

未經許可資本市場活動之監理與法律訴追*

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台灣社會近年因資金浮濫，未經許可之資本市場活動承襲熱錢浪潮而興起，以「未經許可經營證券期貨業務」、「未經許可招攬業務之境外券商責任」、「未取得身分資格執行業務」為最主流犯罪型態，且這些型態多有利用網路、新興媒體作為犯罪手段之趨勢。未經許可經營證券期貨業務的主流型態為地下期貨交易。就地下期貨之適用罪名而言，本文認為應考慮其經營本質來詮釋期貨交易法第 112 條第 5 項第 3 款之保護法益範圍。就境外券商未經許可在台經營境外金融商品之部分，在網路跨境犯罪所產生之訴追困難情形下，宜以行政指導在國內落地之廣告代理商之方式，要求其下架相關招攬廣告，以有效解決境外券商在台之經營破壞我國對於金融特許制度維護之問題。就「未取得專業資格卻從事期貨交易、證券投資顧問業務」之行為，行政監理機關與司法審判機關應建立對話機制，研擬合法、非法證券期貨顧問業者具體化之認定方式，提高法律適用之可預測性。甚而，期貨交易法第 82 條、期貨顧問事業設置標準第 2 條及證券投資信託及顧問法第 4 條應不以「收受報酬」為要件，有修法之必要，否則無法規範以投資顧問為掩護，實際從事吸金、投資詐欺或操縱股價之犯罪行為。附帶論之，實務於訴

「政策與管理意涵」

本論文聚焦在釐清期貨交易法第 112 條第 5 項第 3 款以及與刑法賭博罪之適用關係。對於期貨交易法第 112 條第 5 項第 3 款的內涵予以新的保護法益內涵詮釋。並針對境外券商未經許可在台經營境外金融商品，提出以行政指導方式，以緩和因跨境訴追困境而無法有效規制非法券商之挑戰。另對於期貨交易法等立法技術疏漏提出具體修法建議，試圖以多元面向探討未經許可資本市場活動之監理與法律訴追問題。

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追審判過程中，應衡酌交易人財產法益之保護，於特定情形下，檢視地下期貨經營行為與未取得身分資格執行業務之行為，是否利用網路、新興媒體等虛擬通訊管道，而有犯刑法第 339-4 條第 3 款之可能，以完整評價新興犯罪型態之不法性。

關鍵詞：金融特許、期貨交易法第 112 條、地下期貨、境外券商、證券期貨投資顧問業務。

Supervision and Legal Prosecution of Unauthorized Capital Market Activities

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Taiwan has been flooded with excess liquidity in recent years. Rising tides of “hot money” have readily brought about a variety of unauthorized capital market activities. High on the list of such crimes are “conducting of securities and futures business without prior approval,” “business solicitation by offshore brokerages without prior approval,” and “conducting of securities and futures investment consulting business without the required legal status and credentials.” Moreover, these crimes oftentimes draw on the internet and emerging media as their tools. A majority of perpetrators that conduct securities and futures business without prior approval deal in what is generally known as underground futures. As far as the applicable crime of underground futures is concerned, this article believes that the scope of protected legal interests in Subparagraph 3, Paragraph 5, Article 112 of the Futures Trading Act should be interpreted in consideration of the nature of its operation. When it comes to offshore brokerages dealing in offshore financial products without prior approval in Taiwan, given the difficulty in prosecuting cross-border crime on the internet, it is advisable to resort to administrative guidance instead and ask advertising agencies operating in Taiwan to remove ads that promote the aforesaid offshore financial products. Only thus can one expect to effectively resolve the problem of offshore brokerages, while doing business in

Taiwan, undermining Taiwan's financial services industry that requires special approval. With regard to "conducting futures transactions or offering securities investment advisory services without first obtaining the required credentials," A mechanism for dialogue is recommendable for administrative regulators and judicial establishments to introduce a regime for differentiating between legitimate and illegitimate securities and futures advisory enterprises, thereby enhancing the predictability of legal applications. Furthermore, this study finds fault with "receipt of remuneration" being regarded as a constituent element in Article 82 of the Futures Trading Act, Article 2 of the Standards Governing the Establishment of Futures Advisory Enterprises, and Article 4 of the Securities Investment Trust and Consulting Act. Therefore, there is need for amending these statutes lest there should be no regulating parties that, under the guise of being an investment advisory enterprise, commit such criminal acts as illicit fundraising, investment fraudulence, and stock manipulation. Meanwhile, it is also advisable to take into account protecting the legal interest of traders' property in the prosecution and trial process. Under specific circumstances, scrutiny should be undertaken to ascertain if the internet, emerging media, or other virtual channels have played a role in the conducting of underground futures business or of other businesses without first obtaining the required legal status and credentials and to determine if there has been a violation of Subparagraph 3, Paragraph 1, Article 339-4 of the Criminal Code, thereby fully assessing the illegality of emerging crimes.

Key Words: Special approval for the financial services industry, Article 112 of the Futures Trading Act, underground futures, offshore brokerages, Securities and futures investment advisory business.