

German capital market law – a permanent reform

Review Essay to: *Markus Lenenbach*, **Kapitalmarkt- und Börsenrecht; Reihe Praxislehrbuch Wirtschaftsrecht**, RWS Verlag, Cologne 2002; 618 pages; hardcover; € 49; ISBN 3-8145-8096-6.

By *Matthias Casper**

In spite of the slack period at the stock market in the last couple of years, capital market law and capital markets in general have been of utmost practical importance – both from a practitioner's as well as an academic stance. Since 1994 at the latest, with the passing of the second *Finanzmarktförderungsgesetz*,¹ German capital market law has been in a constant change. One can speak of a permanent reform. Despite several different reform statutes, such as the third *Finanzmarktförderungsgesetz*² in particular, during the boom of the stock exchange lasting until the middle of 2000 it became apparent that German investor protection law, in spite of the high standard of protection already achieved, still contained some serious loopholes. The most far-reaching intervention by the German legislator took place in 2002 with the fourth *Finanzmarktförderungsgesetz*,³ which was a reaction to the crash of the stock market and the consequent decline of the New Market. On the European level, capital market law has been in a constant change as well. The basis for this development forms the so-called "Financial Services Action Plan" (FSAP)⁴ that aims at the creation of an integrated financial market, which is currently taking shape with ever more speed so that further change in German capital market law is to be expected.

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¹ BGBl I 1994, 1749; the first *Finanzmarktförderungsgesetz* (BGBl. 1990, 226) dated 22.2.1990.

² BGBl I 1998, 529.

³ BGBl I 2002, 2010.

⁴ KOM (1999), 232.

The Market Abuse Directive⁵, published on 14 April 2003, has to be transformed into national law within eighteen months, i.e. until 14 October 2004. There is also a changed proposal of a Prospectus Directive⁶, a proposal of a Transparency Directive⁷ as well as the proposal of an Investment Services Directive.⁸ Furthermore, the German Federal Government, in a ten-points-plan for the strengthening of business integrity and investor protection that was published last year,⁹ is planning to develop a stronger liability regime in connection with the right of information of organ members for false information to the capital market.

In this context it does not surprise that *Markus Lenenbach*, an assistant professor at the University of Freiburg, has undertaken to illustrate capital market law in the form of a practitioner text book. For a single author this is at the same time an ambitious as well as a remarkable project. In the title of his book *Lenenbach* does not only mention capital market law but rather talks about capital market and stock market law. This terminology is somehow surprising as nowadays stock market law is regarded as a part of capital market law. *Lenenbach* defends his double terminology by emphasising at the beginning of his book¹⁰ that no definite terminology has so far been established. The book's title therefore purported to express the fact "that the book also deals with stock market law, although stock market law is a part of capital market law." Keeping in mind, however, that capital (as a means of financing an enterprise) cannot only be gained from the stock market but also from other markets, it appears to be recommendable only to talk about capital market law. Capital market law is subdivided into two large areas, which, in accordance with Holger Fleischer¹¹, may be called *material* and *formal* capital market law. Part of

⁵ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse, Official journal 2003 L 96-16; see also Hansen, U. P.A. J. INTERN. ECON. L. (2002), 241).

⁶ Changed proposal of 09.08.2002 for a directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Prospectus Directive), KOM (2002) 460 final, Official journal C 20 E/122.

⁷ Proposal of 26.03.2003 for a directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive), KOM (2003), 138 final; available at: www.europa.eu.int/comm/internal_market/de/finances/mobil/transparency/index.htm.

⁸ See also: Sethe, ZBB 2003, 153, 155.

⁹ See: Seibert, Das 10-Punkte-Programm Unternehmensintegrität und Anlegerschutz, BB 2003, 693.

¹⁰ Foreword p. 5.

¹¹ Fleischer, Gutachten zum 64. Deutschen Juristentag, 2002, F 17.

material capital market law is the classic contract law as part of general banking law. Material capital market law also comprises specific codes of conduct for participants in the capital market that aim at the protection of the functioning of capital markets as well as at an improved protection of investors. They can mainly be found in the German Securities Act (*Wertpapierhandelsgesetz* (WpHG)). The second branch of capital market law, *formal* capital market law, is subdivided into organisation law of the different capital markets (here with a main emphasis on stock market organisation law) and the law of supervision. The book would probably have gained in clarity, if *Lenenbach* had followed this division of capital market law into four parts.

Lenenbach, however, employs a different approach by subdividing his book into thirteen chapters. The first two chapters form the introduction of the book and contain the basics as well as a definition of capital market law. In the first chapter, *Lenenbach* defines the role of capital market law among the different areas of the law as well as its area of conflict between the higher aim of protecting the functioning of capital markets on the one hand and investor protection on the other. Furthermore, he approaches the capital market from an economic perspective by differentiating between the capital market and other financial markets as well as by defining the aims and tasks of the capital market. Where he approaches the capital market from a legal perspective, *Lenenbach* refers to the different sources of law of capital market law and defines capital market law functionally as “the sum of rules, which serve to improve the allocative, operational and institutional functioning of the capital market.” In the second chapter the book turns towards the products of the capital market and the market participants, and thus concentrates on contract law in the first place. Especially the classic products on the capital market are introduced and explained with great clarity and further references.

The basics of capital market law, which are discussed in the first two chapters, form the basis for the following descriptions and allow for an easy start on the subject. Especially law students will profit immensely from *Lenenbach*’s able exposition of the intertwined economic and legal perspectives and foundations of capital market law. The book states the law as of fall 2002. It thus also considers the four major examples of legislative reform of the year 2002 although a profound discussion of the plentiful literature, which has been published in the meantime, was not possible. The four reform laws are the *Bundeswertpapierverwaltungsgesetz* (BwpVerwG), the *Gesetz über die integrierte Finanzdienstleistungsaufsicht* (GintFA), the German Take-Over Act *Wertpapiererwerbs- und Übernahmegesetz* (WpÜG) and the fourth *Finanzmarktförderungsgesetz*. In the following chapters, *Lenenbach* especially illustrates the effect of the fourth *Finanzmarktförderungsgesetz* on capital market law. Here as in other chapters, *Lenenbach* laudibly emphasizes the influence of European law in these fields.

Chapters 3 to 7 deal with trade regulation at the capital market. They do not only focus on the trade institutions but also on the traded products as well as on the relations between the market participants. In his third chapter, *Lenenbach* deals with stock market law, i.e. the law concerning the organisation of the stock market and the trade at the stock exchange. The fourth chapter concentrates on the dealings in securities and is thus again mainly concerned with contract law. It addresses and discusses the relation between the bank and its customers in the purchase and sale of securities *by* the bank *for* the customer. The issue of chapter 5 is the performance of dealings in securities and the custody and administration of securities. Here again the often changing perspectives of the author and his approach to the material before him make it not always easy reading. At one time he looks at stock market organisation law and then again at contract law. A stronger focus on contract in a first part of the book before chancing to the organisation law (formal capital market law) later would have been helpful. In chapter 6, he changes the perspective again by presenting different categories of products, namely innovative financial products¹² which can be object of the previously illustrated transactions. In this context the discussion of capital market products in the introduction is used as a basis for a thorough discussion of the economic function as well as the legal classification of innovative financial products. This part of the book concludes with a discussion of the emission of securities and loan stock rights in chapter 7.

In his eighth chapter, *Lenenbach* moves on from the description of single aspects of the trade at the capital market to give an overview of the current regime of investor protection. However, many parts of this account do only scratch the surface of the topic due to the early date of completion of the book in the middle of 2002. The clarity of the account suffers from the fact that investor protection is dealt with as a *cross-section* topic. Under the heading of investor protection *Lenenbach* discusses such different areas as liability for the violation of duties of information and advice, clashes of interests and their avoidance as well as § 34b WpHG or the liability for defective products and the control of loan terms according to the Standard Contract Forms Act (Gesetz über die Allgemeinen Geschäftsbedingungen – AGBG, recently integrated into the German Civil Code¹³). Also the following chapter, which deals

¹² Like Asset Backed Securities, Financial Futures and Forward, Options, Swaps and modern warrants i.e. range warrants.

¹³ See Peter Schlechtriem: The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe, in: OXFORD UNIVERSITY COMPARATIVE LAW FORUM 2002 (available at: <http://www.ouclf.iuscomp.org>); Hans Schulte-Nölke, The New German Law of Obligations: an Introduction (2003), at: <http://www.iuscomp.org/gla/literature/schulte-noelke.htm>; Peer Zumbansen, The Law of Contracts, in: Mathias Reimann/Joachim Zekoll (eds.), Introduction to German Law (2nd Ed. Kluwer Law: The Hague 2004, *forthcoming*).

with the so-called grey capital market law, is again marked by a cross-section perspective of investor protection, contact and organisation law.

Chapter 10 is the only one that explicitly focuses on a single statute, the German Securities Act (*Wertpapierhandelsgesetz (WpHG)*) as the centrepiece of capital market law. *Lenenbach* especially discusses insider law and the rules governing Ad-hoc-public disclosure in detail. While *Lenenbach*, writing in 2002 and before, cannot include in his discussion the now forthcoming changes with regard to the transformation of the Market Abuse Directive into German law, his account is both precise and informative on the main challenges in this much laboured field. After some remarks on the duties of information and publication in accordance with §§ 21ff. WpHG, *Lenenbach* turns to the duties of conduct of suppliers of investment services according to §§ 31ff. WpHG. This leads to some overlapping with the discussion of investor protection in chapter 8 especially with regard to the organisational duties. The text of sections 8.77 and 10.101 thus bears considerable repetitions. These difficulties again follow from the altogether unconvincing structure of the book. Chapter 8 deals with the regulations of the WpHG as far as they are - at least indirectly - relevant for investor protection. In connection with the law of supervision (*Aufsichtsrecht*) these regulations become again relevant in chapter 10. The administration and enforcement of the regulations of the law of supervision is not illustrated until chapter 12 which focuses on capital market supervision. The distinction between the importance of the WpHG for civil law claims on the one hand and its importance for the law of supervision as well as capital market supervision on the other hand is factually correct. However, as a result of this distinction the entire importance of the WpHG becomes, in contrast to the title of chapter 10, only apparent in a combination of chapters 8, 10 and 12. In this respect a more coherent illustration would have been desirable.

Chapter 11 deals with investment law on the basis of the Investment Act (*Gesetz über Kapitalanlagegesellschaften (KAGG)*). Since the publication of this book the legislator has also been active in this area again, among other things by admitting for the first time Single-Hedge-Fonds in Germany. Chapter 12 focuses on capital market supervision including illustrations of the three-stage supervision by the German SEC (*Bundesanstalt für Finanzdienstleistungsaufsicht (BAFin)*), the stock market supervision authorities of the German states (*Bundesländer*) and the trade supervision authorities at the different stock exchanges (*Börsenaufsichten*). Chapter 13 now explicitly looks at the interfaces between capital market and company law, which *Lenenbach* is especially interested in and already refers to in the preceding chapters. These interfaces are discussed with regard to the German Take-Over Act (*Wert-*

papiererwerbs- und Übernahmegesetz) and the German Corporate Governance Code.¹⁴

The final assessment of Lenenbach's Book "Kapitalmarkt- und Börsenrecht" is an ambivalent one. Such an extensive work is a remarkable achievement for a single author at this point in his career.¹⁵ *Lenenbach* manages to include into his account the latest national and European developments in the area of capital market law. This especially applies to the forth *Finanzmarktförderungsgesetz*. For instance, the paragraphs of the German Exchange Act (*Börsengesetz*) before and after the reform statute are – for the sake of comparison – clearly both cited. This method furthers a better understanding of the changes in the law. However, in some cases it leads to the unavoidable problem of referring to out-dated aspects. In sections 3.27 ff., to name one example, *Lenenbach* first of all describes the previous legal position of the stock market organisation with two different procedures of price setting by a discount controller and an official broker and only after that turns to the standardized procedure under the new law in section 3.72. Since the publication of the book many changes in law haven taken place. The chapters dealing with the New Market with regard to stock market organisation, for instance, have become out-dated by the recent closure of the New Market and the restructuring into "Prime" and "General Standard" at the Frankfurt Stock Exchange. While this certainly cannot be a point of criticism, one may wonder at the same time about the general feasibility of writing on such a fast moving topic.

The year 2003 did not only see the restructuring of the organisation at the stock exchange in Frankfurt but also the modernisation of the *Investmentgesetz* with the admission of Single-Hedge-Fonds which alone attracted considerable political and academic attention. In the progress of 2004, we will surely remain concerned with the realization of the federal government's Ten-Point-Plan for the strengthening of investor protection and company integrity, out of which could well come remarkable changes as to a stricter liability (especially external liability), of organ members for the provision of false information. With regard to this 'permanent reform of capital market law'¹⁶ the author would have been well-advised to give his work a clearer structure by strictly modelling his chapters according to the different

¹⁴ See the code at http://www.corporate-governance-code.de/eng/download/DCG_K_E200305.pdf ; for a thorough introduction see Ringleb/Kremer/Lutter/v.Werder, *Kommentar zum Deutschen Corporate Governance Kodex* [Kodex-Kommentar], Munich 2003.

¹⁵ For a discussion of the particularities of the German *Habilitation* (post-doctoral, tenure qualifying) system for aspiring university professors, see Minnerop/Schorkopf, *The German University Reform: Between Adjustment and Continuity*, in: Russell Miller/Peer Zumbansen (eds.), *Annual of German & European Law*, Vol. 1 (2003), Berghahn Books: Oxford/New York 2004, *forthcoming*.

¹⁶ Compare already the discussion, albeit with regard to stock corporation law, between Zöllner, 39 *DIE AKTIENGESELLSCHAFT* 336 (1994), and Seibert, 47 *DIE AKTIENGESELLSCHAFT* 417 (2002).

branches of capital market law. At the same time an even stronger emphasis on and a more thorough elaboration and discussion of the basics of the subject would have been desirable. However, the book “*Kapitalmarkt- und Börsenrecht*” by *Markus Lenenbach* is a well written and informative work offering practitioners as well as students a good start on the subject. In so far *Lenenbach’s* work indeed meets its claim of being a practitioner work book for commercial law. The fact that any book is already partly outdated on the day of its publication in light of new legislation is a problem of the permanent reform of capital market law which any academic in this area of the law has to face.