



Stock Exchange Law: Concept, History, Challenges

Andreas M. Fleckner, Klaus J. Hopt

Abstract

Stock exchange law is a field that is highly influenced by economic, social, and political factors. This makes research on the concept and on the history of stock exchange law an interdisciplinary challenge: researchers have to link studies of lawyers and legal historians with the works of the social sciences' other branches, such as economic and social history, political economy, and contemporary economics. The number of sources that require investigation and the difficulties of their interdisciplinary analysis may explain why the fundamentals of stock exchange law and, more generally, of capital markets or securities law have received less attention so far than their economic, social, political, and legal weight would call for.

This article has two purposes: First, we would like to point readers to the concept and history of stock exchange law as an important gap in contemporary research. Second, we hope to inspire such research by presenting a brief overview of the most important factors and events that could form the core of a comprehensive account. For these purposes, we will refrain from summarizing secondary sources, but instead try to bring readers in direct contact with the primary sources that we consider relevant. It goes without saying that our overview will be neither exhaustive nor objective, but rather selective and subjective.

Part I introduces the reader to the term 'bourse,' as stock exchanges are referred to in French, German, and many other languages, as well as the rules that constitute 'stock exchange law.' Part II outlines the four stages in the history of stock exchange law: the Middle Ages and the Early Modern Era (A.), Absolutism and Mercantilism (B.), Industrialization (C.), and National Legislation and European Harmonization (D.). Part III highlights four contemporary challenges that policymakers from all over the world currently have to deal with: profit orientation, internationalization, fragmentation, and automation. Part IV concludes with thoughts on the future of stock exchange law.

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STOCK EXCHANGE LAW: CONCEPT, HISTORY, CHALLENGES[†]

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INTRODUCTION

STOCK exchange law is a field that is highly influenced by economic, social, and political factors. This makes research on the concept and on the history of stock exchange law an interdisciplinary challenge: researchers have to link studies of lawyers and legal historians with the works of the social sciences' other branches, such as economic and social history, political economy, and contemporary economics. The number of sources that require investigation and the difficulties of their interdisciplinary analysis may explain why the fundamentals of stock exchange law and, more generally, of capital markets or securities law have received less attention so far than their economic, social, political, and legal weight would call for.¹

¹ The lack of such studies has often been bemoaned, *see, e.g.*, Richard Ehrenberg, *Makler, Hosteliers und Börse in Brügge vom 13. bis zum 16. Jahrhundert*, 30 *Zeitschrift für das Gesamte Handelsrecht* 403, 445 (1885) [hereinafter: ZHR] (Ger.); KLAUS J. HOPT, *DER KAPITAL-*

This article has two purposes: First, we would like to point readers to the concept and history of stock exchange law as an important gap in contemporary research. Second, we hope to inspire such research by presenting a brief overview of the most important factors and events that could form the core of a comprehensive account. For these purposes, we will refrain from summarizing secondary sources, but instead try to bring readers in direct contact with the primary sources that we consider relevant. It goes without saying that our overview will be neither exhaustive nor objective, but rather selective and subjective.

Part I introduces the reader to the term ‘bourse,’ as stock exchanges are referred to in French, German, and many other languages, as well as the rules that constitute ‘stock exchange law.’ Part II outlines the four stages in the history of stock exchange law: the Middle Ages and the Early Modern Era (A.), Absolutism and Mercantilism (B.), Industrialization (C.), and National Legislation and European Harmonization (D.). Part III highlights four contemporary challenges that policymakers from all over the world currently have to deal with: profit orientation, internationalization, fragmentation, and automation. Part IV concludes with thoughts on the future of stock exchange law.

I. CONCEPT: BOURSES, EXCHANGES, AND THEIR LAW

The idea and the origins of stock exchange law are a matter of definition: their understanding depends on the marketplaces that people consider to be ‘bourses’ or ‘exchanges’ (A.) and on the rules that they regard as ‘stock exchange law’ (B.).

ANLEGERSCHUTZ IM RECHT DER BANKEN 15 n.42 (1975) (Ger.); Heinz-Dieter Assmann, *Kapitalmarktrecht: Zur Formation eines Rechtsgebiets in der vierzigjährigen Rechtsentwicklung der Bundesrepublik Deutschland*, in 40 JAHRE BUNDESREPUBLIK DEUTSCHLAND: 40 JAHRE RECHTSENTWICKLUNG 251, 254 n.9 (Knut Wolfgang Nörr ed., 1990) (Ger.). For important works on stock exchange history since then, see DEUTSCHE BÖRSENGESCHICHTE (Hans Pohl ed., 1992) (Ger.); Hanno Merkt, *Zur Entwicklung des deutschen Börsenrechts von den Anfängen bis zum Zweiten Finanzmarktförderungsgesetz*, in BÖRSENREFORM: EINE ÖKONOMISCHE, RECHTSVERGLEICHENDE UND RECHTSPOLITISCHE UNTERSUCHUNG 17-141 (Klaus J. Hopt, Bernd Rudolph, and Harald Baum eds., 1997) (Ger.); Hanno Merkt, *Kapitalmarktrecht: Ursprünge, Genese, aktuelle Ausprägung, Herausforderungen*, in 2 FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG AM 24. AUGUST 2010 2207, 2207-22 (Stefan Grundmann et al. eds., 2010) (Ger.); LODEWIJK PETRAM, *THE WORLD'S FIRST STOCK EXCHANGE: HOW THE AMSTERDAM MARKET FOR DUTCH EAST INDIA COMPANY SHARES BECAME A MODERN SECURITIES MARKET* (2011) (Neth.). For an example of the works on the general history of markets and fairs, see P. HUVELIN, *ESSAI HISTORIQUE SUR LE DROIT DES MARCHÉS & DES FOIRES* (1897) (Fr.).

A. 'Bourses' and 'Exchanges'

The terminology of 'bourses' and 'exchanges,' respectively, may be explained in different ways: The *linguistic roots* of the word 'bourse' lead back to the first financial centers in medieval continental Europe (1.). To understand the exchanges' underlying idea, one has to focus on their *functions* in society (2.). A *legal definition* should distinguish exchanges that require state supervision from unregulated venues, but legislators so far have failed to accomplish this task (3.).

1. Linguistic Roots

Linguistically, there are two plausible explanations for the term *bourse* (French) or *Börse* (German), as exchanges are called in many languages: First, the expression could be a direct derivation from the Medieval Latin word *bursa*, a name for, among other things, purses or wallets (from Ancient Greek βύρσα: coat, skin).² Second, the term could trace back to a merchant family of Bruges, whose name *van der Burse* in turn derives from the Latin word.³ Both explanations shed an interesting light on the exchanges' very beginning, and do not exclude each another.

2. Functional Meaning

Exchanges are marketplaces where traders buy and sell negotiable items with a high degree of standardization. This definition highlights two features: the negotiability of the items that are traded (such as shares, bonds, derivatives or—most recently—emission permits) and the standardization of the trading process with ongoing price fixing (only certain items are admitted to trading, interested parties need permission to trade, and all contracts are concluded under the same provisions). Aside from offering standardized trading, exchanges also serve a number of other purposes: exchanges produce and disseminate market data, exchanges regulate the marketplace that they establish, exchanges set minimum standards for the companies whose shares or bonds are listed at the exchange, and—this is the most recent function—

² *Bursa*, 1 MITTELLATEINISCHES WÖRTERBUCH 1626-27 (1967) (Ger.); *see also* *Byrsa*, 2 THE-SAVRVS LINGVAE LATINAE 2266 (1900-1906) (Ger.).

³ *Borse*, 1 MIDDELNEDERLANDSCH WOORDENBOEK 1385 (1885) (Neth.); *see also* *Beurs*, 2/2 WOORDENBOEK DER NEDERLANDSCHE TAAL 2281-86 (1903) (Neth.).

exchange operators have evolved from not-for-profit entities into listed companies that seek to make money.⁴

From an overall economic point of view, exchanges promote one of the key features of large business enterprises: short-term investments in long-term projects. How does it work? Large business enterprises are typically capital-intensive long-term projects that only capital associations such as stock corporations can finance. One of the preconditions to accomplish this goal is that those institutions preclude their shareholders from withdrawing the capital that they have contributed.⁵ It is crucial, then, that capital associations instead allow their members to sell their share to third parties, because few investors would be willing to provide capital if they could never recall it.⁶ Exchanges support this transformative function by establishing a marketplace where providers of capital and those seeking it can come together at low transaction costs. The more liquid the market is, the more attractive capital commitments become for both sides: investors may sell their shares or bonds at any time and thereby recover the current value of their investment in the short term; as a result, listed companies can exclude the redemption temporarily (for bonds) or indefinitely (for equity) and gain planning dependability for the long term.

3. Legal Term

No jurisdiction has so far been successful in finding a concise legal definition of the terms ‘bourse’ or ‘exchange.’ There is a wide spectrum of markets that organize trading in negotiable items, and apparently no criteria can adequately distinguish venues that require state supervision from those that do not. What constitutes an ‘exchange’ in legal terms is therefore not only the starting point but also one of the key problems of stock exchange law.

The first commercial code, the French *Code de commerce* (1807),⁷ brought a

⁴ For overviews of the main functions of stock exchanges, see Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 *FORDHAM L. REV.* 2541, 2545-50 (2006) [hereinafter Fleckner, *Stock Exchanges*]; Andreas M. Fleckner, *Exchanges*, in *MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW* 658 (Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann eds., 2012) [hereinafter Fleckner, *Exchanges*].

⁵ ANDREAS M. FLECKNER, *ANTIKE KAPITALVEREINIGUNGEN: EIN BEITRAG ZU DEN KONZEPTIONELLEN UND HISTORISCHEN GRUNDLAGEN DER AKTIENGESELLSCHAFT* 49-51 (2010) (Ger.) (as part of a *Theorie der Kapitalvereinigung*, a general theory of the capital associations); see also *id.* at 339-442 (protection of common assets in ancient Rome).

⁶ *Id.* at 51-52, 443-96.

⁷ *CODE DE COMMERCE* [C. COM.] *Bulletin Des Lois* N° 164 161-284 (1807) (Fr.).

few provisions on commercial exchanges (Art. 71-73: “des Bourses de commerce”) but only a cursory definition (Art. 71).⁸ The draft of a general German commercial code, the *Allgemeines Deutsches Handelsgesetzbuch* (1861),⁹ refrained from regulating stock exchanges at all and therefore lacks any legal description.¹⁰ When Germany finally introduced an exchange act, the *Börsengesetz* (1896),¹¹ policymakers saw themselves not prepared to define the term and therefore left this task to legal practice and scholarship.¹² Only two years later, the Prussian Superior Administrative Court, the *Preußisches Oberverwaltungsgericht*, delivered its famous *Feenpalast* decision (1898).¹³ The Court considered the market that the grain and commodity traders of Berlin (*Verein Berliner Getreide- und Produktenhändler*) had established an unauthorized exchange.¹⁴ While the Court mentioned a long list of criteria that constitute an exchange,¹⁵ it failed to find a concise definition that would satisfy the practical

⁸ “La bourse de commerce est la réunion qui a lieu, sous l’autorité du Gouvernement, des commerçans, capitaines, de navire, agens de change et courtiers.” CODE DE COMMERCE [C. COM.] art. 71 (1807) (Fr.).

⁹ Entwurf eines allgemeinen deutschen Handelsgesetz-Buchs [DRAFT], Mar. 12 1861, *reprinted in* Protokolle der Commission zur Berathung eines allgemeinen deutschen Handelsgesetz-Buches, Beilagen-Band zu den Protokollen DXLVIII-DLXXXIX (1861) (Ger.) [hereinafter ADHGB of 1861].

¹⁰ For an overview of the general German commercial code, see Andreas M. Fleckner, *Allgemeines Deutsches Handelsgesetzbuch*, in MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, *supra* note 4, at 51-56; for an index of the sources, see Andreas M. Fleckner, *Aktienrechtliche Gesetzgebung (1807-2007)*, in 1 AKTIENRECHT IM WANDEL 999, 1037-41, (Walter Bayer and Mathias Habersack eds., 2007) (Ger.) [hereinafter Fleckner, *Gesetzgebung*].

¹¹ Börsengesetz [Exchange Act], June 22, 1896, REICHSGESETZBLATT [RGBl.] at 157-76 (Ger.).

¹² Begründung zum Entwurf eines Börsengesetzes (explanatory notes) [Exchange Act] Dec. 3, 1895, REICHSTAGS-DRUCKSACHE 14/1895-96 at 14, 25-26 (supp. vol., at 11, 17) (Ger.).

¹³ 34 ENTSCHEIDUNGEN DES KÖNIGLICH PREUBISCHEN OBERVERWALTUNGSGERICHTS [PRVERWGE] [Prussian Supreme Administrative Court] Nov. 26, 1898 (III B 44/98), at 315-39 (Ger.).

¹⁴ *Id.*

¹⁵ “Zunächst müssen Versammlungen einer größeren Zahl von Personen vorliegen, die an einem ein für alle Mal bestimmten Orte und zu einer allgemein bestimmten Zeit, wenn nicht täglich, so doch in verhältnißmäßig kurzen Zwischenräumen regelmäßig abgehalten werden, und deren Wiederholung von vornherein beabsichtigt ist. Die sich Versammelnden müssen sodann wenigstens vorwiegend selbständige Kaufleute oder kaufmännische Hilfspersonen sein und ihren Geschäftssitz am Orte der Versammlungen oder in dessen Nähe haben. Die Versammlungen müssen weiter dem Handel mit nicht zur Stelle gebrachten vertretbaren Waaren dienen, und zwar so, daß der in ihnen betriebene Handel wiederum zwar nicht ausschließlich, aber doch in erheblichem Maße ein Handel von Großhändlern unter einander ist.” *Id.* at 315, 335-36.

needs. As a result, the exchange definition became a widely recognized problem and a highly controversial topic among German lawyers. Other jurisdictions show similar experiences: When, four decades later, the United States enacted its seminal Securities Exchange Act (1934),¹⁶ it included a definition (kept to this day) of the term ‘exchange’ that is, notwithstanding its lengthy character, still circular, because it refers to “the functions commonly performed by a stock exchange as that term is generally understood.”¹⁷ The following decades brought spirited debates all over the world,¹⁸ but little progress in finding a definition because technological advancement had superseded and thereby rendered irrelevant all the physical criteria that were once put forward to distinguish exchanges from other markets (such as an exchange building or certain trading hours around noon).

New impulses arose on the European level one decade ago (2004).¹⁹ The directive on markets in financial instruments (commonly referred to as MiFID) defines at its outset the term ‘[r]egulated market’ as “a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments—in the system and in accordance with its nondiscretionary rules—in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provi-

¹⁶ Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1934).

¹⁷ “The term ‘exchange’ means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange” *Id.* § 78(c)(a)(1).

¹⁸ *See, e.g.*, *Bd. of Trade of Chicago v. SEC*, 883 F.2d 525, 535-36 (7th Cir. 1989); *Bd. of Trade of Chicago v. SEC*, 923 F.2d 1270 (7th Cir. 1991); Therese H. Maynard, *What is an “Exchange”?* *Proprietary Electronic Securities Trading Systems and the Statutory Definition of an Exchange*, 49 WASH. & LEE L. REV. 833-912 (1992); Klaus J. Hopt & Harald Baum, *Börsenrechtsreform in Deutschland*, in *BÖRSENREFORM: EINE ÖKONOMISCHE, RECHTSVERGLEICHENDE UND RECHTSPOLITISCHE UNTERSUCHUNG*, *supra* note 1, at 287, 377-91; RUBEN LEE, *WHAT IS AN EXCHANGE? THE AUTOMATION, MANAGEMENT, AND REGULATION OF FINANCIAL MARKETS* (1998).

¹⁹ Directive 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 2004 O.J. (L 145) 1-44 (EC) [hereinafter MiFID].

sions of Title III.”²⁰ When the German legislature implemented the MiFID into German law (2007),²¹ policymakers decided to use the MiFID’s definition of the ‘regulated market’ as a blueprint to introduce, for the first time ever, a legal definition of the ‘exchange’ (*Börse*) into the new Exchange Act (*Börsengesetz*): “Exchanges are institutions of public law with partial legal capacity that regulate and monitor, in accordance with this Act, multilateral systems that bring together or facilitate the bringing together of interests of a large number of people, in buying and selling goods and rights permitted to trade at the exchange, within the system according to established rules in a way that results in a contract for the purchase of these traded goods.”²²

Both the European and the German definition properly describe the exchanges’ key functions, the establishment and regulation of a market for negotiable items (*see* 2. above). However, both definitions are only of limited practical use because they fail to separate the consequences of a market’s official recognition as an exchange (especially legal capacity) with its prerequisites (such as the conclusion of contracts within the system). Put differently, the definitions fall short of identifying exchanges that require regulation from markets that need no governmental oversight. In light of this, all parties involved would be well advised to distinguish between a formal exchange definition (referring to marketplaces that are recognized by the competent authorities as exchanges) and a material exchange definition (venues that meet the requirements for being admitted as exchanges).²³

B. ‘Stock Exchange Law’

Stock exchange law is today a subdivision of capital markets or securities law. Its main objective is to strengthen public confidence in the financial

²⁰ *Id.* at art. 4(1)(14).

²¹ Börsengesetz [Exchange Act], July 16, 2007, promulgated in GESETZ ZUR UMSETZUNG DER RICHTLINIE ÜBER MÄRKTE FÜR FINANZINSTRUMENTE UND DER DURCHFÜHRUNGSRICHTLINIE DER KOMMISSION [Finanzmarkttrichtlinie-Umsetzungsgesetz], July 16 2007, BUNDESGESETZBLATT, Teil I [BGBL. I] at 1330, 1351-68, (Ger.).

²² “Börsen sind teilrechtsfähige Anstalten des öffentlichen Rechts, die nach Maßgabe dieses Gesetzes multilaterale Systeme regeln und überwachen, welche die Interessen einer Vielzahl von Personen am Kauf und Verkauf von dort zum Handel zugelassenen Wirtschaftsgütern und Rechten innerhalb des Systems nach festgelegten Bestimmungen in einer Weise zusammenbringen oder das Zusammenbringen fördern, die zu einem Vertrag über den Kauf dieser Handelsobjekte führt.” *Id.* § 2(1). Our English translation is taken from Fleckner, *Exchanges*, *supra* note 4, at 659. All subsequent translations are those of the authors.

²³ *Id.*

markets (1.), and it covers two regulatory areas: the organization of exchanges (2.) and the process of trading at exchanges (3.).

1. Main Objectives and Key Legislation

Whether and to what extent financial markets should be regulated has always been a topic highly controversial among investors, issuers, regulators, and scholars. Today there is a broad consensus that some sort of regulation is indispensable; otherwise, investors would be less willing to provide business corporations with the money that the latter need to finance their projects. Stock exchanges fit into this general picture. Many scandals have occurred at exchanges or in their environment, causing investors and—as a result of the far-reaching implications of those scandals—the general public to call for more exchange regulation.

Compared to other branches of commercial and business law, stock exchange law is relatively young; within capital markets or securities law, though, stock exchange law constitutes one of the first roots. As has already been mentioned, the French *Code de commerce* included a few provisions on commercial exchanges as early as the beginning of the 19th century (1807).²⁴ While the German *Allgemeines Deutsches Handelsgesetzbuch* (1861) abstained from regulating exchanges, it nonetheless frequently referred to the *Börsenpreis*, the exchange price.²⁵ This is why some German states decided to provide for some basic exchange rules in their introductory acts.²⁶ It took another three and a half decades, however, before Germany obtained a detailed regulatory regime on the federal level, the *Börsengesetz* (1896).²⁷ The next major steps were the Securities Exchange Act (1934)²⁸ in the United States and, more than fifty years later and only two and a half decades ago, the Financial Services Act (1986)²⁹ in the United Kingdom. Today, all major jurisdictions have a comprehensive regulatory regime for stock exchanges. In France, it is the second title of book four of the monetary and financial code, the *Code*

²⁴ CODE DE COMMERCE [C. COM] at art. 71-73 (1807) (Fr.).

²⁵ *E.g.*, ADHGB of 1861, art. 343, 353 (Ger.).

²⁶ See, most notably, art. 3 of the Prussian EINFÜHRUNGSGESETZ ZUM ALLGEMEINEN DEUTSCHEN HANDELSGESETZBUCH [INTRODUCTORY ACT TO THE COMMERCIAL CODE], June 24, 1861, GESETZ-SAMMLUNG FÜR DIE KÖNIGLICHEN PREUBISCHEN STAATEN [PreußGS] 449-688 (Ger.) [hereinafter EINFÜHRUNGSGESETZ]; for an index of the sources, see Fleckner, *Gesetzgebung*, *supra* note 10, at 999, 1041-45.

²⁷ Börsengesetz [Exchange Act], June 22, 1896, RGBl. at 157-76 (Ger.).

²⁸ Securities Exchange Act of 1934, 15 U.S.C. § 78a-78j (1934).

²⁹ Financial Services Act, 1986, c. 60 (Eng.).

monétaire et financier (2000);³⁰ in Germany the new version of the Federal Exchange Act, the *Börsengesetz* (2007);³¹ and in the United Kingdom part eighteen of the Financial Services and Markets Act (2000).³²

2. Exchange Organization

Though they have different approaches and consequences, stock exchange laws all over the world govern the organization of the exchanges or their operators, respectively. Typical provisions concern the preconditions to operate an exchange, the structure of the exchange, or the regulatory powers vested with the exchange. In German, these rules are succinctly referred to as *Börsenorganisationsrecht*, exchange organization law. Most of these provisions belong to public law (in the traditional continental European meaning).

Statutory requirements for the organization of exchanges are more problematic than many other provisions of securities law because they affect investor confidence in the financial markets, if at all, only indirectly. This is why policymakers with realistic self-assessment would probably rather let the exchanges find a structure that fits their needs than prescribing certain organizational features.³³ Against this background, it is no surprise that in Germany, as the most (in)famous example, the organizational requirements for stock exchanges have long been met by sharp criticism.³⁴ Similar issues have been

³⁰ Loi 2000-1223 du 14 décembre 2000 de code monétaire et financier, partie législative [Securities Regulation Act] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 16, 2000, p. 20 004, ratified by Loi 2003-591 du 2 juillet 2003 [Law 2003-591 of July 2, 2003] J.O., July 2, 2003, art. 31, p. 11 192 (Fr.).

³¹ Börsengesetz [Exchange Act], July 16 2007, BGBl. I at 1330, 1351-68 (Ger.).

³² Financial Services and Markets Act, 2000, c. 8, sch. 11 (Eng.).

³³ Fleckner, *Exchanges*, supra note 4, at 659.

³⁴ For an overview, see Klaus Hopt & Harald Baum, supra note 18, at 287-467; see also, JOCHEN MUES, DIE BÖRSE ALS UNTERNEHMEN (1999) (Ger.); TILMAN BREITKREUZ, DIE ORDNUNG DER BÖRSE: VERWALTUNGSRECHTLICHE ZENTRALFRAGEN DES WERTPAPIERBÖRSENWESENS (2000) (Ger.); Johannes Köndgen, *Mutmaßungen über die Zukunft der europäischen Börsen*, in FESTSCHRIFT FÜR MARCUS LUTTER ZUM 70. GEBURTSTAG 1401-20 (2000) (Ger.); Horst Hammen, *Börsenorganisationsrecht im Wandel*, 46 DIE AKTIENGESELLSCHAFT 549-67 (2001) (Ger.); Siegfried Kümpel, *Zur öffentlichrechtlichen Organisation der deutschen Wertpapierbörsen*, 3 ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT 3-13 (2003) (Ger.); HANNO MERKT, EMPFIEHLT ES SICH, IM INTERESSE DES ANLEGGERSCHUTZES UND ZUR FÖRDERUNG DES FINANZPLATZES DEUTSCHLAND DAS KAPITALMARKT- UND BÖRSENRECHT NEU ZU REGELN?, GUTACHTEN G, 64TH DEUTSCHER JURISTENTAG (2002) (Ger.); JENS BLUMENTRITT, DIE PRIVATRECHTLICH ORGANISIERTE BÖRSE (2003) (Ger.); Harald Baum & Klaus J. Hopt, *Zum Stand der Börsenreform: Umgesetzte Reformziele und offene Fragen*, in FESTSCHRIFT ZUM 65. GEBURTSTAG FÜR BERND RUDOLPH 537-56 (2009) (Ger.);

raised in many other countries, for instance, in the United States.³⁵

3. *Exchange Trading*

Stock exchange laws also regulate what happens at the exchanges, most notably the process of trading as well as the admission of items and dealers to trading, albeit in a vastly different way from jurisdiction to jurisdiction. In German, this category of rules is known as *Börsenhandelsrecht*, exchange trading law. Many of these provisions are those of public law, but there are also some rules that are genuinely private law (again in the traditional meaning of continental Europe), especially concerning the general terms and conditions that become part of the contracts entered into at the exchange.

II. HISTORY: FAIRS, EXCHANGES, STOCK MARKETS

In the history of stock exchanges, modern observers will notice four main epochs or periods: the Middle Ages and the Early Modern Era (A.), Absolutism and Mercantilism (B.), Industrialization (C.), and National Legislation and European Harmonization (D.).

Like any regulatory regime that has grown over a longer period, the historical development of stock exchange law can only be understood by combining chronological surveys with the diachronic analysis of the key factors. Our plan is to contribute to such studies by giving a chronological overview of the events that we consider relevant or typical. We complement our selection of events by choosing a broad variety of methods and approaches that may be applied to explore the history of commercial exchanges and, more specifically, the evolution of stock exchange law. Each of the following four sections will therefore follow an individual concept and a distinct order.

A. The Middle Ages and the Early Modern Era

What were the first commercial ‘exchanges’ in history? Any answer is a matter of definition and therefore inextricably linked to the question of what distinguishes exchanges from other markets and fairs. Given the conceptual

FRANK SCHÖNEMANN, DIE ORGANISATIONSSTRUKTUR DER BÖRSE: VON DER ÖFFENTLICH-RECHTLICHEN ZU EINER PRIVATRECHTLICHEN BÖRSENVERFASSUNG (2010) (Ger.).

³⁵ See Fair Administration and Governance of Self-Regulatory Organizations, 69 Fed. Reg. 71,126 (proposed Dec. 8, 2004).

uncertainties regarding the characteristics that constitute an exchange,³⁶ it is not surprising that opinions differ on the first occurrence of commercial exchanges.

Common trading places and other types of markets are an essential device of the ζῶον πολιτικόν (*zōon politikón*) and as such as old as mankind.³⁷ Already in antiquity there were regular markets and fairs with regional exchange and beyond.³⁸ This made many observers believe that commercial exchanges in general³⁹ or for corporate shares in particular⁴⁰ were already known in ancient times. While this assumption is still widespread today,⁴¹ it is typically not based on first-hand historical research but rather on statements and opinions from a time when the expressions ‘bourse’ or ‘exchange’ lacked the technical meaning that they convey today. More recent research has shown that the idea of ancient exchanges, both for stock and commodities, is a myth that lacks any basis in the sources.⁴² Even at the height of the ancient

³⁶ See *supra* Part I.A.

³⁷ Fleckner, *Exchanges*, *supra* note 4, at 659.

³⁸ See, e.g., JOAN M. FRAYN, *MARKETS AND FAIRS IN ROMAN ITALY: THEIR SOCIAL AND ECONOMIC IMPORTANCE FROM THE SECOND CENTURY BC TO THE THIRD CENTURY AD* (1993); LUUK DE LIGT, *FAIRS AND MARKETS IN THE ROMAN EMPIRE: ECONOMIC AND SOCIAL ASPECTS OF PERIODIC TRADE IN A PRE-INDUSTRIAL SOCIETY*, (1993).

³⁹ 1 THEODOR MOMMSEN, *RÖMISCHE GESCHICHTE* 421 (2nd ed. 1856) (Ger.); 1/1 LEVIN GOLDSCHMIDT, *HANDBUCH DES HANDELSRECHTS* 67 (3rd ed. 1st Supp. 1891) (Ger.); MAX WEBER, *DIE RÖMISCHE AGRARGESCHICHTE IN IHRER BEDEUTUNG FÜR DAS STAATS- UND PRIVATRECHT* 99 (1891) (Ger.); WILLIAM WARDE FOWLER, *SOCIAL LIFE AT ROME IN THE AGE OF CICERO* 74, 92 (1908).

⁴⁰ WILLIAM CUNNINGHAM, *AN ESSAY ON WESTERN CIVILIZATION IN ITS ECONOMIC ASPECTS (ANCIENT TIMES)* 164 (1898); MICHAEL I. ROSTOWZEW, *GESCHICHTE DER STAATSPACHT IN DER RÖMISCHEN KAISERZEIT BIS DIOKLETIAN* 44 (1902) (Ger.); 1 MICHAEL I. ROSTOVITZEFF, *THE SOCIAL AND ECONOMIC HISTORY OF THE ROMAN EMPIRE* 31 (continued by Peter M. Fraser, 2nd ed., 1957).

⁴¹ ERNST BADIEN, *PUBLICANS AND SINNERS: PRIVATE ENTERPRISE IN THE SERVICE OF THE ROMAN REPUBLIC* 102-03 (1972); ROMUALD SZRAMKIEWICZ, *HISTOIRE DU DROIT DES AFFAIRES, PARIS: MONTCHRESTIEN* 42 (1989) (Fr.); ULRIKE MALMENDIER, *SOCIETAS PUBLICANORUM: STAATLICHE WIRTSCHAFTSAKTIVITÄTEN IN DEN HÄNDEN PRIVATER UNTERNEHMER* 249 (2002) (Ger.); ULRIKE MALMENDIER, *Roman Shares, in THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS* 38 (William N. Goetzmann and K. Geert Rouwenhorst eds., 2005); Henry Hansmann, Reinier H. Kraakman and Richard Squire, *Law and the Rise of the Firm*, 119 *HARV. L. REV.* 1333, 1361 (2006).

⁴² There is only one source that might be referring to a sale of a share in a business association from one of its members to a third person, see Cic. in Vatin. 12.29 (56 B.C.) (“eripuerisne partis illo tempore carissimas partim a Caesare, partim a publicanis?”) (Rom. Rep.). But both the context and the reasons for this transaction remain obscure, see Fleckner, *supra* note 5, at 473-80.

economy, there were no marketplaces where traders could buy and sell negotiable items with a high degree of standardization,⁴³ the key function of exchanges.⁴⁴ In other words, there were no ancient ‘bourses’ or ‘exchanges’ in the technical sense, and the history of commercial exchanges commences in the Middle Ages, when the first venues with standardized trading appeared.

1. Trading Sites

As early as the beginning of the sixteenth century (1524), Martin Luther (1483-1546) called the city of Frankfurt the “silver and gold hole” (“das sylber vnd gollt loch”; in modern German: “Silber- und Goldloch”) because he believed that German capital flowed abroad through Frankfurt’s famous trade fair.⁴⁵

At the same time, the first commercial exchanges had already been established or were about to be founded: Bruges (1409), Antwerp (1460), Lyon (1462), Amsterdam (1530), Toulouse (1546), Cologne (1553), Hamburg (1558), Nuremberg (1560), Rouen (1566), London (Royal Exchange, 1570), Frankfurt (1585), Danzig (1593), Lübeck (1605), Königsberg (1613), Bremen (1614) or Leipzig (1635).⁴⁶

In this first founding wave, the initiative came primarily from the dealers. As a consequence, the early exchanges were, in modern terms, “customer-controlled” from their very beginning, and often had the character of guilds.⁴⁷

2. Trading Items

More detailed investigations into the origins of commercial exchanges are

⁴³ MOSES I. FINLEY, *THE ANCIENT ECONOMY* 137, 195, 197 (2nd ed. 1985); DE LIGT, *supra* note 38, at 97 n.143, 104; Fleckner, *supra* note 5, at 450-94.

⁴⁴ *See supra* Part I.A.2.

⁴⁵ “Gott hatt vns deutschen dahyn geschlaudert / das wyr vnser gollt vnd sylber müssen ynn frembde lender stossen / alle welt reych machen / vnd selbst bettler bleyben / Engeland sollt wol weniger gollts haben / wenn deutschland yhm seyn tuch liesse / vnd der könig von Portigal sollt auch weniger haben / wenn wyr yhm seyne wurtze liessen / Rechen du / wie viel gellts eyne Messe zu Franckfurt aus deutschem land gefart wird / on nott vnd vrsache / so wirstu dich wundern / wie es zu gehe / das noch eyn heller ynn deutschen landen sey / Franckfurt ist das sylber vnd gollt loch / da durch aus deutschem land fleusst / was nur quillet vnd wechst / gemuntzt odder geschlagen wird bey vns” MARTINUS LUTHER, *VON KAUFFSHANDLUNG VND WUCHER*, *2-3 (1524) (Ger.).

⁴⁶ We have taken this data from the standard works and sources, but recognize that a uniform approach would most likely lead to minor adjustments for some exchanges.

⁴⁷ Fleckner, *Stock Exchanges*, *supra* note 4, at 2541-42, 2551-52.

most auspicious if they focus on the functions of exchanges, i.e., which goods were traded where and how, rather than on the structure or even the designation of a particular venue. With this approach, modern observers will stay away from unconsciously projecting modern ideas into the past, a problem that regularly occurs when current terminology (such as ‘bourses’ or ‘exchanges’) is used to describe former practices. This strategy seems particularly promising to explore the history of marketplaces for securities that have been issued by business associations. Otherwise the modern dichotomy of stocks and bonds will obscure older forms of capital investment or alter their perception.

An important historical example are the deposits with the Casa delle Compere e dei Banchi di San Giorgio (in English often referred to as the ‘Bank of Saint George’), a financial institution founded at the beginning of the fifteenth century in the Italian city of Genoa. Many modern observers consider the Casa di San Giorgio an early stock corporation and compare its capital providers with modern shareholders.⁴⁸ Whether such assumptions are warranted may be decided elsewhere.⁴⁹ In this context, though, it is interesting to note that the Roman jurist Sigismondo Scaccia (1619) reports of 420,000 shares (*loca*) that the Casa di San Giorgio had issued.⁵⁰ After further verification, this information could constitute a starting point for considerations as to whether these *loca* were freely transferable, whether they were traded, and whether there was a central trading site.

Functional investigations along these lines will probably lead to a number of insights that go beyond the traditional picture of the commercial exchanges’ history.

⁴⁸ 1 OTTO GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT 991 (1868) (Ger.); GOLDSCHMIDT, *supra* note 39, at 28 n. 42, 254, 270 n.125, 291 n.180, 292 n.182, 295 n.191, 296-98, 311; MAX WEBER, WIRTSCHAFTSGESCHICHTE: ABRIS DER UNIVERSALEN SOZIAL- UND WIRTSCHAFTSGESCHICHTE 240, 250-51, 253 (6th ed. 2011) (Ger.).

⁴⁹ For more skeptical accounts, see, for example, 2 HEINRICH SIEVEKING, GENUESER FINANZWESEN MIT BESONDERER BERÜCKSICHTIGUNG DER CASA DI S. GIORGIO VI, 31 (1899) (Ger.), but see 1 HEINRICH SIEVEKING, GENUESER FINANZWESEN MIT BESONDERER BERÜCKSICHTIGUNG DER CASA DI S. GIORGIO 185-88 (1898) (Ger.) and 2/1 WERNER SOMBART, DER MODERNE KAPITALISMUS: HISTORISCH-SYSTEMATISCHE DARSTELLUNG DES GESAMTEUROPÄISCHEN WIRTSCHAFTSLEBENS VON SEINEN ANFÄNGEN BIS ZUR GEGENWART 153 (2nd ed. 1917) (Ger.).

⁵⁰ SIGISMUNDUS SCACCIA, TRACTATUS DE COMMERCII, ET CAMBIO § 7, Glos. 3 n.7, 682 (1619) (It.) (“in hac domo sunt quatuor centum vigintimille loca comperarum Sancti Georgij”).

3. Trading Rules

The dispersion and content of trading rules varies greatly over time and from place to place.

The German territories from early onward had rules on markets, such as in the most influential law collection of the Middle Ages, the *Sachsenspiegel* (13th century),⁵¹ or subordinated in the *ius commune* that had emerged from the Roman law tradition.⁵² Trading centers also started regulating brokers (since the 13th century),⁵³ as in Hamburg (16/17th century).⁵⁴ None of these rules, though, would be considered ‘stock exchange law’ as defined at the beginning of this article or ‘securities law’ in a broader sense.⁵⁵

The main reason why no such provisions were enacted is that on German soil, no large trading company came into existence whose shares and imported goods could have been heavily traded, such as of the English East-India Company (of 1600)⁵⁶ or the Dutch equivalent, the Vereenigde Oost-Indische Compagnie (of 1602).⁵⁷ Aside from Germany’s fragmentation and its unfavorable geographical position for overseas trading, there were considerable social reservations that hindered large commercial enterprises. Luther’s criticism of the Frankfurt fair as the “silver and gold hole” (“*sylber vnd goltt loch*”) has already been quoted;⁵⁸ also worth mentioning in this context is his condemnation of commercial partnerships,⁵⁹ culminating in the gloomy forecast: “Should the partnerships persist, then justice and honesty will perish.

⁵¹ *Sachsenspiegel*, Landrecht at Lib. II Cap. 26 § 4, Lib. III Cap. 66 § 1 (Ger.), reprinted in KARL AUGUST ECKHARDT, *SACHSENSPIEGEL: LANDRECHT* (2nd ed. 1955) (Ger.).

⁵² See, e.g., Cod. Iust. 4.60 (Valent./Valens, 5th cent. AD) (Rom. Emp.); Cod. Iust. 4.63.4 (Hon./Theod., 408-09 AD) (Rom. Emp.).

⁵³ See GOLDSCHMIDT, *supra* note 39, at 250-54; PAUL REHME, *GESCHICHTE DES HANDELSRECHTES* 152-55, 210-12 (1914) (Ger.).

⁵⁴ For overviews, see GOTTFRIED KLEIN, *400 JAHRE HAMBURGER BÖRSE* 8 (1958) (Ger.); REHME, *supra* note 53, at 198-99. For a more detailed account, see ULRICH BEUKEMANN, *DAS HAMBURGISCHE MÄKLERRECHT* (1912) (Ger.).

⁵⁵ See *supra* Part I.B.

⁵⁶ Charter to the East-India Company of 31 December 1600, 43 Eliz., 6 (1600) (Eng.), reprinted in *CHARTERS GRANTED TO THE EAST-INDIA COMPANY, FROM 1601 – ALSO THE TREATIES AND GRANTS, MADE WITH OR OBTAINED FROM, THE PRINCES AND POWERS IN INDIA, FROM THE YEAR 1756-1772* 3-26 (1774).

⁵⁷ Het Oost-Indische Octroy of 20 March 1602 by de Hooch-Mogende Heeren Staten Generael der Vereenichde Nederlanden (1602), reprinted in 1 *GROOT PLACAET-BOECK* col. 529-38 (1658), also reprinted in (facsimile) *VOC 1602-2002: 400 YEARS OF COMPANY LAW* 1-16 (Ella Gepken-Jager, Gerard van Solinge & Levinus Timmerman eds., 2005).

⁵⁸ LUTHER, *supra* note 45, at *2-3.

⁵⁹ *Id.* at *26, *28-31.

Shall justice and honesty persist, then the partnerships must perish.”⁶⁰ This coincided well with the self-perception of a large number of German merchants, who of course hoped to make money like any merchant, but—and this attitude distinguished them from businessmen abroad—typically on their own and not as a small cog in a large enterprise. A telling testimony is the often-cited response of the Hanseatic cities to an imperial request “that according to their traditional practice, everyone can try his luck on his own, and that it is outrageous to do business with a joint stock, under the supervision and management of a board of directors, and with principals and ships of the company.”⁶¹ Many similar accounts could be added, documented for instance in one of the most influential treatises on European commercial law, the *Tractatus politico-juridicus de iure mercatorum et commerciorum singulari* (1662) by the Lübeck lawyer and mayor Johann Marquard (1610-1668).⁶²

There were more reasons to enact capital market or even stock exchange rules in the thriving commercial centers of Europe. For instance, the measures against certain trading patterns in the Netherlands, particularly against short selling in the shares (“Actien”) of the aforementioned Dutch East India Company (1610),⁶³ are well known.

B. Absolutism and Mercantilism

The dominance of the state in times of absolutism and mercantilism had a significant impact on the stock exchanges. A direct result are the new exchanges that were established by official authorities, such as the bourses in Paris (1724), Berlin (1739), and Vienna (1771).⁶⁴ Unlike the exchanges of the first wave, which owed their existence to the initiative of the traders,⁶⁵ the exchanges of the second group were motivated by the economic interests of

⁶⁰ “Sollen die gesellschafften bleyben / so mus recht vnd redlickeyt vntergehen / Soll recht vnd redlickeyt bleyben / so müssen die gesellschafften vnter gehen.” *Id.* at *30.

⁶¹ “Daß nach der bey ihnen üblichen Handelsart, ein jeder sein Glück für sich versuchen könne, und unerhört seye, mit einem zusammengeschossenen Fonds, unter Aufsicht und Leitung einer Handels-Direction, durch Compagnie-Vorsteher und Compagnie-Schiffe, den Verkehr zu betreiben,” 3 GEORG SARTORIUS, GESCHICHTE DES HANSEATISCHEN BUNDES 80 (1808) (Ger.).

⁶² JOHANN MARQUARD, TRACTATUS POLITICO-JURIDICUS DE IURE MERCATORUM ET COMMERCIORUM SINGULARI Lib. IV Cap. 7 n.57-59 528-30 (1662) (Ger.). One of us is working on a more detailed account of Marquard’s treatise.

⁶³ Placaet, Tegens het verkoopen ende transportereren der Actien inde Oost-Indische Compagnie of Feb. 27 1610, *reprinted in* 1 GROOT PLACAET-BOECK col. 553-56 (1658) (Neth.).

⁶⁴ On the data, see *supra* note 46.

⁶⁵ See *supra* Part II.A.1.

the sovereign, who launched them as an instrument of his mercantilist economic policy. The indirect results of the omnipresent state influence come to the fore at the exchanges themselves: almost all items that qualified for standardized trading, such as the shares of the semi-public overseas companies or the heavily regulated import goods, depended on and related to the state.

1. *International Financial Scandals*

The many scandals that happened at the exchanges or in their surroundings formed both the historical development of this era and the modern perception of it. Some affairs arose independently of governmental influence; others happened for no other reason but state interference with the markets.

As early as the end of the 17th century, the Sephardic Jew Iosseph de la Vega (\approx 1650-1692) composed one of the most remarkable books ever written on the business of exchange trading: *Confusion de confusiones* (1688).⁶⁶ The title could not have been more succinct: “confusion of confusions”.⁶⁷ For those interested in the early days of stock trading at the Amsterdam exchange, de la Vega gives a unique insight into trading strategies and practices that will look all but unfamiliar to the observer of modern exchanges.⁶⁸ A few years later, a report to the British House of Commons (1696) states:

The pernicious Art of Stock-jobbing hath, of late, so wholly perverted the End and Design of Companies and Corporations, erected for the introducing, or carrying on, of Manufactures, to the private Profit of the first Projectors, that the Privileges granted to them have, commonly, been made no other Use of, by the First Procurers and Subscribers, but to sell again, with Advantage, to ignorant Men, drawn in by the Reputation, falsely raised, and artfully spread, concerning the thriving State of their Stock:⁶⁹

⁶⁶ IOSSEPH DE LA VEGA, *CONFUSION DE CONFUSIONES: DIALOGOS CURIOSOS, ENTRE UN PHILOSOPHO AGUDO, UN MERCADER DISCRETO, Y UN ACCIONISTA ERUDITO, DESCRIBIENDO EL NEGOCIO DE LAS ACCIONES, SU ORIGEN, SU ETHIMOLOGIA, SU REALIDAD, SU JUEGO*] Y SU ENREDO (1688) (Neth.).

⁶⁷ De la Vega offers two explanations for the title, see *id.* at 10, 380.

⁶⁸ One of us is working on a more detailed account of de la Vega’s book.

⁶⁹ Answer of the Commissioners appointed to look after the Trade of England of Nov. 24, 1696, *reprinted in* 11 Journals of the House of Commons 593-95 (1803) (Eng.) [hereinafter Nov. 24, 1696 Answer].

When, a seven decades later (1764), Scottish economic historian Adam Anderson (1692-1765) gave an overview of projects that had been undertaken or planned,⁷⁰ it was already hard to believe that people had been willing to invest money in doomed business ideas such as “To make Salt-water fresh,” “For extracting of *Silver* from *Lead*,” “For the transmuting of *Quick-silver* into a malleable and fine Metal,” “For importing a Number of large *Jack-Asses* from *Spain*, in order to propagate a larger Kind of *Mules* in *England*,” “For trading in Human-Hair,” “For a Wheel for a *perpetual Motion*” as well as—even this real-life comedy had the potential to solicit money—“[F]or an Undertaking, which shall in due Time be revealed.”⁷¹

Two scandals at the beginning of the eighteenth century were world famous: the Mississippi Bubble in France (1720) and the South Sea Bubble in England (1720). The course of events is similar in both cases: public debt is transferred to a company (Compagnie d’Occident/Compagnie des Indes, South Sea Company), which is made attractive to the capital market by granting rights that allegedly promise exorbitant profits overseas. Share prices first soared and then equally quickly collapsed when the pyramid scheme ran out of good news and the bubble burst. Following these and other scandals, the public image of large enterprises suffered for a long time. Even more than half a century later, Adam Smith (1723-1790), the celebrated philosopher and economist, criticized with strong words joint-stock companies in general and the South Sea Company in particular (1784):

“They [sc. the South Sea Company] had an immense capital divided among an immense number of proprietors. It was naturally to be expected, therefore, that folly, negligence, and profusion should prevail in the whole management of their affairs. The knavery and extravagance of their stock-jobbing projects are sufficiently known Their mercantile projects were not much better conducted.”⁷²

⁷⁰ 2 ADAM ANDERSON, AN HISTORICAL AND CHRONOLOGICAL DEDUCTION OF THE ORIGIN OF COMMERCE, FROM THE EARLIEST ACCOUNTS TO THE PRESENT TIME: CONTAINING, AN HISTORY OF THE GREAT COMMERCIAL INTERESTS OF THE BRITISH EMPIRE 291-96 (1764).

⁷¹ *Id.* at 293-95 (No. XI. 4., XXXIII. 3., XXXIII. 5., XXXV., XXXVI., LXIII., XLIII.).

⁷² 3 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS: WITH ADDITIONS 128 (3rd ed. 1784). Smith included the passages on the joint-stock companies for the first time in the third edition. *Id.* at 107-50. One of us is working on a more detailed account of this section.

2. Governmental Restrictions

Shortly after the aforementioned report to the House of Commons (1696),⁷³ English authorities responded to the widespread scandals with an “Act to restrain the Number and ill Practice of Brokers and Stock-Jobbers” (1697).⁷⁴ The Act limited the number of brokers to one hundred and introduced a registration system. The famous “Bubble Act” (1720)⁷⁵ followed only two decades later and prohibited a variety of activities and practices that were believed to support undue speculation. The Act’s impact was rather varying and remains ambiguous, but the Act was not overturned until one century later (1825).⁷⁶ The French legislature reacted to the scandals as well, but less radically.⁷⁷

All these rules do not constitute ‘stock exchange law’ as defined earlier in this article because they address neither the organization of exchanges nor the process of trading at them.⁷⁸ Instead, they are selective actions against misconduct that happened to take place at the exchanges or in their surroundings, respectively. The main purpose of governmental intervention was typically to protect the fiscal interests of the state; protection of investors was at best a secondary goal, if at all.

3. Speculation in Quieter Areas

In regions other than England, France, and the Netherlands, the waves of

⁷³ Nov. 24, 1696 Answer.

⁷⁴ An Act to Restrain the Number and Ill Practice of Brokers and Stock-Jobbers, 1697, 8 & 9 Will. 3, c. 32 (Eng.).

⁷⁵ An Act for better securing certain Powers and Privileges intended to be granted by his Majesty by two Charters for Assurance of Ships and Merchandizes at Sea, and for lending Money upon Bottomry; and for restraining several extravagant and unwarrantable Practices therein mentioned, 1720, 6 Geo., c. 18 (Eng.).

⁷⁶ An Act to repeal so much of an Act passed in the Sixth Year of His late Majesty King George the First, as relates to the restraining several extravagant and unwarrantable Practices in the said Act mentioned; and for conferring additional Powers upon His Majesty, with respect to the granting of Charters of Incorporation to trading and other Companies, 1825, 6 Geo. 4, c. 91 (Eng.).

⁷⁷ See, e.g., Loi du May 1716 de Édité concernant les lettres ou billets de change, ou autres billets payables au porteur, reprinted in 21 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES, DEPUIS L’AN 420, JUSQU’A LA RÉVOLUTION DE 1789 114-116 (Isambert, Decrusy & Taillandier eds. 1830 (Fr.); see also Loi du 21 janvier 1721 de Déclaration pour rétablir l’usage des lettres ou billets payables au porteur *id.* at 190-91 (Fr.).

⁷⁸ See *supra* Part I.B.

speculation were less destructive and sometimes hardly noticeable. On German soil, as the prime example of a quieter area, no scandals occurred that had the quality or the impact of the great bubbles abroad. This pleasant outcome is a consequence of the less pleasant underdevelopment or backwardness of the German territories at that time, not only from a political standpoint but also in economic and financial terms. Friedrich Wilhelm (1620-1688), known as the Great Elector of Brandenburg (*Der Große Kurfürst*), described this poor state of affairs in words similar to those of Luther: “The whole commerce of Prussia is no good, as the English and Dutch profit and suck the fat from my country.”⁷⁹ The government failed in establishing a stock exchange in Berlin (1685), and it took another five decades before Friedrich Wilhelm I (1688-1740) successfully launched one (1739). Not a single German overseas trading company flourished over a longer period; sooner or later, all failed.⁸⁰ Even Friedrich II (1712-1786), known as Frederick the Great (*Friedrich der Große*), did not manage to establish a prospering company, but instead had to learn that he had been overly optimistic when he wrote in his *Testament Politique* (April-July 1752) as one of the reasons to found the Compagnie D’Emden, a trading company for the Orient, “because it gives people the chance to increase their capital by twenty or even by fifty percent.”⁸¹

The traditional focus on the developments in Brandenburg and Prussia, though, has probably to some degree distorted the true picture of the past. More detailed studies would be worthwhile especially for areas with closer economic and social ties to the centers of speculation in England, France, and the Netherlands. An interesting indication that Germans found speculation perhaps more fascinating than historians later thought are the attempts to

⁷⁹ “Der gantze Preussische handell dauget nit, als die Engellender Hollender Profitieren u. saugen mein landt das fett ab,” as reported by Wilhelm Naudé, *Die brandenburgisch-preußische Getreidehandelspolitik von 1713-1806*, in 29 JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT 161, 167 (1905) (Ger.). For Luther’s words, see *supra* Part II.A.1.

⁸⁰ For the details, see 1 & 2 RICHARD SCHÜCK, BRANDENBURG-PREUBENS KOLONIALPOLITIK UNTER DEM GROßEN KURFÜRSTEN UND SEINEN NACHFOLGERN (1647-1721) (1889) (Ger.); VIKTOR RING, ASIATISCHE HANDLUNGSCOMPAGNIEN FRIEDRICHS DES GROSSEN: EIN BEITRAG ZUR GESCHICHTE DES PREUSSISCHEN SEEHANDELS UND AKTIENWESENS (1890) (Ger.); KATHARINA JAHNTZ, PRIVILEGIERTE HANDELSCOMPAGNIEN IN BRANDENBURG UND PREUBEN: EIN BEITRAG ZUR GESCHICHTE DES GESELLSCHAFTSRECHTS (2006) (Ger.).

⁸¹ “[A]ccausse que Cela procure au[x] particuillers le [] Moyen de placer leur Capitaux au denier 5, et meme a moitié du Capital d’Interet.” FRIEDRICH DER GROßE, TESTAMENT POLITIQUE (1752) (Ger.); GEHEIMES STAATSARCHIV PREUBISCHER KULTURBESITZ, BPH, URKUNDEN III 1, No. 21, at 10, reprinted in DIE POLITISCHEN TESTAMENTE DER HOHENZOLLERN 290 (Richard Dietrich ed. 1986) (Ger.).

establish two insurance companies at the height of the global speculation in Hamburg (summer of 1720).⁸² Immediately after the plans to found the two companies had been released, a lively trade arose with a view to the expected—but not yet issued—shares. The Senate of Hamburg forbade this trading within a few days (July 19, 1720): “Therefore, the honorable respectable Council has noticed with great astonishment and displeasure, how some private persons, under the pretext of an insurance company, have on their own begun to encourage and start a so-called trading in shares, although there is reason to worry that this will lead to many dangerous and highly disadvantageous consequences, both for the public as well as private persons: Hence, the honorable respectable Council, to satisfy its magisterial duties, could not sit still, but found itself compelled to hereby prohibit all such share trading entirely”⁸³ A week later, the Senate rejected the requests to permit the establishment of the insurance companies and declared them null and void (July 26, 1720).⁸⁴

C. Industrialization

Industrialization led to a third wave of exchange launches, most notably of the London Stock Exchange (1773) and the New York Stock Exchange (1792).⁸⁵ The establishment of these exchanges coincides with other milestones of the modern era, such as the United States Declaration of Independence (1776), the publication of Adam Smith’s famous work *The Wealth of Nations* (1776),⁸⁶ the French Revolution (1789), and the end of the Holy Roman Empire (1806).

⁸² The best account of the events is given by Cäsar Amsinck, *Die ersten hamburgischen Assecuranz-Compagnien und der Actienhandel im Jahre 1720*, 9 Zeitschrift des Vereins für Hamburgische Geschichte 465-94 (1894) (Ger.).

⁸³ “Demnach E. E. Rath mit großer Befremdung und Mißfallen vernommen, welchergestalt einige Privati, unter dem Prätex einer Assecuranz-Compagnie, sich eigenmächtig unternommen, einen sogenannten Actien-Handel zu veranlassen und anzufangen, daraus aber gar viele gefährliche und dem Publico sowol als Privatis höchstnachteilige Folgen zu besorgen: Als hat E. E. Rath, seinen obhabenden obrigkeitlichen Pflichten nach, dazu nicht stille sitzen können, sondern sich genöthiget gefunden, allsolchen Actien-Handel hiemit gänzlich zu untersagen” Befehl, daß keine Privati sich unterstehen sollen, unter dem Prätex einer Assecuranz-Compagnie, einen sogenannten Actien-Handel anzufangen of July 19, 1720, 2 SAMMLUNG 927-28 (1764), corr. 1123 (Ger.).

⁸⁴ Decret wegen der Assecuranz-Compagnie of July 26, 1720, 2 SAMMLUNG 928-29 (1764).

⁸⁵ On the data, see *supra* note 46.

⁸⁶ 1 & 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776). For the important third edition, see ADAM SMITH, *supra* note 72.

Contemporary observers perceived the era of industrialization as the “awakening of a stronger entrepreneurial spirit”⁸⁷ and noticed the “emergence of such manifold large industrial associations.”⁸⁸ The shares and bonds of these “industrial associations,” now typically organized as stock corporations, became widely traded at many exchanges. In addition to shares and bonds, a third group of securities gained more and more attention: government bonds to finance the public debt. It sounds all but unfamiliar to the modern investor that warnings such as of Immanuel Kant (1724-1804) against the “inevitable national bankruptcy” (1795)⁸⁹ remained unheard until some governments could no longer serve their debts and investors lost considerable sums. Industrialization had a decisive influence on all three classes of securities—shares, private bonds, and government bonds—and, thereby, the rise of modern stock exchanges, because it was the process of industrialization that led to projects that required more and more capital, such as the erection of railways or large factories. All major economies were faced with the challenge to—in Adam Smith’s famous words—erect and maintain

those publick institutions and those publick works, which, though they may be in the highest degree advantageous to a great society, are, however, of such a nature, that the profit could never repay the expence to any individual or small number of individuals, and which it, therefore, cannot be expected that any individual or small number of individuals should erect or maintain.⁹⁰

Given the range and richness of economic, social, political, and legal developments, our overview of the main events and factors in the history of commercial exchanges will from now on focus on Germany as one prime example, and, unlike the earlier sections, it will be limited to the legal developments.

⁸⁷ “Erwachen eines regern Unternehmungs-Geistes” Gutachten der vereinigten Abtheilungen des Königlichen Staatsraths für die Finanzen und für die Justiz, über den Entwurf eines Gesetzes über Aktien-Gesellschaften, March 16, 1843, 1 GEHEIMES STAATSARCHIV PREUBISCHER KULTURBESITZ, ACTA GENERALIA DES JUSTIZ-MINISTERIUMS, betreffend: die allgemeinen Bestimmungen über die Aktien-Vereine (1838-1843), I. HA Rep. 84a, No. 10442, sh. 223 at 77 (Ger.).

⁸⁸ “Entstehen so mannigfacher großer industrieller Vereine.” *Id.* at 77.

⁸⁹ “[D]er endlich doch unvermeidliche Staatsbankerott.” IMMANUEL KANT, ZUM EWIGEN FRIEDEN 11 (1795) (Ger.).

⁹⁰ ADAM SMITH, *supra* note 72, at 92-93.

1. Early Stock Exchange Law

Prussia had the greatest influence on the development of German law in general and on stock exchange law in particular. The Prussian Official Journal published the so-called *Börsenordnungen*, the rules and regulations of the Prussian exchanges, for the first time in the second quarter of the century, specifically for the exchanges in Berlin (1825),⁹¹ Königsberg (1827),⁹² Danzig (1830),⁹³ Elbing (1830),⁹⁴ and Stettin (1832)^{95,96} These early stock exchange rules affected mainly the process of trading at the exchange rather than the exchanges' organizational structure.

As mentioned earlier in this article, the German *Allgemeines Deutsches Handelsgesetzbuch* (1861) frequently referred to the *Börsenpreis*, the exchange price,⁹⁷ although the Code brought no general rules on commercial exchanges. When the German states introduced the Code in their respective territories, those with commercial exchanges had to decide if it was necessary or at least advisable to complement the Code by some basic exchange rules, such as on their establishment, approval, and supervision. Prussia chose to refrain from extensive exchange legislation, but enacted a few provisions in its introductory act.⁹⁸ Two provisions are worth mentioning: "The establishment of an exchange requires the approval of the Minister of Trade"⁹⁹ and "New exchange rules and regulations need permission by the Minister of Trade."¹⁰⁰ In the first years, people thought that only those marketplaces that wanted to get recog-

⁹¹ Börsen-Ordnung für die Korporation der Kaufmannschaft zu Berlin, May 7, 1825, PREUBGS at 137-46 (Ger.).

⁹² Börsen-Ordnung für die Korporation der Kaufmannschaft zu Königsberg in Preußen, Sept. 13, 1827, PREUBGS at 128-30 (Ger.).

⁹³ Börsenordnung für die Korporation der Kaufmannschaft zu Danzig, Jan. 12, 1830, PREUBGS at 10-16 (Ger.).

⁹⁴ Börsenordnung für die Korporation der Kaufmannschaft zu Elbing, Apr. 24, 1830, PREUBGS at 73-80 (Ger.).

⁹⁵ Börsen-Ordnung für die Korporation der Kaufmannschaft zu Stettin, Mar. 17, 1832, PREUBGS at 121-27 (Ger.).

⁹⁶ Previously, rules on exchanges had already been published as part of the statutes of the merchant associations (*Kaufmannschaften*); see, e.g., Statut für die Kaufmannschaft zu Berlin, Mar. 2, 1820, PREUBGS at 46-59 (Ger.) (therein the sixth section, "Von der Handhabung der polizeilichen Ordnung in den Versammlungen auf der Börse", §§ 42-48).

⁹⁷ E.g., ADHGB of 1861, art. 343, 353.

⁹⁸ EINFÜHRUNGSGESETZ, *supra* note 26, at art. 3.

⁹⁹ "Die Errichtung einer Börse kann nur mit Genehmigung des Handelsministers erfolgen." *Id.* at art. 3 § 1.

¹⁰⁰ "Neue Börsenordnungen bedürfen der Genehmigung des Handelsministers" *Id.* at art. 3, § 2(1).

nized as a *Börse* (exchange) under the law had to abide by these rules. Later, the Prussian administration applied the provisions to all marketplaces that carried out the functions of exchanges.¹⁰¹ Among the other exchange rules on the state level,¹⁰² there is a noteworthy Act of Hamburg (1880) that vested the local Chamber of Commerce (*Handelskammer*) with the supervision of the exchange.¹⁰³

At the federal level, no exchange rules were enacted before the end of the century. Contrary to what the lack of such provisions may suggest, there has been a lively public debate that closely followed the events at the exchanges and increasingly recognized a need for regulation. Friedrich Carl von Savigny (1779-1861), the most celebrated German jurist of the nineteenth century, described the trading at the exchanges as similar to “gambling” (1853).¹⁰⁴ Gustav Schmoller (1838-1917), one of the famous “Socialists of the Chair” (*Kathedersozialisten*), wrote just before the great stock market crash (1870):

Commercial ethics have reached their lowest point at the stock exchange and in the exchange transactions; here, deals are defended that any remnant of decency condemns. Deception, news forgery, bribery of newspapers and officials, and the like are almost deemed permissible; the border between real and unreal transactions has become blurred and is no longer visible.¹⁰⁵

After the great crash, Eduard Lasker (1829-1884), then one of the few prominent parliamentarians, portrayed the exchange in the *Reichstag*, the parliament of the German Empire, “as a school where you will be made perfectly familiar with all such evasions of the law, as an academy for the violation of

¹⁰¹ The administrative practice is summarized in the decision 34 PRVERWGE [Prussian Supreme Administrative Court] Nov. 26, 1898 (III B 44/98), 315-27 (Ger.).

¹⁰² For an overview, see *Begründung zum Entwurf eines Börsengesetzes* (explanatory notes) [Exchange Act] Dec. 3, 1895, REICHSTAGS-DRUCKSACHE 14/1895-96 at 14, 18-20 (supp. vol. at 11, 13-14) (Ger.).

¹⁰³ § 17 Gesetz betreffend die Handelskammer und die Versammlung Eines Ehrbaren Kaufmanns [G], Jan. 23, 1880 [HambGS] at 26, 29 (Ger.).

¹⁰⁴ “Dieser, dem Glücksspiel ähnliche, Handel.” 2 FRIEDRICH CARL VON SAVIGNY, *DAS OBLIGATIONENRECHT ALS THEIL DES HEUTIGEN RÖMISCHEN RECHTS* 117 (1853) (Ger.).

¹⁰⁵ “An der Börse und in den Börsengeschäften ist die kaufmännische Moral am laxesten geworden; Geschäfte werden hier vertheidigt, die ein Rest von Anstandsgefühl verurtheilt. Täuschungen, Fälschungen von Nachrichten, Bestechungen von Zeitungen und Beamten und Aehnliches gelten beinahe als erlaubt; die Grenze der reellen und unreellen Geschäfte hat sich bis auf vollständige Unkenntlichkeit verwischt.” GUSTAV SCHMOLLER, *ZUR GESCHICHTE DER DEUTSCHEN KLEINGEWERBE IM 19. JAHRHUNDERT* 676 (1870) (Ger.).

the laws” (1873).¹⁰⁶ The stenographic reports note at this occasion “great amusement” (“große Heiterkeit”) and “again amusement” (“erneute Heiterkeit”).¹⁰⁷

The prominent criticism of the “exchange swindle” (*Börsenschwindel*) notwithstanding, it required a longer learning process before the stock exchange law’s genuine contribution to the prevention of further scandals became widely recognized. Even at the time of the second stock corporation law reform, the *Zweite Aktienrechtsnovelle* (1884),¹⁰⁸ the decisive milestone in the history of the German stock corporation (*Aktiengesellschaft*), the fathers of the reform still refrained from regulating exchanges: “The draft . . . tries . . . to avoid putting shackles on the exchanges, as far as their distortions can be reconciled with public morals. . . .”¹⁰⁹ One of the infamous consequences of this approach was that the reform abstained from establishing a prospectus requirement;¹¹⁰ admittedly, bad experiences with such documents helped justify this decision: “A number of criminal investigations from the past crisis have even failed in determining the authors and publishers of the prospectuses on the basis of which investors were solicited to subscribe to or take delivery of the shares.”¹¹¹ Only fifteen years later, when the legislators adopted the Commercial Code (*Handelsgesetzbuch*), still in force today (1897),¹¹² the attitude had already changed: “Undoubtedly it is desirable to counter, as far as possible, the abuses that still exist. But the approaches that are worth consideration

¹⁰⁶ “[A]ls eine Schule, in der man in alle derartigen Umgehungen des Gesetzes auf das Beste eingeführt wird, als eine Akademie für die Uebertretungen der Gesetze” Lasker, REICHSTAGS-PLENARPROTOKOLL [Parliamentary record], Apr. 4, 1873 at 221 (Ger.).

¹⁰⁷ *Id.*

¹⁰⁸ Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften [G], July 18, 1884, RGBL. at 123-70; for an index of the sources, see Fleckner, *Gesetzgebung*, *supra* note 10, at 999, 1049-53.

¹⁰⁹ “Der Entwurf . . . sucht . . . zu vermeiden, dem Börsenverkehr, soweit dessen Manipulationen sich mit der öffentlichen Moral vereinbaren lassen, Fesseln anzulegen . . .” Besondere Begründung zum Entwurf eines Gesetzes, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften (explanatory notes) [Stock Corporation Reform Act] March 7, 1884, REICHSTAGS-DRUCKSACHE 21/1884, *supp. vol.*, at 316, 345 (Ger.). Also noteworthy are a few passages in the general report; see Allgemeine Begründung (general report) [Stock Corporation Reform Act], *id.* at 215, 236, 241, 281, 315 (Ger.).

¹¹⁰ See *id.* at 215, 267.

¹¹¹ “Eine Reihe von strafgerichtlichen Untersuchungen aus der verflorenen Krisis hat nicht einmal die Verfasser und Veröffentlichter der Prospekte, auf Grund deren zur Zeichnung oder Abnahme der Aktien aufgefordert wurde, ermitteln können.” *Id.* at 215, 260.

¹¹² HANDELSGESETZBUCH [HGB] [Commercial Code], May 10, 1897, RGBL. 219-436 (Ger.); for an index of the sources, see Fleckner, *Gesetzgebung*, *supra* note 10, at 999, 1054-56.

are to a lesser degree those of corporate law than those of exchange law.”¹¹³

After this brief survey, it becomes apparent that before the end of the nineteenth century, Germany had hardly any exchange regulation that would constitute stock exchange law in a technical sense. It would obscure the picture of the past, though, to stop at this point because many of the later Exchange Act’s goals were pursued through other regulatory strategies. To the modern observer, those strategies do not look unfamiliar, but resemble measures that would today be qualified as provisions of securities or corporate law. A functional analysis of the stock exchange law’s evolution would miss an important part of the picture if it ignored these regulatory approaches. The following sections give a brief overview.

2. Early Securities Law

For many decades, Prussia refrained from regulating exchanges and stock corporations, but instead intervened on a case-by-case basis to counter misconduct and abuses on the financial markets. In modern categories, these individual measures can be understood as an early form of securities law.¹¹⁴

A cursory review of some thirty of the most important of these measures shows that the regulatory approaches are very inconsistent and totally insensible to their impact in the medium and long term.¹¹⁵ The lowest point in a series of questionable measures is probably the granting of trustee security status to railroad shares (1843);¹¹⁶ even the Prussian representatives acknowl-

¹¹³ “Unzweifelhaft ist es wünschenswerth, den noch vorhandenen Mißbräuchen nach Möglichkeit entgegenzutreten. Die hierfür in Betracht kommenden Mittel liegen aber weniger auf dem Gebiete des Aktienrechts als auf dem der Börsengesetzgebung.” Denkschrift zu dem Entwurf eines Handelsgesetzbuchs und eines Einführungsgesetzes (explanatory notes) [Commercial Code], ZU REICHSTAGS-DRUCKSACHE 632/1895-97, Jan. 22, 1897, supp. vol., at 3141, 3197 (Ger.).

¹¹⁴ For a broader context, see HOPT, *supra* note 1, at 28-29; Klaus J. Hopt, *Ideelle und wirtschaftliche Grundlagen der Aktien-, Bank- und Börsenrechtsentwicklung im 19. Jahrhundert*, in 5 WISSENSCHAFT UND KODIFIKATION DES PRIVATRECHTS IM 19. JAHRHUNDERT 128, 157-59 (Helmut Coing & Walter Wilhelm eds., 1980) (Ger.).

¹¹⁵ There are too many laws and other measures to print a full record, but almost all of them can be found in the official journal of Prussia (*Gesetz-Sammlung für die Königlichen Preussischen Staaten*); in the bulletin of the Prussian government (*Ministerial-Blatt für die gesammte innere Verwaltung in den Königlich Preussischen Staaten*); or in the Prussian state gazette (*Königlich Preussischer Staats-Anzeiger*).

¹¹⁶ Allerhöchste Kabinettsorder, die Annahme der Eisenbahnaktien als pupillen- und depositalmäßige Sicherheit betreffend, Dec. 22, 1843, PREUBGS at 45 (1844) (Ger.).

edged later the devastating effects of this order.¹¹⁷ The best examples for legislation driven by the current waves of speculation rather than a general understanding of the phenomena are three regulations that, in turn, prohibited the trade in Spanish and other owner-denominated government securities (1836),¹¹⁸ generally in foreign securities (1840),¹¹⁹ and in subscription certificates for railway companies (1844).¹²⁰ As the Prussian government admitted when it repealed the regulations (1860),¹²¹ these three measures were not “the product of a systematic evolution of the legislation, but rather casual laws”¹²² for “the particular group of securities . . . on which the spirit of speculation had currently focused.”¹²³

¹¹⁷ Bericht der Kommission für Handel und Gewerbe über den Gesetz-Entwurf, betreffend die Aufhebung verschiedener Bestimmungen über den Verkehr mit Staats- und anderen Papieren (explanatory notes), ABGEORDNETENHAUS-DRUCKSACHEN 55/1860, Mar. 10, 1860, *supp. vol.*, at 347, 348 (Ger.).

¹¹⁸ Verordnung, den Verkehr mit Spanischen und sonstigen, auf jeden Inhaber lautenden Staats- oder Kommunalschuld-Papieren betreffend, Jan. 19, 1836, PREUBGS at 9-11 (Ger.).

¹¹⁹ Verordnung, den Verkehr mit ausländischen Papieren betreffend, May 13, 1840, PREUBGS at 123-24 (Ger.).

¹²⁰ Verordnung, die Eröffnung von Aktienzeichnungen für Eisenbahn-Unternehmungen und den Verkehr mit den dafür ausgegebenen Papieren betreffend, May 24, 1844, PREUBGS at 117-18 (Ger.).

¹²¹ Gesetz, betreffend die Aufhebung verschiedener Bestimmungen über den Verkehr mit Staats- und anderen Papieren, sowie über die Eröffnung von Aktienzeichnungen für Eisenbahn-Unternehmungen [G], June 1, 1860, PREUBGS at 220 (Ger.).

¹²² “[D]as Produkt einer systematischen Entwicklung der Gesetzgebung, als vielmehr Gelegenheits-Gesetze” (Motive zum Entwurf eines Gesetzes, betreffend die Aufhebung verschiedener Bestimmungen über den Verkehr mit Staats- und anderen Papieren (explanatory notes), ABGEORDNETENHAUS-DRUCKSACHEN 54/1860, Feb. 9, 1860, *supp. vol.*, at 344, 345 (Ger.); *see also* Bericht der Kommission für Handel und Gewerbe über den Gesetz-Entwurf, betreffend die Aufhebung verschiedener Bestimmungen über den Verkehr mit Staats- und anderen Papieren (explanatory notes), ABGEORDNETENHAUS-DRUCKSACHEN 55/1860, Mar. 10, 1860, *supp. vol.*, at 347, 348 (Ger.).

¹²³ “[D]iejenige Gattung von Effekten . . . , auf welche sich der Spekulationsgeist gerade geworfen hatte.” Motive zum Entwurf eines Gesetzes, betreffend die Aufhebung verschiedener Bestimmungen über den Verkehr mit Staats- und anderen Papieren (explanatory notes), ABGEORDNETENHAUS-DRUCKSACHEN 54/1860, Feb. 9, 1860, *suppl. vol.*, at 344, 345 (Ger.). *See also* Bericht der Kommission für Handel und Gewerbe über den Gesetz-Entwurf, betreffend die Aufhebung verschiedener Bestimmungen über den Verkehr mit Staats- und anderen Papieren (explanatory notes), ABGEORDNETENHAUS-DRUCKSACHEN 55/1860, Mar. 10, 1860, *suppl. vol.*, at 347, 348 (Ger.).

3. Early Corporate Law

Policymakers of the nineteenth century increasingly tried to fight the abuses at the exchanges by regulating those who issued the items (shares and bonds) that were most heavily traded: the stock corporations.¹²⁴ The landmarks of the German legal development are the Prussian Railways Act (1838),¹²⁵ the Prussian Stock Corporation Act (1843),¹²⁶ the draft of a general German commercial code (1861),¹²⁷ as well as the first (1870)¹²⁸ and the second stock corporation law reform (1884).¹²⁹ Aside from Prussia, none of the other states that later formed the German Empire enacted a stock corporation act.¹³⁰

In the regulation of stock corporations, two basic concepts competed, which—applied in isolation—proved in retrospect to be a choice between a rock and a hard place: self-protection of investors or state supervision. The most enthusiastic plea for the investors' personal responsibility to fend for themselves came from the representatives of Hamburg, who said at the conferences that composed the draft of a general German commercial code (1857):

Against the abuses then occurring . . . there is, in essence, only one effective instrument, namely, the personal experience of the public that makes individuals themselves apply the necessary caution and moderation, to watch out for damages, without preferring to rely on the paternalistic welfare of the state. The more the legislature adopts special rules to protect the individual against the consequences of his own carelessness and to save him from financial losses in his private

¹²⁴ For an overview of the German legislation on the stock corporation (*Aktiengesellschaft*) in the 19th century and of the sources related to its development, see Fleckner, *Gesetzgebung, supra* note 10, at 999, 1029-56.

¹²⁵ Gesetz über die Eisenbahn-Unternehmungen [G], Nov. 3, 1838, PREUBGS at 505-16 (Ger.).

¹²⁶ Gesetz über Aktiengesellschaften [G], Nov. 9, 1843, PREUBGS at 341-46 (Ger.).

¹²⁷ ADHGB of 1861.

¹²⁸ Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften [G], June 11, 1870, BUNDESGESETZBLATT [BGBL.] at 375-386 (Ger.); for an index of the sources, see Fleckner, *Gesetzgebung, supra* note 10, at 999, 1045-48.

¹²⁹ Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften [G], July 18, 1884, RGBL. at 123-70

¹³⁰ For a list of the most important legislative drafts, see Fleckner, *Gesetzgebung, supra* note 10, at 999, 1003-04. Some regions applied the French law on stock corporations (*sociétés anonymes*). CODE DE COMMERCE [C. COM] at art. 19, 29-38, 40, 45 (1807) (Fr.).

affairs, nature dictates that the necessary prudence among the public will develop all the more slowly and weakly, and it will therefore become easier for smarter and more corrupt traders to conduct their business.¹³¹

Since it was impossible to reach a consensus on this fundamental question, the conference members agreed on a compromise: In principle, the establishment of a stock corporation (*Aktiengesellschaft*) needed state approval (a charter system),¹³² a practice that was followed especially in Prussia.¹³³ But each state was given the option to waive this requirement,¹³⁴ as had been common namely in Hamburg.¹³⁵ It was not before the first stock corporation law reform (1870) that the more liberal attitude came into law nationwide.

A decade later, Germany struck a new social and economic path, followed until today, that turned out to be a *Sonderweg* (separate path) compared to other countries' approaches. As a result, with the second stock corporation law reform, Germany's law on stock corporations (1884) became more restrictive than any other major regime.¹³⁶ The underlying paternalism was frankly revealed, for instance, in the government's draft of the reform bill:

It is rightly argued that the wrong flow of capital could and should

¹³¹ “Gegen die alsdann mit vorkommenden Mißbräuche [...] gibt es hauptsächlich nur ein wirksames Mittel, nämlich die eigene Erfahrung des Publikums, welche dahin führt, daß die Einzelnen selbst die erforderliche Vorsicht und Mäßigung anwenden, um sich vor Schaden in Acht zu nehmen, ohne sich vorzugsweise auf die obervormundschaftliche Fürsorge des Staates zu verlassen. Je mehr die Gesetzgebung specielle Vorschriften erläßt, um den Einzelnen gegen die Folgen eigener Unvorsichtigkeit in Schutz zu nehmen und in seinen Privatinteressen vor geschäftlichen Verlusten zu bewahren, desto langsamer und schwächer entwickelt sich, der Natur der Sache nach, die erforderliche Umsicht beim Publikum, und umsomehr wird auf andere Weise schlaueren und gewissenloseren Unternehmern ihr Treiben erleichtert.” Testimony of the representatives of Hamburg; *reprinted in* Protokolle der Commission zur Berathung eines allgemeinen deutschen Handelsgesetz-Buches Meeting n. 35 [ADHGB Protocols], Mar. 13, 1857, Appendix, at 308, 320 (Ger.).

¹³² ADHGB of 1861, at art. 208(1).

¹³³ Gesetz über die Eisenbahn-Unternehmungen, Nov. 3, 1838, at § 1; Gesetz über Aktiengesellschaften, Nov. 9, 1843, at § 1(1) (Ger.).

¹³⁴ ADHGB of 1861, at art. 249.

¹³⁵ Verordnung wegen der bei Errichtung, Veränderung und Aufhebung von Handlungs-Societäten, Handlungs-Firmen, anonymen Gesellschaften und Procuern bei dem Handels-Gerichte zu machenden Anzeigen, Oct. 15, 1835, 14 SAMMLUNG DER VERORDNUNGEN DER FREYEN HANSE-STADT HAMBURG 307-16 (1837) (Ger.).

¹³⁶ Fleckner, *Gesetzgebung*, *supra* note 10, at 999, 1006-07.

primarily be countered by not only not informing the ‘man on the street’—in the general interest as well as in his own interest—but instead by saving him from engaging on this path that threatens his financial existence. The investment in stocks is always a risky one. The small capital, arduously acquired, perhaps the only savings after years of work, needs to be safely invested; it should be directed to the investment in good mortgages, government securities, mortgage and pension bonds, municipal or priority bonds, or in savings banks or in shares of commercial cooperatives that promote the members’ business. The hope for higher profit should not jeopardize the capital, especially as this hope is often an illusion.¹³⁷

And the *Reichstag* became witness of verdicts like “we want first and foremost to keep the man on the street away from stock corporations”¹³⁸ or “we do not want the man on the street to have shares.”¹³⁹

D. National Legislation and European Harmonization

With the foundation of the German Empire (*Deutsches Reich*) came the fulfillment of the *constitutional* requirements, with the abandonment of liberal views the *political* requirements, and with the bad outcomes of the former regulatory approaches the *legislative* requirements to create an Exchange Act: the *Börsengesetz* (1896).¹⁴⁰

¹³⁷ “Mit Recht wird geltend gemacht, daß der falschen Strömung des Kapitals in erster Linie dadurch begegnet werden könne und müsse, daß der sogenannte ‚kleine Mann‘ im allgemeinen wie im eigenen Interesse nicht nur nicht darauf hinzuweisen, vielmehr davor zu bewahren sei, in diese für seine wirthschaftliche Existenz bedrohliche Strömung sich zu begeben. Die Geldanlage in Aktien ist stets eine gewagte. Das kleine Kapital, mühsam erworben, vielleicht die einzige Ersparniß langjähriger Arbeit, muß sicher angelegt werden; es sollte auf die Anlage in guten Hypotheken, Staatspapieren, Pfand- oder Rentenbriefen, Kommunal- oder Prioritätsobligationen oder in Sparkassen oder auf die Bethheiligung an wirthschaftlichen Genossenschaften, welche die eigene Erwerbsthätigkeit fördern, verwiesen sein. Die Hoffnung auf höheren Zins sollte nicht das Kapital gefährden, zumal sie meist trügt.” Allgemeine Begründung, REICHSTAGS-DRUCKSACHE 21/1884, Mar. 7, 1884, *supp. vol.*, at 215, 248 (Ger.).

¹³⁸ “Wir wollen hauptsächlich die kleinen Leute fernhalten von den Aktienunternehmungen.” Hartmann, REICHSTAGS-PLLENARPROTOKOLL [Parliamentary record], June 23, 1884 at 962 (Ger.).

¹³⁹ “Wir wollen nicht, daß die kleinen Leute Aktien haben.” Von und zu Aufseß, *id.* at 964 (Ger.).

¹⁴⁰ Börsengesetz [Exchange Act], June 22, 1896, RGL. at 157-76 (Ger.).

Our overview of the main events and factors in the history of commercial exchanges after industrialization will again focus on Germany as one prime example and, given the great amount of economic, social, political, and legal developments, concentrate on the Exchange Act and its evolution over the last twelve decades.

1. Creation of the German Exchange Act

The Exchange Act follows one of the most thorough legislative preparations in the history of German commercial law: the work of the Exchange Commission (*Börsen-Enquete-Kommission*).¹⁴¹ The public took great interest in the work of the Commission, and none other than Max Weber (1864-1920), who later became a celebrated sociologist and political economist, discussed the Exchange Commission's main results at great length in a series of articles (1895/1896).¹⁴² The Exchange Act that was finally enacted, though, made little use of the opportunities that the long deliberations of the Commission had offered, mainly due to the careless preparation of the first draft and the many conflicts that occurred in the legislative process.¹⁴³ It is therefore not without justification that Arthur Nußbaum (1877-1964), the legendary commercial lawyer,¹⁴⁴ wrote in his influential commentary on the Exchange Act that the Act was “in formal respects . . . to such an extent failed as perhaps no other of the newer federal laws” (1910).¹⁴⁵ Julius von Gierke (1875-1960) considered the Act a “total monstrosity” even decades later (1958).¹⁴⁶

¹⁴¹ The Commission's main publications are as follows: Börsen-Enquete-Kommission, 1-4 Stenographische Berichte (1892-1893); Sitzungs-Protokolle (1893); Bericht und Beschlüsse der Börsen-Enquête-Commission (1894).

¹⁴² Max Weber, *Die Ergebnisse der Deutschen Börsenenquete*, 43 ZHR 83-219, 457-514 (1895) (Ger.); Max Weber, *Die Ergebnisse der Deutschen Börsenenquete*, 44 ZHR 29-74 (1896) (Ger.); Max Weber, *Die Ergebnisse der Deutschen Börsenenquete*, 45 ZHR 69-156 (1896) (Ger.).

¹⁴³ For the details of how the Exchange Act was created, see JOHANN CH. MEIER, *DIE ENTSTEHUNG DES BÖRSENGESETZES VOM 22. JUNI 1896* (1992) (Ger.); WOLFGANG SCHULZ, *DAS DEUTSCHE BÖRSENGESETZ: DIE ENTSTEHUNGSGESCHICHTE UND WIRTSCHAFTLICHEN AUSWIRKUNGEN DES BÖRSENGESETZES VON 1896* (1994) (Ger.).

¹⁴⁴ For a critical acclaim, see Klaus J. Hopt, *Arthur Nußbaum (1877-1964)*, in *FESTSCHRIFT 200 JAHRE JURISTISCHE FAKULTÄT DER HUMBOLDT-UNIVERSITÄT ZU BERLIN* 545-60 (2010) (Ger.).

¹⁴⁵ “[I]n formeller Beziehung ... in solchem Maße mißlungen wie wohl kein anderes der neueren Reichsgesetze.” ARTHUR NUßBAUM, *KOMMENTAR ZUM BÖRSENGESETZ* xxviii (1910) (Ger.).

¹⁴⁶ “[V]öllige Mißgeburt”. JULIUS VON GIERKE, *HANDELSRECHT UND SCHIFFFAHRTSRECHT* 518 (8th ed. 1958).

After all, the Exchange Act is at least properly labeled: The Act consists almost completely of provisions that are stock exchange law in the technical sense.¹⁴⁷ Its focus is on the exchange as an institution and the direct users of the exchange—that is, brokers and dealers as well as issuers. Investor protection is only a secondary objective; the first goal is to strengthen the functioning of the exchange and of the trading process. This already becomes perceptible just from the titles of the Act's six sections: (I) General Provisions on Exchanges and Their Organs (sections 1-28); (II) Price Fixing and Broker-Dealer Activities (sections 29-35); (III) Admission of Securities to Trading (sections 36-47); (IV) Derivatives Trading (sections 48-69); (V) Brokerage Services (sections 70-74); and (VI) Criminal Sanctions and Final Provisions (sections 75-82).

2. Evolution of the Exchange Act

Since its adoption, the Exchange Act has been amended roughly thirty times.¹⁴⁸ This is a higher rate of change than in many other fields of law, but lower, for instance, than for the German stock corporation (*Aktiengesellschaft*), whose code, the *Aktiengesetz*, has been changed some seventy times within the last five decades.¹⁴⁹ The legislature twice completely repealed the Exchange Act and replaced it with a new Exchange Act:¹⁵⁰ the first time with the Fourth Financial Market Promotion Act (2002),¹⁵¹ the second time with the MiFID Implementation Act (2007).¹⁵² In addition, the text of the Exchange Act has been newly promulgated four times (1908,¹⁵³ 1961,¹⁵⁴ 1996,¹⁵⁵ 1998¹⁵⁶). Over-

¹⁴⁷ See *supra* Part I.B.

¹⁴⁸ For indices of the amendments to the Exchange Acts of 1896, 2002, and 2007, see KAPITALMARKTRECHT No. 080 and 080/1 (Siegfried Kümpel, Horst Hammen & Jens Ekkenga eds.) (Ger.); for a brief discussion of the main reforms, see ADOLF BAUMBACH & KLAUS HOPT, HANDELSGESETZBUCH (14) BörsG Einl 8-20 (35th ed. 2012) (Ger.).

¹⁴⁹ For an overview of all amendments before 2007, see Fleckner, *Gesetzgebung*, *supra* note 10, at 999, 1079-1107.

¹⁵⁰ A technique that is called an *Ablösungsgesetz*; see BUNDESMINISTERIUM DER JUSTIZ, HANDBUCH DER RECHTSFÖRMLICHKEIT 504-15 (3rd ed. 2008) (Ger.).

¹⁵¹ Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Viertes Finanzmarktförderungsgesetz) [G] [Fourth Financial Market Promotion Act of 2002], June 21, 2002, BGBL. I at art. 1, 2010, 2010-28 (Ger.).

¹⁵² Finanzmarktrichtlinie-Umsetzungsgesetz, July 16, 2007, BGBL I at 1330, 1351-68.

¹⁵³ Bekanntmachung, betreffend die Fassung des Börsengesetzes, May 27, 1908, RGBL. at 215-37 (Ger.).

¹⁵⁴ Börsengesetz [Exchange Act], Mar. 1, 1961, BGBL. III 4110-1 (Ger.).

all, the Exchange Act has been published seven times in its entirety in the *Official Journal*, a rarity in German business and commercial law.

All changes and amendments pose a number of questions that could be discussed under the general heading “exchange regulation and legislation”: What were the causes and reasons to enact certain rules? Who were the people who drafted the bills? What were their sources of knowledge? What influence did the parliamentary process have? What were the fundamental factors that shaped the law?¹⁵⁷ Questions of this type require a thorough investigation into the parliamentary proceedings and the governmental archives, a task too broad for this article. But it is good to have these questions in mind for the survey of the main amendments in the following subsection.

A factor that has become increasingly important in the evolution of German stock exchange law is the harmonization on the European level. In the broader area of securities law, European legal harmonization is already well advanced for many regulatory issues. There is almost no securities law in Germany that is not based on or at least influenced by European law.¹⁵⁸ Exchange law belongs to the few exceptions because only some regulatory aspects are governed by European law.¹⁵⁹ Therefore, the survey in the following subsection will reveal a mix of reforms, some of which were prompted by European requirements and others by purely national motives.

3. Main Amendments to the Exchange Act

In the nearly twelve decades since the enactment of the German Exchange Act (1896), the world as such and the exchanges in particular have witnessed major changes in the economic, social, and political environment. It is no surprise, then, that the German Exchange Act has been subject to changes, too. The following overview presents the most important amendments:

¹⁵⁵ Bekanntmachung der Neufassung des Börsengesetzes, July 17, 1996, BGBl. I at 1030-46 (Ger.).

¹⁵⁶ Bekanntmachung der Neufassung des Börsengesetzes, Sept. 9, 1998, BGBl. I at 2682-2700 (Ger.).

¹⁵⁷ See Fleckner, *Gesetzgebung*, *supra* note 10, for the legislation on stock corporations (*Aktiengesellschaften*).

¹⁵⁸ For overviews, see, for example, Klaus J. Hopt, *Capital Markets Law*, in MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, *supra* note 4, at 141-45; Lars Klöhn, *Kapitalmarktrecht*, in EUROPARECHTLICHE BEZÜGE DES PRIVATRECHTS § 6 (Katja Langenbucher ed. 2008) (Ger.).

¹⁵⁹ See Fleckner, *Exchanges*, *supra* note 4, 660-61.

a) *Reform of 1908*.¹⁶⁰ The reform of 1908 overhauled, most notably, the law of derivatives trading after the original concept had proved to be a complete failure.

Although the economic and political crises of the decades following the 1908 reform (including the two world wars) led to a great number of individual measures, the Exchange Act and its regulatory approach remained largely unchanged. This is probably not a testament to the quality of the revised Act and the isolated interventions on the financial markets, but rather an indication of the fact that the Act's content mattered little in the context of the problems that the exchanges and their surroundings faced in that period.

b) *Exchange Listing Act of 1986*.¹⁶¹ The first fundamental revision of the Exchange Act brought the Exchange Listing Act of 1986. The Act had two objectives: First, it implemented into German law the requirements of the Listing Directive (1979),¹⁶² the Prospectus Directive (1980),¹⁶³ and the Interim Report Directive (1982).¹⁶⁴ Second, the Act introduced a new market segment (*Geregelter Markt*) to facilitate the access of small businesses to the capital markets. This reform also brought an Exchange Admission Regulation (*Börsenzulassungs-Verordnung*) into force that specifies the requirements of the Exchange Act for the admission of securities to exchange trading.¹⁶⁵

c) *Reform of 1989*.¹⁶⁶ The most important change that came with the reform of 1989 was the introduction of the “derivatives trading capacity by virtue of information” (*Termingeschäftsfähigkeit kraft Information*). In addition, the

¹⁶⁰ Gesetz, betreffend Änderung des Börsengesetzes [G], May 8, 1908, RGBL. at 183-94 (Ger.).

¹⁶¹ Gesetz zur Einführung eines neuen Marktabschnitts an den Wertpapierbörsen und zur Durchführung der Richtlinien des Rates der Europäischen Gemeinschaften vom 5. März 1979, vom 17. März 1980 und vom 15. Februar 1982 zur Koordinierung börsenrechtlicher Vorschriften (Börsenzulassungs-Gesetz) [G], Dec. 16, 1986, BGBL. I at 2478, 2478-83 (Ger.).

¹⁶² Council Directive 79/279 of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, 1979 O.J. (L 66) 21-32 (EC).

¹⁶³ Council Directive 80/390 of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, 1980 O.J. (L 100) 1-26 (EC).

¹⁶⁴ Council Directive 82/121 of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing, 1982 O.J. (L 48) 26-29 (EC).

¹⁶⁵ Verordnung über die Zulassung von Wertpapieren zur amtlichen Notierung an einer Wertpapierbörse (Börsenzulassungs-Verordnung—BörsZulV), Apr. 15, 1987, BGBL. I at 1234-54.

¹⁶⁶ Gesetz zur Änderung des Börsengesetzes [G], July 11, 1989, BGBL. I at 1412, 1412-16 (Ger.).

Exchange Act was brought in line with changes in daily life, specifically the ongoing automation and the increase in cross-border trading. Last but not least, European law again demanded some changes to meet the requirements of the amendments to the Prospectus Directive (1987).¹⁶⁷

d) *Second Financial Market Promotion Act of 1994*.¹⁶⁸ The Second Financial Market Promotion Act of 1994 established a central act for the regulation of the capital markets, the Securities Trading Act (*Wertpapierhandelsgesetz*),¹⁶⁹ and a national regulatory authority, the Federal Supervisory Office for Securities Trading (*Bundesaufsichtsamt für den Wertpapierhandel*), now the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*).¹⁷⁰ The Second Financial Market Promotion Act implemented the Transparency Directive (1988)¹⁷¹ and the Insider Trading Directive (1989).¹⁷² A decade ago, the Transparency Directive and the three Directives mentioned at the beginning (of 1979, 1980, and 1982) were consolidated in a new directive (2001)¹⁷³ that, in turn, has been overhauled in the meantime (2004).¹⁷⁴ The Insider Trading Directive has been replaced by the Market Abuse Directive (2003).¹⁷⁵

The creation of a Securities Trading Act and a regulatory agency on the federal level had a major impact on the relevance of the Exchange Act and its application by the states in which the exchanges are located. It is true that the

¹⁶⁷ Council Directive 87/345/EEC of 22 June 1987 amending Directive 80/390/EEC coordinating the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, 1987 O.J. (L 185) 81-83 (EC).

¹⁶⁸ Gesetz über den Wertpapierhandel und zur Änderung börsenrechtlicher und wertpapierrechtlicher Vorschriften (Zweites Finanzmarktförderungsgesetz) [G], July 26, 1994, BGBL. I at 1749, 1760-70 (Ger.).

¹⁶⁹ *Id.* at 1749-60.

¹⁷⁰ BAFIN, Federal Financial Supervisory Authority, <http://www.bafin.de/EN> (last visited Feb. 13, 2013).

¹⁷¹ Council Directive 88/627 of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, 1988 O.J. (L 348) 62-65 (EC).

¹⁷² Council Directive 89/592 of 13 November 1989 coordinating regulations on insider dealing, 1989 O.J. (L 334) 30-32 (EC).

¹⁷³ Directive 2001/34 of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, 2001 O.J. (L 184) 1-66 (EC).

¹⁷⁴ Directive 2004/109 of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, 2004 O.J. (L 390) 38-57 (EC).

¹⁷⁵ Directive 2003/6 of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), 2003 O.J. (L 96) 16-25 (EC).

Exchange Act was never supposed to settle all questions arising in the context of stock exchanges in one single codification. Therefore, policymakers had no reservations about removing regulatory matters from the Exchange Act as early as eleven months after its adoption.¹⁷⁶ The Second Financial Market Promotion Act of 1994, though, was a major blow to the Exchange Act's weight when it implemented the new European requirements by virtue of the newly created Securities Trading Act and not as part of the already existing Exchange Act. Admittedly, the Second Financial Market Promotion Act also added regulatory issues to the Exchange Act, such as the establishment of a market surveillance unit at the exchanges. But at the same time, it transferred important matters from the Exchange Act to the Securities Trading Act, for instance concerning the duties to immediately disclose relevant new information to the public (*Ad hoc-Publizität*).

e) *Third Financial Market Promotion Act of 1998*.¹⁷⁷ The Third Financial Market Promotion Act of 1998 provided for a revision of the prospectus regime, among other matters.

f) *Fourth Financial Market Promotion Act of 2002*.¹⁷⁸ As already mentioned, the Fourth Financial Market Promotion Act of 2002 replaced the old Exchange Act of 1896 with a revised new version. The most visible change in the regime was the abolition of the official exchange brokers (*amtliche Kursmakler*). The law of derivative trading was once again put on a new conceptual basis and, on this occasion, transferred to the Securities Trading Act. A remarkable oddity was the regulation of alternative trading systems within the Exchange Act.

g) *MiFID Implementation Act of 2007*.¹⁷⁹ The last fundamental reform came with the MiFID Implementation Act of 2007; this Act led, once again, to a new Exchange Act that replaced the one of 2002. The most striking changes are the unification of the formerly two market segments at the exchanges and, in the Securities Trading Act, the revision of the rules for alternative trading systems.

The name of the reform act speaks for itself with regard to its back-

¹⁷⁶ Sections 70-74, regarding brokerage services, of the Exchange Act of 1896 were transferred to Sections 400-05 of the Commercial Code of 1897. *See* Börsengesetz, June 22, 1896, at §§ 70-74; *HANDELSGESETZBUCH*, May 10, 1897, at §§ 400-05.

¹⁷⁷ Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Drittes Finanzmarktförderungsgesetz) [G], Mar. 24, 1998, BGBl. I at 529, 529-32, (Ger.).

¹⁷⁸ Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Viertes Finanzmarktförderungsgesetz) [G], June 21, 2002, BGBl. I at 2010, 2010-28 (Ger.).

¹⁷⁹ Finanzmarktrichtlinie-Umsetzungsgesetz, July 16, 2007, BGBl. I at 1330, 1351-68, (Ger.).

ground: the MiFID Implementation Act aims to implement the aforementioned MiFID, the directive on markets in financial instruments (2004).¹⁸⁰ The MiFID succeeded the Investment Services Directive (1993),¹⁸¹ and is further specified by a Commission Regulation (2006)¹⁸² and a Commission Directive (2006).¹⁸³ The MiFID mandates the member states to provide for rules that govern “regulated markets,”¹⁸⁴ a term that the Directive defines at its outset,¹⁸⁵ and to establish national authorities that supervise such markets.¹⁸⁶ Unlike the older directives, the MiFID directly affects the organization of the exchanges, though it does not prescribe a certain structural form that all European exchanges have to adopt.

III. CHALLENGES: REGULATORY ISSUES OF TODAY

The environment of today’s exchanges is no less eventful than in the past. There are at least four regulatory challenges that exchanges, overseers, and policymakers from all over the world are currently faced with: profit orientation (A.), internationalization (B.), fragmentation (C.), and automation (D.).

A. Profit Orientation

In the last two decades, observers became witnesses of a fundamental transformation in the organization of exchanges: the conversion from public not-for-profit institutions that resembled medieval trading guilds to international business companies that seek to make profit (“demutualization”).¹⁸⁷

¹⁸⁰ MiFID, *supra* note 19.

¹⁸¹ Council Directive 93/22 of 10 May 1993 on investment services in the securities field, 1993 O.J. (L 141) 27-46 (EC).

¹⁸² Commission Regulation No. 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, 2006 O.J. (L 241)1-25 (EC).

¹⁸³ Commission Directive 2006/73 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, 2006 O.J. (L 241) 26-58 (EC).

¹⁸⁴ MiFID, *supra* note 19, at 36-47.

¹⁸⁵ *See supra* Part I.A.3.

¹⁸⁶ MiFID, *supra* note 19, at 48-55.

¹⁸⁷ On demutualization, *see, e.g.*, Oliver Hart and John Moore, *The Governance of Exchanges: Members’ Cooperatives Versus Outside Ownership*, 12(4) OXFORD REV. ECON. POL’Y 53-69

Today, almost all major exchanges or their operators have become stock corporations whose shares are listed on the exchange itself, publicly traded, and scattered among financial investors.¹⁸⁸ The main exception is the Tokyo Stock Exchange: its shares are not yet listed and traded, but the exchange recently (in November 2011) announced that it will soon become a listed stock corporation with publicly traded shares.¹⁸⁹

Demutualization challenges the traditional regulatory framework because it creates a broad range of conflicts of interest.¹⁹⁰ If exchanges become for-profit companies, their attention in exercising their supervisory powers might shift from regulatory motives and needs to the financial implications of their decisions. This may lead to over-regulation of areas in which the exchanges can impose significant penalties or, conversely, to inattention to areas in which they cannot expect such supervisory returns. There is also the fear that exchanges may regulate competitors more strictly than affiliated companies. Despite the fundamental transformation in the organization of stock exchanges and the regulatory concerns raised by this development, the law of stock exchanges has largely remained unchanged in the major jurisdictions; only minor details, if at all, have been added or altered. The MiFID (of 2004) demands that the “conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market” be avoided, but neither prescribes nor even mentions specific strategies.¹⁹¹ The national stock exchange laws that implement the MiFID offer little in addition.¹⁹²

(1996); Johannes Köndgen, *Ownership and Corporate Governance of Stock Exchanges*, 154 J. INST. & THEORET. ECON. 224-251 (1998); Roberta S. Karmel, *Turning Seats Into Shares: Causes and Implications of Demutualization of Stock and Futures Exchanges*, 53 HASTINGS L.J. 367-430 (2002); Harald Baum, *Changes in Ownership, Governance and Regulation of Stock Exchanges in Germany: Path Dependent Progress and an Unfinished Agenda*, 5 EUR. BUS. ORG. L. REV. 677-704 (2004); Jonathan R. Macey and Maureen O'Hara, *From Markets to Venues: Securities Regulation in an Evolving World*, 58 STAN. L. REV. 563-599 (2005); Fleckner, *Stock Exchanges*, *supra* note 4; INTERESSENKONFLIKTE BEIM BÖRSENGANG VON BÖRSEN (Horst Hammen ed., 2009) (Ger.); Erin Oldford and Isaac Otchere, *Can Commercialization Improve the Performance of Stock Exchanges Even without Corporatization?*, 46 FIN. REV. 67-87 (2011).

¹⁸⁸ For an historical overview, see Fleckner, *Stock Exchanges*, *supra* note 4, at 2554-65.

¹⁸⁹ *Agreement regarding Business Combination between Tokyo Stock Exchange Group, Inc. and Osaka Securities Exchange Co., Ltd.*, TOKYO STOCK EXCHANGE, Nov. 22, 2011, http://www.tse.or.jp/english/news/30/20111122_a.html.

¹⁹⁰ On these conflicts of interest and on the regulatory strategies to address them, see Fleckner, *Stock Exchanges*, *supra* note 4, at 2579-2618.

¹⁹¹ MiFID, *supra* note 19, at Art. 39(a).

¹⁹² See, e.g., Börsengesetz, July 16, 2007, at § 5(4)(1); Loi 2000-1223 du 14 décembre 2000 de code monétaire et financier, at art. L 421-11(1)(1). For more depth, see Lois du 29 octobre

In retrospect, the process of demutualization lets the fierce debates on the German two-tier exchange system, with its separation of the exchange's operator from the exchange as a public institution, appear in a somewhat different light.¹⁹³ The same, although to a lesser degree, may be said for the discussion in the United States. On the one hand, the German system cannot be as burdensome as many observers have claimed because otherwise the *Deutsche Börse AG*, the operator of the Frankfurt Stock Exchange, would not rank among the world's leading exchange companies today. On the other hand, the experiences in other countries show that it does not require a binding organizational framework to ensure that exchanges assume a proper structure. In their efforts to avoid the numerous conflicts of interest that the new structure entails, stock exchanges worldwide have come to solutions which look, in many respects, like the two-tier system in Germany. Possibly the best example is the new structure of the New York Stock Exchange.¹⁹⁴ These experiences indicate that the law should not prescribe a certain organizational framework, but instead lay down specific organizational objectives. Compared with the current regulatory approach of many jurisdictions, a regime focusing on organizational objectives would have both regulatory and economic benefits because the exchanges could, under the new regime, react quickly to changes in their environment without having to wait for a revision of the statutory provisions that they are subject to.

While the debate on the organizational structure of stock exchanges is now in calmer waters, it will probably stay on the agenda of policymakers and scholars in a broader context: the corporate governance of financial institutions.¹⁹⁵ The main challenge remains the same: to find the right balance between state control, self-regulation, and competition.

B. Internationalization

The international dimension of exchange law, such as its extraterritorial

2004 de Règlement Général de l'Autorité des Marchés Financiers [Law of Oct. 29, 2004] J.O. n. 253, Oct. 29, 2004, p. 18 262, at art. 512-3–512-6(Fr.); for detailed guidance, see *FSA Handbook*, REC 2.5.10–16 (2011) (U.K.).

¹⁹³ See *supra* Part I.B.2.

¹⁹⁴ For a detailed account, see Andreas M. Fleckner, *Verfassung der New York Stock Exchange*, in, INTERESSENKONFLIKTE BEIM BÖRSENGANG VON BÖRSEN, *supra* note 187, at 51-56.

¹⁹⁵ See RUBEN LEE, *RUNNING THE WORLD'S MARKETS: THE GOVERNANCE OF FINANCIAL INFRASTRUCTURE* (2011); see also *FINANCIAL REGULATION AND SUPERVISION: A POST-CRISIS ANALYSIS* (Eddy Wymeersch, Klaus J. Hopt & Guido Ferrarini eds., 2012).

reach, is a phenomenon rather new to many jurisdictions.¹⁹⁶ When new technologies allowed exchange operators from Germany and elsewhere to solicit new exchange members from all over the world, the United States prevented them from entering the American market by banning foreign trading screens from US soil.¹⁹⁷ Only then—and probably motivated by anger at the United States—did the German legislature regulate the access of foreign trading systems to Germany.¹⁹⁸ It seems from these and from other countries that the whole debate on market access for foreign exchanges is influenced less by regulatory rather than by political reasons, especially as no cases have come to the fore where investor protection was at risk only because investors traded through foreign exchanges. Allowing alternative trading systems to enter foreign markets, though, may require more regulatory caution. The right strategy seems to differentiate between exchange operators and their supervisor, respectively.¹⁹⁹ The topic should remain on the political agenda in the broader context of the requirements that the United States imposes on foreigners that want to access U.S. capital markets, such as traders, issuers, and exchanges. Early fruits of the ongoing debate are reforms that eased the burdens on foreign issuers that would like to withdraw from the U.S. capital market (2007),²⁰⁰ that prepare their financial statements according to international

¹⁹⁶ For the Germany, UK, and US jurisdictions, see GUNNAR SCHUSTER, *DIE INTERNATIONALE ANWENDUNG DES BÖRSENRECHTS: VÖLKERRECHTLICHER RAHMEN UND KOLLISIONSRECHTLICHE PRAXIS IN DEUTSCHLAND, ENGLAND UND DEN USA* (1996) (Ger.).

¹⁹⁷ Howell Jackson, Mark Gurevich & Andreas M. Fleckner, *Foreign trading screens in the United States*, 1 *CAP. MARKT. L.J.* 54-76 (2006).

¹⁹⁸ Through the Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Viertes Finanzmarktförderungsgesetz) [G], June 21, 2002, BGBl. I at art. 2, N. 24, 28 (Ger.) (adding §§ 37i-37m, 44 to the Securities Trading Act).

¹⁹⁹ See, most notably, the Mutual Recognition Arrangement between the United States Securities and Exchange Commission and the Australian Securities and Investments Commission, together with the Australian Minister for Superannuation and Corporate Law, Aug. 25, 2008, SEC, available at http://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/framework_arrangement.pdf. For an example of a previous “trial balloon,” see Ethiopis Tafara and Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 *HARV. INT’L L.J.* 31-68 (2007); for a critical assessment, see Howell E. Jackson, *A System of Selective Substitute Compliance*, 48 *HARV. INT’L L.J.* 105-119 (2007). See also Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 *CHI. J. INT’L L.* 243-284 (2010); Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 *HARV. INT’L L.J.* 55-108 (2011).

²⁰⁰ Termination of a Foreign Private Issuer’s Registration of a Class of Securities Under Section 12(g) and Duty To File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Exchange Act Release No. 34-55540, 72 *Fed. Reg.* ¶¶ 16934-60 (Mar. 27, 2007).

financial reporting standards (2007),²⁰¹ whose securities are not listed on a national securities exchange or otherwise publicly traded (2008),²⁰² and that are subject to the respective disclosure regime for foreign private issuers (2008).²⁰³

Another set of problems associated with the international reach of stock exchange law is cross-border exchange mergers.²⁰⁴ The most prominent example is the combination of the New York Stock Exchange and Euronext (2006), which, in turn, is the holding company of exchanges in Belgium, France, the Netherlands, Portugal, and the United Kingdom. Policymakers feel increasingly uncomfortable with the oversight over such entities. In addition, with more and more of the leading exchange operators merging, severe antitrust issues are raised. While national regulators may prefer to extend the extraterritorial reach of the laws they are operating under, the better regulatory approach will be to intensify the cooperation with foreign regulators. The failed merger of NYSE Euronext with Deutsche Börse (2011/2012) has once again highlighted the main problems.²⁰⁵ The fierce competition, especially with alternative trading systems,²⁰⁶ will continue to put pressure on the traditional exchange operators to team up with their counterparts in order to low-

²⁰¹ Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Exchange Act Release Nos. 33-8879 and 34-57026, 73 Fed. Reg. ¶¶ 986-1012 (Dec. 21, 2008).

²⁰² Exemption From Registration Under Section 12(G) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Exchange Act Release No. 34-58465, 73 Fed. Reg. ¶¶ 52752-69 (Sept. 5, 2008).

²⁰³ Foreign Issuer Reporting Enhancements, Release Nos. 33-8959 and 34-58620, 73 Fed. Reg. ¶¶ 58300-27 (Sept. 23, 2008).

²⁰⁴ See, e.g., Klaus J. Hopt, *Amerikanisches Recht durch die Hintertür*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov.10, 2006, at 24 (Ger.); FABIAN L. CHRISTOPH, *BÖRSENKOOPERATIONEN UND BÖRSENFUSIONEN* (2007) (Ger.); Pierre Schammo, *Regulating Transatlantic Stock Exchanges*, 57 INT'L & COMP. L.Q. 827-862 (2008); DENNIS A. LEPCZYK, *RECHTLICHE ASPEKTE INTERNATIONALER BÖRSENFUSIONEN: GESELLSCHAFTSRECHT, ORGANISATIONSRRECHT, AUFSICHTSRRECHT* (2009) (Ger.); BERNADETTE SEEHAFFER, *GRENZÜBERSCHREITENDE BÖRSENKONZENTRATIONEN IM DEUTSCHEN UND BRITISCHEN RECHT* (2009) (Ger.); LEE, *supra* note 195.

²⁰⁵ See, most importantly, Press Release, European Commission, Mergers: Commission Blocks Proposed Merger Between Deutsche Börse and NYSE Euronext (Feb. 1, 2012) (on file with the Virginia Law and Business Review); for a critical assessment under German exchange law (based on an expert opinion commissioned by one the constituencies), see Ulrich Burgard, *Die börsenrechtliche Zulässigkeit des Zusammenschlusses der Deutsche Börse AG mit der NYSE Euronext im Blick auf die Frankfurter Wertpapierbörse*, 65 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT 1973-82, 2021-34 (2011) (Ger.).

²⁰⁶ See *infra* Part III.C.

er their costs. This means that cross-border exchange mergers will probably remain on the agenda not only of the exchange operators but also of legislators, regulators, and other observers.

C. Fragmentation

The rivalry between exchanges and other marketplaces for stocks, bonds, or commodities is as old as the exchanges themselves, because only the physical and temporal concentration of the trading at the exchanges leads to a separation of the market into exchanges and other venues. The traditional difficulties in distinguishing exchanges from other marketplaces, a problem as old as the exchanges themselves,²⁰⁷ provide for many examples where operators of exchanges and other sites came into conflict, either with one another or with official authorities. Since the aforementioned decision of the Prussian Superior Administrative Court (1898), the problem of separating exchanges from other marketplaces is widely recognized as a regulatory challenge.²⁰⁸

Until one decade ago, other marketplaces failed to win considerable trading volume from the traditional exchanges. The “network effect” explains why: the more liquid a marketplace is, the lower the transaction costs are, and the lower the transaction costs are, the more attractive and thus more liquid the market is. In such an environment, entering a market is very difficult and will not be a success without a significant advantage over the existing competitors. Over the course of the last decade, technological advances have dramatically reduced the obstacles for new market entrants because alternative trading systems are now accessible from anywhere in the world (which increases their liquidity) at low transaction costs (which attracts more liquidity). In addition, legislators and regulators all over the world have readjusted the market system to facilitate the entrance of new competitors.²⁰⁹ As a result, exchanges have lost market share in many fields, sometimes even their market leader-

²⁰⁷ See *supra* Part I.A.3.

²⁰⁸ 34 PRVERWGE [Prussian Supreme Administrative Court] Nov. 26, 1898 (III B 44/98), 315-39 (Ger.).

²⁰⁹ For a critical assessment of the developments in German, European and US law, see CHRISTOPH KUMPAN, DIE REGULIERUNG AUßERBÖRSLICHER WERTPAPIERHANDELSYSTEME IM DEUTSCHEN, EUROPÄISCHEN UND US-AMERIKANISCHEN RECHT (2006) (Ger.); see also, e.g., Polly Nyquist, *Failure to Engage: The Regulation of Proprietary Trading Systems*, 13 YALE L. & POL'Y REV. 281-337 (1995); DANIELA COHN-HEEREN, KAPITALMARKTRECHTLICHE REGULIERUNGSKONZEPTE FÜR ALTERNATIVE HANDELSYSTEME (2006) (Ger.); HORST HAMMEN, BÖRSEN UND MULTILATERALE HANDELSYSTEME IM WETTBEWERB (2011) (Ger.).

ship, and markets have become more fragmented. Two examples illustrate the tremendous pace of change: At the end of 2005, it was a widely recognized event that the New York Stock Exchange's market share in the trading of securities whose issuer is primarily listed in New York dropped below 75%, the lowest level since the beginning of the recording of this data three decades ago.²¹⁰ Less than three years later, in summer 2008, the New York Stock Exchange's market share stood at a mere 25%.²¹¹ The London Stock Exchange's market share in the United Kingdom fell between January and October 2008 from 96% to 58%,²¹² recovered in 2010 to some 62%,²¹³ before it dived below 50% in 2011.²¹⁴

Originally, traders, issuers, regulators, and most other constituencies welcomed the competition by alternative trading systems as it considerably reduced trading costs. Even the exchanges initially benefited from this development because the steady growth of the overall trading volume outweighed their loss of market share. It took some time until observers began to appreciate the negative consequences of the ongoing market fragmentation, such as heterogeneous pricing (instead of central price fixing at the exchange), intransparency (caused by "dark pools" and other forms of hidden trading), or inequalities in the trading options (that give certain professional traders advantages over other investors). It is not beyond imagination that regulators may decide to intervene and reintroduce a regime that leads to more concentration.²¹⁵ Possible regulatory reforms may even include items that have never

²¹⁰ Aaron Lucchetti, *NYSE's Market Dominance Slips*, WALL ST. J., Nov. 29, 2005, at C1.

²¹¹ See NASDAQ Stock Market, NYSE Share Volume in NYSE-Listed Securities (chart), <http://media.primezone.com/cache/6948/file/5876.jpg>. See also, e.g., Steven McNamara, *Rents and the Floor Brokers*, TRADERS MAG., Aug. 14, 2008, available at <http://www.tradersmagazine.com/news/101848-1.html>. For a brief overview of the New York Stock Exchange's competitive position, see Fleckner, *supra* note 194, at 37, 39-43.

²¹² *Konkurrenz setzt Londoner Börse zu*, FIN. TIMES DEUTSCHLAND, Nov. 26, 2009, at 17.

²¹³ *Londoner Börse verteidigt Marktanteil*, FIN. TIMES DEUTSCHLAND, Sept. 30, 2010, at 17.

²¹⁴ *Gigant im Rückzugsgefecht*, FIN. TIMES DEUTSCHLAND, Apr. 28, 2011, at 17.

²¹⁵ For a general account of the equity market structure in the United States, see Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358, 75 Fed. Reg. ¶¶ 3594-614 (Jan. 14, 2010). For regulatory reform proposals in the European Union, see, most notably, *Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] On OTC Derivatives, Central Counterparties and Trade Repositories*, COM (2011) 652 final (Oct. 20, 2011); *Proposal for a Directive of the European Parliament and of the Council on Markets in Financial Instruments Repealing Directive 2004/39/EC of the European Parliament and of the Council*, COM (2011) 656 final (Oct. 20, 2011). See also, e.g., Stavros Gadinis, *Market Structure for Institutional Investors: Comparing the U.S. and E.U. Regimes*, 3 VA. L. & BUS. REV. 311-56 (2008); Jan von Hein, *Best Execution: Funktionale Konvergenz des europäischen und des US-amerikanischen Modells*, in 2 FESTSCHRIFT

or only rarely been traded at exchanges, such as contracts-for-difference or over-the-counter derivatives.²¹⁶

D. Automation

More and more orders originate from computer algorithms rather than from human traders. As in many other areas of daily life, this automation brings great benefits and is nothing anyone should worry about per se. In the last few years, though, the share of automated orders and, equally important, cancellations has increased so much that in some market segments, algorithm trading has become the determining factor. Now, a number of risks have come to the fore and people have started mulling over regulating algorithm trading or, as it is often labeled, high-frequency trading.²¹⁷

FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG AM 24. AUGUST, *supra* note 1, at 1909-32 (Ger.); Gerard Hertig, *Mifid and the Return of Concentration Rules*, in *id.*, at 1989-2000 (Ger.); Nis Jul Clausen & Karsten Engsig Sørensen, *Reforming the Regulation of Trading Venues in the EU under the Proposed MiFID II – Levelling the Playing Field and Overcoming Market Fragmentation?*, 9 EUR. COMP. FIN. L. REV. 275-306 (2012); Guido Ferrarini & Niamh Moloney, *Reshaping Order Execution in the EU and the Role of Interest Groups: From MiFID I to MiFID II*, 13 EUR. BUS. ORG. L. REV. 557-97 (2012).

²¹⁶ See, most notably, *Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties and Trade Repositories*, COM (2010) 484 final (Sept. 15, 2010); *Proposal for a Directive of the European Parliament and of the Council on Markets in Financial Instruments Repealing Directive 2004/39/EC of the European Parliament and of the Council*, COM (2011) 656 final, at art. 61, 72, 83, (Oct. 20, 2011); *Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] On OTC Derivatives, Central Counterparties and Trade Repositories*, COM (2011) 652 final, at art. 7-10, 24-27, (Oct. 20, 2011); Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping Exchange Act, Release No. 33-9204 and 34-64372, 76 Fed. Reg. ¶¶ 29818-29900, corr. 32880 (Apr. 29, 2011). *See also, e.g.*, Press Release, European Association of Corporate Treasurers, Leading European Companies Unite Against Proposed Derivatives Regulation, (Jan. 6, 2010), available at <http://www.eact.eu/main.php?page=press>; Dan Awrey, *The Dynamics of OTC Derivatives Regulation: Bridging the Public-Private Divide*, 11 EUR. BUS. ORG. L. REV. 155-93 (2010); Stefan Jobst, *Börslicher und außerbörslicher Derivatehandel mittels zentraler Gegenpartei*, 21 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT 384-400 (2010) (Ger.); Joanne P. Braithwaite, *The Inherent Limits of ‘Legal Devices’: Lessons for the Public Sector’s Central Counterparty Prescription for the OTC Derivatives Markets*, 12 EUR. BUS. ORG. L. REV. 87-119 (2011); Franz-Christoph Zeitler, *Vergessene Ursachen der Banken- und Finanzkrise*, 66 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT 673, 676-77 (2012) (Ger.); Lambert Köhling & Dominik Adler, *Der neue europäische Regulierungsrahmen für OTC Derivate*, 66 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT 2125-33, 2173-80 (2012) (Ger.).

²¹⁷ See, most notably, Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358, 75 Fed. Reg. ¶¶ 3594, 3606-12 (Jan. 14, 2010); Large Trader Reporting,

The public became aware of this new phenomenon with the infamous “flash crash” in the United States, when stock prices of many companies plunged for a short time with a violence unseen before (May 2010).²¹⁸ It is likely that we will never fully understand what happened on this day, but it seems from the many reports that algorithm trading had a critical impact on the development, at least in the sense that the programs contributed to the sharp decline by placing more and more sell orders that the market could not absorb. Another famous case is the failed initial public offering (IPO) of BATS Global Markets, ironically an operator of exchanges and other trading facilities (“BATS” originally stood for “Better Alternative Trading System”): on its first day of trading, BATS shares fell within seconds from roughly fifteen dollars to almost zero cents, prompting both the termination of trading and the withdrawal of the IPO (March 2012).²¹⁹

More generally, there are at least two regulatory concerns that require further investigation: First, many exchange operators let algorithm traders place and cancel orders at a rate that allows them to make money to the detriment

Exchange Act Release No. 34-64976, 76 Fed. Reg. ¶¶ 46969-47007 (July 27, 2011); *Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] On OTC Derivatives, Central Counterparties and Trade Repositories*, COM (2011) 652 final, at arts. 17, 51, (Oct. 20, 2011); *High-frequency Trading in the Foreign Exchange Market*, BANK FOR INTERNATIONAL SETTLEMENTS, MARKET COMMITTEE, Sept. 2011, <http://www.bis.org/publ/mkte05.pdf>. See also, e.g., Merkt, *supra* note 1, at 2207, 2242-44; Terrence Hendershott, Charles M. Jones & Albert J. Menkveld, *Does Algorithmic Trading Improve Liquidity?*, 66 J. Fin. 1-33 (2011); Peter Gomber, et al., *High-Frequency Trading* (Working Paper, 2011) (on file with the Virginia Law and Business Review); NIKOLAUS HAUTSCH, *ECONOMETRICS OF FINANCIAL HIGH-FREQUENCY DATA* (2012); *The fast and the furious: High-frequency trading seems scary, but what does the evidence show?*, *ECONOMIST*, Feb. 25, 2012.

²¹⁸ Among the many statements, see, most notably, *Testimony Concerning the Severe Market Disruption Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the H.*, 112th Cong. (2011) (testimony of Mary L. Schapiro, Chairman, Securities and Exchange Commission), available at <http://www.sec.gov/news/testimony/2010/ts051110mls.pdf>; *Examining the Causes and Lessons of the May 6th Market Plunge, Before the Subcommittee on Securities, Insurance, and Investment of the S. Committee on Banking, Housing, and Urban Affairs*, 111th Cong. (2010) (testimony of Mary L. Schapiro, Chairman, Securities and Exchange Commission), available at <http://www.sec.gov/news/testimony/2010/ts052010mls.pdf>; STAFF OF CFTC AND SEC TO THE JOINT ADVISORY COMMITTEE ON EMERGING REGULATORY ISSUES, 110th Cong., Rep. on Findings Regarding the Market Events of May 6, 2010, available at <http://www.sec.gov/news/studies/2010/marketevents-report.pdf>.

²¹⁹ See, e.g., Press Release, BATS Global Markets: BATS Global Markets Withdraws Initial Public Offering (Mar. 23, 2012) (on file with the Virginia Law and Business Review); Press Release, BATS Global Markets: A Message From BATS CEO Joe Ratterman (Mar. 25, 2012) (on file with the Virginia Law and Business Review).

of other traders (similar to “classical” front-running). Those practices could get in conflict with basic principles of many securities laws, such as equal treatment of traders or investors, respectively. Second, algorithm trading is often trend following, meaning that computers buy stocks that soar and sell or short sell stocks that fall. If such strategies dominate the market, they become self-fulfilling and stock prices will move away from their “fair” price. Again, this contradicts one of the core pillars of securities laws and, in particular, of stock exchange laws: to reduce volatility and increase reliability by bringing together supply and demand at prices that reflect the overall market interest.

IV. OUTLOOK: THE FUTURE OF STOCK EXCHANGE LAW

Stock exchanges and stock exchange law are in a relationship of mutual impact. In theory, stock exchange law has the greater influence because policymakers can employ it to shape the exchanges and their surroundings. History reveals, however, that events in practice have more frequently prompted reactions by policymakers than the other way around. As overzealous legislative activity in other areas shows, this is a sensible approach that should be safeguarded against hasty reactions of the type that could be observed during the recent crisis on the financial markets.

Looking ahead, it seems likely that it is not the particulars of stock exchanges and stock exchange law that will dominate the debate among policymakers, regulators, and scholars, but instead the question of whether stock exchanges and stock exchange law have any future at all. The dramatic loss of market share and the ever-increasing role of competing trading facilities show that many of the exchanges’ functions may now be carried out by other marketplaces. While, accordingly, the regulation of those new venues gains more and more importance, the traditional canon of stock exchange law has lost much of its former relevance in practice. For many observers, stock exchange law has passed its zenith as a regulatory concept and is today understood merely as a part of capital markets or securities law. This shift is visible in many European jurisdictions: In France and in the United Kingdom, the operation of exchanges is regulated as one financial service among many.²²⁰ Germany still has an Exchange Act, but it has become a “limbless torso,” which, since its first enactment (1896), has lost many of its limbs to the Secu-

²²⁰ Loi 2000-1223 du 14 décembre 2000 de code monétaire et financier, at art. L 421-26; Financial Services and Markets Act, 2000 at §§ 285-313.

urities Trading Act and other laws.²²¹

Five years ago, we were skeptical that stock exchange law had a future at all.²²² In the meantime, though, both the practice of trading as well as the regulatory environment have changed. The fragmentation of markets has considerably increased, and stock exchanges are no longer the place where traders conduct most of their transactions. On many markets, algorithms are now the driving force, with orders placed and canceled in fractions of a second. Both developments—fragmentation and automation—challenge the traditional regulatory regime because they threaten one of the exchanges' core functions: to concentrate and to standardize trading so that supply and demand will be matched at "fair" prices. If policymakers feel the need to intervene, the result may be provisions that are genuinely 'stock exchange law.' Even if those rules will be part of a more general approach in the area of capital markets or securities law, it is not beyond imagination that they will be dubbed 'stock exchange law' in the traditional meaning, and in any event, they will be 'stock exchange law' in a functional sense. In light of these recent developments, it does not seem too far-fetched to assume that the long history of stock exchange law is about to enter into a new era.

²²¹ Fleckner, *Exchanges*, *supra* note 4, at 660.

²²² Fleckner & Hopt, *supra* note †, at 249, 272-273.