

# FINANCIAL MARKET LAW, ITS DEFINITION, AND PLACE IN THE LEGAL SYSTEM

## PRÁVO FINANČNÍHO TRHU, JEHO DEFINICE A MÍSTO V PRÁVNÍM SYSTÉMU

*Michal Janovec<sup>1</sup>*

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### ABSTRAKT<sup>2</sup>

*Tento článek se snaží definovat a zařadit finanční trh do oblasti práva, ve které se lze s finančním trhem setkat. Základem zkoumání bude nejen samotný finanční trh, ale také vztahy a právní normy s ním související. Jedním z výsledků tohoto článku bude souhrn těch nejzásadnějších definičních znaků toho, co pojem finanční trh obsahuje a zejména jaké společenské a právní vztahy se na finančním trhu uskutečňují. Analýza finančního trhu společně s analýzou společenských vztahů na finančním trhu odehrávajících se, pomůže přesněji vymezit prostřednictvím metody indukce také oblast, případně výšeč práva, ve které se předmět tohoto článku nachází. Cílem tohoto článku je shrnout základní definiční znaky finančního trhu a vymezit právo finančního trhu v právním řádu. Ambicí článku je tedy prozkoumat vymezení práva finančního trhu a předložit co nejpřesnější definici finančního trhu jako takového, pokud je takové přesné vymezení možné.*

### ABSTRACT

*This article seeks to define and situate the financial market within the area of law in which the financial market can be encountered. The basis of the examination will be not only the financial market itself but also the relationships and legal norms related to it. One of the results of this article will be a summary of the essential definitional features of what the term financial market contains and, in particular, what social and legal relations take place in the financial market. The analysis of the financial market and the study of the social relations taking place in the financial market will also help to define more precisely, through induction, the area or section of law in which the subject of this article is located. This article aims to summarize the basic definitional features of the financial market and to define financial market law in the legal system. Thus, the ambition of the article is to explore the determination of financial market law and present the most precise definition of the financial market as such, if such an exact definition is possible.*

### I. INTRODUCTION<sup>3</sup>

This article focuses on the definition of the financial market, or financial market law, in both the general and legal sense. However, to define the law that deals with such an important area as the financial market, it is necessary not only to determine what the financial market is and who operates in it but it is also required to deal with the legal relationships and legal norms that occur in the financial market.

For this paper, the term financial market will be used, not the plural financial markets, because I do not believe that there are multiple financial markets, but that there is only one

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<sup>1</sup> doc., JUDr., Ph.D., Masarykova univerzita v Brně, Právnická fakulta, Brno, Česká republika  
Masaryk University, Faculty of Law, Brno, Czech Republic.

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international, globalized financial market within which there are different national financial markets. This is mainly because globalization is blurring the boundaries in the field of finance, not only between countries but also between the various financial instruments provided in the financial market. All this is true even if it is recognized that a single, fully interconnected financial market is not a reality. Still, the interconnectedness and international links in this area are strong and make it possible to claim the existence of a financial market.

**This article aims to summarize the basic definitional features of the financial market and to define financial market law in the legal system. Thus, the ambition of the article is to explore the determination of financial market law and present the most precise definition of the financial market as such, if such an exact definition is possible.**

The primary methods of this paper are analysis, description, and synthesis of opinions and information obtained through analysis. Besides these basic methods, the induction and deduction methods are also used.

The method of description and analysis will define the subject matter of this paper, including its placement in the area/system of law in which the financial market may be encountered. From the foundations thus laid, it is not only the financial market that will be analysed. Using methods of description and analysis, the result will summarize the essential defining features of what the term financial market encompasses, mainly what social and legal relations occur in the financial market. An analysis of the financial market, together with an analysis of the social relations taking place in the financial market, will also help to define more precisely, using the method of induction, the area or section of law in which the subject of this article is located.

In terms of the current state of research and knowledge in the financial market law, the state of research is relatively comprehensive, even if an explicit definition is, in my view, lacking. When we look at the financial market not just in isolation but in a broader context as part of what we call the financial system, public banking law, or investment regulation, I daresay the current state of knowledge is incomplete. In particular, there is a lack of coherence between these areas and a lack of systemic inclusion in the law. It is advisable to try to supplement this with general but comprehensive scientific research of the financial market law, particularly in those areas which, in my opinion, have a significant impact on its determination. Thus, there are gaps in research regarding the definition and systematic classification of financial market law, and the ambition of this article is to try to fill these gaps and define the financial market or financial market law more comprehensively.

Future perspectives can only emerge from an understanding of the current situation. One of the best sources of current knowledge and understanding in this area is the plethora of processes of change in the financial market, whether economic or legal. There are also frequent changes in organization and division that are constantly taking place, whether on a local, national, or global scale. In particular, these processes are constantly moving towards European and global harmonization of the rules governing the operation and business of financial institutions and conglomerates on the financial market.

Regarding the literature review, many authors have addressed the financial market area locally and internationally.

The topic has been analysed and scientifically researched for a long time by both legal and economic authors. Probably the most active author on the issues closest to the subject of this publication is Čunderlík, who has been working in the field of regulation and supervision for a long time (not only), and his publications are also crucial and beneficial for this field internationally. A comprehensive and handy book under his direction is *Právo finančného trhu / Financial Market Law*.<sup>4</sup>

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<sup>4</sup> ČUNDERLÍK, L. *Právo finančného trhu*. Bratislava, Wolters Kluwer, Univerzita Komenského v Bratislave 2017.

Another author from the legal field is Kohajda, who also focuses primarily on financial market supervision and has published dozens of monographs, articles, and contributions from scientific conferences in this area.

With the combination of practical application and the theoretical definition of the financial market with emphasis on investment services, Husták<sup>5</sup> should be mentioned.

Jurkowska-Zeidler is a versatile and highly erudite author for the international financial market. She focuses on the general definition of the financial market at the EU level with comparative overlaps into Polish law.<sup>6</sup> Her definition of the architecture and analysis of the European financial market forms and should form the cornerstone of theoretical research in the field of the financial market.

## II. FINANCIAL MARKET

The financial market can be viewed from an economic perspective and defined accordingly or legally. However, a legal definition of the financial market is unlikely to be entirely accurate, as the law generally regulates social relations and does not define social systems. In this case, such systems are realized by a particular circulation of free funds from entities with a surplus to those with a shortage. It can also be stated that the financial market is legally determined by legal norms governing the economic and legal relations of similar entities providing similar financial services.

However, we need to use economics to determine how money circulates in the financial market and what relationships this creates. The law itself, as an established social system in the context of the financial market, defines or regulates the interactions between the subjects of the financial market as a segment of the economy with relative precision. Regulation itself defines the financial market, but only partially. Kotáb<sup>7</sup> defines the financial market as a system of relationships, instruments, entities, and institutions that enable the collection, concentration, distribution, and allocation of temporarily free money based on supply and demand. The financial market enables the redistribution of available monetary resources on a voluntary contractual basis.

Such a definition is abstract, is not strictly legal, and must provide a precise definition of the financial market. However, a more accurate definition can be found if we look at the financial market as an area of the economy or an economic system. Rejnuš<sup>8</sup> defines the financial market by dividing it into the money market, the capital market, the foreign exchange market, and the precious metals market. This is a definition and a breakdown of the basic types of financial investment instruments. Still, even such a definition is not precise as it does not capture actors' full range of interactions before they enter the market, e.g., by investing. The breakdown and subdivision of the financial market is, of course, possible according to various criteria and will be made later in the text, but it never provides the most accurate picture of what the financial market is.

It is impossible to define the financial market with complete precision if only because the definition of the financial market is constantly evolving and expanding, as there are new and additional areas that fall within or interfere with the financial market. However, an attempt can be made to find a definition that comes as close to an accurate but still precise specification of the financial market. For this purpose, it is beneficial to elaborate and expand on what has

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<sup>5</sup> HUSTÁK, Z, SMUTNÝ, A. *Investiční služby a nástroje po rekodifikaci*. Praha: C. H. Beck, 2016.

<sup>6</sup> JURKOWSKA-ZEIDLER, A. *The architecture of the European financial market: legal foundations*. Gdańsk ; Warsaw : Gdańsk University Press : Wolters Kluwer, 2016.

<sup>7</sup> KOTÁB, P., KARFÍKOVÁ, M, VONDRÁČKOVÁ, P. *Základní finančněprávní instituty*. In BAKEŠ, M. et al. *Finanční právo*, 6. upravené vyd. Praha: C. H. Beck, 2012. s. 102.

<sup>8</sup> REJNUŠ, O. *Finanční trhy*, 4. vyd., Praha: GRADA 2014, s. 61.

already been mentioned above, that the financial market is where free funds circulate, with an economic view of how these funds circulate, or from where to where and through whom. Suppose we stick to this general, relatively abstract definition of the circulation of finance from surplus entities to scarce ones. In that case, we will not get an answer as to which entities are involved in this circulation and where precisely this circulation takes place. At the same time, it is also possible to conclude that such a circulation occurs only in some markets associated with investment. This is true, but only partially, because financial circulation does not and cannot take place only in the investment market, but it must be remembered that there is an important role played by intermediaries who may be the final investors, but with other people's money. Such intermediaries are most often banks, but although the relationship between the depositor and the bank cannot be considered primarily an investment relationship, it can be seen as the beginning of a circulation of unrestricted funds, which the bank then uses and sends elsewhere as part of the economic circulation, without having to tell its client in most cases. Then, of course, there is the other side of this financial circulation, which is the demand from entities that are short of funds and which, of course, provide some compensation.

In this context, **we can define the financial market in a narrower sense and in a broader sense**, where the narrower definition would best define the financial market according to Rejnuš,<sup>9</sup> but does not reflect the entities entering the financial market, but only the financial market as a place where various entities invest their free financial resources and other entities demand these resources.

Financial markets are at the core of every market economy. They aim to facilitate the transfer of funds from savers (agents with excess funds) to borrowers (agents in need of funds). Efficient financial markets help to ensure the transfer of savings to the highest-return investments, increasing productivity and growth. The transfer of funds from savers to borrowers could, of course, be achieved by having savers buy securities directly from firms. In practice, firms in the financial industry supply the service of transferring funds from savers to borrowers.<sup>10</sup> This could be called a financial market in a broader sense – direct (using intermediaries) and indirect transfer of funds

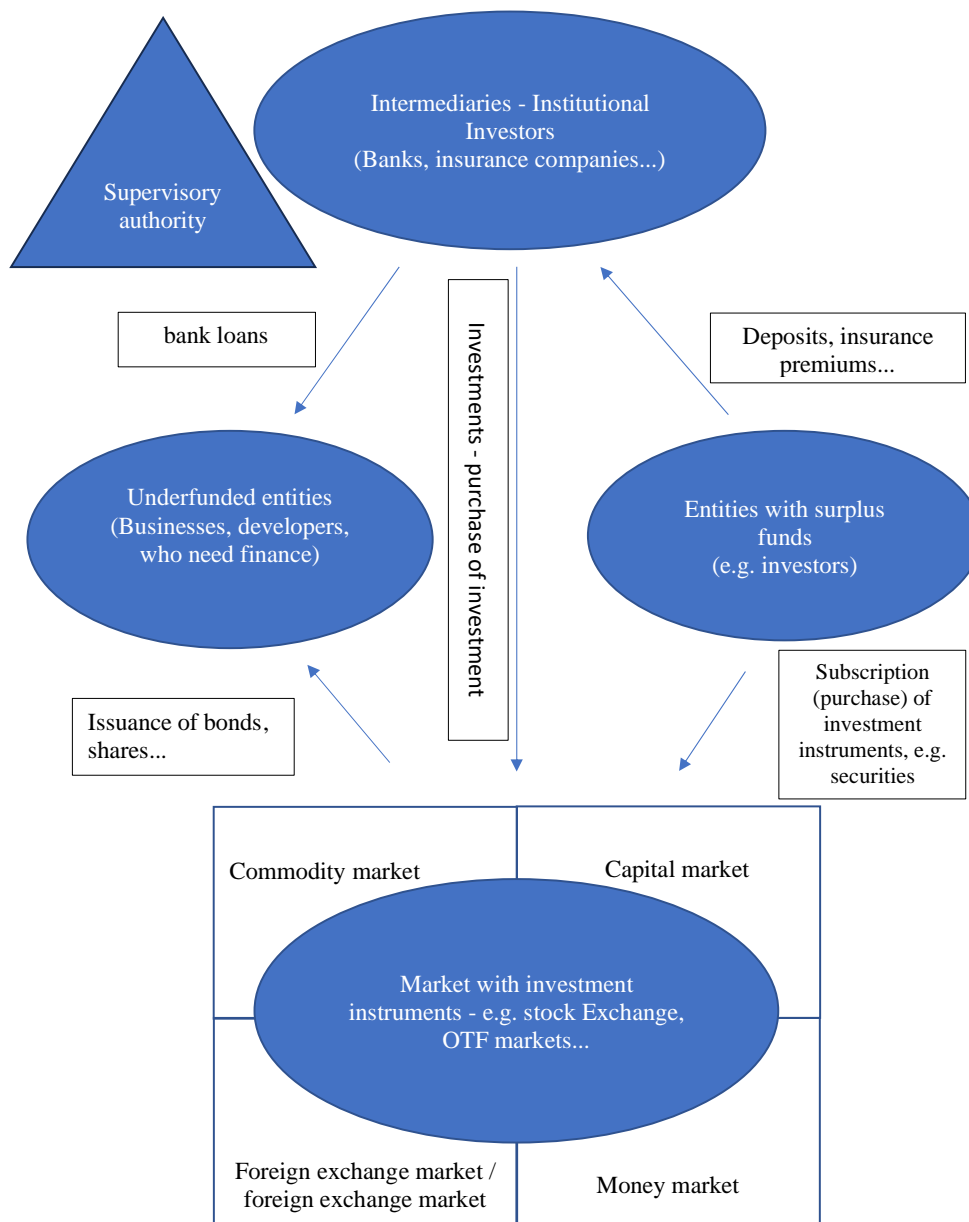
In a broader sense, and in my opinion, the most accurate conception of the financial market, **the financial market, can be defined precisely by combining economic and legal perspectives. From an economic perspective, it is the circulation of funds in the financial system. From a legal standpoint, it is the social relations occurring within the circulation of finance<sup>11</sup> in the economic system.** The financial market can best and most clearly be defined graphically in the following diagram.

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<sup>9</sup> Money market, capital market, foreign exchange market, and precious metals market. In REJNUŠ, O. *Finanční trhy*, 4. vyd., Praha: GRADA 2014, s. 61.

<sup>10</sup> CLARK, R. HOUDE, J.F, KASTL, J. The Industrial Organization of Financial Markets. NBER Working paper No. 29183. National Bureau of Economic Research, Cambridge. August 2021. p 1 – 2.

<sup>11</sup> The term "circulation of finance" is used to express the flow of funds from entities with a surplus to those with a shortage, including relationships associated with financial intermediation implemented on the financial market.

**Fig. 1.** The financial market in a broader sense

Source: Husták, Z. and Janovec, M. *Financial market and its stability*. Prague: Wolters Kluwer ČR, 2023. p. 3.

Defining the financial market broadly provides a realistic picture of the financial market and how free funds are circulated.

At first glance, it may seem that the relationship between the bank and depositors has nothing to do with the financial market, nor can it have anything to do with the relationship between the bank and the recipients of loans from the bank. But that would be a false look.

Banks mobilize capital by providing depositors with both a return on their investment and liquidity.<sup>12</sup> Savers want to be able to convert their investments to cash at short notice in case

<sup>12</sup> DIAMOND, D.W., DYBVIK, P.H. Bank runs, Deposit Insurance, and Liquidity. *Journal of Political Economy* Vol. 91, No. 3 (Jun., 1983), p. 401 pp. cited according to ARMOUR, J., AWREY, D., DAVIES, P., ENRIQUES, L., GORDON, J. N., MAYER, C., PAYNE, J., *Principles of Financial Regulation*. Oxford University Press 2016., p. 28.

they suffer financial shock - loss of employment, illness, divorce – or decide to change their consumption patterns.<sup>13</sup>

Suppose we do not include banking services, i.e., the relationship between a bank and its customers, in the financial market and separate these services from the bank's investment activities in a regulatory and supervisory sense. In that case, we will jeopardize the stability of the banking sector.<sup>14</sup> Logically, the way funds enter the bank must first be sufficiently regulated so they can be disposed of. It is impossible to split the regulation and supervision of one entity (the bank) into different segments of its activities, especially when it is the most important financial intermediary in the economic system. Such a split is precisely what we will achieve if we do not include complex banking activities in the financial market.

This would lead to a different approach to banking activities by the legislator and the regulator. The premise that the **financial market, as a fundamental area of the economic system, needs to be regulated precisely** is undoubtedly valid. If the relationship between clients and banks were not emphasized, as they would not be part of the financial market, there would be double-tackiness in regulation and supervision within a single entity, which is undoubtedly systemically undesirable. Moreover, it is not even technically possible. And yet another, perhaps the main reason, is that it is through these relationships that funds come into the bank. Without them, no further regulation is necessary, as they are the cornerstone of bank capital formation and a fundamental pillar of the entire economic system. Why is the stability of the banks necessary and elementary for the whole financial market? Because there is a thread of bank runs, and banks are essential intermediaries (and investors) in the financial market – they partly define the financial market itself. Bank runs cause real economic problems because even "healthy" banks can fail, causing the recall of loans and the termination of productive investment.<sup>15</sup> That might cause a complete collapse of the financial system.

The same applies to other financial intermediaries - financial service providers such as insurance companies.

**But why is the definition of a financial market important?** It mainly provides a specific range of social relations regulated by law, constituting a financial market. The legal regulation of these relationships can then be called financial market law. Furthermore, the precise definition of a financial market also provides a basis and, consequently, a guide for the comprehensive setting of stabilizing elements such as regulation and supervision in the financial market. Only if we know what social relations are taking place in a particular area and what their nature is can we then answer the question of what exactly we need to regulate and supervise, especially in what ways. This is the reason for defining and understanding the financial market as precisely as possible.

In addition to the financial market, the literature uses a similar term in content and meaning, namely the economic system and the related law of the monetary system. In the context of EU law, the term has started to appear in the context of the stability of the financial system.<sup>16</sup> The financial system is a broader concept than the financial market, although these terms may be used synonymously.

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<sup>13</sup> ARMOUR, J., AWREY, D., DAVIES, P., ENRIQUES, L., GORDON, J. N., MAYER, C., PAYNE, J., *Principles of Financial Regulation*. Oxford University Press 2016., p. 28.

<sup>14</sup> This, however, is without prejudice to the obligation to create "Chinese walls" to separate credit and investment business units in banks, which was historically enshrined first in the US in the form of the Glass-Steagal Act (officially The Banking Act of 1933) in response to the Great Depression.

<sup>15</sup> DIAMOND, D.W., DYBVIK, P.H. Bank runs, Deposit Insurance, and Liquidity. *Journal of Political Economy* Vol. 91, No. 3 (Jun., 1983), p. 402.

<sup>16</sup> ČUNDERLÍK, L. *Právo finančného trhu*. Bratislava, Wolters Kluwer, Univerzita Komenského v Bratislave 2017. p 18.

The financial system is comprised of a mixture of financial intermediaries and financial markets with a range of supporting institutions that facilitate the effective operation of markets.<sup>17</sup>

The financial system<sup>18</sup> can also be defined as:

- The sum of all markets (money, capital, foreign exchange and derivatives)
- The aggregate of all entities providing financial services in those markets that create the infrastructure to enable the creation, modification, and termination of legal relationships involving the handling of financial funds
- The issue of currency and its care (the conduct of monetary policy)

The financial system is subsequently shaped by the regulatory and supervisory authorities (through general legal regulation or individual decision-making).

The main difference between the financial system and the financial market is the inclusion of monetary law within the financial system, which more or less "copies" the definition of the non-fiscal part of financial law within which financial market law is an important area. The systematic classification is discussed below. The above, among other things, implies that, in general, the concept of the financial system should not be confused with the financial market.

### III. BASIC DEFINITION OF FINANCIAL MARKET LAW IN THE LEGAL SYSTEM

The legal system is a normative system of a society that is fundamental in the sense that it broadly regulates that society's life, further claims to be legitimate to ensure social control of that society, and claims to be generally enforceable by a procedure that anticipates.<sup>19</sup> It could be stated that financial market law must be part of some legal system because its definition coincides with what determines the legal system, as mentioned in the previous sentence. That's also one of the reasons why it is important to subordinate an institution (the financial market) to a system of law. To be sure, it's legitimate and generally enforceable.

The branches of law and the list of areas that fall under them are and always will be, to some extent, different in different countries. Therefore, this systematics will be analysed in the Czech legal area. Financial market law is not generally accepted as a separate branch. However, especially in the Anglo-American legal environment, some signs of independence are registered, most often in conjunction with capital market law. However, autonomy is not fundamental or essential for determining financial market law.

#### 3.1. Financial market law as public law

Financial market law is more or less a public law, given the importance of the financial market to the economic system, as the public interest in regulating this sector is vital. This entails the existence of a majority of mandatory legislation. On the other hand, there are private law elements and relations in the financial market area, although they are somehow related to the public interest. They are part of the whole financial market system since at least part of the legal regulation of the financial market is aimed at protecting private law relations and ensuring their smooth functioning. Then, the public law elements of the financial market (such as supervision, investor protection, and protection against market manipulation) have a protective function vis-à-vis these private law relationships. In this context, it is thus worth pointing out

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<sup>17</sup> ARMOUR, J., AWREY, D., DAVIES, P., ENRIQUES, L., GORDON, J. N., MAYER, C., PAYNE, J., *Principles of Financial Regulation*. Oxford University Press 2016., p. 28.

<sup>18</sup> According to KOHAJDA, M. Právo finančního systému jako podobor finančního práva? In *Daně a finance*. 2016. Supplementum, s 37 – 38.

<sup>19</sup> MICHALEK, J., Co je právo a jak ho můžeme modelovat, *Právník* 04/2020, p. 341.

Knapp's skepticism<sup>20</sup> about the distinction between public and private law, which confirms the protective effect of public law on private relations in the financial market.

In this context, it is certainly relevant to ask whether the private sector is of any fundamental importance in the overall financial market system and, if so, how it affects public regulation. In the financial market area, elements of public and private law meet and intermingle, influence, and complement each other, and this is sure because they cannot regulate the very complex relationships that arise and are realized in the financial market, either separately or in isolation. Such separate regulations in the financial market area could not function effectively because they would undoubtedly create gaps in the law, which would be very difficult for the supervisory authority to fill, for example, using soft law instruments or case law. These gaps in the law exist anyway, but when private and public law are intertwined and overlapping, and there is significant and continuous interaction, their occurrence is reduced to an acceptable minimum. The significance of private law elements in public law regulation is easy to answer. It is precisely the need for the circulation of funds in the economy, which, among other things, is ensured by private entities in the framework of private-law relations on the financial market. This circulation of funds, i.e., one of the essential functions of the financial market and, hence, of the economy, must be protected by public law regulation. Similarly, the weaker participants in these relations must be protected by consumer protection, protection against financial market manipulation, and other negative phenomena. Public regulation comes after private law relations have been implemented.

### 3.2. Legal norms and legal relations of the financial market

The legal norms of public law are mainly mandatory. This is a public law area which, even in the case of institutes theoretically private law, attributes to such institutes the character and meaning of public law or uses public law regulatory procedures to fulfill the functions expected of regulation, in this case, the protection of the weaker party to the contract.

Thus, private law relations in the financial market exist and are significant. Still, the interference of public law in these relations and the environment in which they are implemented is equally substantial and necessary. Without public law interference in private law relations, particularly for banks and insurance companies, their position, professional background, and dominance would be abused. Their primary legal anchorage is in what can be called the financial business sector. It is so vital to the economy as a whole precisely because it helps to ensure the circulation of funds in the economy or, in the case of insurance, a certain degree of property protection. Business in these areas has become so crucial to the economy that it is in the public interest to protect and promote the stability of this business environment with great precision. It is still a matter of business and the pursuit of private interests. Still, these are, to a certain extent, 'elevated' to the level of public law because public law must ensure their existence, i.e., supported and protected. It is an interesting situation where this business environment is given specific support and protection precisely because business in this sector is in the economic public interest.

On the one hand, the protection itself is manifested by strict conditions for entry into the sector and by strict conditions for business conduct, with supervision of that business. However, this tends to restrict the entrepreneurial freedom of individual operators, even though the environment protects this. On the other hand, the protection provides public regulatory and

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<sup>20</sup> Knapp is very sceptical about the importance of the distinction between private and public law and is also sceptical about the classification of law into different branches of law. Cf. KNAPP, V. *Teorie práva*. C.H. Beck. Praha 1995. s 68 a násl.

supervisory support<sup>21</sup> for the functioning of the financial market with guaranteed unique and lucrative business opportunities that other economically active entities do not have (deposit taking, lending, insurance, etc.).

Based on the above, financial market law is more or less public law. The distinction between public and private law is insignificant for financial market law, and more specific information about this area needs to be provided.

The role of public law with all its command and control (in the financial market) could be questioned because it might cause a legal system rigidity. Mattei<sup>22</sup> argues that the rigidity, however, is caused by the overuse of command and control regulation that forecloses any principled development of the legal system.

The state's interest in this case is not only to ensure the position of individual financial market participants but, above all, to ensure the proper functioning of the economic system. The financial system must, therefore, be kept stable, but not in the sense of 'stagnation,' but in the mind of the stability of a certain level of economic prosperity, preferably in the form of economic growth. In this case, the State's interest is a public interest, and its action consists of public financial activity aimed at ensuring the activities and objectives specified above, i.e., in particular, ensuring the stability of the financial market, consumer protection, or the equal treatment of all market operators.

### 3.3. Legal sources of financial market law<sup>23</sup>

The study of the sources of law forms the basis of scientific knowledge of any branch of law or institutes of law. Through the sources, we can get to know the individual normative sources of law, and they allow us to learn where a branch of law or institutes comes from and what gives them their actual form and legal force. The specificity of the sources of law facilitates the knowledge of a particular legal regulation. It provides sufficient information about the given area and the possibilities of the individual subjects implementing themselves in a given area of law. A fundamental element and a significant specificity is the role of soft law in the financial market, which is very substantial. Sources of law can be divided according to their legal nature into legislation and soft law instruments such as recommendations, standards, etc. Then there is the case law of the courts and the decisions of supervisory authorities, which help to shape the law.

The following is an overview of the sources of law. I note that their influence and importance in the financial market are evident from the overview and soft law instruments' scope. The soft law relating to the financial market is a significant underpinning of economic stability, and this is because it helps to complement the legal standards in this area operationally and efficiently. Innovations are very rapid in the financial market. Therefore, it is often necessary to react quickly regarding regulation, which the standard legislative process of adopting legal norms needs to allow. Then there is case law, an instrument that helps to fill gaps in the law and ambiguities in the application and interpretation of legal norms, as well as in the case of soft law instruments.

The sources of financial market law are, therefore, as follows:

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<sup>21</sup> Regulatory and supervisory support in this sense is not meant to imply that regulation is created and supervision is exercised for the benefit of and tailored to individual entities, but rather that there is some regulatory and supervisory flexibility to respond to necessary changes in this environment.

<sup>22</sup> MATTEI, U. *Comparative Law and Economics*. University of Michigan Press 1997. p. 14.

<sup>23</sup> The chapter is based on JANOVEC, M. a kol. *Propedeutika finančního práva IV – Právo finančního trhu*. Brno. Masarykova Univerzita 2022. s. 27.

**Legislation (complex law) <sup>24</sup>**

- Directives and Regulations (EU)
- laws and decrees, government regulations
- measures of a general nature

**Standards and recommendations (soft law)**

- international - global standards
- general guidelines and recommendations from the European authorities
- Official communications (at European and national level)
- statements and answers to CNB<sup>25</sup> questions
- standards and recommendations of professional organizations

**Case law**

- Court decisions of the CJEU and domestic courts
- Administrative decisions of European ESA<sup>26</sup> authorities and domestic CNB decisions

**3.3.1. Legislation**

In the financial market, given its economic importance, as discussed above, harmonised legislation plays a significant role in the Czech Republic and other EU Member States.

These are rules of EU law, which include both primary law in the form of the TFEU,<sup>27</sup> and secondary law expressed in individual regulations and directives, especially framework ones, adopted by the European Parliament and the Council. Implementing technical standards and delegated technical standards, which take the form of regulations or decisions of the EU Commission, are also sources of law.<sup>28</sup>

In addition to those European legal norms, domestic laws and other legislation are still essential sources, although their role is, to some extent, being replaced by European ones. It is in the area of the financial market that the replacement of the text of regulations by references to specific articles of European rules can be observed.<sup>29</sup>

The most important sources of law are continuously mentioned in the text of this publication. Therefore, a list will not be presented here, as it will be very long and will not contain anything.

**3.3.2. Measures of a General Nature**

Under sectoral laws, the CNB is authorized to issue general measures. This is where the features of administrative law, where this institution is regulated, come into play.

A general measure is an administrative act with a defined subject matter (i.e., it relates to a specific situation) and a generally defined range of addressees. A general measure cannot replace a sub-legislative standard-setting measure or impose new obligations beyond the scope

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<sup>24</sup> Determined by HUSTÁK, Z. SMUTNÝ, A. *Investiční služby a nástroje po rekonstrukci*. 1. vydání. Praha: C.H.Beck, 2016, p 51.

<sup>25</sup> The Czech National Bank is a supervisory authority in the financial market.

<sup>26</sup> European Supervisory Authorities - European Banking Authority, European Securities Market Agency, European Insurance and Occupational Pension Authority (hereinafter „ESA“).

<sup>27</sup> TFEU - Treaty on the Functioning of the European Union, Internal Market Services, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010 and repealing Directive 2007/64/EC.

<sup>28</sup> In addition to the framework directives and regulations adopted by the European Parliament and the Council, implementing acts and delegated acts (delegated acts), which are EU Commission regulations, are also binding. These Commission acts allow for the addition or modification of less essential elements of those framework regulations and, in the case of delegated acts, for the clarification of legislative acts.

<sup>29</sup> For example, in the case of Act No. 256/2004 Coll. on Capital Market Undertakings ("ZPKT"), this is increasingly evident and this regulation may become more of a list of references to specific provisions of European regulations.

of the law; it serves only to specify existing obligations arising from the law and not to impose new obligations not contained in the law.<sup>30</sup>

The CNB uses general measures in the Czech Republic as an administrative act directed generally at entities in a selected financial market sector. However, it is, to a certain extent, a specific administrative act where the CNB's powers derive from individual sectoral laws for specific needs of a particular nature. It is not an interpretative tool, as it might seem at first sight, but a tool for setting particular obligations. The CNB uses these measures to set, for example, capital buffer rates for banks or asset valuation methods. For instance, under Act No 21/1992 on Banks, Sections 12o to 12r powers are used to set the countercyclical capital buffer and the capital buffer to cover systemic risk. The specificity lies in that under Section 12x of the Banking Act, the application of the Administrative Procedure Code is excluded, and the measure of a general nature takes effect on the date of its publication in a manner allowing remote access.

Another example is using a general measure in investment services under Section 199(5) of the ZPKT, which empowers the CNB concerning European regulations.<sup>31</sup> Within the limits of these regulations, the CNB is granted the power to grant exemptions or to regulate the application of specified rules to securities dealers. In this case, the measure of a general nature is no longer excluded from the scope of the Administrative Code, and its effectiveness is linked to the 15th day of publication of the public notice.<sup>32</sup>

The logic of excluding the Administrative Code in the first example of capital provisioning is quite clear. This is an authoritative and peremptory decision where it makes no sense to publish a public ordinance, if only because these measures tend to be published long before, e.g., one year before what they mandate is to come into use. Furthermore, there is no possibility of a review procedure, which, in the case of a classical measure of a general nature, is linked to a time limit of 3 years after the measure has come into force.<sup>33</sup>

### 3.3.3. Standards and recommendations - soft law

Soft law is a rule of conduct established using instruments that are not legally binding but have specific (indirect) legal effects, are intended to produce particular effects, and are capable of making those effects.<sup>34</sup>

Wellens and Borchardt's<sup>35</sup> definition of soft law states that its rules of conduct find themselves on the legally non-binding level (in the sense of enforceable and sanctionable through international responsibility) but which, according to the intention of its authors, indeed do possess legal scope, which according to the intention of its authors indeed do possess legal scope, which has to be further defined in each case. Such rules do not have in common a uniform standard of intensity as far as their legal scope is concerned, but they do have in common that they are directed at (intention of the authors) and do have an effect (through international law) that the conduct of States, international organizations and individuals are influenced by these rules, however without containing international legal rights and obligations.

These rules are essential for the financial market because they provide a relatively more flexible response to the needs of specification, interpretation, and application of legislation to

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<sup>30</sup> According to the judgment of the Supreme Administrative Court of the Czech Republic of 27 September 2005, No. 1 Ao 1/2005-98.

<sup>31</sup> MiFiD2 and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

<sup>32</sup> Cf. § 173 of the Act No. 500/2004 Coll., Administrative Code (hereinafter Administrative Code).

<sup>33</sup> Cf. § Section 174(2) of the Administrative Code.

<sup>34</sup> SENDEN, L. Soft Law in the European Community Law. In: PETERS, A., PAGOTTO, I. *Soft Law as a New Mode of Governance: A Legal Perspective* [online]. Dostupné z [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1668531](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1668531).

<sup>35</sup> WELLENS, K.C., BORCHARDT, G. Soft Law in European Community Law. *14 European Law Review*, 1989, p. 274.

the realities of the financial market. Legislation cannot, and should not, cover all possible situations in life but often only defines the essential boundaries of the rules of conduct. The more flexible soft law instruments in terms of interpretation and application serve to specify the legislation, which completes the overall intention of the legislator and presents much more effective rules that can respond more quickly to changing needs and innovations in the financial market.

For example, individual standards, especially at the international level, converge supervisory practices across countries so that they are ideally the same. Let's consider that there is a European passport for financial institutions in the EU, where they can provide services in another Member State based on authorization from one Member State. It is more than appropriate that regulation and supervision should work at least very similarly.

The individual standards and recommendations include guidelines, answers to questions, and, where appropriate, other methodological and interpretative documents.

The general guidelines and recommendations of the ESA authorities are intended to ensure the consistent application of EU law within the European System of Financial Market Supervision.<sup>36</sup> The General Guidelines should also be followed by individual financial market institutions across all sectors, and national supervisors monitor this. However, the individual supervisory authorities in the Member States adopt the general guidelines of the ESA authorities with relative ease and use them to interpret EU law. The CNB publishes the individual guidelines with an additional communication that declares that it will act according to the procedures in its supervisory activities.<sup>37</sup>

### 3.3.4. Standards and recommendations issuers

Soft law instruments - standards and recommendations are not only issued by the ESA mentioned above agencies. However, they can be considered among the most important in the financial market, if not the most important. This statement is based on the above and the de facto binding nature of the soft law instruments of these agencies. However, it is also necessary to look at other and, in the end, primarily "true soft law" instruments from the perspective of individual institutions, whether of global importance or European, and therefore Czech, importance.

**1) International institutions** active in the financial market in its various segments.

The most important is the Basel Committee on Banking Supervision, which issues essential standards in prudential rules for banks. There is IOSCO<sup>38</sup> for investment services and IAIS<sup>39</sup> for insurance supervision for other sectors.

**2) EU institutions**

- European Commission standards and recommendations - interpretative opinions on EU regulations relating to various financial market sectors. In this case, these are accurate soft law instruments that specify and supplement EU regulations so that the harmonization of application and consistent interpretation across the EU is always and everywhere the same.

- ESA (European Banking Authority, European Securities Market Agency, European Insurance and Occupational Pension Authority) standards and recommendations

**3) The supervisory authority** issues official statements, interpretative opinions, and methodological materials, communications

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<sup>36</sup> Compared to other ESA authorities, ESMA has, in addition to soft law instruments, enforcement powers vis-à-vis private parties, namely credit rating agencies and trade repositories, which has so far been lacking across the spectrum vis-à-vis other financial market entities.

<sup>37</sup> HUSTÁK, Z. SMUTNÝ, A. Investiční služby a nástroje po rekonstrukci. 1. vydání. Praha: C.H.Beck, 2016, p. 61.

<sup>38</sup> International Organization of Securities Commissions. See <https://www.iosco.org/>.

<sup>39</sup> International Association of Insurance Supervisors. See <https://www.iaisweb.org/>.

In this case, these are only sometimes accurate soft law instruments, as official communications are mainly informative. On the other hand, the information provided by an official communication is at least of an application and implementation nature, sometimes also of an interpretative nature, and these are the characteristics of soft law, as discussed above. Communications about soft law issued by the ESA will not be discussed further here because they have been discussed in detail above. Interpretative opinions and guidance material are a traditional and vital soft law instrument that complements and, in particular, concretizes legislation in this area very well. Financial market legislation is often concise in some respects, which is not detrimental. Still, it is necessary to have such specific instruments to supplement what is not explicitly stated so that legal norms in the financial market can be the same for all entities and that there are no divergent interpretative positions. In this case, too, these instruments very often acquire a specific legal force since, without their application, it is not possible to comply with the obligations laid down by the regulation or to achieve an objective that the institution concerned would like to achieve (e.g., obtaining a banking license).

**4) Professional organizations** - they set rules for their members vis-à-vis customers, formulate various technical regulations for the performance of their activities, and also standardize contractual documents. In this case, it is an actual soft law that increases the certainty for customers who choose to use the services of the members of these organizations. It is an informal guarantee that at least minimum standards will be respected to guarantee customer protection. This also increases the 'culture' and improves the market's competition rules.

- international professional organizations - for example, the European Banking Federation, International Capital Markets Association,

- domestic professional organizations like the Czech Banking Association or the Capital Market Association. They issue codes of ethics or codes of conduct that members must follow. These codes are then followed by specific standards of conduct of members towards their clients. Membership in such an association gives its members, in particular, greater credibility with the public, as there is a guarantee of compliance with the individual standards. As a result, this increases the credibility of individual members and the financial market. Not all institutions operating in the financial market are members of these organizations, but most are major (especially regarding the number of clients).

### 3.3.5. Case law and administrative decisions

**European case law** is essential, particularly for its authoritative interpretation of EU law. It considers preliminary questions under Article 267 TFEU in many areas, such as national court proceedings interpreting treaties and acts of individual EU institutions or bodies.

With this interpretative tool, the Court of Justice of the European Union expresses and interprets financial market issues in all its sectors, thus contributing to the uniform application of European law (also in the form of implemented legislation) across Member States.

Another potential option is the possibility of judicial review under Article 263 TFEU. In this case, it is a review of the legality of various legislative acts, acts of the Council, the European Commission, and the European Central Bank, but only those binding acts, as discussed in more detail above. However, this form of case law is, to a certain extent, only a corrective to legality, i.e., it is not a source of law in the positive sense, but instead in the negative sense, since it can annul existing legally binding acts.

**The domestic case law** reflects, in particular, the decision-making in administrative justice after the CNB has acted as an administrative authority in the exercise of supervision. However, civil law decisions relating, for example, to compensation for clients' damages against financial institutions can also be mentioned.

### Decisions of supervisory authorities

At the European level, only ESMA has enforcement powers through direct supervision of private parties, but only CRAs and trade repositories.<sup>40</sup> However, this trend will continue across other sectors as ESA's powers, including decision-making powers, are strengthened vis-à-vis other financial market entities.

The CNB's decisions are those of an administrative authority in financial market supervision. In most cases, they are decisions of a punitive nature, which apply legislation in this area or punish non-compliance with such legislation. All final decisions since 1999 are available on the CNB's website.

It can be summarised within this area that the diversity and, more importantly, the breadth of the system of sources of law in the financial market is unique. Indeed, it is not just the formal activities of various bodies that produce, in particular, those sources of law that we refer to as soft law. These precise instruments play an essential role in the financial market and are gradually becoming more important. They are also unique in the financial market compared to other areas of law in terms of their regulatory importance and breadth of scope. However, the case law of the Court of Justice of the European Union has also played a significant role in the law's specification, interpretation, and application since its inception. With this case law, it is possible to fill gaps in the law itself, and, at the same time, it is possible to harmonize EU law across Member States to create and maintain a single market.

### IV. CONCLUSION

The intention and aim of this article were to define the financial market from different perspectives. Besides all mentioned above, the importance of financial market law definition is also determination for financial literacy and consumer protection in the financial market. It's essential to know precisely the environment where financial products are provided and where consumer protection is highly needed, and financial literacy should be promoted.<sup>41</sup> The regulatory environment also influences the quality of services and competitiveness in their provision, ensures sufficient competition, and is characterised by the fact that it is "stamped" not only by the national but also by the European legislator in the relevant sector of the financial market.<sup>42</sup>

This article tried to summarize the definitions and characteristics of financial market law and to define financial market law in the legal system. These characteristics can be divided into legal and economic ones. Those legal ones were primarily described as rules (sources of law) allowing social and business relations between all financial market participants. The economic ones enable the transfer of finance from "money holders" through financial intermediaries to those requesting extra financing. This transfer uses investment instruments of the financial market. That definition point could create and define the financial market and the law, allowing the existence and usage of such a market. In recent years, the developments of the dynamic financial market resulted in

- Enhanced consumer protection measures in financial services
- Efforts to address systemic risks and improve financial stability

<sup>40</sup> See. ESMA. Supervision [online] Available from < <https://www.esma.europa.eu/supervision/supervision>>.

<sup>41</sup> For more, see World Bank Group. *Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A diagnostic Tool*. [online] Available < <https://www.worldbank.org/en/topic/financialinclusion/publication/good-practices-in-consumer-protection-and-financial-literacy-in-eca>>.

<sup>42</sup> SLEZÁKOVÁ, A. Návrhy de lege ferenda vzťahujúce sa na reguláciu finančného poradenstva / proposals de lege ferenda relating to the regulation of financial advisory. *STUDIA IURIDICA Cassoviensia*. 2020, vol. 8. no 1. p. 90.

- Increased focus on digital assets and cryptocurrency regulation<sup>43</sup>
- Necessary attention is paid to sustainable finance and ESG (environmental, social, governance) factors.

These areas of the financial market law are under solid regulation and supervision, which must lead to the stability of the financial market itself. Financial market stability should be one of the main points of the financial market law – to ensure a stable and fair market for all participants.

Thus, future research in financial market law should produce strong regulation without overkill effect for the “free market” with apparent supervision of the financial market.

Future research should move towards ensuring sufficient regulation in new areas of the financial market. These are new and novel services, investment opportunities, and new institutions operating in the financial market.

Future research helping to define financial market law should focus on Investigating the balance between innovation and regulation in fintech. Since the financial market is worldwide, the effectiveness of cross-border financial regulations should be regularly examined.

One way to determine the financial market is to explain it legally and economically through the services and institutions that operate in it. Another point of view is to describe the legal relationships and norms that occur in the financial market and specifically help to determine them. The position and content of financial market law have been partially summarised, implying that the importance of such a definition and systemic classification can positively impact further and deeper exploration of the financial market.

The financial market is dynamic, and its defining features are and will be equally dynamic. Still, this article's principles, general postulates, and tenets should remain constant. These include, in particular, the nature of legal rules and legal relations and the principle of the circulation of finance from surplus entities to deficit ones. The institutions in the financial market may change, as may their nature and the way they conduct their business, which will undoubtedly modify the definition of the financial market. The same applies to the services provided in the financial market and their enumeration and content.

In other words, the interpretation and determination of financial market law is universally possible and accurate only partly because, over time, the financial market, the institutions operating in it, and the services they provide will evolve and change. All the above-presented topics, together with the evolution of financial market law, could/should be the subject of future scientific research

## KLÍČOVÉ SLOVA

finanční trh, právo finančního trhu, kapitálový trh, definice finančního trhu

## KEYWORDS

Financial market, Law of the Financial market, Capital market, definition of financial market

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<sup>43</sup> About regulation of cryptocurrencies and their financial and legal basis, see POPOVIČ, A., SÁBO, J., ŠTRKOLEC, M. Bitcoin a jeho finančno-právne východiská. In: *Právo obchod ekonomika: zborník vedeckých prác*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2020, pp. 217-228.

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#### **CONTACT DETAILS OF THE AUTHOR**

**doc. JUDr. Michal Janovec, Ph.D.**

ORCID:0000-0002-6565-4043

Associate professor

Masarykova Univerzita v Brně,

Faculty of Law, Veveří 70, Brno

Phone number: +420 73700330

E-mail: [michal.janovec@law.muni.cz](mailto:michal.janovec@law.muni.cz)