Introduction

OVERARCHING THEMES

Objectives and Scope of the Book

This Handbook offers a comprehensive discussion of up-to-date developments in global capital markets, focusing on ‘mainstream’ capital markets in terms of securities products and market developments. Although there is well-trodden critique of regulated mainstream securities markets in terms of being overly burdensome, creating barriers to entry especially for smaller and new businesses and creating inefficiencies for management and compliance, mainstream capital markets remain important, and not only as fund-raising venues. Mature, regulated capital markets are a global benchmark for evidencing corporate maturity and investment appeal, and form the apex of a system of fund-raising options and their more proportionate regulatory frameworks. In this manner, modern developments that offer a suite of options for fund-raising, supporting new economic purposes including sustainability, should not be regarded as ‘marginalising’ regulated securities markets. This development instead shows how both capital markets and regulation have organically evolved to form a large and diverse eco-system of fund-raising and investment choice on the supply and demand sides, enveloped in the legitimacy of regulated structures. This Handbook discusses global capital markets as such an eco-system, seeking to canvass key cross-cutting themes as well as more unique and granular developments of interest.

Global Drivers of Change

Decline of public markets and the rise of private markets/private equity

A key trend across global capital markets in recent decades has been the decline of public markets and the rise of private markets and private equity. This is evident, for example, in the number of listings across the major markets, which has been in decline for some time.¹ That trend can be linked to the regulatory compliance costs, intense investor scrutiny and short-termism associated with public listing, albeit there are different trends across regions and industries: in the US, for example, the number of exits relative to IPOs has been highest in banking and software, whereas it is only in pharma and biotech that IPOs have exceeded exits.² Nevertheless, the recent trend overall has been more positive, with issuance in both equity and debt capital markets in the US reaching record levels in 2021, driven by buoyant market conditions and the rapid rise of Special Purpose Acquisition Companies (SPACs) and Private Investment in Public Equity (PIPE).³ Moreover, despite the relative decline in

its public markets and growth elsewhere, the US equity market remains by a long way the world’s largest, with a market capitalisation roughly four times the size of each of the next largest markets respectively (China and the EU). From such a strong home base it is hardly surprising that the US should continue to cast a long shadow over regulation and practice in global capital markets.

In the EU, the Capital Markets Union initiative, launched in 2015, represented an attempt to energise capital markets as an alternative source of funding in the wake of the constraints on bank lending which followed the global financial crisis. In 2020, when it had become clear that the initiative had largely failed to meet its objectives, it was relaunched, but to date there is no clear indication that it has reversed the (continental) European reliance on bank funding in the corporate sector. In contrast, Asia has seen a significant rise in capital markets financing in the past decade, driven especially by a surge in the number of Chinese IPOs. As a result, Asia is now the region with the highest number of listed companies.

The rise of private capital can be linked to the global decline in public markets. Private equity is the largest and best-known segment of this asset class, which includes traditional venture capital as well as so-called growth capital, represented by firms that are too large to tap venture capital but unwilling to go public or sell out control to private equity. The most obvious attraction of private equity is a mirror image of the drawbacks of public listing – privacy instead of investor scrutiny, a more flexible regulatory environment and the potential for a longer-term outlook. Beyond that it also offers the potential for more effective control than is normally possible in listed companies, at least in markets such as the US and UK with widely dispersed share ownership and regulatory regimes that are less amenable to controlling shareholders. The potential for greater reliance on leverage as a technique to boost returns is another factor, evidenced by a higher risk appetite than is typical among institutional investors in listed companies. However, while the returns generated by private capital can be impressive and have driven its growth, questions remain over public accountability and investor access, which are undoubtedly stronger features of the public listing regime. The rise in private equity has not resulted in the predicted collapse of public markets, as access to fund-raising from ‘the crowd’ remains an important modus of capital formation. In this regard the public markets have been undergoing reinvention, in terms of hybrid fund-raising models such as SPACs or crowdfunding enabled for smaller companies and businesses using platform technologies.

Changes in market structure – CCPs, decline of OTC and dealer markets, rise of electronic markets

Two changes in global market structure are particularly evident in recent years. One is the increasing role of Central Counterparties (CCPs) and the other is the rise of electronic trading. Both represent long-term evolutionary trends in global capital markets, but they have been subject to specific influences in recent years that have likely driven the trend even more strongly. In the case of CCPs, the perception that the risks associated with the ‘over the

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counter’ (OTC) derivatives markets were linked to the global financial crisis of 2008 led to the G20 agreeing in 2009 that all standardised OTC derivatives contracts should be traded on exchanges and be subject to central clearing. The objective was to improve transparency and mitigate systemic risk, and in due course these requirements were adopted by key international standard-setters such as the Financial Stability Board (FSB) and the International Association of Securities Commissioners (IOSCO) and implemented into domestic law. Regulatory interventions in related areas of market infrastructure such as trade repositories, central securities depositories and post-trade settlement have also contributed to more effective risk management and mitigation of systemic risk across capital markets. The move to electronic trading has been under way for some time but was given added impetus by the COVID-19 pandemic, which required remote access for the continuation of issuance and trading. As well as reducing transaction costs, the move to electronic trading brings benefits in terms of the integration of information disclosure, risk management techniques and post-trade clearing and settlement. It can also be linked to the resurgence of retail investing, especially in the US, where the long-term trend towards institutional ownership was reversed during the pandemic as ‘free’ access for retail investors became generally available and was linked with speculative bubbles. The regulatory environment in Europe makes replication of that trend less likely, but even so it might well be expected that the expansion in low-cost products (discussed below) could support an expansion in retail investment at the global level.

Changes in investment structures and strategies
The past couple of decades saw the rise of the professional asset management industry, which is increasingly being entrusted with the management of vast amounts of savings, from pensions to other forms of retail collective savings, such as in mutual funds.\(^7\) In this manner, institutional investors, that is, the pooled vehicles for savings and wealth management, are increasingly being engaged with capital markets through their professional asset managers, whose activities in capital markets affect market structures and corporate governance. These create implications for various areas of law, including securities and financial regulation, corporate law and even competition law\(^8\) (which is not canvassed in this volume). This volume showcases commentators’ reflections on the impact of the growth of the asset management industry on the demand side of capital markets, and how law and regulation responds to this development as a work in progress.

One significant innovation that professional asset managers have brought to capital markets is low-cost indexed investing strategies that are intended to respond to the needs of a low-yield environment over the course of many years in which interest rates are kept low and monetary policies loose. Index investing, especially as exchange-traded funds, has become popular

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with institutional and retail investors alike and entails changes for market structures and corporate governance too. This volume will also account for this development. Although work on this volume was completed at the turn of monetary policy changes in many developed jurisdictions, combating historically high levels of inflation after the onset of the COVID-19 pandemic and the invasion of Ukraine by Russia on 24 February 2022, the reflections in this volume are critical in nature, not only showcasing the developments so far but also sounding the hazards accompanying these developments. The volume provides scope for thinking about the space for responding to new changes in the economic environment more broadly, and more than ever, asset managers who yield great allocative power in the capital markets now need to respond to asset risks and opportunities in new ways, including geopolitical risks and the risks regarding long-term factors such as sustainability, which we mention below.

We have not yet experienced a significant upheaval in established securities markets such as in the US and UK to which many indexed strategies are tied, and it may be argued that existential risks to these markets remain small. However, just as this volume takes stock of changes in the investment sector and market structures as key drivers for the evolution of law and regulation, we remain mindful of external dynamics that may play increasingly significant roles in shaping investment and capital markets for the future.

The rise of stewardship
Since the global financial crisis of 2007–9, the roles of institutional investors have also been highlighted to be important for protecting the wealth of their investors by being more engaged in the corporate governance of their issuers in order to avert corporate or even sectoral disaster. The UK led in the development of framing institutional investors and their asset managers as ‘stewards’, and this globally galvanised the global institutional investment industry, resulting in a global diffusion of ‘stewardship codes’. Institutional investors and their asset managers have begun to adopt more engaged investment strategies with issuers or with common issues across their portfolios. Although the discussions of the effectiveness of investor stewardship in this volume remain nuanced, the stewardship framework encompassing accountability and engagement can shape capital markets in pronounced manners regarding influence upon corporate performance, cost of capital for certain issuers, and at a more macro level, the competitiveness and attractiveness of certain securities markets. Stewardship as a broad framework can also shape more specifically impact purpose-based investing, such as sustainable finance, to which we shortly turn.

ESG, sustainability, green and impact investing as investment styles
The rise of ESG, sustainable or green investing is indefatigable and marked. This is partly driven by policy-led leadership (even if climate activists consider the efforts still to be

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modest)\textsuperscript{12} as well as bottom-up market appetite and demand. Policy-led leadership such as the Paris Agreement and COP26 Agreement on climate boundaries provide the foundations for law and policy, as well as market-influencing actions such as sovereign bond issue characteristics. Key policy leaders such as Mark Carney, who championed a way to account for the financial risks of climate change, also played a crucial role in developing the Taskforce for Climate-related Financial Disclosures’ reporting template for financial institutions, which the Financial Stability Board has effectively galvanised and disseminated globally. Bottom-up developments are more shaped by pro-social consciousness and activism that institutional investors respond to/engage in, sometimes backed by volumes of empirical research that show findings of correlations between ESG-themed investing styles and superior financial returns.

The significant investment flows into green bonds,\textsuperscript{13} and ESG investing,\textsuperscript{14} further prompted the EU to take leadership over standardising these investment labels in order to prevent ‘greenwashing’, so that sustainably labelled finance needs to be tied to the accountability for particular scientific outcomes defined in a taxonomy.\textsuperscript{15}

The rise in green, sustainable and ESG finance is a marked development likely to have a lasting impact on capital market structures, investment flows and the rise and fall of issuers and institutional investors alike. In this space, further niche products are also being developed that concern social development and change, and not just climate and environmental protection. These products, such as ‘impact investing’ products, seek to achieve social and developmental outcomes as a condition for financial performance. With the EU’s leadership in developing a social taxonomy for finance in addition to the environmental one, investment products that bid for ‘double materiality’ in terms of financial and non-financial outcomes will continue to change the shape and nature of capital markets and issuers in significant ways.

Technology – Fintech, rise of blockchain, algorithmic trading and so on

Global capital markets are driven and affected by changing technologies, as new means of efficiency, networks and reach potentially create reconfigurations in terms of information, access and market structures. Automated and speedy market interactions have had a marked impact on market structures and this volume discusses the impact of algorithmic trading, especially high-frequency versions, in terms of their impact on liquidity and systemic risk. Disintermediations may also be facilitated by new peer-to-peer technologies and fintech, though we have yet to see major disruptions on mainstream capital markets, which remain in the stranglehold of established intermediaries who are attempting to square with new technologies and partner with new technology firms to explore business opportunities and fend off competition.\textsuperscript{16} The alternative unregulated space of disintermediated finance for privately

\textsuperscript{12} “COP26 hasn’t solved the problem”: scientists react to UN climate deal’ (Nature, 15 Nov 2021), https://www.nature.com/articles/d41586-021-03431-4.


\textsuperscript{14} Note 11.

\textsuperscript{15} Regulation (EU) 2020/852 (Taxonomy) on the establishment of a framework to facilitate sustainable investment.

issued crypto-assets, including ‘currency’ coins. is not the focus of this volume, and our discussions allude to developments recognising that law and policy are still at an emerging stage in responding to these, including the ultimate question of whether these spaces are part of the legitimate universe of capital formation markets or otherwise.

**Structure of this Volume**

This volume is organised in the following manner, to take stock of global capital markets and key changes and development in law and policy focused on the last couple of decades. Part I provides for high-level reflections in relation to the key theoretical, doctrinal and economic developments that shape today’s global capital markets, especially in leading jurisdictions such as the US, EU and UK. Part II of the volume addresses crucially the public offer of securities as the iconic route towards capital formation and its regulation as constituting the foundational tenets of law and policy in publicly accessible securities markets. The public market has been challenged by competing trends in various forms over the past decades, and has evolved to become part of a diverse eco-system for fund-raising and capital formation. Part III focuses on market structures, their stability, resilience as well as risks markets face. Part IV discusses how capital markets have grown in diversity, featuring specific discussions on sustainable and impact finance, as well as changes in the derivatives market. Islamic finance as a niche market is also discussed. Part V then deals with contemporary developments in investors’ conduct. This Part charts the rise of exchange-traded funds, investor stewardship trends and the global regulatory intensification for asset managers. It takes stock of the increased intensity in law and policy for the demand side of the securities markets, that is, institutional investors and their asset managers, governing how they shape and influence capital markets. Finally, Part VI provides a selection of comparative and jurisdiction-specific discussions that highlight how certain themes converge or diverge, such as in corporate governance, as well as unique granular developments in small or emerging markets.

Part I addresses some foundational themes that underpin the more specific chapters in this volume. Siems’ opening chapter considers the now extensive ‘Law and Finance’ literature, which traces its origins back to the seminal papers by La Porta et al in the early 2000s. The empirical approach to evaluating the role and impact of law in capital market development has since become much more mainstream and important insights have emerged. The ‘law matters’ proposition has become more widely accepted, but Siems highlights aspects of the ‘Law and Finance’ approach that remain problematic, such as coding methodology, the limited attention to ‘law in action’ and the challenge of demonstrating causal relationships between law and finance and identifying the causal pathways through which law influences behaviour. Thus, even if the ‘Law and Finance’ approach has likely resulted in a more prominent place for law on the policy-making agenda, linking it to solutions remains challenging. Arner et al then shift the focus to technology, arguing that four seemingly unrelated EU regulatory frameworks introduced since the global financial crisis are together providing a regulatory eco-system that is spurring the transformative transition from relationship-based to data-driven finance that underpins the future of digital capital markets in Europe. McCarthy and Donnelly next evaluate the capacity of EU capital markets to support and expand SME financing in the context of a system that has traditionally relied on bank finance. They examine how the Capital Markets Union (CMU) aims to achieve that outcome and find that there remain real challenges for SMEs to achieve the scale required for listing. While equity market segmentation has been
adopted to promote better access to listing for SMEs, they propose that more could be done in terms of pre-listing techniques (such as sandboxes) to support SME access to capital markets.

Part II evaluates the role of public capital markets in providing finance and how they have adapted as alternative sources of finance and alternative business structures have emerged. This part begins with Lin’s evaluation of private equity, noting its strong growth and a gradual global move from contractual and self-regulatory forms of governance to a more prominent role for regulation. Payne and Martins Pereira consider the future of the UK IPO in the light of three trends that challenge traditional assumptions about the role of the IPO: the tendency for companies to remain private longer; the tendency for founders to want to retain control; and the emergence of alternatives to the traditional IPO, such as SPACs and direct listing. They review proposals for changes in the UK listing regime to adapt to the changing environment and conclude that the reforms seem unlikely to provide companies with an IPO model that will operate as a meaningful alternative to these other mechanisms, or to address the concerns of retail investors wishing to invest in a broader range of companies than is available to them at present. Passador’s chapter picks up on this theme with a more detailed assessment of direct listing and SPACs as alternatives to an IPO. While direct listings do not provide similar potential for capital raising as an IPO, they have, at least in the US context, proven suitable for listing of well-capitalised tech companies. SPACs have emerged as a more substantial alternative to the traditional IPO. While share price performance and accountability issues have accompanied some US SPACs, that has not deflected the EU and the UK from adapting their own listing regimes to accommodate SPACs. Brackman Reiser and Tucker’s chapter broadens the discussion of capital raising to encompass social enterprises, meaning those enterprises that pursue social impact alongside profit. They outline the opportunities and challenges involved in social enterprises tapping a broad range of equity financing options in the US market. They conclude that serious structural obstacles remain in the provision of fit-for-purpose financing for such enterprises, even if some progress has been made in the form of regulatory interventions, market-based solutions and private ordering. This part concludes with Tyson’s chapter on capital market development in emerging economies. The chapter evaluates the drivers and support mechanisms for capital market development, noting that building market infrastructure and deepening the investor base are key factors. For those countries that fall short of establishing the macroeconomic and institutional foundations necessary for capital market development and meeting the funding challenges of climate change, public development finance will likely remain more important.

Part III focuses on market structure, integrity and governance, in particular by evaluating how the risks generated by markets can be mitigated. Droll and Minto’s chapter examines how evolution in the securities market post-trading system can improve efficiency and mitigate systemic risk. Relative to the digital transformation evident in other parts of the financial market (eg payments) they find progress to be quite limited. Nevertheless, some progress has been made on cyber risk and distributed ledger technology (DLT) offers potential for improving the post-trading infrastructure. Meanwhile, the chapter also considers how crypto-assets and more generally decentralised finance infrastructures (DeFi) are dealt with by emerging regulatory guidelines. Schammo’s chapter focuses specifically on the role of central counterparties (CCPs), which have become a more prominent part of the global capital market infrastructure in the wake of regulatory reforms following the global financial crisis. While substantial convergence is evident at a high level in terms of the role of CCPs as ‘system risk managers’, different regulatory regimes at national level present a challenge to global coordination.
The principle of mutual recognition through ‘equivalence’ offers a pragmatic solution to the problem of global coordination amid competing jurisdictional claims but an examination of the principle in the context of the EU and US suggests that it has its limits, especially where the risks to the host system are significant. Mosca and Picciau evaluate issuers’ disclosure obligations in the EU and US and their links to market integrity. They contrast in particular the principle-based EU regime which relies on issuer selection of information to be disclosed with the more rule-based US regime which focuses on legal certainty and a stronger role for regulators. Perkins’ chapter considers market integrity from the perspective of ‘offshore’ markets, where typically more relaxed regulatory regimes may raise concerns over the potential for market abuse. It adopts the approach of benchmarking several offshore jurisdictions against the EU’s well-established market abuse regime. It finds considerable alignment in terms of the definition of the offence of market abuse but notes that more work needs to be done on the scope of the regimes and the range of sanctions that can be applied. Finally, Gerner-Beurle concludes this part with an analysis of automated trading in capital markets. Starting from a taxonomy of regulatory issues linked to automated trading, it critiques current regulatory initiatives and makes tentative proposals to define their reach more clearly and review their application to disorderly markets.

Part IV of the volume showcases modern developments in securities markets in terms of new products, the challenges they pose to regulation and the reforms to regulatory policy that have resulted. The accommodation of such new products within the landscape of global capital markets reflects supply-side innovations, such as the derivatives market, as well as new demand-side appetites, such as the appetite for sustainable finance and niche types of impact investing. Schwarz’s chapter provides an overview of the development of global derivatives markets and their regulatory evolution. He charts the watershed moments of the global financial crisis and their impact on regulatory policy, which has tightened up considerably for what is often regarded to be a wholesale sector market for sophisticated financial institution players only. Further, Part IV discusses ‘specialist’ securities products that are now distinguished in various ways from mainstream corporate issuer-based securities. These may focus on ‘purpose’, such as financing developmental or sustainable causes intended to achieve certain results (impact investing) and more ‘loosely framed’ sustainable finance. Villiers and Levine’s chapter focuses on the niche but growing market of impact investing and the enabling legal and regulatory frameworks for this. Park’s chapter discusses the growth of sustainable finance more generally, critiquing the loose framing and the ambiguous nature of such securities products lying in between being issuer-oriented and being results/cause-oriented. The regulatory policy developments in this area is at the time of writing highly dynamic, with leadership emanating largely from EU policy-makers. Finally, Askari’s chapter in this Part highlights the universe of Islamic securities products, their ethical underpinnings and how these have affected design of the products. Although the markets for these products are niche in nature, the different designs of the products raise more general questions in relation to different choices made in the ethical balance of interests between product originator, investors and stakeholders.

Although legal and regulatory discussions regarding global capital markets would usually focus on regulating the supply side, that is, issuers and conduct of markets in order to protect investors, hence explaining the positioning of Parts I–III of this volume, attention should increasingly be turned to the demand side. The legal framing for investors’ roles and supporting entities for investors has developed significantly since the global financial crisis. Part V of
this volume thus focuses on institutional investors, recognising the important roles they play as financial allocators and as influential corporate governance actors in the issuers in which they invest, and potentially having systemic impact too in relation to large global asset managers. Jordan and Callis’ chapter provides an overview of the rise of institutional investors as corporate governance actors, from US-style activism to modern-day stewardship. Chiu’s chapter further dives into the asset management industry to consider the significance of their market and social footprints and argues that regulatory developments and policy for the sector have been on the rise and that this is likely to be a continuing movement in relation to their allocational functions, systemic impact and good old market failures. Cullen’s chapter also sheds light on the passive exchange-traded funds sector, which has seen massive growth, and discusses their potential systemic impact and what may be needed in regulatory policy to contain such systemic risks. This Part also deals with key support structures for institutional investors’ roles, in the form of information intermediaries whose roles are crucial to support investors’ decision-making. Ultimately, investors’ choices are signals to the market for efficient price formation. In particular, after the global financial crisis, policy-makers acknowledged the systemic importance of credit rating agencies’ informediaction roles and their influence on financial allocation. Hence, credit rating agencies have been subject to increased regulation in order to foster greater rating integrity and accuracy. Miglionico’s chapter takes stock of bond rating agencies, their roles and the regulatory framework for them, including proposals for what else remains to be addressed. Morley’s chapter sheds light on a growing industry that is important for supporting the growth in sustainable finance – the ESG rating industry – and its links to the emerging sustainability accounting standards. This industry has been criticised as having developed divergent and incompatible methodologies for ESG evaluations of issuers, and this has to an extent hindered comparability and standardisation of ESG reporting and ratings for corporate issuers. However there are significant developments afoot to standardise ESG corporate reporting, the most recent effort being led by the International Sustainability Standards Board,17 a sister organisation of the International Accounting Standards Board, set up under the IFRS Foundation. The ISSB’s proposed standards also incorporate input from key ESG reporting and rating developers.18

Although the volume does not curate detailed country/continent studies, we have chosen to be more selective in terms of preferring to offer high-level comparative approaches and highlighting country or jurisdiction-specific developments where there are unique features that offer lessons or reflections for the theme of ‘global capital markets’ in general. A key area for comparative discussion is the impact of global capital markets upon corporate governance standards across the listed sectors across the world. Although focusing on the impact of corporate governance standards development in the UK, MacNeil and Esser’s chapter offers insights for how board governance and shareholder protection standards have evolved to be stronger and more accountable. This general trend is one that many listed markets have sought to emulate, being consistent with international institutional investors’ appetites.19 Further, Kamalnath’s chapter sheds light on the making of law and regulatory policy for an emerging

17 https://www.ifrs.org/groups/international-sustainability-standards-board/.
19 Eg Ronald J Gilson, ‘Globalizing Corporate Governance: Convergence of Form or Function’ (2001) 49 American Journal of Comparative Law 329; Carsten Gerner-Beurle, ‘Diffusion of Regulatory
market, and we have selected the Indian capital markets as a case study which can be useful for other emerging markets with democratic institutions. Finally, Licht’s chapter looks at the tricky interrelationships between capital markets in the world, acknowledging that there are market leaders and emulators. Focusing on the Tel Aviv Stock Exchange, the chapter discusses how unilateral recognition of another well-established market has helped to support the survival of the Exchange and its dual listing regime. Licht, who has written extensively on cross-listings and the bonding thesis, continues to explore the dynamics of regulatory competition and alignment in the landscape of globally competitive stock markets.
