
Principles, Legislative and Institutional Framework in Which Financial Institutes Operate in Germany's Social Market Economy*

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Among its many negative effects, the 2007–2009 economic and financial crisis destroyed large amounts of monetary assets. It also cemented the previously creeping process of decay and dissolution of values, of social consensus and social peace.

Now, while the years long huge quantitative easing programmes worth thousands of billions of US dollars and Euros bought us some time, there is an urgent need of profound reform and restructuring of our systems of national organization in politics and economics. For doing this we need to look into their roots.

When systemic political and economic reform is at stake, such as the case currently is with financial institutes, it is necessary to understand the principles of macroeconomic order, of the legislative, institutional and conceptual context and framework in which all economic agents, banks, insurers, etc. act. Among the good examples in which governments successfully managed to rebuild the framework and make a fast comeback after defeat in war, after material, social and spiritual destruction, is Germany.

Helped by the 50% war debt cut under the London Debt Agreement of 1953, the then newly introduced ordo-liberal market economy system managed to make the German economy recover and grow for several decades. The country made a comeback (but politically still with somewhat limited access) into the small global leadership team of the West.

This book chapter addresses the core principles which lay at the basis of national legislation and institutions which regulate economic and social life in the functional national

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economy of the Social Market Economy in Germany. Financial institutes are at the core of the national economic order and therefore in order to understand how to restore their credibility, we will look at principles and the regulative context in which they work.

Regulation of financial institutes and banks is sensitive. Blaming the banks for the economic and social crisis of 2007–2009, which had devastating effects on the economies of leading Western countries and a negative impact on some other Western economies, appear legitimate in a more superficial analysis. But if we dig deeper, we realize that the banks and the financial sector in general, did two things, a good one and a bad one: the acceptable one for market economy rules was to use the Schlupfloecher offered by the existing market economy rules and their at that time quite deregulated financial and monetary system in order to generate more turnover and profits. These opportunities for them appeared during the deregulation era of the 1980s and 1990s in the West. This was done not only in the UK where Margaret Thatcher is finally responsible for the deindustrialization of the UK (the country to whom we all due the industrialization) but in the USA too. It was not only the Reagan administration which deregulated, but the atmosphere and general trend were towards it. Former Federal Reserve Chairman Alan Greenspan admitted too that too much deregulation was put in place. He admitted this with respect to the regulation of the monetary sector which was under the supervision of the Federal Reserve and said “we made a mistake” (s. Beattie and Politi 2008). The bad and not really acceptable thing the financial sector did, was to abuse the trust of investors by creating, placing on the market and selling financial products of such a complexity that, as some top manager of such companies themselves gave in, they did not really understand to the full. This is unethical and unmoral, but was still done in spite of the UN Global Compact and globally envisaged principles of ethic rules for business leaders (s. Knoepffler et al. 2011, pp. 42–43). This all took place in the context of advancing globalization and which encompassed increasing geographic world regions and increasing parts of markets. There simply were not enough rules by public supervisory authorities to address and prevent collateral damage done locally by globally acting equity management funds and institutes (banks, insurers, raters). The innovation capacity of the financial and investment sector was higher than the ability of supervisory authorities (both national as well as international) to secure that the effects of bringing on the market new products (stocks, bonds, mortgages, derivatives, investment schemes, et alia) to secure that such products brought on the market was helping maintain the stability of income by individuals or companies. Since income revenue is interdependent with social security and finally with public order, we realize that supervisory agencies were not able to prevent such risks and to stop these from entering the financial market. Then, they also failed to prevent them then enter the economy of production of real goods and services and from being transferred internationally across borders. To illustrate that this crisis is a mixture of the lack of balance of power between the private sector and the public supervisory institutions and lack of applied ethics rules we can think of two things. First is the transmission of toxic assets from the packages of financial products developed by Fanny Mae and Freddie Mac in the USA to the banking sector and to the real economy, first in the USA then across the world. Then also think about the sovereign wealth fund

Abu Dhabi Investment Corp. (Singapore) and its activities. By investing massively into the telecommunication sector of Singapore I 2007 this fund with financial assets valued at several hundred of billion of US dollars, not only destabilized the telecommunication market of Singapore by acting against competition rules, but thereby also posed a question of national security.

This papers attempts to address only the regulatory part of the problem with which the free market economies are confronted as national systems since the onset of the effects of globalization in the 1990s. In this approach, I will be studying the roots of the models of successfully creating, upholding and reforming legislation and institutions in the Social Market Economy of Germany.

Again here, within this national system, the financial institutions move within the same legislative and institutional regulatory framework and environment in which any company or economic agent is moving in. The only difference which might appear is that some or other type of financial institutions have lobbied to pass through special exemption for their area of business. For example, banks succeeded to pursue the German government to exempted them from charging VAT. Of course this is a clever move for the banking sector (not approved for the insurance sector, for example), namely that the borrower does not have to pay VAT on the amount he is borrowing. Other types of financial institutions passed other laws specific to them.

Thus, we will look at political freedom, private property, monetary stability, competition, predictability of economic policy, wages, trade unions, collective wage bargaining and company management.

2.1 The Economic and Monetary Reform of 1948 in Germany¹

Even though it was not stated this way at the beginning of the post-war period, the Social Market Economy in Germany began with the adoption of the package of legislative measures known as “The Economic and Monetary Reform” of 20 June 1948 (Wirtschafts- und Währungsreform).

This reform was the first legislative pillar of the new economic system in post-war Germany. It reintroduced economic freedom; of course this is to be understood against the status quo in which the economy in Germany had been turned into a centralised war economy. Creating the market economy was the first legislative and institutional step undertaken in order to implement the Ordoliberal and Socio-Liberal ideas that had lain until then in the drawers of the group of professors mentioned above as “Fathers of the Social Market Economy”.

¹ This book sub-chapter is the only slightly readapted chapter 4.1.1.1 of the book Muresan, Stefan-Sorin, Social Market Economy. The Case of Germany. Springer International Publishing, 2014, p. 167–170

The positive effects of this reform, namely that it brought into movement the energies and initiatives of entrepreneurs, were catalysed and accelerated by the Marshall Plan. Through the US\$ 1.3 billion that were made available to Germany between 1948 and 1952 (ca. 10% of the total funds made available by the US under the Marshall Plan for Europe), the Marshall Plan contributed to the financial capital and fixed assets required for recovery (s. the history of the OECD on the internet portal of the OECD on <http://www.oecd.org/about/history/>).

On the one hand, this decisive step of the Economic and Monetary Reform consisted in the monetary and financial reform and, on the other hand, in another series of liberalisations through the adoption of a set of laws concerning commercial and financial liberalisation.

There were four main laws. The first law, the “Currency Law” (Währungsgesetz) (Military Law no. 61) regulated the replacement of the Reichsmark with a new currency called the “Deutsche Mark” (DM) and the initial supply of the population, the public institutions, businesses and banks with a fixed amount of DM. At the same time, the law decreed the cancellation of the old Reichsmark currency and its withdrawal from the market.

The second law was the “Coinage Law” (Emissionsgesetz) (Military Law no. 62) and was related to the means of issuing, transporting, storing and s. o. of new banknotes and coins as well as withdrawing the old ones from the market. It also established the minimum reserve requirements and created a foreign currency Exchange Department within the Bank of the German States. These two laws both came into force on 20 June 1948.

The third law was the “Conversion Rates Law” (Military Law no. 63) that became effective one week later, on 27 June 1948. It regulated—provisionally—conversion rates from the old currency into the new one for the various types of deposits, securities and other contributions. It also established the modality through which the conversion operation was going to be overseen by the newly created Federal Ministry of Finance.

The fourth law was the “Fixed Accounts Law” (Festkontengesetz) that came into force only in October 1948. It established the final value for the level of bank accounts and contributions (for the military laws quoted above s. Wandel 1980, pp. 120–125).

This was a fresh new start. The bright ones seized the opportunity. Many who started new businesses then, are now well established companies on the market.

The Reichsmark (RM) was thus replaced by the Deutsche Mark (DM). Up to 10 billion new banknotes were issued and brought on the market. The amount was calculated so that it maintained economic stability. The new banknotes were made “of simple paper, bearing no watermark. The graphical design of numbers and brochures was similar to the dollar notes. Gears, marble pedestals, titans and women were copied from the American railway company’s shares” (s. Wandel 1980, p. 129: “einfaches Papier, ohne Wasserzeichen ... Die graphische Gestaltung der Ziffern und Brochüren ähnelte den Dollarnoten. Zahnräder, Marmorsockel, Titanen und Frauengestalten waren den amerikanischen Eisenbahnaktien entliehen”). Every German citizen initially received 40 DM in cash, in exchange for 40 RM. Moreover, each employer received 60 DM in liquid assets for each of his employees. The conversion of the other payment means that exceeded the value of 40 RM was made, initially using the formula 100 RM = 10 DM. During the autumn of 1948 however, as a result of inflationist tendencies, the conversion rate for deposits at that specific

moment in personal or business bank accounts was reduced to 100 RM=6.50 DM (comp. Wandel 1980, p. 124).

The other part of the Economic and Monetary Reform, i.e. the liberalisations, were centred on the “Act on reference interest rates for economic activity and the price policy after the Monetary Reform” (*Leitsätze für die Bewirtschaftung und Preispolitik nach der Geldreform*). The law concerning reference rates and many other decrees and application norms, adopted under Erhard’s lead, brought back freedom into economy. These measures invalidated around 90 % of the prescription ordinances for price levels, blocked since 1936. The limitations on wages and the ban on obtaining a bank loan on the basis of a current account were also lifted. Quotas were established for over 400 products (comp. Wandel 1980, p. 118 ff.).

Among academics and public opinion, this Economic and Monetary Reform was supported through individual actions of the other professors, members of the Freiburg group of the forefathers of the Social Market Economy. They backed Ludwig Erhard, federal minister of the economy (1948–1963) the initiator of this reform with written articles, lobby, interviews and s. o.

With the Economic and Monetary Reform, during the special circumstances created by the London Agreement on German External Debt of 1953, the road had been opened towards the much praised “German Economic Miracle” (*Deutsches Wirtschaftswunder*). Shelves became filled with products literally overnight, on Monday, 21 June 1948. In fact, these goods already existed in the country, but because of the lack of regulation at a macroeconomic level, they were only available on the black market.

It is important to note that the Economic and Monetary Reform took place before any other political reform was generated through German initiative. The economic reform preceded by almost one year, the adoption of the democratic Constitution. Democratic Germany thus made the first step in the economic field, a fact that proves again that this country is an economic nation. It is also the proof that the Social Market Economy has its roots in the real economy and not in social distributive policies.

The Economic and Monetary Reform opened the way for that new economic model of the Social Market Economy, which was to be implemented on the basis of the free market doctrine. This opening also made way for a national democratic political reform which was at that time still to come.

2.2 The Constitution of 1949 and Political Roots of Democracy²

In 1949, a new democracy appeared on the European political stage: the Federal Republic of (Western) Germany. The Constitution was adopted and the first general elections were held during the same year. The Constitution is to be seen as the second foundation of the Social Market Economy, the political foundation.

² This book sub-chapter is the only slightly readapted chapter 4.1.1.2 of the book Muresan, Stefan-Sorin, *Social Market Economy. The Case of Germany*. Springer International Publishing, 2014, p. 170–176.

Being the fundamental and first national law with political character of postwar Germany, the Constitution bore an appropriate name: the “Basic Law” (Grundgesetz der Bundesrepublik Deutschland; GG). It was adopted on May 8, 1949 by the Parliamentary Council (Parlamentarischer Rat) gathered in Bonn and came into force on May 23, 1949. After the German Reunification of 1990, the West-German Constitution was modified and completed in 1994 in order to include the five new “Länder” of the former German Democratic Republic. The amendments became effective on November 1st, 1995.

Between the free market economy and the Constitution there was a dynamic and mutually conditional relationship. This relationship was described by former Chancellor Schröder too. The Constitution attempts to exclude extremely bad situations for individuals which appear given the market forces. But it also provides that a command economy cannot appear in Germany. Thus it is a middle way between the two types of economic policy. Social-democrats thus agree with the Social Market Economy as the “third way”, even though the decision for it was mainly done Christian-Democrats (s. Schröder 1999, p. 18).

It should be stated from the very beginning that the form of government of the Federal Republic of Germany, as the Second German Republic, or the Bonn Republic, was that of a federal parliamentary republic. It is hard to say whether this form of government was the choice of Germany alone, free from international influences. The federal form was definitely a local choice, but maybe while looking, again, at the model of US federalism.

Nowadays, the Republic still reminds many people of defeat in World War II, while the Reich and the Monarchy are associated with historical traditions, times of glory, stability and prosperity.

If, in the economic field, Germany opted for the continental model of Rhineland Capitalism, the political field was sown with values inspired from the French Republic and US federalism. The French model was embedded in political elements particular to Germany, which then received North American implementation influences. No political programme and no party, aside from those that came to be perceived as extremist after 1945 (i.e. the Republicans and the NPD) abandoned the values promoted by the French Revolution. There is a consensus among political and constitutional experts who draw parallels between the French “Liberté, Egalité, Fraternité” and the values embedded in the German Constitution. If “Liberté” was translated into German political discourse using the exact equivalent, “Freiheit” (Freedom), the other two virtues were equated according to different local German specificities. “Egalité” was equated with “Gerechtigkeit” (Justice) and not “Gleichheit” (Equality). “Fraternité” was translated using the word “Solidarität” (Solidarity) instead of “Brüderlichkeit” (s. von Nell-Breuning 1979, pp. 150–151) (Fraternity/Brotherhood). According to Nell-Breuning, and other analysts, it is liked to see it such as all three core elements of the French Revolution are included as well in the German Constitution as in the contemporary political discourse, the legislation of the socio-economic system and institutional principles (comp. von Nell-Breuning 1979, pp. 150–153).

The French triad is embedded in the German specific concept of the state. This concept has strong medieval (Western and Catholic) roots and is based on the concept of divinity and is explained in one of Pope Leo XIII’s (1878–1903) encyclical works. According

to that concept, the state is “as an entity endowed with authority directly by God in the person of the Prince, in some ways an incarnated bearer of sovereignty” (s. von Nell-Breuning 1979, p. 156: “als unmittelbar von Gott mit Autorität ausgerüsteter, in der Person des ‘princeps’ gewissermaßen inkarnierter Hoheitsträger”). According to this model, the authority is granted with legitimacy from “above” by the grace of God (Gottesgnadentum) and, according to the Catholic Medieval vision, this authority is first received by the Pope of Rome. The Pope then delegates and transmits this authority received from above through the coronation of the Kaiser. The latter then transmits it further “down” by delegating it to local noblemen or princes, dukes, counts, etc. This is the feudal system and was called “the system of the lent right and of vassal support” (Lehnswesen; comp. Lexikon-Institut Bertelsmann 1981, p. 711). It is within this system that principalities, as state entities preceding the contemporary 16 Länder of Germany, appeared during the High Middle Ages. The main idea is that noblemen borrow (leihen) from the Kaiser not only the right to exert power locally, but also the right to use the land over which they rule. In his turn, the Kaiser relies (anlehnen) on his noblemen in the governing process and the wars he might have to lead.

The system is similar to the clerical one. In the case of both the Catholic and the Orthodox Churches, the priests are the bishops’ representatives in the territory, i.e. in the parishes. The sole reason for which priests are needed in parishes is that bishops can not be physically present simultaneously in all the parishes of their diocese. According to Canon Law, the only persons directly authorised by Jesus Christ to preach and to give out the Holy Communion to the people (Church customers, in a more economic and cynical language) would be bishops. This is the reason for which only bishops are entitled to appoint priests as their delegates.

Therefore, we note that in its exertion, the state authority is a top-to-bottom system and is perceived as coming from above and exercised at the bottom through delegates or commissioning (the subsidiarity principle). This delegation/commissioning is clearly visible in Germany thanks to the existence of the Constitutions of the sixteen federal Länder. However, when central power is elected in the federal system, their authority comes from below and it moves upwards by representative democracy becoming perceivable at the meeting in the Reichstag (Bundestag). In Austria the political system is somewhat similar not only because it belongs culturally to the German language area, but because it also belongs to the area of the Holy Roman Empire of German nation.

The Constitution of Germany is a federal one. According to the subsidiarity principle, it does not affect all spheres of public life. It only sets out the basic principles and the general organization framework for political life. Within this general framework, the specific fields of public life are regulated, in a detailed manner, in Constitutions of each of the sixteen Länder. The Länder, in their quality of semi-sovereign states decided to freely accept the federal Constitution. At the same time, given the right of subsidiarity they did not delegate all their competences to the federal authority. For example, policing, education and the tax collecting system are just some of the areas in which competence is exerted mainly by the Länder, however, respecting the general limits imposed by the Federal Constitution.

The ethnic German people's orientation towards work, its quest for harmony and consensus and its specific search for its own national vocation strongly influenced the identity of the Social Market Economy system which appeared within its borders. Often, the national vocation within "the concert of peoples" is connected to the Social Market Economy model as it defines the concept of profession, of work and of community as a vocation from God. Here, the concept of profession (Beruf) is the most important because the individuals are main drivers of any economic activity. In this case, profession becomes synonymous with mission, calling, aptitude, talent. The concept bears the name of "Berufung" or "Beruf", just like we saw in Tomas Aquins and Max Weber and becomes visible in the Constitution for the whole nation and is understood as being in front of the international community: "In awareness of its responsibility in front of God and men, inspired by the will to serve world peace as an equally entitled member of a united Europe, the German people, by virtue of its constituent sovereignty, has enacted upon itself this Basic Law" (s. GG, Präambel: "Im Bewusstsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben."). But what is, more precisely, the type of state and of Constitution which the German people has given itself?

One of the basic rights guaranteed by the Constitution is freedom: "The freedom of the individual person is inviolable" (s. GG Art. 2, Abs. 2: "Die Freiheit der Person ist unverletzlich."). Nevertheless, this disposition appears only in Article 2 and seems to be just a means to achieve the main goal in the German model: human dignity. The fact that freedom is not a goal in itself can be inferred from Article 1 paragraph one of the Constitution which mentions dignity, not freedom: "The dignity of man is intangible" (s. GG Art. 1, Abs. 1: "Die Würde des Menschen ist unantastbar."). The German focus is thus the human being as a whole. The holistic approach was definitely transferred from the political level to the economic level of the Social Market Economy as well. Freedom finds itself among the other social values and has the same importance as any of them, but not more. The elements with individual and private character do not have an absolute, but a relative validity.

Then, the Constitution guarantees private property, but rather in a limited way. It states that "(1) Property and inheritance rights are guaranteed. The content and limitations thereto are established by laws" (s. GG Art. 14 Abs. 1: "Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt."). Connected to property is the principle of responsibility which is formulated in the very next paragraph and connected to the concept of collective rights and responsibilities: "(2) Property creates obligations. The use of property shall equally serve the common good. (3) An expropriation is admissible only for the common good" (s. GG Art. 14 Abs. 2–3: "Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen (3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig."). So, in theory, if the exercise of property rights obstructs common good, e.g. in the case of war, expropriations would be not inconceivable. This political choice is important since it defines the focus on common wealth interests of the business community, on the interests of social groups. Although this

might have its advantages for social cohesion, at times though it seems to be a dangerous path to follow, because it always depends on the interpretation by the decision-making body of what is in the interest of common good and what is not.

Through the provisions of the Constitution, the tutorial effects of the social state model also apply to the economic field. The Constitution “does not make the Social Market Economy compulsory, but limits itself to banning a Market Economy that is not bound to the social dimension, as well as banning a Centralised Administration Economy” (s. Grosser 1988, p. 56: “Da das Grundgesetz aber die Soziale Marktwirtschaft nicht festlegt, sondern lediglich eine sozial nicht gebundene Marktwirtschaft, sowie eine Zentralverwaltungswirtschaft untersagt, ...”).

Because they are included in the Constitution, elements related to the social order have a significant power over the functioning of the market economy. The statement that “The Federal Republic of Germany is a democratic and social federal state” (s. GG Art. 20 Abs. 1: “Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.”) means that the state automatically has some social responsibilities too. The fact that the state is supposed and expected to orchestrate the social order is not determined only by the Constitution, but also by the German traditional way of perceiving the community and the state. “The State (more precisely the Prince) is just, good and wise; he knows what is best for his subjects and wants only their best; his subjects are not mature and uneducated underaged who need education and, in some cases, to be disciplined by the State who assists them with parental authority” (s. von Nell-Breuning 1979, p. 156: “Der Staat (konkret der ‘princeps’) ist gerecht, gütig und weise; er weiß, was für die Untertanen gut ist und will nur ihr Bestes; die Untertanen sind unmündig, ungebildet und unerzogen, bedürfen der Erziehung und gegebenenfalls in Zucht gehalten zu werden, durch den mit (landes-) väterlicher Autorität ihnen *gegenüberstehenden* Staat.”). Therefore, a tutorial interaction exists between the State and its citizens.

As we are about to see below, the social order really contains two “third level” principles derived from the social tasks delegated to the State by political consensus: “the principle of state care” (staatliches Fürsorgeprinzip) and “the principle of state supply” (staatliches Versorgungsprinzip). Through these, the State accomplishes its missions of orchestrating social order and of tutoring its citizens. These two principles represent the starting point for the creation of laws and social institutions with this specific influence of identity.

The way the Constitution is written proves that the goal of the Social Market Economy is to guarantee common good but also to protect against dictatorial and political abuses. It does not indicate the manner in which to reach these goals. The Constitution allows the implementation of any economic model, provided that the social dimension is maintained. The distinctive feature for Germany and which can be pointed out here, is that historical traditions visibly influence the choice of the type of economy, state model and economic policy style.

The competent institution, responsible for the monitoring of the Constitution is the Federal Constitutional Court of Germany (Bundesverfassungsgericht), located in Karlsruhe.

As long as its judges will succeed to maintain an equidistant character of the decisions, the principles of “social justice” and “common good” shall be properly applied in Germany. Still, with the slow decline of the practice of virtue, a “sine qua non” for the functioning of political democracy, it may be that federal constitutional judges might, at times, heed to political pressure.

The implementation of the Social Market Economy within the current political constitutional framework led, during the first three decades after 1945, to good results. Even though there have been voices advocating the introduction of a model similar to the ordoliberal theoretical model of Walter Eucken, Franz Böhm and Ludwig Erhard that had produced the German economic miracle of postwar reconstruction within the federal Constitution, such a model was not included into the Constitution. Some analysts believe that it was this decision that allowed a turn towards Keynesianism and Socialism in the 1970s. According to another hypothesis, if the model had been included in the Constitution, there is no guarantee that it could have been adjusted in accordance to the change of political doctrine in successive Governments (comp. Grosser 1988, pp. 35–73). In Great Britain, for instance, a final text in a written form of the British Constitution does not even exist; it is rather a huge collection of common law, case law and experience in the judicial field built up over the centuries, and where the social order and the market economy are to be freely governed by the respective governments. No one thinks of questioning it, but this makes the British system flexible according to the specific need of the respective historical age in order to serve British interest.

To sum up, we could say that the Constitution is the primary largest political framework within which the economic processes take place. It could be considered the “exterior ordering circle” or “the largest circle of the Economic Constitution” of the Social Market Economy as it was developed in Germany.

2.3 Business Organizations (Companies), Profit and Investments³

As we have seen, in order for it to be functional, any national economy has to be supported by a minimum number of profitable businesses organizations. Among these are banks too. Without these economic cells, ideally producers of profit, maintained at a self-sufficient level, no social-economic life is possible. Their profitability is the ideal case and is needed at any expense because they are the driving force of physical existence. But things are not ideal any more, ever since the West left in 1971 the classical model of the “savings capitalism” and moved to “debt driven” capitalism. The US Government’s tacit fiscal policy of growth by spending in deficit, pursued after the onset of the free floating system in 1971, allowed for a large number of core companies—mainly those operating on the basis of

³ This book sub-chapter is the only slightly readapted chapter 4.1.2 of the book Muresan, Stefan-Sorin, Social Market Economy. The Case of Germany. Springer International Publishing, 2014, p. 176–184.

Rating von Finanzinstituten

Banken und Finanzdienstleister richtig beurteilen

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