PAPERS PRESENTED

REGULATORY PROBLEMS IN INTERNATIONALIZING TRADING MARKETS

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1. Introduction

Regulatory problems arising from the internationalization of business activities tend to be complex. This appears to be particularly true for securities trading. Not only the national systems of securities regulation, but also the capital markets themselves are shaped by sometimes strikingly different needs, interests, traditions, and institutions. For this reason, a step-by-step analysis seems appropriate, even at the risk of repeating familiar aspects and well-known observations.

2. Internationalization Trends: Aspects and Factors

2.1 Aspects

The internationalization of securities trading occurs in different forms which may raise different regulatory problems. A first and very fundamental observation relates to the fact that not only bonds but also stocks issued under specific national systems (and primarily traded domestically) are increasingly sold and traded in other countries, though no overall figures are available. Although one may assume that the real volume is in over-the-counter[1] trading (OTC), the general trend is clearly indicated by the steady increase in listings abroad.

At the beginning of 1984, 46 foreign securities or American Depository Receipts (ADRs) were listed on the New York Stock Exchange (NYSE), 52 were listed on the American Stock Exchange

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[1] An "over-the-counter" transaction is one which does not utilize any of the national exchanges. Words and Phrases 368 (1972).

(AMEX), and 294 were quoted on NASDAQ, the automated quotation system of the National Association of Securities Dealers (NASD).[2] At about the same time, approximately 200 U.S. companies, all listed on NYSE, were also listed on the London Stock Exchange; 43 companies were listed on the Bourse de Paris;[3] and 6 companies were listed on the Tokyo Stock Exchange.[4] In February 1986, about 190 foreign companies were officially listed on the Frankfurter Wertpapierbörrse and about 45 others were admitted to the "geregelte Freiverkehr,"[5] an equally regulated market with lesser listing requirements. It is estimated that more than half of the shares of ICI are traded via ADRs in U.S. markets, and that about 40% of SONY's shares are held in the U.S.[6] In several countries, the stock exchanges are planning to facilitate the listing of foreign securities in order to enlarge business activities, and the Securities and Exchange Commission (SEC) has recently developed measures to promote multinational securities offerings.[7]

The expansion of securities trading has not only a territorial but also a time dimension; there is a growing interest in "24 hour trading," occasionally referred to as the "globalization of trading."[8] For this reason, the trading of listed securities outside the regulated exchange markets — at other times as well as in other places — appears to have increased. A number of stock exchanges have extended trading hours, thus narrowing or closing the time-gap among the major exchange markets. Some exchanges have entered into cooperation with other markets through linkages,[9] an example of which is the sophisticated linkage involving the Singapore International Monetary Exchange and the Chicago Mercantile Exchange.[10]

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[2] *SEC Request for Comments on Internationalization of Securities Markets*, 17 Sec. Reg. & L. Rep. (BNA) No. 17, at 784 (Apr. 26, 1985) [hereinafter cited as *SEC Internationalization*].

[3] *Id.* at 785.

[4] *Id.*; *see also* JAPAN SECURITIES INSTITUTE, SECURITIES MARKET IN JAPAN 182 (1986) (by the end of 1984, the number of U.S. companies listed on the Tokyo Stock Exchange had increased to 11).

[5] Frankfurter Allgemeine Zeitung, Feb. 1, 1985, at 18.

[6] D. Hawes, Internationalization of the Capital Markets: Economic Changes and Legal Implications, at 7 (July 8, 1985) (unpublished manuscript).

[7] *SEC Request for Comment on Multinational Offerings*, 17 Sec. Reg. & L. Rep. (BNA) No. 10, at 434 (Mar. 1, 1985) [hereinafter cited as *SEC Offerings*].

[8] "Globalization" is defined as the increasing internationalization of financing and finances. Donahue, *The Role and Challenges Facing Unions in the 1940's and 1980's - A Comparison*, 52 FORDHAM L. REV. 1062, 1069 (1984).

[9] *See SEC Internationalization*, *supra* note 2, at 785-88; H. Beck, International Trading: The Trading Links Between the Toronto Stock Exchange, the American Stock Exchange and the Midwest Stock Exchange (Sept. 1986) (unpublished manuscript).

[10] *SEC Internationalization*, *supra* note 2, at 788 n.55.

The most interesting experience so far may well be the emergence of truly supranational trading markets, the major example of which is, without any doubt, the Eurobond market.[11] For a long time, Eurobond trading was praised as evidence of the efficiency of completely unregulated markets. There are some doubts as to whether there has been a complete lack of regulation.[12] At the same time, there are questions as to the need for regulation. Lately, some concern has been expressed with regard to the pricing mechanism and the risk of manipulative practices.[13] Some of these regulatory needs have been taken care of by the Rules and Recommendations issued by the Association of International Bond Dealers (AIBD).[14] It remains to be seen if there will be other problems in the event that the currently small number of Euroequity issues increases.[15]

At the same time, the Eurobond market is often referred to as illustrating the importance of high performance computers for establishing new transnational markets. This experience appears to be confirmed by other systems of trading via computers across border lines[16], e.g., the Instinet participation acquired by Reuters; the Computer Assisted Trading System (CATS) of the Toronto Stock Exchange; the automated trading mechanism established by the Tokyo Stock Exchange; and INTEX, a fully automated and fully internationalized commodities futures market incorporated in the Bermudas with the computer facilities located in New York and the clearing operations performed in London.[17]

Another distinct feature of the internationalization of the trading markets is the emergence of a new type of player. Today there are a number of internationally oriented investment and commercial (and universal) banks, securities companies, brokerage houses, investment funds, and insurance companies which have evolved to be truly mul-

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[11] Total new issues of Eurobonds rose from US$45 billion in 1983 to US$180.3 billion in the first 11 months of 1984. *Id.* at 784. [Henceforth all references are to U.S. dollars unless otherwise noted.] In the first half of 1985 there were 959 issues aggregating $81 billion. D. Hawes, *supra* note 6, at 1.

[12] *See* M. Mendelson, The Need For Regulation? — Lessons from the Eurobond Market (Sept. 1986) (unpublished manuscript).

[13] *See, e.g.*, Koenig, *Anatomy of a Eurobond Scandal*, INSTITUTIONAL INVESTOR, Dec. 1984, at 237.

[14] Association of International Bond Dealers, Statutes, By-Laws, Rules, and Recommendations 1985/86 (1985). For the issuance of Eurobonds, there are Recommendations presented by the International Primary Market Association (IPMA).

[15] The first Euro-equity issue for a Belgian company was launched in December 1985; another issue for Bank Brussel Lambert N.V./Banque Bruxelles Lambert SA was made in March 1986.

[16] *See* D. Hawes, *supra* note 6, at 7-8.

[17] *Id.*

tinational enterprises.[18] Such enterprises perform important functions by opening up, enlarging, and linking the existing national markets, as well as by contributing to the establishment of truly supranational markets. On the other hand, they may create regulatory gaps. This is illustrated by the history of the International Overseas Services (IOS), a multinational investment fund which generated a certain amount of trouble and confusion in what were, at that time, largely unregulated markets.[19]

2.2. *Factors*

The importance of the trend towards the internationalization of securities activity should be evaluated not only by its current status, but also in terms of the forces and incentives behind this development. This may be helpful in finding out not only where we are, but also where we are headed. There seem to be several factors generating transnational securities transactions. The relaxation of foreign exchange controls eases the transfer of funds from one country to another.[20] Other measures of liberalizing transnational financial operations, e.g., the mitigation of tax disincentives[21], support this effect. Another factor may be found in the "securitization"[22] of the credit markets by "disintermediation": banks have started to reduce their credit exposure by underwriting and placing negotiable notes or newly created facilities as substitutes for bank loans.[23] At the same time, the improvement of information and communication technology allows the growth of more operationally efficient markets by reducing the costs of transnational as well as domestic trading.

The main incentives appear, however, to come from the markets themselves, that is to say, from the significant increases in the offer and demand of capital. Increased needs for funds are generated not only by

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[18] For foreign securities firms licensed in Japan, see JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 4, at 187; *SEC Internationalization*, *supra* note 2.

[19] *See* C. RAW, B. PAGE & G. HODGSON, DO YOU SINCERELY WANT TO BE RICH? 337-72 (1972).

[20] *See SEC Offerings*, *supra* note 7, at 434; *see also SEC Internationalization*, *supra* note 2, at 784 n.16.

[21] *See SEC Offerings*, *supra* note 7, at 434 (e.g., the abolition of Kouponsteuer in Germany and the withholding tax for non-residents in the U.S.).

[22] It has been determined that in 1985 the international financial markets expanded by 30% and the securities sector grew by 66%, whereas the traditional credit sector shrunk by 16%. *See* VERBAND OFFENTLICHER BANKEN, VERBANDSBERICHT 1985 at 25.

[23] *See* Guth, *Im Spannungsfeld alter und neuer Risiken*, Frankfurter Allgemeine Zeitung, Jan. 18, 1986, at 15; Gleske, *Finanzinnovationen aus der Sicht der Notenbanken und der Bankaufsichtsbehorden*, Die Bank, at 280, 282 (1986).

the investment desires of developing societies, but also by the budget deficits in some of the most developed countries. At the same time, economic growth generates rapidly increasing amounts of savings and household liquidity; these funds look for safe and rewarding investment opportunities. The development is characterized by disparity, this time in the rate of savings. Therefore, in some countries, institutional investors, like insurance companies and pension funds, are under growing pressures to look for more diversified investment opportunities. In oversimplified terms, it may be said that some countries generate capital and others generate the need for it. It is obvious that both sides, as well as the public, will be served best if securities can be traded in an efficient manner across existing national borders.

3. The Identification of Regulatory Problems

3.1. Regulatory Problems in a National Context

It can be assumed that international trading basically will give rise to the same regulatory problems that arise in domestic markets. Looking at the domestic situation, I would suggest restricting the discussion to four points.

The first issue is the "execution" problem. Most national systems of securities regulation or stock exchange law have some rules relating to the information of all potential market participants about current prices and the execution of orders given to the market makers. In its recent Exchange Act Release concerning the "Internationalization of the World Securities Markets," the SEC appeared to be particularly interested in mandatory systems of consolidated reporting and consolidated quotations as means to inform market participants.[24]

The second issue is the "clearing" and "settlement" problem. All conventional forms of trading require a lapse of time between execution and settlement. During this period, the market is faced with the risk that a buyer or seller will not be able or willing to honor their obligations. This risk is not eliminated by the application of the rule of "payment against delivery." The regulation of market access by stock exchanges or other self-regulatory organizations like the NASD is designed to minimize these risks of nonperformance by market participants. This problem is complicated by the proliferation of automated settlement procedures where book entries are substituted for the physical transfer of certificates. The system has to ensure that the book entry will provide the holder with all the rights, powers, and guarantees of

[24] *SEC Internationalization, supra* note 2, at 787-88.

physical possession.

The "manipulation" problem is the third factor. In the previously mentioned Exchange Act Release, the SEC pointed to problems of applying its Rule 10b-6, which prohibits transactions by persons interested in a distribution to market participants acting outside the U.S.[25] This can and should be understood as an example illustrating a more general issue. Whenever a domestic security is also traded on a foreign market, manipulative practices used abroad will — through arbitrage or other media — affect the price for transactions executed in the home market.

As to the "insider" problem, the question is whether there are sufficient provisions or whether there should be more effective mechanisms of enforcement used in order to prevent the circumvention of national rules against insider trading through the use of foreign financial institutions or trading on extraterritorial securities markets. The importance of this issue is emphasized by the well-known and well-documented controversies between U.S. authorities (in particular, the SEC) and the Swiss banks.[26] The emergence of these problems and the various measures used in order to mitigate the conflict highlight some of the specific regulatory difficulties arising from transnational securities trading.

3.2. The International Dimension of Trading Regulation

Generally, it can be stated that the specific regulatory problems arising from international securities trading are mainly due to the different treatment of the same fact situation in different countries. That is to say, there are specific problems generated by the differences existing between various national systems based upon legal structures and behavioral attitudes. Thus, the problem could be eliminated if all the countries would agree to adopt uniform rules. It is obvious that this will not happen, at least for a very long time, due to the fact that the existing differences have evolved from different framework conditions which are very often difficult to change. Even the unification of very specific rules may involve considerable costs for those who accept — or have to accept — the burden of amending their regulations. These costs can be compared with and weighed against the problems arising from such differences. Let me give a few examples in order to explain the

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[25] *Id.* at 789-90; *see also* Koenig, *supra* note 13 (discussing similar problems in the Eurobond market).

[26] *See, e.g.*, Lee, *Secrecy Laws and Other Obstacles to International Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 63, 67, 70, 73-76; L'AVANT-PROJET DE LA LOI FÉDÉRALE SUR LES OPÉRATIONS D'INITIÉS (R. Hirsch, D. Forstmoser, & R. Mundheim eds. 1984).

nature of such a balancing test.

Differences existing among the rules and institutions of various countries can be the accidental result of historical development and thus can be of a rather technical nature. That also may be true for the regulation of the mechanism of exchange markets. As long as it can be assumed that the American "specialist" system is equivalent to the German "Kursmakler" system, each country could adopt the other's rules.[27] But so far, it is not clear that the costs involved by such a change would be justified by an equivalent benefit. The coexistence of NYSE and OTC in the U.S. is sufficient evidence that even national markets can live with different trading procedures.[28] Thus, the real question might be whether there is any need at all to regulate the emerging systems of trading via computers. This appears to be primarily an issue of national regulation wherever such trading occurs.A somewhat different view may be appropriate with regard to international consolidation of reporting and quotations.[29] In regulating international transactions, a number of difficulties have to be taken into account, such as the fact that prices for the same security in different markets will be expressed in different currencies. On the other hand, there may be less need for consolidation if it can be assumed that there is no delay in the process of harmonizing the transaction prices of different national markets through arbitrage.

Differences in substantive rules also may be rooted in the general structures of the legal systems involved. This can be illustrated by the problems connected with automated settlement procedures. By now, all of the countries of some importance for financial markets have introduced and refined their own national systems.[30] These national systems appear to be conceived in terms of their respective private law traditions. Thus, the solution in the U.S. is based primarily upon a trust relationship,[31] whereas the German statute is determined by the notions of substantive property law.[32]

With the internationalization of the securities markets, however,

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[27] For a comparative analysis, see H. SCHMIDT, BÖRSENORGANISATION ZUM SCHUTZE DER ANLEGER 250-56 (1970).

[28] *Compare* Freund, *The Big Board Lives On*, Wall St. J., Dec. 4, 1985, at 30, col. 2 (discussing recent activity on the NYSE) *with SEC Internationalization*, *supra* note 2, at 784-86 (reviewing current trends in internationalization of trading markets).

[29] *SEC Internationalization*, *supra* note 2, at 787-88.

[30] For a comparative description, see H. PLEYER, EIGENTUMSRECHTLICHE PROBLEME BEIM GRENZÜBERSCHREITENDEN EFFEKTENGIROVERKEHR (1985).

[31] *Id.* at 82-93.

[32] *See* Gesetz über die Verwahrung und Anschaffung von Wertpapieren §§ 6, 18, para. 3 1937 Bundesgesetzblatt [BGBl] 59 (W. Ger.) (Dopetgesetz = Safe Custody Law).

there is a growing need to use these national systems for transnational as well as domestic transactions. The main reason is that arbitrage between markets in different countries cannot work if there is no possibility of providing transfer of title from one country to the other within a short period of time.[33] Nonetheless, nobody thinks of substantive harmonization of the very different systems; it is enough if they can be linked for transnational operations. For this purpose, the systems have to be mutually compatible which may require some legal changes. Last year, Germany amended its rules[34] in order to allow direct transactions between its Effektengirosystem and the Nederlands Centraal Instituut voor Giral Effectenverkeer BV (NEGICEF). It is expected that similar links will soon be established with the Schweizerische Effekten-Giro AG (SEGA); the French Sociėtė Interprofessionelle pour la Compensation des Valeurs Mobilières (SICOVAM); and the Austrain Osterreichische Kontrollbank AG Wien.

Regulatory differences may also be rooted in the size and structure of the respective securities markets. This aspect appears to be relevant with regard to the extent of supervision imposed upon financial institutions participating in trading activities. It is easy to see why the enormously large and active American market is well-served by a sophisticated system of regulatory and self-regulatory mechanisms controlling the activities of brokers, dealers, and investment advisers. For countries like Germany and Switzerland, with much smaller and much less active markets that are dominated by a comparatively small number of institutions having a common interest not to shake investor confidence, it may very well be that the costs of adopting and enforcing such rules and mechanisms will exceed the benefits which they might generate.[35]

However, the framework conditions tend to change when financial institutions leave their home countries in order to act on the international stage. There, they are no longer members of "the club" but a much larger and much less homogeneous community. The resulting conflicts may be illustrated by the British Financial Services Bill.[36] Sec-

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[33] *See* Kümpel, *Die Internationalisierung der deutschen Girosammelverwahrung*, WERTPAPIER-MITTEILUNGEN, at 942, 943-44 (1976).

[34] Gesetz uber die Verwahrung und Anschaffung von Wertpapieren 1937 Bundesgesetzblatt [BGBl] (W. Ger.) (The Statute, as amended in 1985, allows the establishment of direct transmittal lines between safe custody institutions if basic requirements of investor protection are met.)

[35] For a more profound discussion of this aspect, see Kübler, *Verrechtlichung von Unternehemensstrukturen*, VERRECHTLICHUNG VON ARBEIT, WIRTSCHAFT UND SOZIALER SOLIDARITAT 167, 187-92 (1984).

[36] Finance Act, 1986. The Financial Services Bill was presented to the public in 1986. It gives effect to the proposals contained in the Gower Report, "Review of Investor Protection" and the White Paper, "Financial Services in the United Kingdom: A

tion 30 of the Bill provides for the recognition of the authorization by a member state if the law of this state affords protection to investors in the United Kingdom that is at least equivalent to that provided for them by British law.[37] There is some concern among German banks, which are subject only to banking supervision and not to an SEC-type regulatory agency, that British authorities may adopt the view that the requirement of equivalent protection will not be satisfied by German law and that this will block their access to the British markets.

In addition, regulatory differences often can and will be the result of several other factors. The regulation of insider trading (or the lack thereof) may very well depend on the size and importance of the national stock markets. At the same time, differences in national philosophies are to be taken into account. Sanctions against insider trading are primarily justified by the idea that the distribution of corporate earnings between managers and investors should be governed by some standards of fairness.[38] On the other hand, the enforcement of such sanctions requires that brokers be legally required to disclose the identity of their customers. A country might not want to engage or participate in this form of enforcement if it values the confidentiality of the customer-broker relationship more than it frowns upon insider trading. It is obvious that such diverse ideas can generate conflicts where insiders engage in transnational trading activities.[39]

4. First Steps in Solving Or Mitigating the Problem

This part of the paper will briefly discuss some of the measures that can be taken to solve or mitigate the regulatory problems arising from the internationalization of securities markets.

4.1. Expansion of the Territorial Reach of National Regulation

A country like the U.S., having adopted a high level of regulation, will easily be tempted to protect its policies from circumvention and erosion by expanding the territorial reach of its regulation. That includes requiring and enforcing compliance for transactions executed

New Framework for Investor Protection" (Cmnd 9432) - January 1985.

[37] Otherwise, the person or entity would have to apply for authorization by the Secretary of State. Finance Act, 1986, §§ 25-26.

[38] It is far from obvious if and how regulation of insider trading can add to the efficiency of the markets. *See* Mendelson, *Insider Trading Revisited*, in R. Hirsch, D. Forstmoser & R. Mundheim, *supra* note 26, at 175-83.

[39] There could even be the economic interest of a free rider; by refusing regulation of its own as well as the enforcement of foreign regulation, a country might try to attract certain types of transactions to the disadvantage of those who should be protected by the foreign regulatory system.

partially or wholly outside its territory. American courts, in general, subject foreigners to their domestic law and regulations for transactions on an exchange or market inside the U.S. even if the order was given abroad.[40] But the enforcement of this approach could be blocked by referring to secrecy laws protecting the confidentiality of the relationship between a non-U.S. financial institution and its customer.

For this reason, the SEC has suggested the more extensive "waiver by conduct" rule.[41] Under this rule, whoever engages in trading on U.S. exchange or market should be presumed to have waived the protection of domestic secrecy laws.[42] This proposal has not met with much enthusiasm within the U.S.[43] and generally has been rejected by non-American experts for good reasons.[44]Experience demonstrates that such a rule can generate serious conflicts of duties; a foreign bank may be required under American law to disclose and under its domestic law to keep secret the name and the transactions of a customer.[45] Whatever this institution chooses to do will be against the law. Such an outcome is as undesirable as it is contrary to the very idea of law.

The enforcement of a "waiver by conduct" rule could be equally undesirable because of its economic consequences. In general, a court can impose and enforce effective sanctions against a foreign institution only as long as this institution maintains assets within the regular jurisdiction of such a court. Thus, a foreign broker or bank can avoid difficulties by either abstaining from transactions or SEC-regulated trading

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[40] *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Matter of Wiscope*, 20 Comm. Fut. L. Rep. (CCH) ¶785 (1979); *Tamari v. Bache & Co.*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 105 S. Ct. 221 (1984). *But see CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984) (holding that Section 6(b) of the Commodities Exchange Act does not give federal courts the power to impose investigative subpoenas on foreign citizens in a foreign state).

[41] Request for Comments Concerning a Concept to Improve The Commission's Ability to Investigate and Prosecute Persons who Purchase or Sell Securities in the U.S. Markets from Other Countries, Exchange Act Release No. 21,186, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83, 648 (July 3, 1984).

[42] *See* Fedders, Wade, Mann & Beizer, *Waiver by Conduct — A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MKT. L. 26 (1984).

[43] *See* D. Hawes, *supra* note 6, at 16; see also the previous doubts expressed by Williams (former SEC Chairman) and Spencer, *Regulation of International Securities Markets: Toward Greater Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 275 (1982). The SEC itself seems to have somewhat changed its view. In footnote 69 of the "Internationalization of Securities Markets" Release it says merely that the ". . . waiver by conduct proposal was intended to stimulate discussion on how this problem might be addressed. . . ." *SEC Internationalization, supra* note 2.

[44] Wymeersch, *Response to Fedders' Waiver by Conduct*, 6 J. COMP. BUS. & CAP. MKT. L. 339, 340 (1984).

[45] *E.g., SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) ("St. Joe's Case").

markets or withdrawing its assets (and other activities) from U.S. territory. Each of these alternatives would mean cutting back on generally desirable transnational activities.[46]

Finally, a "waiver by conduct" approach would be ineffective at least in the long run. Investors wishing to escape U.S. securities regulation would decrease their risk by choosing a broker who had no assets in the U.S. and could, therefore, not be seriously affected by an action initiated exclusively by the SEC. Also, the application of U.S. law could be completely avoided if the transaction took place in an offshore market.[47]

4.2. *International Cooperation*

The rather obvious shortcomings of purely national approaches to the problem have stimulated attempts to address the problem by intensifying and institutionalizing international cooperation among regulators.[48] There exist two bodies for such cooperation. One group is the "Interamerican Association of Securities Commissions and Similar Organizations", which includes 42 countries, and the other is the very small "Group of Securities Regulators" in which countries like Japan, Switzerland, and Germany are not represented.

There are good reasons to assume that neither of these organizations will be able to offer an adequate framework for an efficient coordination of efforts to respond to regulatory needs.[49] Therefore, the Section of Corporation, Banking and Business Law of the American Bar Association recommends the formation of a committee by the Bank for International Settlements modeled on the "Basle" or "Cooke Committee"[50] of the same organization.[51] This proposal deserves very serious consideration. The Bank for International Settlements has been established and is controlled by the central banks of the most important Western countries. The "Cooke Committee" has an impressive record

[46] *See supra* notes 24-39 and accompanying text.

[47] This aspect is emphasized in a Letter from the Bundesverband Deutscher Banken (Federation of German Banks) to the SEC (Nov. 30, 1984).

[48] Wymeersch, *supra* note 44; *see also* Lee, *Secrecy Laws and Other Obstacles to International Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 63, 79 (1982) (former SEC Chairman Pollack recalling the successful cooperation by several regulators from different countries in the IOS case).

[49] Roughly speaking, it could be said that the first body is too big and the second is not big enough. *See* D. Hawes, *supra* note 6, at 18.

[50] The "Cooke Committee" is the Committee on Bank Regulation and Supervisory Practices formed in 1974. It is an unofficial arm of the Bank for International Settlements.

[51] Letter from ABA Section of Corporation, Banking and Business Law, to the SEC (Aug. 30, 1985).

of achievement in dealing with the coordination of policies in banking regulation.

It is not likely, however, that a committee sponsored by the Bank for International Settlements will be able to act as effectively in the field of securities trading as it did and does with regard to the regulation and supervision of transnational banking activities. Although the supervision of banks is not always within the immediate jurisdiction of central banks, it is much closer to banking than to securities regulation. In addition, the regulatory goals of banking supervision tend to be similar at least in the major countries.[52] In the case of securities regulation, however, it will not be easy to identify the competent authorities in all the countries to be included. In several countries, there is no agency comparable to the SEC.[53] Some of the regulatory functions may be performed by the banking supervision authorities,[54] or by the stock exchanges, or by private institutions,[55] whereas other functions are not performed at all. The objectives as well as the instruments of securities regulation still differ considerably from country to country.[56] Finally, the regulatory goals are not of the same importance. While insider trading or the manipulation of securities markets may be very undesirable, it is certainly not as dangerous as a run on the banks and the breakdown of banking services. This should not be understood as an argument against organized international cooperation. On the contrary, it would be very helpful if there were a body representing the countries hosting the major markets. It could monitor the markets, exchange information, identify emerging problems, recommend measures for coping with the problems, and press — where necessary — for action. But the potential success of such a committee for coordinating the efforts of the major countries would be rather limited, at least when compared with the impressive performance of the "Cooke Committee".

4.3 Harmonization Of Law

For this reason, the progressive harmonization of securities laws and regulations should not be completely disregarded. However, it should not be understood as a substitute for international cooperation.

[52] *See* Lee, *supra* note 48.

[53] This is true in particular for Switzerland and Germany.

[54] In Germany, trading of securities by banks is to some extent regulated and monitored by the banking supervision authority.

[55] In Germany, the investigation of insider trading is entrusted to independent commissions (including professional judges) set up by private agreements. Hopt, *The German Insider Trading Guidelines — Springun or Scarecrow*, 8 J. COMP. BUS & CAP. MKT. L. (1986).

[56] *See* Lee, *supra* note 48.

On the contrary, the common investigation of critical areas and study of available solutions will be an indispensable condition for the successful elimination of harmful regulatory discrepancies. The insider trading conflict between Switzerland and the U.S. illustrates how cooperation can lead to the harmonization of law.

Under the "Treaty of Mutual Assistance in Criminal Matters", concluded in 1977 between Switzerland and the U.S.,[57] the SEC faced the problems that assistance was to be given only in cases of "dual criminality," that insider trading was not a criminal act in Switzerland, and that the Swiss banks could block any investigation by invoking the legal protection of the secrecy of the relationship with their customers. As a result, the U.S. and Switzerland established a framework for improved cooperation between the responsible authorities in a "Memorandum of Understanding" concluded in 1982.[58] The text of the Memorandum specifically noted that insider trading might violate existing provisions of the Swiss Criminal Code.[59] This "Memorandum of Understanding" was implemented by "Agreement XVI" of the Swiss Bankers' Association,[60] and it provided for a commission that was given certain powers of investigation with regard to member banks. Since the application of these texts raised problems,[61] the Swiss government recently introduced legislation that will make insider trading a criminal offense in Switzerland and thus open the way for assisting the SEC in its investigations.[62]

This Swiss contribution can be viewed as the product of intensive bilateral deliberations. But the regulatory problems of transnational securities trading can be addressed in a more general way. The example of the European Community (EC) illustrates the problems and possibilities of regional harmonization of capital market laws.[63] In 1977, the EC Commission issued the "Recommendation of a European Code of Conduct Relating to Transactions in Transferable Securities".[64] Without imposing legally binding obligations, this document urged the

[57] Mutual Assistance in Criminal Matters, July 7-10, 1976, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.

[58] Lee, *supra* note 26, at 333; C. EBENROTH, AUSWIRKUNGEN DES "WAIVER BY CONDUCT" — KONZEPTES IM INTERNATIONALEN WERTPAPIERGESCHAFT 157-62 (1985).

[59] 2 Schweizerisches Strafgesetzbuch, Code pénal suisse, Codice penale svizzero, arts. 140, 148, 158.

[60] *See* Lee, *supra* note 26, at 328; C. EBENROTH, *supra* note 58, at 169.

[61] *See* Lee, *supra* note 26, at 127.

[62] *See id.* at 339; C. EBENROTH, *supra* note 58, at 105.

[63] *See* Wymeersch, *From Harmonization to Integration in the European Securities Market*, 3 J. COMP. CORP. L. & SEC. REG. 1 (1981).

[64] 20 O.J. EUR. COMM. (No. L. 212) 37 (1977).

member states to consider the harmonization of rules relating to the organization of stock exchanges, the regulation of broker-dealers, and insider trading.[65] Two years later, the Council adopted a Directive requiring the member states to harmonize the rules as to the admission of securities for listing in stock exchanges.[66] Two other directives imposed general requirements of prospectus disclosure[67] and of continuous information by listed companies.[68] The Commission also has asked a working group to study the need for harmonized rules on insider trading.[69] It cannot be denied that European legislation thus far has been a slow and cumbersome process, but the progress achieved in other fields justifies some hope that a basic framework for a European capital market will evolve over time.

5. Conclusion

In summation, it should be clear that these observations do not exhaust the subject. The mutual penetration of existing capital markets and the internationalization of securities trading are complex phenomena. Their regulatory implications are slow to emerge. Because the economic forces which have so far inspired and pushed the development toward bigger markets have not abated and are still growing in strength, it can be assumed that more regulatory issues will appear over time. There are and will be no simple solutions. More internationalized markets will be able to make an important contribution to better allocation of capital if all the important players involved — legislators, regulators, self-regulatory organizations, and financial institutions — will be ready and able to learn new lessons, and use this experience in much closer cooperation than they have exercised so far.

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[65] See the analysis by Lempereur, *Insider Trading en droit des Communautés Européennes*, in Lee, *supra* note 26, at 279, 280.
[66] 22 O.J. Eur. Comm. (No. L. 66) 21 (1979).
[67] 23 O.J. Eur. Comm. (No. L. 100) 9 (1980).
[68] 25 O.J. Eur. Comm. (No. L. 48) 26 (1982).
[69] For details, see Lempereur, *supra* note 65, in Lee, *supra* note 26, at 284.