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CAPITAL MARKET IN POLAND AND GERMANY – THE COMPARATIVE LAW ANALYSIS

The purpose of this article is to analyze the comparative law of capital market in Poland and Germany. This analysis was based on in-force legislation in these countries. Attention is also paid to the construction of regulations in specific areas of German and Polish capital markets. In addition, the article presents the key data relating to the Polish Stock Exchange and the German Stock Exchange (in German – Deutsche Börse).

Keywords: law, capital market, Poland, Germany, analyze.

Table: 1. **Figure:** 1. **Bibliog.:** 18.

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ПОРІВНЯЛЬНИЙ АНАЛІЗ ДІЇ ЗАКОНІВ ЩОДО РИНКУ КАПІТАЛУ В ПОЛЬЩІ ТА НІМЕЧЧИНІ

Здійснено порівняльний аналіз дії законів щодо ринку капіталу у Польщі та Німеччині. Аналіз базується на чинних законах у цих країнах. Увага також приділена побудові правил в конкретних сферах німецьких і польських ринків капіталу. Крім того, представлено основні дані, які стосуються польської і німецької фондових бірж (німецькою мовою – Deutsche Börse).

Ключові слова: закони, ринки капіталу, Польща, Німеччина, аналіз.

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СРАВНИТЕЛЬНЫЙ АНАЛИЗ ДЕЙСТВИЯ ЗАКОНОВ НА РЫНКАХ КАПИТАЛА В ПОЛЬШЕ И ГЕРМАНИИ

Сделан сравнительный анализ действия законов на рынках капитала в Польше и Германии. Анализ был основан на вступивших в силу законах в этих странах. Внимание также уделено построению правил в конкретных сферах немецких и польских рынков капитала. Кроме того, представлены основные данные, касающиеся польской и немецкой фондовых бирж (на немецком языке – Deutsche Börse).

Ключевые слова: законы, рынки капитала, Польша, Германия, анализ.

Introduction

In any market economy, the capital market, which is a segment of the financial market plays a huge role. If the assumption that the market is in total transactions involving the buyer and seller [Heffernan, 2005, p. 55], the capital market can be defined as a market where transactions are carried out in financial instruments. However, one should bear in mind that in Polish literature you can often find the idea that "(...) capital market is the market where transactions within purchase of long-term instruments are made " [Dobosiewicz, 2013, p. 14]. The author agrees to the mentioned definition, but you should also take into account that the world instruments, the duration of which is less than a year, are also traded in the capital markets.

The literature also mentions [Copeland, Weston, Shastri, 2008, pp. 35-44] that these markets are more important from the point of view of well-functioning market economy that allows the official transfer of capital between the donors and recipients in need of funding. This transfer, however, is associated with a variety of costly and burdensome, which could include first of all taxes, transaction costs, costs of obtaining the information and the opportunity cost [Running, Kussmaul, 2009, p.

18]. From the point of view of economic growth, Poland, as a member of the European Union, is included in the group of medium developed countries. According to Eurostat data, in 2012 the volume of Polish GDP per capita in PPS was only 66% [Eurostat, 2012] (in statements Eurostat above index is presented in relation to the EU average, receiving a value of 100%). However, the largest economy among the European Union Member States are Germany, where GDP per capita in PPS in 2012 was up 121% [Eurostat, 2012], while the EU average of 100%.

Polish capital market appears to be mature and stable, but the economic slowdown, which currently can be seen, can undermine the structure. However, Germany's capital market is one of the pillars of sustainable economic growth of the country and its economy is characterized by, among others, high stability. Given the above, it is worth considering what the legal solutions are, based on which the Polish capital market and the capital market in Germany function? The answer to this question is the main purpose of this publication, and it was granted on the basis of comparative legal analysis of the Polish and German capital markets. The result of this analysis is to evaluate the structure and functioning of these markets and to draw conclusions about the commonalities and differences. The analysis will also allow for an objective assessment of the construction of the Polish capital market.

Study of comparative law is presented in later sections of this publication, but it should be noted that the following test methods were used:

- literature research,
- Polish and German legislation research.

However, before the study of comparative law, it is considered, in the author's opinion, to make a general characteristic of Polish and German capital markets.

General characteristics of the Polish and German capital market

As it is known, the focal point of each capital markets can take the stock exchange [Dobosiewicz, 2013, p. 35], and therefore this part of the article is devoted to the Polish Stock Exchange in Warsaw and the German Stock Exchange in Frankfurt am Main (in German – Deutsche Börse). What is important, is the fact that the Polish stock market is facing a difficult challenge because, taking into account the number and value of transactions made on it, it is small (in comparison with the German), and today globalization imposes on small exchanges to carry out changes in the ownership structure in order to avoid marginalization [Antkiewicz, 2012, p. 28]. Moreover, the current economic slowdown in Poland will also affect the development of the stock exchange, as empirical studies have shown that the crisis in 2007-2009 caused a reduction to arrange financing for the company [Philippon, Schnabl, 2013, p. 32], which decreased during the crisis capital expenditures. A major source of funding for these companies were shares on the stock exchange.

Table 1

The basic data relating to the Polish Stock Exchange and the German Stock Exchange (end May 2013)

	Polish Stock Exchange	German Stock Exchange
capitalization	132 602,61 million EUR	1 247 656,14 million EUR
Number of listed companies	884	735
Number of listed bonds	405	22 558
Number of listed ETFs	3	1 020
The value of trading in structured products	4,5 million EUR	1 903,5 million EUR
Number of listed UCITS	54	2 851

Source: own study based on data FESE – Federation of European Securities Exchanges [<http://www.fese.eu/en/>].

Furthermore, companies often raise finance by issuing shares. Thus, the current economic downturn could discourage firms from the issue of its shares on the Polish market. The German stock market is entirely different challenge, namely to become a leader in the European Union. Although it is one of the largest in the region, but its market capitalization is about 1.88 times smaller than the capitalization of NYSE Euronext. In addition, since the end of the 80's – the German stock ex-

change threatened OTC markets (Over-the-counter) [Andersen & Co., von Stein, 1989, p. 15], which allow companies to raise capital at a lower cost than traditional stock exchanges. The most important data on the Polish and German stock exchanges are presented in the table (Table 1).

The data presented in Table 1 show, by even comparing the capitalization of German and Polish stock exchange¹, that the Polish stock market is much smaller than the German stock exchange. That is also a small number of listed bonds and UCITS. However, detailed analysis of themes raised beyond the scope of the publication, as its main focus is the analysis of comparative law and German Polish capital market.

Comparative law analysis of Polish and German capital market

In Poland, the main areas of the capital market are regulated by separate laws. These areas include: trading of financial instruments by different operators, the operation of investment funds, IPO and capital market supervision. As mentioned, the effect of this is that everyone in Poland, the most important area of the capital market is governed by a separate law (Fig. 1).

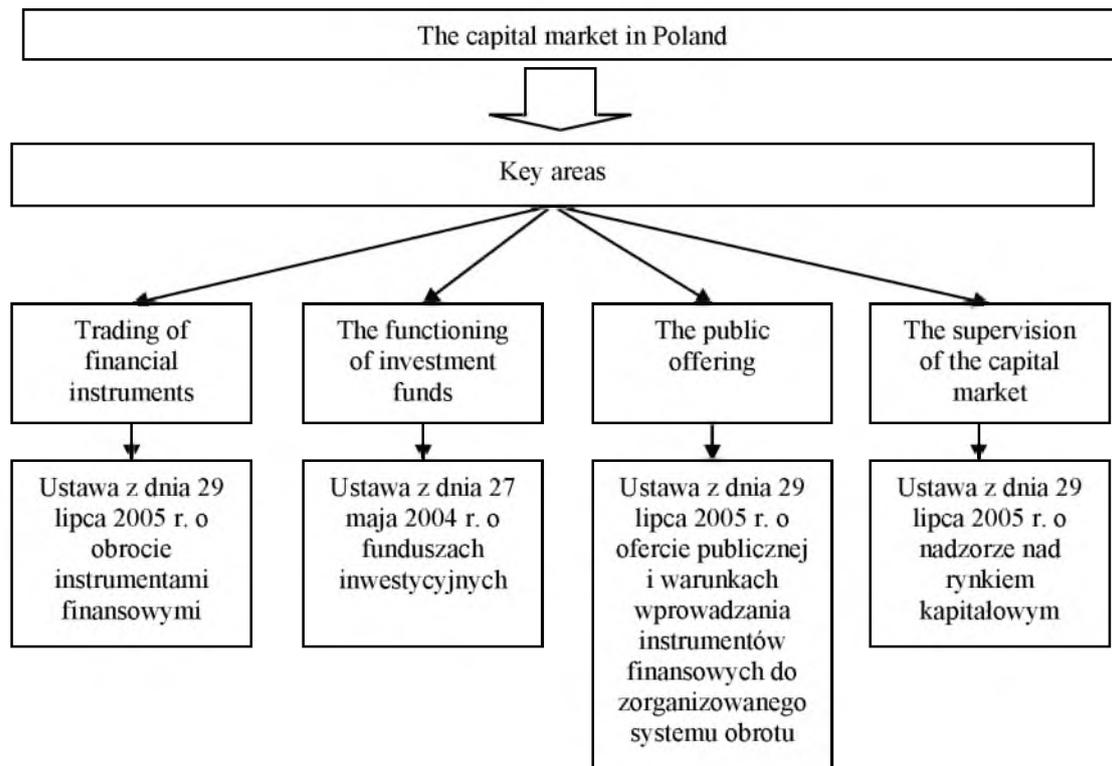


Figure 1. Building Polish capital market regulations.

Source: own study.

In Germany, the legal regulations on the capital market are built in a different way than in Poland, because the most important regulatory tool is the Civil Code (in German – Bürgerliches Gesetzbuch). In the areas of business, but not governed by the said code, it is crucial Commercial Law (in German – Handelsgesetzbuch). In the area of capital markets, finance and banking, which is not governed by the trading Act, in Germany one must apply legal provisions of the Act on Credit (in German – Gesetz über das Kreditwesen). However, the detailed regulations on trading in financial instruments not included in the above presented laws, are in the Act on Trading in Securities (in German – Gesetz über den Wertpapierhandel) and investment Act (in German – Investmentgesetz). The functioning of stock exchanges, to the extent not previously recognized in these laws, is regulated by the stock exchange Act (in German – Börsengesetz). The answer on how to control key areas of the capital market in Germany was also presented graphically (Fig. 2).

¹ Polish stock market capitalization is 9.41 times smaller than the capitalization of the German Stock Exchange.

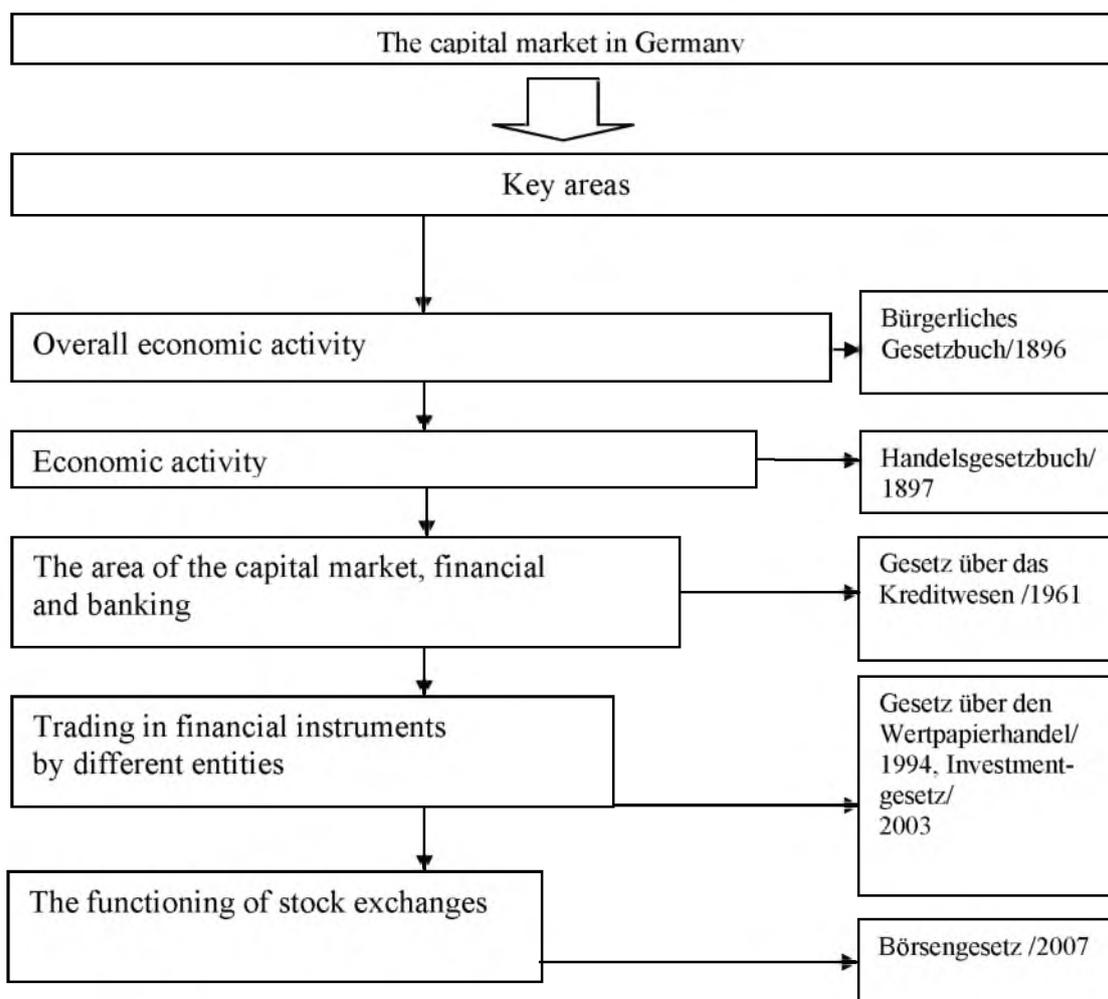


Figure 2. Construction of the regulations of the German capital market.

Source: own study.

The author wishes to express the view that, from the perspective of legal analysis of capital markets, the most important are participants and segments. For participants one may include brokerage houses, investors and investment funds. They include direct and indirect transactions with one another. It is also worth noting that within each of the capital markets two segments can be distinguished, the primary market and the secondary market, however within the secondary market there are stock exchanges functioning, as the most important elements of these two segments. The author is of the opinion that comparative law analysis of Polish and German capital market should cover the most important issues relating to the participants and the stock exchanges.

This analysis starts with a definition of investment firms operating in Poland, which are understood as [Art. 3/33 Ustawy z dnia 29 lipca 2005 r. o obrocie...] "(...) a brokerage house, bank conducting brokerage activities, foreign investment firm conducting brokerage activities in the territory of the Republic of Poland and foreign legal person established in the territory of a member state of the OECD or WTO, leading on Polish territory brokerage activities". In Germany, investment firms do not exist, but their functions are remained to financial services institutions [§ 1 / (1a), the Gesetz über das Kreditwesen] (in German – Finanzdienstleistungsinstitute) that perform various financial services.

It could be argued that the brokerage houses are the most important type of investment firms in Poland. In Germany, the brokerage houses functions perform securities services companies [§ 2 / (4), the Gesetz über den Wertpapierhandel] (in German – Wertpapierdienstleistungsunternehmen), which under current law are financial services institutions or banks. It is worth noting that the functions of banks in Germany perform credit institutions [§ 1 / (1), the Gesetz über das Kreditwesen] (in German – Kreditinstitut).

Investment funds also play a big role in each capital market from the perspective of individual investors. In accordance with the Polish law [Art. 3/1 Ustawy z dnia 27 maja 2004 r. o funduszach...], the investment fund is a legal entity that can only invest money collected in specific securities, money market instruments and other property rights. Importantly, the authority of each fund is the company that manages it, and represents it. It can be set up only in the form of a joint stock company [Art. 38/1 Ustawy z dnia 27 maja 2004 r. o funduszach...]. Specific in Poland is that each investment fund may be set up as: open-end investment fund, specialized open investment fund and closed-end investment fund [Art. 14/2,3 Ustawy z dnia 27 maja 2004 r. o funduszach...]. Furthermore, the provisions of law in Poland allow for the creation of special funds.

In Germany, the functions of investment funds belong to companies investing capital [§ 2, Investmentgesetz] (in German – Kapitalanlagegesellschaften), which are investment companies [§ 2 / (1), Investmentgesetz] (in German – Investmentgesellschaften). Also important is the fact that companies that invest capital can be created in the form of limited liability companies or joint-stock companies [§ 6, Investmentgesetz]. In German law, it is important that it does not specify the types of investment funds that can be managed by companies which invest their capital. Also it does not mention what exactly is to be invested by the company's collected cash.

As it is commonly known, the capital market operators make most transactions on a regulated market. In Poland, it is defined as a system of trading in financial instruments admitted to turnover [Art. 14/1 Ustawy z dnia 29 lipca 2005 r. o obrocie...]. In Germany, the regulated market is not defined but the organized market is (in German – organisierter Markt), which is understood as a trading system that combines the interests of many people in the purchase and sale of financial instruments that are admitted to trading in the system in accordance with the prescribed rules, organizing the purchase of these instruments [§ 2 / (5), the Gesetz über den Wertpapierhandel]. It is worth mentioning that financial instruments are defined in the Polish and German law in a similar way [Art. 2/1 Ustawy z dnia 29 lipca 2005 r. o obrocie...], [§ 1 / (11), the Gesetz über das Kreditwesen]. It is easy to conclude that the manipulation of financial instruments both in Poland [Art. 39/1,2 Ustawy z dnia 29 lipca 2005 r. o obrocie...] and Germany [§ 20a / (1), the Gesetz über den Wertpapierhandel], is prohibited by law.

In Poland, so-called market practices shall be accepted. They are defined in [Art. 44/1 Ustawy z dnia 29 lipca 2005 r. o obrocie...] as a behavior that can be reasonably expected in one or more financial markets. In Germany, however, such behavior was not recognized by law. Another important issue in the capital markets is called brokerage activities, which may include mainly in Poland [Art. 69 Ustawy z dnia 29 lipca 2005 r. o obrocie...]: the reception, transmission and execution of orders concerning financial instruments, portfolio management, investment advisory services, offering financial instruments. In Germany, there are also the covering brokerage operations presented above, but the law named them as financial services [§ 1 / (1a), the Gesetz über das Kreditwesen] (in German – Finanzdienstleistungen). What is important is that in Poland, the portfolio management agreement in financial instruments was specified precisely [Art. 75/1 Ustawy z dnia 29 lipca 2005 r. o obrocie...] and also the Investment Advisory Agreement [Art. 76 Ustawy z dnia 29 lipca 2005 r. o obrocie...], while Germany presented only the existence of such activities within the financial services [§ 1 / (1a), the Gesetz über das Kreditwesen].

What is important in the author's view is that in Poland, for example, each investment firm must employ, to perform as provided by law brokerage operations [Art. 83/1 Ustawy z dnia 29 lipca 2005 r. o obrocie...], at least one "broker" or two "investment advisers." In Germany such an obligation does not exist, because the law does not include professional titles "stockbroker and" investment adviser ". However, attention should also be paid to that, both banks in Poland as well as credit institutions in Germany, may perform brokerage activities, and provide brokerage accounts.

It is also interesting to mention that in Poland, individuals can join together in investor clubs. In Germany, the law does not regulate this issue. However, the similarity is evident in the case of protecting the interests of investors. In Poland, for this purpose there has been developed a system of

compensation [Art. 132/1 Ustawy z dnia 29 lipca 2005 r. o obrocie...], and in Germany the protection device [§ 32 / (3), Gesetz über das Kreditwesen] (in German – Sicherungseinrichtung).

A very important area of the capital market is a public offering. In Polish law it is defined as "making available to at least 150 people or an unspecified addressee, in any form or by any means, information on securities and conditions for the acquisition, representing a sufficient basis for a decision to purchase these securities" [Art 3/1 Ustawy z dnia 29 lipca 2005 r. o ofercie...]. In Germany, the definition of a public offering (in German – Öffentliches Angebot) is similar [§ 2 quarters, the Gesetz über den Wertpapierhandel] also relates directly to the securities and the provision of information on them (in any form or by any means). Another issue is the prospectuses that typically need to be made by issuers of securities applying for admission to trading on the stock exchange. However, in Poland it is required, that the prospectus has been drawn up as a single document or set of documents including the registration document, securities note and summary document. In Germany, the law does not specify the exact form of the preparation of this Prospectus.

As for the required level of capitalization of the company, which is seeking to issue shares on the stock market (the main market or parallel), it is different, because in Poland it amounts to at least PLN 60,000,000 or the equivalent in PLN – EUR 15,000,000 [WSE.pl], and in Germany only EUR 730,000 [§ 32 / (2), Börsengesetz] (without distinguishing between the primary market or parallel). However, it is alike that issuers of securities in Poland [Art. 56-68 Ustawy z dnia 29 lipca 2005 r. o ofercie...] and Germany [§ 30a, the Gesetz über den Wertpapierhandel] must prepare and publicly disclose information about their functioning, important from the point of view of investors.

In the author's opinion, the supervision of the capital market is not only a very important part of well-functioning stock exchanges, but also the foundation of a well-functioning financial market. This is due to the fact that supervision includes supervision of issuers of securities, investment companies, investment funds, investment banks, people performing brokerage activities and managing portfolios of financial instruments, as well as the stock exchanges.

In Poland, the supervision of the capital market (as well as the entire financial market) exercise the Financial Supervision Authority (KNF briefly) with registered office in Warsaw [Art. 1/2 ustawy z dnia 29 lipca 2005 r. o nadzorze...]. In Germany this function is fully represented by [§6/2, the Gesetz über das Kreditwesen] Federal Financial Supervisory Authority, based in Bonn and Frankfurt am Main (in German – Bundesanstalt für Finanzdienstleistungsaufsicht – in short, BaFin). It is an independent federal institution. It is also worth mentioning that the institutions have shown similar supervisory powers. It can therefore be concluded that the supervision of the capital market in Poland and Germany is built according to the same principles.

Conclusion

The globalization of capital markets helps to increase the speed of capital flows, causing a change in the nature of the activities of the entities that are its participants. For this reason, capital markets should be as constructed as to support the country's economic growth through a positive effect on the stability of the entire financial system. In this respect, the Polish capital market can be assessed very positively. The reason is that each of its territory was spelled out, along with its members and the inspecting authority. However, Polish law regulations are so strict that even Accepted Market Practices were defined, as well as forms that can take any investment funds and professional titles (such as securities broker and investment advisor).

The capital market in Germany is built on a similar basis (although regulations are structured differently). It should be noted that the rules are more liberal (no definition of market practices, the lack of specific professional titles, etc.) However, these differences do not seem to have much impact on the stability of the capital market. However, its main function is to support and stimulate the economic development of the Polish and German economy.

It is also worth noting that the regulations of the capital market in recent years have changed significantly and it would be worth comparing the legal Polish and German capital market in the context of EU regulations and the challenges of integration and crisis events. However, the framework volume limited the running considerations in this paper. But the above issue could be addressed in separate publications.

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