to the debate.

D. Interim conclusion

An interim conclusion in this article is that the impact of adopting criminal sanctions to combat market failure in the financial market is not rigorous enough viewed in the light of the EU’s own principles and regulatory science in general. The European legislators have not paid too much attention to the tension between criminal law and administrative law as described above. This potentially means that the aim of harmonizing the legislative basis and regulatory practices in the Member States will fail, now that each Member State will decide unilaterally which regulatory arrangement will be adopted and whether a criminal or administrative approach will be taken.

In particular, this potentially harms the overall aim of Directive 2014/57, being the combating of market failure in the financial market as a response to certain aspects of the financial crisis currently harming the economies of the EU and well-being of its citizens.

With regard to the Dutch Covenant 2009 between OM and AFM, the interim conclusion is that no guidance is given in either the considerations or other sources, on how to implement Directive 2014/57 in the Netherlands and how to interpret it. In the next and final section of this article, an attempt is made to fill that lacuna.

V. Proposal for interpretation tools for the “OM” and “AFM” use of criminal sanctions in the new regime of Directive 2014/57

In this section, various traits of the sections above come together and result in conclusions pertaining to the question as to how EU Directive 2014/57 is to be interpreted, how it should be implemented, and how the criminal and administrative legal regime should cooperate in achieving the objective of this European legislation. Implementation in the Netherlands is discussed in particular, followed by the cooperation between the Dutch public prosecution, the OM and Dutch financial market regulator, the AFM.

A. Consequences of the regulatory science on EU Directive 2014/57

The first trait to be discussed in connection with EU Directive 2014/57 is the regulatory science discussed above. It is proposed that the introduction of criminal sanctions in EU Directive 2014/57 should not disregard the innovations and advancements in regulatory science. In particular, the objective of the criminal sanctions should be regarded as identical to the objectives central to regulatory science. Or, in other words, where the EU Directive 2014/57 aims to combat market failure, it shares that objective with regulatory science, which aims to study ways to combat market failure.

One of the most successful results of regulatory science is “responsive regulation” (see above). In this theory, emphasis is placed on a continuum within the interaction between state and regulatee.

1. Regulation of the Dutch financial market

In a previous section of this article, a description is provided of the general regulatory arrangements in the Netherlands. With regard to the Dutch financial market, within the twin peak model, the Dutch AFM plays the leading role in matters of products, services and market behavior.¹⁵⁵ The Dutch central bank oversees the prudential aspects of the financial market, currently within the European System of Financial Supervision (ESFS). In addition, as indicated above, the Covenant between the AFM and OM regulates the cooperation between the different types of regulators with regard to the topic of this article.¹⁵⁶

An important aspect of the regulation of the Dutch financial market is the so-called principle-based technique of legislation¹⁵⁷ in, among others, the primary act WFT. This is one of the legislative tools that allow regulators to adopt versions of responsive regulation. The objective of those principles, such as “treat your customer in an appropriate manner”¹⁵⁸, is to allow the regulator to fill in this open norm in keeping with the needs of market development. Obviously, this approach constitutes a stretch of the legal doctrine of legal certainty and, not surprisingly, the Dutch AFM compensates for the uncertainty with numerous guidelines and policy documents.¹⁵⁹ All in all, this results in a mixed picture of allegedly flexible mechanisms and, in reality, a status quo that can be described as a situation in which the Dutch AFM is in full control of the norms. The OM is not particularly involved in the regulation of regulatees that are covered by the regulation of the AFM, at least the limited data does not indicate the opposite. So it can be concluded that the existing criminal sanctions are not used against those regulatees that are the focus of this article.

2. No mention of criminal sanctions

Despite reference to the use of more sanctions by the WRR 2013 report, in ten years of developing a comprehensive design of the regulatory function in the Netherlands, no mention is made of the Dutch OM. Even in dealing with the pyramid of sanctions and pointing at the category of harsh sanctions, criminal sanctions are not mentioned.

It is safe to argue that the WRR 2013 report and its appeal for a governance approach to regulation is the opposite of the strengthening of the vertical sanction pyramid as is done with criminal sanctions. This article poses that the current Dutch atmosphere in regulatory science is against criminal sanctions. They are rarely mentioned in the literature and all governmen-

tal and government-related policy documents point at an integral and governance-oriented development.

3. Change of Dutch Law required?

The **subsequent** question then is whether the implementation of Directive 2014/57 will bring about changes to the legislative and regulatory landscape in the Netherlands.

One small anticipated change relates to the duration of imprisonment. Currently, the criminal sanction stands at two years. Directive 2014/57 requires four years. For that reason alone, the law should be amended.

All other elements of Directive 2014/57 seem to be included in the current Act on Financial Supervision. Therefore, no changes to those elements law are expected.

B. Proposal for implementation of EU Directive 2014/57 in the Netherlands

Applying the findings of the previous section to the implementation of EU Directive 2014/57 in the Netherlands, this article proposes that criminal sanctions within the new European regime should be viewed with caution. The use of criminal sanctions and corresponding prosecution methods disturb the integrated approach to combating market failure as is possible within an administrative legal approach.

In concrete terms, regarding the criminal sanctions with caution means continuing the current status quo.

1. Current status of the implementation

In early 2015, it appears that the Dutch government has not initiated the process of implementing Directive 2014/57 in the Dutch legal system. In the governmental quarterly reporting¹⁶⁰ on the implementation of directives, Directive 2014/57 is mentioned, but without further information on any action taken. The same applies to the overview of the Dutch parliament.¹⁶¹

This status quo adds to the relevance of the current article, now that the outcomes of this can be used to advance the implementation of Directive 2014/57 in the Netherlands.

2. Pending legislative proposals for changing the legislative basis in the Netherlands

Based on the previous sub-section¹⁶², no pending legislative proposals are known. This sub-section may contain more data in a future version of this article.

3. Proposal for change of the 2009 Covenant between the OM and AFM

Now that only limited changes are expected in the legal framework, it can be argued that the Covenant between the AFM and OM should remain unchanged.

The current Covenant is a rather neutral repetition of the legal rules that state that no double prosecution or criminal charge is allowed and thus, that the state should organize coordination of its intervention actions in its internal organs and quasi-organs.

Now that the criminal sanctions remain part of the regulatory mechanism, the Covenant can remain the same.

C. Proposal for interpretation of the new regime

However, the findings of this article lead to the proposition that criminal sanctions do have a negative impact on the development of a regulatory arrangement in which responsive regulation and forms of horizontal regulation can be used to maximize the effectiveness of the steering of the state in the market of financial products.

The Directive 2014/57 does not prescribe the selection of cases to be handled by either administrative or criminal regulators. This is still the prerogative and margin of appreciation of the Member State. In the Netherlands, this is the prerogative of the independent regulator AFM and the quasi-independent prosecutor OM.

The above means that, in the cooperation between the OM and the AFM, the AFM should (continue to) take the lead.

VI. Conclusions

Directive 2014/57 is not just another addition to European legislation. It leads to a paradigm shift in the regulation of the financial market in Europe, unless the interpretation of this Directive 2014/57 and subsequent implementation in the Member States in 2016 follows the recommendations of this article.

This interpretation of Directive 2014/57 acknowledges that the European legislator has decided to harmonize criminal sanctions and that Member States have no choice other than to implement it. It is also acknowledged that criminal sanctions already exist in many Member States, such as the Netherlands, to sanction certain wrongful behavior in the financial market. Wrongful behavior consists of insider dealing, unlawful disclosure of inside information and market manipulation. This behavior on the part of employees of financial institutions like banks and stockbrokers is harmful to economies. And given the interconnection between the economies of the Member States of the EU and the existence of an internal market, as well as the devastating effects of the financial crises since 2008, it has also been acknowledged that countermeasures against that harm are appropriate. Similar to the response to other kinds of harmful behavior, criminal sanctions are the natural response.

The research conducted for this article resulted in the development of a lifecycle theory, on the basis of which Directive 2014/57 can be categorized as an intervention in the financial market in the phase of norm-setting. This lifecycle theory makes it possible to view harmful behavior in a market and the response by the state as a circular affair that is not static but dynamic. Each action is followed by a reaction, each new rule and intervention by the state results in new behavior on the part of the market actors. So the current existing criminal sanctions for insider dealing and market manipulation in the Netherlands did indeed increase awareness of the wrongful nature of such behavior and, based on the general deterrence theories connected to criminal sanctions, are to be regarded as having prevented more harm. In the dynamic developments of markets and responses to it by states, the research revealed that events like a financial crisis, the current technological and other complexities of financial markets and financial products, and the systemic effects of mistakes on society need more than one dimensional rule with corresponding enforcement. In the theories on governance, an anchor is found for further interpreting those market mechanisms and developing new

views on the role of the state. It has been observed that the current states can be labeled as “regulatory states”, in which the state “steers” and the businesses “row”. This typology has been relevant since the 1980s, preceded by a period of “welfare capitalism” in which the state assumed both the role of “steering” and “rowing”. Prior to that, “laissez-faire capitalism” was the applicable label, in which businesses both “steered” and “rowed”.

In such a “regulatory state”, the leading question is which steering techniques are best equipped to have businesses row well. It has been observed that a state should interact with market actors and consumers, that the state should actively mobilize the entire network of stakeholders around all markets, including civil society and science. The state should employ more tools than the legislative rule backed by a sanction. This tool, in science labeled as (1) “command”, can be accompanied by tools like (2) “competition”, with which market actors are provided with tax and other incentives to change their behavior, (3) “consensus” with which state and market actors agree on a certain behavior in, for instance, a professional field like legal services, (4) “communication”, with which a state can educate market actors as well as consumers, in the hope that consumers and others can distinguish between healthy and unhealthy products and services and apply their superior market regulation skills of “offer and demand” (the private actor choice in the lifecycle theory), and the tool of (5) “code”, which quite literally forces the actors in the (financial) market to “reduce their rowing speed”. Each organ and part of a state should engage in this horizontal approach to governance and market regulation. To avoid conflicts of interest between the state as supervisor and the state as shareholder of a businesses in a market (like nationalized banks and utility companies), the organs involved in enforcement are often made independent from the central government. This trend results in a typology of these organs in five types of regulators: (Ia.) the public prosecutor, (Ib.) the executive branch itself (minister) or subordinate agency, (II.) the independent state-controlled authority, (III.) the independent technical commission and (IV.) the industry self-regulating body. The focus of this article is the Dutch AFM and Dutch OM, being a category (II.) regulator and category (Ia.), respectively. Each regulator has a uniform task, being the (1) collection of information about the question as to whether goods, services or market behavior comply with the set legal norm, (2) developing a legal opinion on that information and (3), if necessary, intervening in the market and sanctioning market actors.

The most dominant trend in the task of a regulator to engage horizontally with the market is “responsive regulation”. This theory pertains to a pyramid of supports and a pyramid of sanctions. Supports include the education and persuasion of the market actor based on the world view that a capable and willing market actor will comply with the rules and will “row” responsively, not harming the market or society at large. These supports can be assisted by a framework of informal praise of progress in safe testing, safe manufacturing or service design and ethical marketing, up to and including formal praise and awards for good market behavior.

With the pyramid of sanctions, the article arrives at the main topic of administrative and criminal sanctions. This pyramid also starts with education and persuasion about correct market behavior and the problems and harms that will occur when the market actor does not comply. The next level of interaction between regulator and market actor is shaming for inaction, warnings and escalated sanctions like fines and, ultimately, criminal prosecution. Those sanctions can be divided into a category of “restorative sanctions”, with which the harm and

damage to the market or consumer is corrected, and “punitive sanctions”, aimed at harming the market actor in the hope that (a) the market actor will not commit an offense again, (b) that other market actors will not commit an offense, and (c) as retribution on behalf of the society. These sanctions are portrayed as a continuum, enabling the state to act flexibly with its horizontal positioning and vertical sanctioning without obstacles.

Herein lies the main problem of this article: lower-level sanctions are positioned in the hands of an administrative organ (AFM) with judicial review by administrative courts, and criminal sanctions are positioned in the hands of the state public prosecutor (OM) with judicial review by criminal courts. The central problem is therefore that, when the state wants to use the full range of the pyramid of sanctions, it has to engage two different regulators. This potentially causes problems in terms of a continuous approach, such as the effectiveness of both pyramids of the theory of responsive regulation. It also increases the costs of regulation and the risk of mistakes being made in the “steering” and of the market actor getting away with non-compliance. Moreover, the existence of two regulatory mechanisms reduces the willingness of market actors and their compliance officers to fully cooperate with an administrative regulator like the AFM, not knowing what effect their cooperation will have in a criminal procedure. Or worse, it has the potential of making market actors unwilling to voluntarily participate in projects to innovate the “steering” with, in the Netherlands, “systeemtoezicht” and other forms of horizontalized regulatory arrangements.

The research underlying this article examined this central problem and tried to identify solutions. It observed that the difference between administrative sanctions and criminal sanctions does not lie in the timing of the judicial review. In both sanction mechanisms, a judge can review the sanction and test whether the fundamental rights of the market actor have been honored. It was observed, however, that, with administrative sanctions, an “ex-post” judicial review by an administrative court rarely occurs because of the tendency of a market actor to focus on business and not on litigation, charging clients with the corresponding costs of the fine. It is furthermore questioned whether the current practice to “hand over serious cases to the prosecutor” does not infringe on the fundamental rights of the market actor, the first fundamental right being the right not to incriminate oneself, and the first contacts with the administrative regulator being potentially self-criminating. Subsequent fundamental rights include the right not to be tried twice for the same offense (double jeopardy), potentially frustrating interventions by the “other” regulator, as well as the presumption of innocence, increasing the burden of proof on the side of the regulator. It has been observed that the general principles of administrative law also provide protection against infringements on the market actor’s fundamental rights. It is no surprise that the ultimate guardian of those rights, the ECHR, regards both administrative and criminal procedures as “criminal charge” in the sense of Article 6 of the ECHR, guaranteeing corporate and other citizens in Europe a fair trial. In view of this, the characteristics of both procedures do not help overcome the main problem.

Subsequently, it was observed that the potentially intrinsic character of criminal law does not solve the central problem either. It cannot be stated that criminal law itself is unfit to be used to sanction harmful market behavior or that failure to comply with market rules is “morally neutral”, with the suggested consequence in the literature that criminal law should therefore not be used to correct it, considering that criminal law is the area reserved for offenses that

affect morality in society. But financial crime and financial crises do affect morality in society – hence the existence of Directive 2014/57, which forces Member States to use criminal law to prosecute offenders.

In looking for a solution to the central problem of the gap in the continuum of AFM and OM, the research focused on Directive 2014/57 itself for answers. It was observed that no answers are found to this question in the legislative process or prior case law and that Directive 2014/57 is the first of its kind to use Article 83 (2) of the TFEU, allowing the EU in its ordinary legislative procedure to harmonize even criminal sanctions in the legal systems of the Member States. The safeguard for this extended authority is the Essentiality Standard, the test whether the approximation of the criminal laws of the Member States proves essential for ensuring the effective implementation of EU policies. This test of the Essentiality Standard should be done prior to the legislative initiative in a so-called Impact Assessment. It has been observed that the Impact Assessment of Directive 2014/57 is not convincing enough; that for the financial crimes at hand, insider dealing and market abuse, criminal sanctions are essential to ensure effective implementation of the EU policies in the single financial market. No evidence is provided that the deterring effects of criminal sanctions do actually avoid non-compliance, or that the central problem of this research is less harmful than not having any criminal sanctions. In theory, this observation could lead to an annulment procedure in Luxembourg, but it is highly unlikely that such action will be taken and will change the reality that Directive 2014/57 will be implemented by July 3, 2016.

The technical analysis of the legislative proposal and discussion in the European Parliament, Council and other stakeholders also reveal any consideration about the central problem of this article, i.e. the gap in the continuum between enforcement by AFM and OM. The introduction of criminal sanctions seems to be self-explanatory and Members of Parliament have expressed a distaste of the “bankers who caused the financial crisis”. Given the recent date of the promulgation of Directive 2014/57 as European law, this research did not find any scholarly work providing answers to the main question.

Consequently, this article proposes that Directive 2014/57 be taken as a given and that the implementation in the Netherlands only focus on the change in the duration of imprisonment from two to four years. The Covenant between the AFM and OM should remain unchanged as an expression of the status quo in the Dutch regulatory landscape in order to deal with both innovations as “responsive regulation” and the existence of criminal sanctions. This status quo seems to be effective or at least not to hamper the AFM in taking steps in this innovation. The OM also seems to align well with this status quo. No major problems are identified in the literature. Further research projects will have to analyze this.

This conclusion also implies that this research has established that the further innovation of good governance of regulated markets requires a full continuum in the sanctions and that the involvement of more than one regulator per sector should be avoided where possible. In addition, no compelling proof exists that criminal sanctions as such add much to the rainbow of sanctions in the administrative realm. Therefore, it is proposed that, ideally, no involvement of the OM exists. Translated into the interpretation of Directive 2014/57 in the Dutch context, and probably to other Member States with similar regulatory arrangements like the

UK (although this country opted out of Directive 2014/57), this observation means that there will be no increased use of criminal sanctions, that the existence of Directive 2014/57 is not interpreted as a paradigm shift and that the return of the classic approach to regulation is by “command” only. Such interpretation would hamper the developments in good governance and innovations that are currently being developed in the “steering” of a complex market like the financial market. This is especially true now that no evidence exists and no theory can argue that criminal sanctions will prove more effective at combating market failure involving insider dealing and market abuse than the other tools out of the toolbox of “responsive regulation”. Let Directive 2014/57 have its quiet existence and continue to work on a functioning financial market in the Netherlands and the EU at large.

VII. Bibliography

The bibliography below contains the sources of this article grouped by empirical data, such as legal sources and related documents and non-empirical data, such as scholarly books, articles and other argumentative and reflective documents.¹⁶³

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Endnotes

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- ⁵ Consideration 8 of Directive 2014/57.
- ⁶ E.g. Tafara E. (2012), *Foreword. Observations about the crisis and reform*, in: Ferran E. et al., *The regulatory aftermath of the global financial crisis*, Cambridge (UK), Cambridge University Press, 2012, p. xii.
- ⁷ Commission Communication of May 11, 1999 entitled "Implementing the framework for financial markets: action plan" [COM(1999) 232 final – Not published in the Official Journal]
- ⁸ Starting with, among others: Larosiére, J. de at alia (2009), *Report of the High-Level Group on Financial Supervision in the EU*, Brussels (BE), European Commission, February 25, 2009.
- ⁹ EU Regulation 596/2014 of The European Parliament and of the Council of April 16, 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
- ¹⁰ Morgan, B. and Yeung, K. (2007), *An introduction to law and regulation*, Cambridge (UK), Cambridge University Press, 2007, p. 221 ff.
- ¹¹ in Dutch: *Convenant ter voorkoming van ongeoorloofde samenloop van bestuurlijke en strafrechtelijke sancties*, Stcrt, 15-1-2009, no. 665.
- ¹² Advanced Course of the International Bachelor of Law Program of The Hague University of Applied Sciences, taught by the author.
- ¹³ Introductory course of the Safety and Security Management Program at the same university, also taught by the author.
- ¹⁴ Smits, J. (2012), *The mind and method of the legal academic*, Cheltenham (UK), Edward Elgar Publishing, 2012, p. 74 or in Dutch: *Omstreden rechtswetenschap. Over aard, methode en organisatie van de juridische discipline*, Den Haag (NL), Boom Juridische Uitgevers, 2010, p. 114
- ¹⁵ D'Amato, A. (1996), *Introduction to Law and Legal Thinking*, New York (USA), Transnational Publishers, 1996, p. 1.
- ¹⁶ Also known as the Universal Declaration of Human Rights.
- ¹⁷ Also known as the Millennium Development Goals.
- ¹⁸ G8, Closing Communiqué 35th Summit in L'Aquila, Italy, 2009, number 8.

- ¹⁹ See: Lo Duca, M. and Stracca, L. (2012), *The effect of G20 Summits on global financial markets*, Frankfurt am Main (GER), European Central Bank, Working Paper Series 1668, 2014, p. 6; see also Eernisse, A.C. (2012), *Banking on cooperation: the role of the G-20 in improving the international financial architecture*, Duke Journal of Comparative and International Law (Volume 22), 2012, p. 239-260, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1288&context=djcl>, accessed April 3, 2014.
- ²⁰ On consumer protection.
- ²¹ See among others Ahsmann, M. (2012), *Over meesters in de rechten en priesters van het recht*, Den Haag (NL), Boom Juridische Uitgevers, 2012, p. 29.
- ²² See among others Moloney, N. (2014), *EU Securities and Financial Market Regulation*, Oxford (UK), Oxford University Press, 2014 – third edition, p. 699 ff.
- ²³ Article 4(1) point (15) of Directive 2014/65/EU of the European Parliament and of the Council (referring to Annex I Section C).
- ²⁴ The period from September 2008 when Lehman Brothers collapsed to mid-2009 when most too-big-to-fail financial institutions were nationalized or otherwise rescued. The subsequent period is characterized by the current debate how to respond to such crisis by improved regulatory mechanisms. Also subsequent to this period is the so called euro crisis, the still ongoing dealing with the stability of the euro, which falls outside the scope of this article.
- ²⁵ Tafara, E. (2012), *Foreword. Observations about the crisis and reform*, in: Ferran, E. et al., *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge (UK), Cambridge University Press, 2012, p. xi.
- ²⁶ Idem, p. xiii.
- ²⁷ Article 3 (1) Directive 2014/57.
- ²⁸ Art. 3 (2) Directive 2014/57.
- ²⁹ Art. 2 (4) Directive 2014/57.
- ³⁰ Art. 7 (1) sub (a) Regulation 596/2014.
- ³¹ Article 5 (2) sub (a), (b), (c) and (d) Directive 2014/57.
- ³² See for a and earlier account, Avgouleas, E. (2005), *A critical evaluation of the new EC financial market regulation: peaks, troughs, and the road ahead*, The Transnational Lawyer, 2005, volume 18, p. 179-230, p. 207.
- ³³ This section is based on the work done by the author as part of the Bynkershoek Research Center on Regulated Markets & Compliance, resulting in a course Theory & Practice of Regulated Markets, the Bynkershoek Texts & Materials of which contains the lecture slide of the author with this theory. This article makes this theory available to the wider public for the first time.
- ³⁴ See Verhey, L.F.M., en Verheij, N. (2005), *De macht van de marktmeesters. Markttoezicht in constitutioneel perspectief*, in: Van Rossum, A.A., *Toezicht*, Deventer (NL), Kluwer, 2005, p. 135-332, on p. 139 ff.
- ³⁵ Bator, F.M. (1958), *The Anatomy of Market Failure*, Quarterly Journal of Economics, Volume 72(3), 1958, Oxford (UK), Oxford University Press (Harvard University), pp. 351-379, available at http://instruct1.cit.cornell.edu/Courses/econ335/out/bator_qje.pdf, on p. 352.
- ³⁶ Medema, S.G. (2007), *The Hesitant Hand: Mill, Sidgwick, And The Evolution Of The Theory Of Market Failure*, History of Political Economy, 2007, vol. 39, issue 3, pp. 331-358, available at <http://www.henrysidgwick.com/mill%20sidgwick%20and%20the%20evolution%20of%20theory%20of%20market%20failure.pdf> and at SSRN: <http://ssrn.com/abstract=560921>, on p. 349.
- ³⁷ Idem, p. 450.

- ³⁸ See Hardin, G. (1968), *The Tragedy of the Commons*, Science Volume 162 (3859) 1968, pp. 1243-1248, available at <http://www.sciencemag.org/content/162/3859/1243.full>, accessed August 1, 2014.
- ³⁹ In the Netherlands, the "job description" of a regulator is articulated in the Dutch Ministry of the Interior and Kingdom Relations (2005), *Minder last meer effect: Zes principes van goed toezicht. Kaderstellende visie op toezicht II*, The Hague (NL), 2005, p. 11.
- ⁴⁰ In the Netherlands, labor law allows employers to dismiss employees on the basis of non-compliance with instructions, art. 7:678 (2) sub (10) Dutch Civil Code (BW).
- ⁴¹ EU Directive 2014/57 art. 3 (3) sub a
- ⁴² EU Directive 2014/57 art. 3 (3) sub c
- ⁴³ In the Netherlands, codified as art. 5:11 General Administrative Law Act (Awb)
- ⁴⁴ Financial Stability Board, Overview of Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability. Report of the Financial Stability Board to G20 Leaders (2014), Basel (CH), FSB, 2014, p. 22.
- ⁴⁵ OECD (2005), *OECD guiding principles for regulatory quality and performance*, Paris (FR), OECD, 2005, available at <http://www.oecd.org/fr/reformereg/34976533.pdf>, p. 1.
- ⁴⁶ See, for instance, rule (iv) of the 1997 OECD Recommendations, see OECD (2012), Recommendation of the
- ^{council} on regulatory policy and governance, Paris (FR), OECD, 2012, available at <http://www.oecd.org/governance/regulatory-policy/49990817.pdf>, accessed January 22, 2015, p. 4.
- ⁴⁷ Ferran, E., Moloney N., Hill J.G. and Coffee J.C., eds. (2012), *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge (UK), Cambridge University Press, 2012, pp. 1-110.
- ⁴⁸ Vourloumis, S. (2012), *Reforming EU and Global Financial Regulation: Crisis, Learning and Paradigm Shifts*, working paper, Author, 2012, available at <http://regulation.upf.edu/exeter-12-papers/Paper%20019%20-%20Vourloumis%202012%20-%20Reforming%20EU%20and%20Global%20Financial%20Regulation.pdf>, accessed January 22, 2015, p. 1.
- ⁴⁹ See for the history of the term Levi-Faur, D. (2011), *From Big Government To Big Governance?*, Jerusalem Papers in Regulation & Governance Working Paper No. 35, Jerusalem (ISR), The Hebrew University, 2011, p. 4.
- ⁵⁰ See Rosenau, James N., *Along the domestic-foreign frontier: exploring governance in a turbulent world*, Cambridge (UK), Cambridge University Press, 1997, p. 383, as cited by Hein, W., *Global Health Governance and National Health Policies in Developing Countries: Conflicts and Cooperation at the Interfaces*, in: W. Hein, and L. Kohlmann ed., *Globalization, Global Health Governance and National Health Policies in Developing Countries: An Exploration into the Dynamics of Interfaces*, Hamburg (GER), Deutschen Uebersee Institut, 2003, pp. 33-62, on p. 38.
- ⁵¹ See Black, J. (2008), *Constructing and contesting legitimacy and accountability in polycentric regulatory regimes. Regulation & Governance*, 2, 2008, 137-164.
- ⁵² Burris, S., Drahoš P., Shearing C. (2005), *Nodal Governance*, Temple Law School Working Papers, available at SSRN: <http://ssrn.com/abstract=760928>, last accessed July 5, 2014, also published in the Australian Journal of Legal Philosophy. Volume 30, 2005.
- ⁵³ See Levi-Faur, D. (2005), *The Global Diffusion of Regulatory Capitalism*, Annals of the American Academy of Political and Social Science, Vol. 598, 2005, pp. 12-32, available at SSRN: <http://ssrn.com/abstract=958100> last accessed July 5, 2014, p. 15.
- ⁵⁴ Braithwaite, J., Coglianese, E. and Levi-Faur, D. (2007), *Editorial First Volume of Regulation & Governance*, 2007, p. 3.
- ⁵⁵ Baldwin, Dodge R. and Cave M. (1999), *Understanding regulation: theory, strategy, and practice*,

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- ⁵⁶ See note 53.
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- ⁵⁹ See note 53, Levi-Faur, D., *The Global Diffusion of Regulatory Capitalism*, Annals of the American Academy of Political and Social Science, Vol. 598, 2005, pp. 12-32, available at SSRN: <http://ssrn.com/abstract=958100> last accessed July 5, 2014, p. 16.
- ⁶⁰ Ogas A. (2002), *Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries*, Working Paper No. 35, Centre on Regulation and Competition, 2002, available at http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Ogas_Comparing_Regulatory_Systems.pdf last accessed December 2014, p. 3.
- ⁶¹ See footnote 34.
- ⁶² For instance, the AFM may issue policy guidelines that effectively result in norms that guide the behavior of the regulatees.
- ⁶³ For instance, the former regulator in the telecommunication industry, OPTA, used to settle disputes between regulatees.
- ⁶⁴ See also Gilardi, F. (2001), *Principal-Agent Models Go to Europe: Independent Regulatory Agencies as Ultimate Step of Delegation*, Paper presented at the ECPR General Conference, Canterbury (UK), September 6-8, 2001, available at https://www.researchgate.net/publication/228813340_Principal-agent_models_go_to_Europe_Independent_regulatory_agencies_as_ultimate_step_of_delegation, last accessed September 3, 2014, p. 8.
- ⁶⁵ Kingsbury, B., Krisch, N. and Stewart, R.B. (2004), *The Emergence of Global Administrative Law*, ILLJ Working Paper, 2004, Number 1, available at SSRN: <http://ssrn.com/abstract=692628>, accessed June 6, 2013, p. 1.
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- ⁶⁸ On an international level, one can see that in art. 35 of the UN Law Commission 2001, Responsibility of States for Internationally Wrongful Acts, annex to General Assembly resolution 56/83 of December 12, 2001 and corrected by document A/56/49(Vol. I)/Corr.4, in the Dutch administrative law context: Art. 5:2 (1) sub (b) Awb.
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⁹⁷ See Jurgens, M. and R. Stijnen (2008), *Compliance in het financieel toezichtrecht*, Deventer (NL), Kluwer, 2008, p. 133.

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⁹⁹ ECHR 2014 Case 18640/10, 18647/10, 18663/10, 18668/10 et 18698/10 Grande Stevens vs. Italy, March 4, 2014, available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4687386-5686720#%22itemid%22:\[%22003-4687386-5686720%22\]](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4687386-5686720#%22itemid%22:[%22003-4687386-5686720%22]), accessed July 7, 2014.

¹⁰⁰ Raedschelders, S. (2011), *Interrelations Between Administrative and Criminal Sanctions in Environmental Law: New Legislation And Actual Practice in Flanders*, (Proceedings) Ninth International Conference on Environmental Compliance and Enforcement 2011, Whistler (CAN), INECE, 2011, pp. 616-627. p. 618.

¹⁰¹ ECHR 1980, case: Engel and Others vs. Netherlands (1979-80) 1 E.H.R.R. 647.

¹⁰² Within the context of this article, this applicable legal framework is the twin instrument of Directive 2014/57, being Regulation 596/2014 ("MAR"), subjecting insider trading and market abuse to the full range of administrative sanctions.

¹⁰³ Barkhuysen, T. (2014), *Adequate rechtsbescherming bij grondrechtenbeperkend overheidsingrijpen. Studie naar aanleiding van de agenda voor de rechtspraak.*, Deventer (NL), Kluwer, 2014, p. 24.

¹⁰⁴ Article 113 (3) of the Dutch Constitution ("GW")

¹⁰⁵ According to Article 5:55 of the Act on Financial Supervision (in Dutch: WFT), the designated

court is the court in Amsterdam for all criminal adjudication of insider dealing and market abuse. Pre-trial bargain or the like.

¹⁰⁶ See footnote 79.

¹⁰⁷ Article 1:72 of the Act on Financial Supervision (in Dutch: WFT), or Article 4:26 of the WFT, or in particular the obligation to actively inform the AFM about non-compliance based on Article 5:62 of the WFT.

¹⁰⁸ Article 5:63 (2) of the WFT states that such information may not be used in criminal prosecution. See: Schonewille, W.H., *De 'klikplicht' van effecteninstellingen op grond van de Wet Marktmissbruik*, in: Jaarboek Compliance 2006, p. 107-122, p. 110 ff.

¹⁰⁹ ECHR 1976 Case 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 Engel et al. vs. The Netherlands June 8, 1976 [on the interpretation of 'criminal charge'], see Verveale 2013 p. 122.

¹¹⁰ ECHR 2012 Case C-617/10 Aklagaren vs. Hans Akerberg Fransson

¹¹¹ See Bröring, H.E., *De bestuurlijke boete*, Deventer (NL), Kluwer, 2005, p. 185 ff.

¹¹² Barkhuysen T. and Damen L.J.A. et alia (2007), *Feitenvaststelling in beroep*, The Hague (NL), Boom Juridische Uitgevers, 2007, p. 25.

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¹¹⁴ See Albers, C.L.G.F.H. (2002), *Rechtsbescherming bij bestuurlijke boeten. Balanceren op een magische lijn?*, Den Haag (NL), Sdu, 2002, p. 422 ff.

¹¹⁵ For the Netherlands, see Bröring, H.E. (2005), *De bestuurlijke boete*, Deventer (NL), Kluwer, 2005, p. 232 ff.

¹¹⁶ See Jans, J.H. at alia (2002), *Inleiding tot het Europees bestuursrecht*, Nijmegen (NL), Ars Aequi Libri, second edition, 2002, p.153 ff.

¹¹⁷ See, among others: Ashworth, P. (2000), *Is the criminal law a lost cause?*, Law Quarterly Review, Volume 116, 2000, p. 225-256; Seredynska, I. (2012), *Insider dealing and criminal law. Dangerous Liaisons*, Heidelberg (GE), Springer, 2012; Cartwright, P. (2007), *Crime, punishment, and consumer protection*, Journal of Consumer Policy, 2007, p. 1-20; Green, S.P. (1997), *Why it's a crime to tear the tag off a mattress: overcriminalization and the moral content of regulatory offenses*, Emory Law Journal, Volume 46, 1997, p. 1533-1615; Luna, E. (2005), *The overcriminalization phenomenon*, American University Law Review, Volume 54, 2005, p. 703-743, p. 708.

¹¹⁸ Green, S.P. (1997), *Why it's a crime to tear the tag off a mattress: overcriminalization and the moral content of regulatory offenses*, Emory Law Journal, Volume 46, 1997, p. 1536.

¹¹⁹ Luna, E. (2005), *The overcriminalization phenomenon*, American University Law Review, Volume 54, 2005, p. 703-743, p. 708.

¹²⁰ Being an oversimplification of the work of Iwona Seredynska, see footnote 118.

¹²¹ Being an oversimplification of the work of Stephen Green, see footnote 118.

¹²² Ottow, A.T. and Robben P.B.M. (2012), *De toezichthouder als koorddanser*, Tijdschrift voor Toezicht, 2012, volume 3, p. 32- 35, available at <http://hdl.handle.net/1765/38435>, accessed January 22, 2015.

¹²³ See footnote 1.

¹²⁴ See footnote 2.

¹²⁵ See footnote 9.

¹²⁶ See footnote 16.

¹²⁷ See footnote 11.

¹²⁸ See footnote 34.

- ¹³⁰ See footnote 44.
- ¹³¹ See footnote 45.
- ¹³² European Union, Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, December 13, 2007, Brussels (BEL), Official Journal of the European Union (C 306) of December 17, 2007, p. 1 ff.
- ¹³³ Dougan, M. (2012), *From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law*, in: Marise Cremona ed., *Compliance and the Enforcement of EU Law*, Oxford (UK), Oxford University Press, 2012, pp. 74-131, p. 75 (with reference to the ECJ 2007 Ship-Source Pollution Cases, Case C-440/05, ECR I-9097).
- ¹³⁴ Miglietti, M. (2013), *The New EU Criminal Law Competence in Action: The Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation*, IES Working Paper 5, Brussels (BEL): Institute for European Studies, 2013, p. 7.
- ¹³⁵ European Commission (2011a), p. 5 as cited by Miglietti (2013), p. 8.
- ¹³⁶ European Union, Treaty on the European Union (Consolidated Version), Treaty of Maastricht, February 7, 1992, Brussels (BEL), Official Journal of the European Communities C 325/5; December 24, 2002, pp. 5 ff.
- ¹³⁷ Among others, the Amsterdam Treaty with its Framework Decisions (Art. 34 of the old TEU) and the ECJ case law, in particular the Pupino Case (Case C-105/03 Pupino [2005] ECR I-5285) and the Environmental Crimes Case (Case C-176/03 Commission vs. Council [2005] ECR-I-7879). The latter introduced the "Essentiality Standard" and laid the basis of some earlier Directives introducing criminal sanctions under the old regime.
- ¹³⁸ European Commission (2010a), Communication "Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme" COM(2010)171, final, p. 4 as cited by Miglietti (2013), p. 8.
- ¹³⁹ Miglietti, M. (2013), *The New EU Criminal Law Competence in Action: The Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation*, IES Working Paper 5, Brussels (BEL): Institute for European Studies, 2013, p. 8.
- ¹⁴⁰ European Commission (2011a) Communication "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies" COM(2011)573, final.
- ¹⁴¹ Idem, p. 7 as cited by Miglietti (2013), p. 16.
- ¹⁴² Klip, A. (2012), *European Criminal Policy*, European Journal of Crime, Criminal Law and Criminal Justice Volume 20, 2012, p. 3–12, p. 7.
- ¹⁴³ Federal Constitutional Court, 2 BvE 2/08 of June 30, 2009 – Lisbon, marginal number 362, as cited by Miglietti (2013), p. 17.
- ¹⁴⁴ German Bundestag (2013), Opinion approved by the Plenary on May 24, 2012 (Printed paper 17/9770), as cited by Miglietti 2013, p. 18.
- ¹⁴⁵ Herlin-Karnell, E. (2009), *Subsidiarity in the Area of EU Justice and Home Affairs Law—A Lost Cause?*, European Law Journal, Volume 15, 351–361, 2009, p. 356.
- ¹⁴⁶ European Commission (2011c) Commission Staff Working Paper, Impact Assessment Accompanying the document Proposal for a Regulation on insider dealing market manipulation (market abuse) and the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, (Commission Impact Assessment 2011) SEC (2011) 1217, final.
- ¹⁴⁷ Velentza, M., Head of Unit G3 in DG MARKT, as cited in: Di Noia, C. (2008), *Reviewing Market Abuse regime: some indications from the ESME report*, Contribution to the EU Commission Conference on the Market Abuse Directive (MAD), Brussels, November 12, 2008. Available at [http://](http://ec.europa.eu/internal_market/securities/docs/abuse/mad_di_noia_en.pdf)

- ec.europa.eu/internal_market/securities/docs/abuse/mad_di_noia_en.pdf, p. 4, as cited in: Miglietti, 2013, p. 24
- ¹⁴⁸ European Commission (2010b) Communication on "Reinforcing sanctioning regimes in the financial services sector", *Communication on sanctioning regimes in the financial sector*, 2010, COM(2010)716, final, p. 11.
- ¹⁴⁹ See: *The High-Level Group on Financial Supervision in the EU*, chaired by Jacques de Larosière, 2009, Report (de Larosière Report), p. 45 Available at http://ec.europa.eu/economy_finance/publications/publication14527_en.pdf
- ¹⁵⁰ European Parliament Legislative Resolution of February 4, 2014 on the proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (COM(2011) 0654 – C7-0358/2011 – 2011/0297(COD)).
- ¹⁵¹ See footnote 134.
- ¹⁵² See footnote 133.
- ¹⁵³ See Miglietti (2013).
- ¹⁵⁴ See footnote 121.
- ¹⁵⁵ See Boots, M.P. and Schoenmaker D. (2007), Het doel van de Wft: een economische benadering, in Busch, D. et alia. ed. *Onderneming en financieel toezicht*, Deventer (NL), Kluwer, 2007, p.15 ff.
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- ¹⁵⁷ De Serière, V.P.G. (2008), *Luiheid, opportunisme, of wijsheid? Principle based regelgeving in het financiële recht*, Ondernemingsrecht, 2008, p. 99-100, p. 99.
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- ¹⁶³ Citation style follows the Bynkershoek Universal Legal Citation Standard (BULCS), available at <http://www.bynkershoek.nl/activities/bh-research/bhr-legal-education/bulcs/>, with a "social science" (APA) addition of the year of publication between brackets.

Abstract

The Hague and Geneva are two cities that grew over time into global centres specialised in addressing peace, justice and human rights. The aim of this paper is to compare these two cities with regard to how their local and national authorities are approaching the hosting of international organisations (IOs) and non-governmental organisations (NGOs) and how they could improve on this. Since globalisation is causing both cities to experience increased competition from other internationally prominent cities when it comes to hosting IOs and NGOs, both The Hague and Geneva need to reformulate their strategies for attracting and retaining these organisations. This article, which is based on the findings of comparative analysis, investigated how The Hague and Geneva are attracting and retaining IOs and NGOs and what their local and national authorities could do to improve their competitive advantages. It was found that Geneva focuses on retaining IOs and NGOs while The Hague focuses on attracting more organisations but is also committed to retaining them. Geneva attracts a wide variety of organisations while The Hague focuses more on organisations that address peace and justice. The improvements that The Hague's authorities could make to achieve its goals would be in the areas of healthcare and transport. Geneva could improve its parking facilities and housing. And both cities could improve their childcare facilities and their debate centres.