Vanderbilt Journal of Transnational Law

Volume 3
Issue 1 *Winter 1969*

Article 1

1969

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Recommended Citation

Manuel F. Cohen, Legal Problems of International Capital Formation, 3 *Vanderbilt Law Review* 1 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol3/iss1/1

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A SYMPOSIUM ON THE LEGAL PROBLEMS OF INTERNATIONAL CAPITAL FORMATION

INTRODUCTION

Manuel F. Cohen*

In the past ten or fifteen years, a revolution has been going on in the financial and securities field. This phenomenon is only an aspect of a wider revolution which is occurring throughout our society. To understand these revolutions, one must understand not only the economic issues but also the national interests and prejudices that affect governmental action. For example, securities law is moving in a slightly different direction in Canada from that in the United States. This introduction sets forth what I sense is going on in Western Europe.

Unless the people whose savings the market wishes to tap have confidence that the market is a safe place to assign a portion of all of their savings, there are really no good capital markets. Moreover, other political and economic factors profoundly affect the nature of the market. Governments often have a policy of directing savings of both individuals and groups of financial intermediaries such as institutional investors. For example, in some countries, pension funds and insurance companies are prohibited from investing a substantial percentage of their assets or reserves in equities, or they are required to provide a market for government securities. These restrictions on investment simply reflect a government attitude that its needs come first. Such a way of thinking is one of the main problems in reaching what the Europeans refer to as a "harmonization" among the various members of the Common Market; nor does it encourage channelling funds into the equity market.

For these reasons, the markets in most European countries were, until recently, solely markets for debt securities. The international companies, for the most part, tapped the equities market of the United States and a few capital exporting countries on the Continent. Even after equity markets began to develop, lack of interest on the part of individuals, and restrictions on institutions, hindered the development of what Americans called "after markets," so essential to good primary markets. In recent years, however, this has changed - at least in attitude. In no small measure, the changed attitude is a result of the United States policy which led to the interest equilization tax on capital flows from the United States, whether for direct or portfolio investment. United States policy, in fact, vastly influenced the creation of Eurobond issues, the Eurodollar, and their use abroad. An additional factor has been the development and dramatic growth of the offshore funds with tremendous effects on domestic and foreign capital markets.

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Nevertheless, the vast majority of Europeans still lack an understanding of, an appreciation for, and confidence in the market. While government regulation is partly responsible for public acceptance, it is not necessarily the controlling consideration. Both the political and economic contexts are far more important. For example, both the OECD and the EEC have been anxious to persuade their members to develop a multinational securities market. One approach is to have a basic statute for a multinational company which would be given recognition in every country in the Common Market. Another is to "harmonize" the laws of the various countries which have different currencies, trade and tariff barriers, tax schemes, and exchange rates.

One difficulty in reaching "harmonization" is the national jealousies and chauvinistic tendencies of nations. Another is the varying national needs and attitudes. Finally, the different nations all have divergent points of view for the solution to any problem. There is a feeling in some countries, like West Germany, that labor may appropriately participate in management, while such a suggestion is anathema to Frenchmen. Likewise, bankers in some countries want to control the securities market, while in other countries only a broker can effect a securities transaction. It cannot be overemphasized that these barriers to harmonization often have roots in concerns free from conventional economics.

Nevertheless, with the growth of American industry, and recognition by American industry, particularly companies with European or other foreign operations, that there were markets abroad that could and should be tapped, Europeans began to realize the seriousness of the competition. To strengthen the competitive stance of domestic companies, the Europeans could have prohibited foreign companies from entering their markets. Such a policy, of course, would run counter to the current mood for free competition and flow of capital. The alternative was, to use an English expression, "rationalization of the industrial sector." This meant that the European companies had to grow large enough and strong enough to compete, not only with the American corporations, but also with corporations from other industrialized areas of the world, including the Japanese. Unfortunately, existing law makes it almost impossible to merge a company in one European country with one organized in another. Furthermore, other problems, including national pride, unwillingness to face up to economic realities, and political differences, add to the difficulties.

As the discussions in this symposium will show, these phenomena are occurring not only in West Europe but also around the world. While the less developed countries place greater reliance on international organizations, they too are suffering similar psychological, political, and economic problems.