THE EUROPEAN UNION (EU) FACING THE GLOBAL ARENA: STANDARD SETTING BODIES AND FINANCIAL REGULATION

Giulia Bertezzolo
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by Giulia Bertezzolo

I. Introduction

The globalization of markets has shown the interdependency and vulnerability of national systems. In fact, due to increasing market integration, mal-regulation in one country can produce negative effects worldwide. Since these consequences cannot be effectively addressed by separate national regulatory and administrative measures, the importance of cooperation has been increasingly emphasized.

Historically, international cooperation has been conducted by states through bilateral or multilateral treaties. Traditionally, international organizations have been established by means of an “agreement”, which regulates either the organization’s competences and goals or the principles governing its structure and functioning. The agreement also sets forth the member states’ reciprocal duties

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within the organization and their duties to the organization itself. Within this kind of cooperation, rules are usually binding and non-compliance is often punished by sanctions.

In addition to this traditional way of cooperation, the emergence of other types of relationships, at a global level, has recently gained significant importance. Various transnational systems of regulation or regulatory cooperation have not, in fact, been established through international treaties, but through more informal intergovernmental networks of cooperation. Moreover, some organizations consist of individuals, corporations, NGO’s or other groups, rather than states.

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These organizations often issue their own rules, which officially have no binding force. Nevertheless, these rules spread both quickly and internationally. Sometimes they are used by international organizations with the aim of improving states’ compliance. In other cases, they are incorporated within regional legal systems (such as the EU) or they become a precondition for the application of binding or non-binding rules issued by other organizations. For example, the adoption of diverging standards by a state from those of global bodies (such as the Basel Committee on Banking Supervision - BCBS) may be interpreted as non-tariff trade barriers under the GATS agreement\(^3\). As a consequence, even states that have not been involved in the standard setting process often find themselves forced to implement global rules.

Given the rising relevance of the above mentioned bodies, the way in which the European Community deals with them is becoming increasingly important, mainly due to the consequences that this new system of rule-making could have on European community law and governance.

With the exception that the EU actors operate within an institutionalized framework under the supervision of the European Commission, other EU bodies and Member states authorities, the EU and the global system have many features

in common\textsuperscript{4}. Both systems are mostly characterized by horizontal relationships, deliberation by consensus and informal links.

Originally, the EU performed executive tasks in only a few areas (direct administration). Most of the time, the role of enforcement agencies was left to Member States’ administrations (indirect administration)\textsuperscript{5}. Over the years, this simple model of administration has changed following the expansion of EU activities and the consequent need for the coordinated enforcement of common policies. This has led to the continual birth of institutional structures and \textit{ad hoc} instruments with the aim of fostering co-operation between different authorities or solving technical issues that could not be addressed effectively by the Commission alone. Committees, agencies and, more recently, bodies made up by national regulators have thus enriched the EU administrative system, making it a “network of administrations”, linked but not fixed together\textsuperscript{6}. The financial field is no exception to the described scenario.


\textsuperscript{5} See, JÜRGEN SCHWARZE, Droit administratif européen, 15 (1994); JOHN A. E. VERVAELE (ed.), Compliance and enforcement of European Community law (1999); Id., see also Shared governance and enforcement of European law: from comitology to a multi-level agency structure, in EUROPEAN COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 132 (CHRISTIAN JOERGES & ELLEN VOS eds., 1999); HERWIG C.H. HOFMANN & ALEXANDER H. TÜRK (eds.), EU administrative governance (2006).

\textsuperscript{6} RENAUD DEHOUSSE, Regolazione attraverso reti nella Comunità europea: il ruolo delle agenzie europee, RIV. IT. DIR. PUB. COM. (1997), at 629; SABINO CASSESE, Le reti come figura
In a global arena “dominated by networks, fluid roles and mobile alliances”\(^7\) the EU appears to fit easily. The present research will therefore attempt to verify whether global financial regulators are trying to be incorporated by the EU net and with what consequences, both for the EU system and for the global one.

This analysis will focus on the financial field in particular because of its representativeness. Due to the high number and variety of global bodies, as well as the fast pace of developments, financial services provide a privileged perspective for analyzing the most urgent problems to which the growing importance of global standard setters gives rise. This is also due to the remarkable spreading of global standards set by the mentioned bodies in this field.

The final goal is to obtain better comprehension of the interaction between the EC legal system and the emerging global “arena”. More precisely, the study aims at verifying if, by confirming its functional nature, the EU is developing any instruments or mechanisms to assert its priorities on the considered matters of regulation. Therefore, starting from the EC and global financial architecture, this research will stress formal and informal links established between the EU and

global bodies, with a special spotlight on Standard Setters’ decision-making process and the implementation of global standards into EC law.

II. Global standard setting bodies and the financial sector: linking up a fragmented regulatory survey

As mentioned, financial services constitute one of the sectors in which the density of global regulators may be seen most clearly.

For many years, the international financial sector has been characterized by a centralized system, set up by the Bretton Woods agreements and signed in 1944. The purpose of these agreements was to regulate commercial and financial relations among the world’s most industrialized countries and, ultimately, to create a sound international monetary system. In order to achieve this goal, the Bretton Woods framework provided for the establishment of two institutions: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), which is now part of the World Bank Group.

After the collapse of the Bretton Woods system, in the beginning of the 1970’s, no single international agency or unitary institutional framework arose to replace it. Therefore, the financial sector now appears “decentralized, essentially
based on informal international understandings, which are to be implemented at
the level of domestic jurisdiction”

Apart from bodies traceable to the “international administration” model, such as the International Monetary Fund (IMF), the World Bank (WB) and the Organization for Economic Co-operation and Development (OECD), transnational regulatory networks such as the Basel Committee on banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS) and the most recent International Organization of Pension Supervisors (IOPS) also develop rules for banking, securities, insurance and pension supervision respectively. Within these bodies, not the states themselves, but national administrative authorities are represented. Moreover, transnational administrative bodies’ powers are not based on formal treaties but on informal agreements, so both the organization and the functioning of these bodies are flexible and mostly dependent on cooperation between their members.

The financial standard setters also include some hybrid organisms amongst their numbers. An example is given by the Financial Stability Forum (FSF), a meeting space for the most important actors dealing with financial regulation at a

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9 A classification of administrative global bodies is given by KINGSBURY, KRISCH & STEWART, supra note 2.

10 D. Zaring has stressed that “they act out of international law because they are not considered international actors, as those can be only States” (ZARING, supra note 2, 286, 287).
global level. In addition to the above mentioned transgovernmental regulatory networks, it also brings together intergovernmental international organizations (such as the IMF and the World Bank), national financial authorities and private bodies with regulatory functions, such as the International Accounting Standards Board (IASB) and the International Auditing and Assurance Standards Board (IAASB).

Although for a long time unnoticed, this kind of cooperation is not a novelty, indeed some informal intergovernmental networks such as the BCBS, for instance, date back many years\textsuperscript{11}.

During the last decade, however, the number of transnational bodies intervening in many different fields has increased. Furthermore, their role has changed over the years. While in the past they were simply transnational fora of discussion, they have suddenly become important standard setters. In other words, from places devoted to the exchange of ideas, they have evolved into transnational regulatory bodies, shifting many regulatory decisions from the national to the global level. The main reasons for this development can probably be found in the need for regulation perceived by market participants in a globalized world. In order to expand their market position and reduce costs, large firms call for a level

playing field. In other words, global bodies are filling the normative gap left by domestic regulation.

Of course, the rules established by these global bodies are not formally binding. They are issued in the form of guidelines, standards and other norms of general applicability. However, in practice, they are implemented at a national or international level as though they were mandatory.

The absence of a centralized regulatory system does not mean a total lack of consistency. Despite the described fragmentation, the high numbers of varied actors operating in the financial sector have developed various instruments of coordination over the last years. With the purpose of providing the widest adaptation to their standards, the above-mentioned bodies have established a tight networking system. This is particularly true of “public” or “public-private” bodies, such as the IMF, IOSCO or BCBS, which keep in constant contact.

Representatives of each body, for example, are invited to attend almost all the other bodies’ meetings. Also, during the decision-making process of one standard setter, the others are frequently asked to give their advice on the subject matter of regulation. With the aim of coordinating their activities in fields of common interest, such as financial conglomerates, the BCBS, the IOSCO and the IAIS have also set up the Joint Forum, an informal body that meets three times per

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12 STEWART, supra note 4, 36.

13 According to D. Zaring national authorities prefer to meet at global level to escape national constraints which make their normative activity less flexible and rapid (in this sense, ZARING, supra note 2, 319).

year. The Joint Forum is in charge of studying issues of common interest to the three financial sectors, developing guidance and principles and/or identifying appropriate best practices.

This kind of cooperation is not based on a command and control system, but rather on a consensus-building process. Through inter-sectoral negotiations and contacts, global regulators aim to avoid possible antinomies between global standards and to fill regulatory gaps that may occur. Therefore, standard setters are engaged in an endless work of updating. Furthermore, reciprocal cross-referencing between global standards reveals a trend towards the creation of a coherent system of rules.

In such a context, a central role is played by the Financial Stability Forum (FSF), which is designed to provide an early warning system on threats to the global economy from financial sector developments and to “identify and oversee action needed to address vulnerabilities affecting the international financial system”. In order to attain this goal the FSF must “improve co-ordination and information exchange among the various authorities responsible for financial stability”. One of its main achievements is the “Compendium of Standards”, which brings together codes and rules developed by the financial standard-setting bodies participating in the FSF. Although this compendium does not include all of the standards issued by global financial regulators, it is an attempt to codify global

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financial rules. The FSF also plays a propulsive role for its members. In fact, fulfilling its mandate of proposing solutions for financial market’s weaknesses, the FSF addresses financial standard-setting bodies recommendations asking for new or updated regulatory measures.\textsuperscript{17}

The above-described processes (the building up of a network of regulators and the creation of a coherent and exhaustive system of norms) helps to spread standards and favors the compliance of domestic governments.\textsuperscript{18}

In order to achieve the same objective, a sort of division of labor among regulators can be observed. Standard setters are not provided with any executive


power or formal assessment instruments. Apart from the pressure exerted on their members, who are expected to implement the global rules they helped to develop, they do not have the power to foster compliance of the addressees of global rules. They leave this task to other international authorities. The Basel Committee itself, for example, admits that: “Although Committee members individually collaborate in assessment missions, these are conducted primarily by the IMF and the World Bank. The Committee has decided not to make assessments of its own to maintain the current division of labor between the Committee’s standard-setting and the international financial institutions’ assessment functions.”

Within the context of financial markets, the IMF and WB play a key role toward the implementation and effectiveness of standards. More precisely, the Reports on the Observance of Standards and Codes (ROCSs) compiled by the two above mentioned organizations and their conditioned lending policy are considered two of the most important factors through which non binding standards tend to become mandatory, especially for developing countries.

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Through these instruments, the IMF and the WB assess the compliance of domestic governments to rules developed by standard setters.

As mentioned above, in the financial sector, the importance of private bodies such as the International Accounting Standards Board (IASB) and the International Auditing and Assurance Standards Board (IAASB), or credit rating agencies, is growing. Each of these bodies develops standards of its own, which are frequently incorporated into “public” or “public-private” bodies’ standards through cross-references. One such example is the BCBS’ Basel II accord on International convergence of capital measurement and capital standards reference to rating agencies’ evaluations. According to the Basel II, rating agencies can be asked to assess the creditworthiness of banks on the basis of standards they have published themselves. The IOSCO’s standards reference IAASB global rules on accounting, which are also part of the FSF’s Compendium of Standards, represent a further example.


DE BELLIS, supra note 18, 114.

However, public regulators’ tendency to incorporate private entities’ activity or standards is not unconditioned. In order to be entrusted with the task of carrying out the rating process, for example, rating agencies must meet the requirements fixed by global public authorities. Similarly, IAASB activity is subject to the supervision of the Public Interest Oversight Board (PIOB). This body, whose members are appointed by the BCBS, the IOSCO, the IAIS, the WB

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and the FSF, has been set up to assure that the IAASB acts in pursuit of public interest.

To summarize, it can be said that within the financial sector, an attempt to build up a system of “global governance” is currently underway. During the last decade, the various actors dealing with financial matters have made efforts to establish a functioning network with the aim of creating a coherent system of global rules. This tendency is not jeopardized by the growing importance of private standard setting bodies, since they are incorporated into the network under control of “public” or “public-private” entities. On the whole, this system contributes to the authoritativeness of global standards and favors compliance with them.

This research does not aim at a comprehensive analysis of all international financial actors. The study, therefore, will focus on the activity of the BCBS, the IOSCO and the IAIS, primarily for two reasons. First, among the financial standard setting bodies, the mentioned transnational administrative bodies are those that seem to have reached the highest degree of achievement in pursuing the spread and implementation of their rules. Second, the “administrative” nature of the above mentioned global bodies gives raise to new issues for the European Community, different from questions brought about by treaty-based organizations operating in the sector, such as the IMF. Thus, global actors dealing with financial

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26 EMANUELA ROTOLO, La regolazione globale del settore contabile: International Accounting Standards Board (IASB) e International Auditing and Assurance Standards Board (IAASB), in LA REGOLAZIONE GLOBALE DEI MERCATI FINANZIARI 241 (STEFANO BATTINI ed., 2007).
issues other than the BCBS, the IOSCO and the IAIS will be taken into consideration only insofar as their activity is relevant to the above mentioned global bodies or for highlighting the EC attitude toward financial fields covered by the BCBS, the IOSCO and the IAIS’ standards.

III. Characteristics of the Global bodies considered: the BCBS, the IOSCO and the IAIS

As previously underlined, the global bodies considered by this research consist mainly of transnational organizations of administrative authorities. These organizations act informally and their meetings are not open to the public. Even though they have recently strived to improve their transparency, many aspects of their functioning remain obscure. This is true, in particular, for the global standard setting bodies’ decision-making process.

In addition to these common features, some aspects distinguish one financial standard setter from another.\(^{27}\)

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\(^{27}\) For a more detailed description of the BCBS, IOSCO and IAIS’ organization and functioning see, respectively, GIULIA BERTEZZOLO, La regolazione globale della vigilanza bancaria: il Comitato di Basilea (BCBS); ANTONIO CASSATELLA, La regolazione globale del mercato dei valori mobiliari: la International Organization of Securities Commissions (IOSCO); SILVIA PELLIZZARI, La regolazione globale del mercato assicurativo: la International Association of Insurance Supervisors (IAIS), in LA REGOLAZIONE GLOBALE DEI MERCATI FINANZIARI (STEFANO BATTINI ed., 2007).
The Basel Committee on Banking Supervision (BCBS) is the oldest and the least formal of these standards setters. Set up by the G-10 central bank governors at the end of 1974, the Committee does not rely on any treaty or bylaws. The number of its members is very limited (fourteen). The Committee is compounded only by central banks’ governors of the richest countries. It is not a formal supranational authority, but provides a place for the on-going co-operation and coordination of prudential supervision policies by formulating standards, best practice and guidelines. Even if the BCBS professes to be open to new admissions, this does not occur practically. Membership applications cannot be addressed by any state wishing to do so. Rather, the BCBS may invite a country to join the group only when the economic system of that country has reached the level of development of the other members, and this decision is made by the BCBS itself. Significantly, only Spain has been asked to become a member of the body since it was created.

The International Organization of Securities Commissions (IOSCO) consists of approximately 182 world securities regulators, including international organizations and private associations. However, decisions are made exclusively by ordinary members, a smaller group made up of 108 national authorities entrusted at a domestic level with the regulation of the securities sector. Associate and affiliate members can take part in the IOSCO’s discussion meetings, but do not have voting rights. The functioning of the organization is not regulated by any treaty, but only by the IOSCO-passed bylaws. According to the latter, any security commission or similar governmental agency may apply to become member of the
organization. As the Basel Committee, the IOSCO is a sort of meeting space for co-ordination. Through its permanent structure, it aims at promoting high standards of regulation in order to maintain efficient and sound markets, working on all major issues for securities regulators.

Similarly to the IOSCO, the International Association of Insurance Supervisors’ (IAIS) membership comprises not only national administrative authorities (insurance industry supervisors). International organizations and private bodies are also eligible to become part of the membership. Within the IAIS, all members have voting rights, except for international organizations such as the European Community. This global body was not formed by treaty, but rather is governed by a set of bylaws. The main goal of its members is to “co-operate to contribute to improved supervision of the insurance industry on a domestic as well as an international level in order to maintain efficient, fair, safe and stable insurance markets for the benefit and protection of policyholders.”

While the BCBS and the IOSCO seek to achieve their aims through a consensus voting system, the IAIS uses a majority principle.

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28 IOSCO’s bylaws, cited by ZARING, supra note 2, 292.

29 IAIS’ bylaws, art. 6, http://www.iaisweb.org/__temp/By-laws_2005Edition.pdf (last visited Aug. 14, 2008). The organization admits also certain actors with observer status to attend IAIS’ meetings. However, as international organizations which are members, they do not have voting right.

As previously stated, national systems are “represented” within financial standard setters by their administrative authorities. Therefore, officials taking part in global bodies are not diplomats and do not represent national governments. As a consequence of their limited competence at a domestic level, national authorities simply carry national sectorial interests or their own interests to the discussion board.  

IV. Where, why and how are global standards implemented?

National authorities may chose whether or not to implement global rules, as compliance with global financial standards is generally voluntary, even for those who participate in standard setting bodies. However, one of the most interesting aspects of global standards is that they are applied not only by members of standard setting bodies, but worldwide. This remark gives rise to at least three types of questions.

First, one ought to understand on what grounds the wide implementation is based. Scholars have made an effort to highlight the reasons why global financial standards are so largely obeyed. Some authors have stressed that the success of

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31 ZARING, supra note 2, 301. Similar remarks have been pointed out for the EU committees, see JOSEPH H.H. WEILER, Epilogue: “Comitology” as revolution – Infranationalism, constitutionalism and democracy, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 342 (CHRISTIAN JOERGES & ELLEN VOS eds., 1999).
financial standards lies mainly on market forces’ incentives\textsuperscript{32}, standards setting bodies’ expertise\textsuperscript{33} or their ability to persuade\textsuperscript{34}.

It would be difficult to say which of the above factors plays the greatest part, as the effects of each of these elements cannot be easily determined. It seems rather to be a convergence of forces that pushes governments to implement financial standards. Moreover, possible answers to this question may be different depending on the perspective considered. For example, it is widely believed that developing countries are mostly encouraged to implement global standards by the WB and the IMF\textsuperscript{35}. These organizations are able to include compliance with standards in the conditions that must be fulfilled by a borrowing state. The latter is thus practically forced to apply them. The same does not occur for standard

\textsuperscript{32} Daniel E. Ho, Compliance and international soft law: why do countries implement the Basle Accord?, 5 J. Int’l Econ. L., Aug. 2002, 647, 683; Cassatella, supra note 27, at 77.


\textsuperscript{34} Anne-Marie Slaughter, A New World order 213 (2004).

\textsuperscript{35} Giovannoli, supra note 8, 46-47; Ward, supra note 3, 33; Deonis, supra note 21, 563; Barr & Miller, supra note 21, 32-34.
setters’ members. Their compliance is essentially a political issue\textsuperscript{36}. As it happens within traditional international organizations, since decisions are primarily taken on a \textit{consensus} basis, members are expected to implement rules on which they have previously given their consent\textsuperscript{37}.

The second question that must be explored is through which mechanisms are global rules implemented in domestic systems. This question is strongly related to the nature and effect of financial standards. Many scholars have engaged themselves in an attempt to define the legal \textit{status} of these rules. For the majority, they are “imperfect laws” or “laws in limbo” which need to be transformed into formal rules to be enforced\textsuperscript{38}.

Depending on the legal system in which they are going to be transposed, these rules may be included into statute law (through a legislative process) or into administrative rules. The latter case mainly occurs for standards issued by transnational regulatory bodies, such as the IOSCO or the IAIS. Members of these standard setters are domestic authorities with the power at the national level to regulate a particular economic field. It is commonly shared the idea that those matters, which are strongly related to financial stability and require long term


\textsuperscript{37} On the use of \textit{consensus} in treaty-based international organizations, see ANTONIO CASSESE, \textit{International law}, 35 (New Title ed. 2001).

decisions, shall be kept out of political forces. At national level, then, oversight of financial firms’ behavior is usually left to independent authorities.

The European Union does not have similar administrative authorities\(^\text{39}\). Actually, the European Central Bank does not have competences in supervisory matters, but only an advisory role (see Article 105.5 of the EC Treaty). Therefore, compliance with global financial standards is provided principally through the adoption of legislative acts\(^\text{40}\). For example, the 2005/68/CE directive of the

\(^{39}\) Some authors suggest a sole authority for the EU (see, for example, MAURO MEGLIANI, *Il quadro evolutivo dei mercati finanziari europei nella prospettiva internazionale*, DIR. UN. EUR. (2000), at 677; for alternative solutions see also, ROSA M. LASTRA (ed.), *Legal foundations of international monetary stability*, 324 (2006); DOROTHEE FISCHER-APPELT, *Does the EU need a single European security regulation?*, in EU ADMINISTRATIVE GOVERNANCE 244 (HERWIG C.H. HOFMANN & ALEXANDER H. TÜRK eds., 2006). The subject is, however, very controversial. Any modification of the principle of national competence on matters related to prudential oversight at EC level is considered very carefully. In order to solve the problem of supervision over cross-border activities of credit institutions the Commission has rather recently launched a public consultation on the setting up of *Colleges of supervisors*. These would be *ad hoc* bodies bringing together members of the home and host supervisory authorities competent within the State in which the cross-border credit institution operate (the consultative document is available at http://www.ec.europa.eu/internal_market/bank/docs/regcapital/consultation_en.pdf) (last visited Aug. 14, 2008). On the willing to preserve the principle of decentralized supervision, see Council ECOFIN Interim Report 7290/08 to the European Council (March 4, 2008), http://www.consilium.europa.eu (last visited April 12, 2008).

\(^{40}\) As far as EC international agreements are concerned, the ECJ stated that there is no need for any particular act of transposition. However, this does not mean that no implementing measures are required (on the distinction between transposition and implementation, see generally, I. D.
European Parliament and of the Council on reinsurance incorporates the IAIS’ standards. Similarly, the 2003/71/CE directive has been explicitly adopted to make the EC securities rules consistent with the IOSCO’s guidelines. More recently, the BCBS’ Basel II accord has been transposed into the 2006/48/CE directive on the taking up and pursuit of the business of credit institutions41.

Given that financial standards are often incorporated into domestic legal acts, there remains a third question to address. To what extent can global standards’ content be modified at a domestic level? In other words, do domestic authorities, which are empowered to implement financial standards, still have command over issues regulated by standard setters?

If, for instance, we look at the IOSCO’s or the BCBS’ standards, it is not hard to notice that beyond simply providing general principles and guidelines, some global standards are very detailed. For example, in order to avoid bank insolvency, the Basel II accord provides for minimum capital requirements. In other words, in order to cover losses that may occur, banks must maintain a reserve of money adequate to the risks they assume. The method of calculating the amount of money banks must own to comply with the minimum capital

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requirements depends upon a calculating system that is precisely determined in
the accord.

As a consequence, national administrative authorities agree that in matters
covered by global standards very little discretionary power is left at a national
level\(^\text{42}\). Is this also true when standards are implemented through acts of a
legislative nature? Normally, the parliamentary process should guarantee the
highest degree of democratic control. However, some authors have pointed out
that in many cases, even parliaments have little freedom of decision in dealing
with the incorporation of financial standards, not least due to the technical nature
of the questions addressed by the standards and the lack of access to
information\(^\text{43}\). As it usually happens for the endorsement of international
agreements, parliaments’ powers are bound by decisions stipulated at a different
level.

This remark is actually confirmed for the European Union by the content
of the above-mentioned directives. Apart from a few deviations, these directives
look like the standards issued by the IAIS, the IOSCO and the BCBS. Thus, it is
not surprising that during the implementing process of *Basel II*, the European

\(^{42}\) See, Battini (ed.), *supra* note 14 and, in particular, BerizzoLo, *supra* note 27 and
Cassatella, *supra* note 27

\(^{43}\) Giovannoli, *supra* note 8, 43; Yannis Papadopoulos, *Problems of democratic accountability
Parliament criticized the lack of parliamentary control over the global decision-making process.\footnote{For example, in the Resolution on the adequacy of banks' own funds (Basel II), the Parliament "regrets that the Basel Accord and other international agreements laying down a framework for legislation at EU level came into existence without any form of democratic mandate or control by the European Parliament; expresses the view that, in future, questions with such far-reaching political implications should not be determined in advance by expert committees alone" (EUR. PARL. DOC. INI 2001/2257 (Sept. 2, 2003), http://www.europarl.europa.eu/activities/plenary/ta/sidesSearch.do) (last visited Aug. 14, 2008). See also, BARR & MILLER, supra note 21, 29-30.}

To conclude, once financial standards are issued, they circulate in a way that is hardly traceable. Many factors jointly influence the implementation of global rules, so the latters’ spread cannot effectively be kept under control. Even when they are included in domestic law, frequently very little discretionary power is left to domestic institutions. This means that being part of global bodies and participating in their decision-making process is fundamental to have regulatory power over these issues.

\section*{V. The European Union financial architecture}

The peculiar features of the EU organization must be considered when questioning how the European Community deals with standard setting bodies. For our purposes, two important aspects must be envisaged in particular. First, the division of competences between the Member States and the European Union on
financial issues falling under global bodies’ regulation, and second, the European Union institutional architecture in those fields.

In fact, the European Union is a functional organization. This means that it does not have general sovereignty but its capacity is limited to the matters Member States assign to it.

According to Article 105.5 of the EC Treaty, the ECB competence in the field of banking supervision is limited and it is only a power “to contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system”. Likewise, within the securities sector the ECB is only granted an advisory role for prudential supervision by Article 105.4 of the EC Treaty and Article 25 of the Protocol to the Statue of the ESCB\textsuperscript{45}. However, the Council may decide unanimously to assign the competence to the ECB (Article 105.6 EC Treaty)\textsuperscript{46}. Neither the Treaty nor other dispositions include any similar provisions for the insurance field\textsuperscript{47}.

In theory, with the exception of some limited powers attributed to the ECB in the banking and securities supervision fields, matters regulated by the considered global bodies remains national.

\textsuperscript{45} See, NIAMH MOLONEY, EC securities regulation, 872 (2002).


\textsuperscript{47} The Constitutional Treaty leave the framework unchanged.
As a consequence, financial governance in the EU is marked out by two main ideas: minimum harmonization of rules and national supervision\textsuperscript{48}.

The harmonization of securities, banking and insurance sectors is based on the Treaty objective of building up a common market (Article 2 of the EC Treaty). The aim for financial matters is essentially achieved through the principles of mutual recognition and home country control within the framework of free movement of services and freedom of establishment (Articles 43-48 and 49-55 of the EC Treaty respectively).

From the organizational perspective, some scholars have pointed out that co-operation among supervisory authorities is a natural consequence of establishing common rules at the EU level\textsuperscript{49}. There are two reasons for this. First, because there is need of a uniform implementation of the EC set of laws. Second, because the increasing number of cross-border activities calls for transnational joint actions to prevent undertakings from escaping prudential supervision.

Others have also asserted that international cooperation, namely in the banking sector, is a consequence of prudential supervision organization in EC


\textsuperscript{49} MOONEY, \textit{supra} note 45, 880; FRATANGELO, \textit{supra} note 48, 9.
The EC treaty originally left this field to national authorities, setting up the European System of Central Banks (ESCB) only to support national central banks by providing them with a forum within which to exchange experiences and good practices.

In addition to the ESCB, the Community has encouraged the creation of multilateral fora since the very beginning of the construction of the Single market for financial services. The first EC multilateral forum dates back to 1972 when the Group de Contact was established. This body brings together senior officials of central banks from the Member states (plus Lichtenstein, Iceland and Norway) in order to exchange information and draft comparative studies. It plays also an important role in the legislative process as it is frequently asked by the Commission to give advice on all major legislative proposals. Similar bodies have sprung up, like the Banking Advisory Committee (BAC) and the Banking

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50 PAOLO CLAROTTI, L’internazionalizzazione della vigilanza sulle banche, in SVILUPPO DELLA FINANZA INTERNAZIONALE E INTERDIPENDENZA DEI SISTEMI FINANZIARI 173 (PAOLO BARATTA ET AL., 1984).


52 Multilateral fora are not the only instrument of cooperation. The latter can be performed also through bilateral relations between supervisory authorities regulated by Memoranda of Understanding (MoU) (MOLONEY, supra note 45, 881-882; FRATANGELO, supra note 48, 4-6).

Supervision Committee (BSC). Moreover, the model offered by the banking sector has been reproduced in securities and insurance sectors as well\textsuperscript{54}.

At the end of the 90’s, before the establishment of the Monetary Union, the financial system was brought up for discussion. In 1998, the Council of Cardiff concluded that it ought to push integration further and to set up a system adequate for the establishment of the monetary union and for the fulfillment of the planned enlargements\textsuperscript{55}. According to the Financial Sector Action Plan (FSAP) of the European Commission, the only way out was in setting up a modern financial system\textsuperscript{56}.

In order to achieve that goal, one of the most important issues that needed to be re-considered was the EC legislative process and implementation of rules. The financial sector apparatus was not up to the task of warranting an efficient system of law-making. It appeared too slow and badly organized to keep up with

\textsuperscript{54} Within the considered sectors some informal bodies made up of national regulators can also be identified. An example is given by the Forum of European Securities Commission (FESCO), (now called European Securities Committee - ESC), set up in 1997 by the initiative of national regulatory authorities in the securities field to foster the accomplishment of the financial internal market through the development of common standards on supervision. It played an important role in the approaching of supervisory practices and it also performed well in the development of standards in matters not covered by EU law (see, MOLONEY, supra note 45, 859).


the pace of financial market changes. Roles and tasks of the different bodies operating in that field clearly needed to be redefined.

Therefore, in 2000 the ECOFIN Council consigned a Group of Wise Man (chaired by B.A. Lamfalussy) to propose practical solutions for improving the EC law-making apparatus. The Lamfalussy final report proposed a four level regulatory approach allowing the EU to respond rapidly and flexibly to financial market developments\(^ {57}\). The Report was endorsed by the 2001 Stockholm European Council and suddenly implemented by EU law\(^ {58}\).

Each step represents a different level of the regulatory process. Within the first level, the general framework and core values of new laws are adopted by a co-decision process. Here, actors include not only the ECOFIN (and of course the CO.RE.PER), the Commission and the Parliament, but also the ECB and two other Committees (further, also Council Committees). One is the Financial Service Committee (FSC), consisting of Member States financial ministers’ representatives and the European Commission. The other, called Economic and Financial Committee (EFC), is of a “hybrid” political-technical nature. It is made


up of representatives of finance ministers and national central banks, the ECB and the European Commission.

Principles agreed on through the co-decision process are implemented in a twofold manner. Sector-specific comitology committees of the regulatory type, namely the European Banking Committee – EBC, European Insurance and Occupational Pensions Committee – EIOPIC, the European Securities Committee – ESC and the Financial Conglomerates Committee – FCC (further, also Comitology Committees) assist the European Commission in adopting technical measures in order to specify the details of the framework (Second Level). National supervisory authorities are responsible for ensuring a consistent and equivalent transposition of EU rules through enhanced supervisory cooperation (Third Level). In order to achieve this aim, the EU financial architecture comprises three sector-specific committees which bring together national supervisory authorities’ representatives in banking, securities and insurance sectors respectively plus one representative from the Commission (the Committee of European Banking Supervisors – CEBS; the Committee of European Securities Regulators – CESR and the Committee of European Insurance and Occupational Pension Supervision - CEIOPS) (further, also Committees of Regulators). Within these Committees, members are expected to exchange information and good practices, as well as develop common interpretation recommendations. They may also develop consistent guidelines and common standards in areas not covered by EU law59.

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59 See, Lamfalussy Report, supra note 57, 7.
The Commission in its role of guardian of the Treaty, underpinned by Member states, is responsible for the compliance of the latters to EU rules (Fourth level).

Furthermore, according to the Lamfalussy report, the entire regulatory process (and especially the first three stages) shall be based on three main principles: transparency, involvement of market participants and consumers, and accountability of both Comitology Committees and Committees of Regulators. In particular, accountability is achieved by providing for mechanisms adequate to inform the European Parliament, such as hearings in front of the Parliament, regular reporting and the granting of observer status to the European Parliament⁶⁰.

VI. The functioning of the Lamfalussy regulatory system

In practice, the scheme drawn by the Lamfalussy report is not as clearly defined as it initially appears.

First of all, the concrete working of the rule-making process may be less structured than the one set out in the Lamfalussy report. Particularly, the order in which each step of the rule-making process is developed does not necessarily coincide with that described in the Lamfalussy report. In fact, the first and second

⁶⁰ See, Lamfalussy Report, supra note 57, 47. See, also, Commission Decision 2001/527, 2001 O.J. (L191), 43.
regulatory phases might overlap and the first level measures’ content might, in practice, be determined by measures adopted in the second level\textsuperscript{61}.

Second, the activity of each of the above-mentioned actors is not solely limited to one level of the Lamfalussy procedure. For example, the Committees of regulators (CEBS, CESR and CEIOPS) play an active role not only in the third stage of the rule-making procedure but also in the first two stages (co-decision and comitology). More precisely, these bodies take part in the work of the Economic Financial Committee (EFC) and the Financial Services Committee (FSC)\textsuperscript{62} which, as previously seen, are consulted by the Council during the co-decision process. Moreover, the Committees of Regulators may act as advisory bodies during the co-decision process\textsuperscript{63}. Finally, they operate as technical


\textsuperscript{62} \textit{See}, for example “about CEIOPS”, http://www.ceiops.eu/content/view/2/2/ (last visited Aug. 14, 2008).

\textsuperscript{63} MENDES, \textit{supra} note 61, 5; \textit{see also}, Inter-Institutional Monitoring Group (Oct. 15, 2007), \textit{supra} note 61, 14.
advisory bodies during the second step of the Lamfalussy procedure, as they give advice to the Commission on the adoption of technical measures implementing the framework principles of the first level.\textsuperscript{64}

Finally, the Lamfalussy report does not provide for the establishment of links between the different actors taking part in the regulatory process, except for those officially undertaken by the Commission, the European Parliament and the Council. However, European Committees operating in the financial sector have developed a set of linkages among them. Within each sector close links between the Committee of Regulators and Comitology Committees are maintained in a twofold way. First, the formers’ chairperson takes part in the meetings of the latters.\textsuperscript{65} For example, for banking matters, the chairman of the CEBS is invited to attend EBC’s meetings with an observer status. Then, Comitology Committees are asked to discuss reports on the activities and plans of the Committees of Regulator that operate in the same field.\textsuperscript{66}

Aiming at addressing problems of common interest and promoting consistency across sectors, as well as with the intent of filling regulatory gaps within the financial sector, some inter-sectoral relationships have also developed.

\textsuperscript{64} See, for example, “about CEIOPS”, supra note 62.


\textsuperscript{66} See, Commission Decision 2001/527, art. 4, supra note 65; Commission Decision 2004/10, art. 4, supra note 65; Commission Decision 2004/6, art. 4, supra note 65.
The banking, securities and insurance’ Committees of Regulators have, in fact, established regular ties on an informal basis\(^{67}\). In addition, the Joint Protocol, signed on 24 November 2005, provides for the enhancement of cooperation and coordination among the CEBS, CESR and CEIOPS through the exchange of information and experience, the organization of common meetings and the development of joint work or reports to relevant EU institutions and committees\(^{68}\). Moreover, in order to deal with cross-sectoral issues, the Committees of Regulators may set up working groups bringing together representatives from the three Committees. One such example is given by the Interim Working Committee on Financial Conglomerates (IWCFC), established in 2006\(^{69}\).

The Financial Service Committee (FSC), at the Council level, coordinates the work of the Lamfalussy Committees\(^{70}\). It acts as a bridge between high level policy fora, such as the ECOFIN Council, and technical bodies, such as the new Committee of Regulators. The FSC mandate is to provide strategic guidance on

\(^{67}\) See, for example, “about CEBS”, http://www.c-ebs.org/documents/CEBS.pdf (last visited Aug. 14, 2008); “about CEIOPS”, supra note 62.


financial sector policies, especially from a cross-sectoral perspective. For this reason, both the Comitology Committees and the Committee of Regulators report to the FSC.

In the described context, a leading role is played by the Commission. In order to coordinate the activities of bodies involved in the regulatory process, the Commission is represented as chairman or observer in all the Committees provided by the Lamfalussy Report (Comitology Committees, Committees of Regulators and the Financial Service Committee), it receives the annual report of the Committees of regulators and it is entitled to request advice from all the mentioned Committees.

Finally, the ECB has observer status within Comitology Committees and takes part to the Committees of Regulators’ meetings.

Aiming at rendering the EU system more efficient and flexible, the Lamfalussy report reorganizes the financial sector’s architecture and decision-making process, making it akin, in certain aspects, to the global one. From an organizational point of view, the most evident aspect of the two systems is the setting up of sectorial Committees of Regulators. Moreover, similarly to what happens at global level, the actors dealing with financial matters within the EC system are engaged in establishing a close regulatory network. The idea behind that process is the creation of a consistent and comprehensive system of norms in order to avoid antinomies and to prevent undertakings from escaping national authorities oversight.
VII. Interaction between the EC and the global systems: the preferential way for global standards to become EC law

The global level and, in particular, financial standard setting bodies are not taken into consideration by the regulatory architecture provided for by the Lamfalussy report. Of course this task was not within the mandate of the Wise Men Group, which was requested to focus on the European financial regulatory framework and to propose arrangements for rendering the law-making and implementation processes more efficient. However, considering the observed EU implementation of global standards, one might ask what kind of relationship exists between the two regulatory levels? In other words, have the actors operating within the EU and global financial systems developed any formal or informal linkages?

The first thing to notice is that the relationship of the EU with the global bodies considered (BCBS, IOSCO and IAIS) is essentially centralized. Apart from the Committees of Regulators, which have a special relationship with global standard setters, the Committees provided by the Lamfalussy report (Comitology Committees and Council Committees) do not have any direct contact with the global committees. The EC Committees work with and refer to the Commission or the European Central Bank, which are rather the bodies through which a link between the global and the EU system is granted.
More precisely, even though the EU does not have explicit regulatory power in banking, securities and insurance supervision, it is invited to participate in global standard setting bodies’ activities.

The Community status within those bodies varies depending on the global body considered. For instance, the European Community is officially part of the IAIS but without voting rights, while, within the BCBS, it has only an observer status. The same applies for the FSF, where the EU is a member. Contrarily, IOSCO membership is not granted to the European Community, even as an observer\(^71\).

Within each of the above mentioned bodies, the European Community is represented through different institutions according to the issue the global body is dealing with. The Commission takes part in the IAIS and in the BCBS. As an observer, it also attends the Joint Forum’s meetings. In some cases, there is double representation, as it happens for the BCBS. Here, in addition to the Commission, the European Central Bank takes part in the decision making process, where it is solely in charge of embodying the European Community’s interests at the FSF’s meetings\(^72\).

Apart from the participation of EC institutions to global standard setting bodies’ works, in order to highlight the interactions between the global and the EC

\(^{71}\) The idea that the Commission should participate to the IOSCO’s meetings is currently under discussion (informal interview with an official of the European Commission, DG Internal Market, April 2008).

\(^{72}\) The idea that the Commission should participate to the FSF’s meetings is currently under discussion (see, Council ECOFIN Interim Report 7290/08 (March 4, 2008), supra note 39.)
system, the links established by the Committees of Regulators have to be taken into consideration.

First, the Committees mentioned are constantly in contact with global standard setters. For example, they are asked to comment on global bodies’ draft standards. In some cases they are also invited to attend global standard setters’ meetings. This means that the Committees of Regulators are regularly informed about the works underway at global level and spurred to undertake analysis on the same issues or to reevaluate those issues if they are already under discussion at EC level.

Second, and more importantly, global standard setting bodies and the Committees of Regulators are made up of the same actors, namely national supervisory authorities. Even though the person who takes part to the meetings may vary from the EC to the Global body, the authority from which the representatives comes from is the same. For example, officials of the Italian Central Bank will be members of both the CEBS (EU level) and the BCBS (Global level). Thus, through national authorities there is also an indirect link between the Committee of Regulators in one field and the corresponding global standard setter.


74 Informal interview with an official of the CEBS (April 2008).
The importance of the observed relationships for the implementation of global standards become evident when the leading role played by the Committee of regulators in the system provided for by the Lamfalussy report is taken into account. They are involved from the very beginning of the decision-making process and continue intervening during all the following steps. Moreover, the importance of national supervisory authorities’ position is increased by the character of their advice, as well as by the peculiarity of the decision-making process they employ. The technical nature of the advice, combined with the fact that they often resort to experts and consultation inputs, give their opinions authoritativeness. In addition, the CEBS, the CESR and the CEIOPS’ decisions represent an agreed solution among national regulators. These factors usually make it extremely difficult for the Commission to diverge from the above-mentioned bodies’ opinion. Finally, considering that EC and global committees’ members come from the same national bodies, it is highly likely that during the EU rule-making process, national authorities propose solutions consistent with those agreed at global level (within the standard setters).

75 MENDES, supra note 61.

As a consequence, the CEBS, the CESR and the CEIOPS can be envisaged as the main mechanism through which global standards get into EU rules.

**VIII. Asserting the EU’s interests at global level: old problems and new tools**

Within the described framework what remains to be considered is how the EU’s interests are represented at the global level.

First of all, as previously underlined, despite their informal nature, the way in which the global standard setting bodies considered allow the European Community to participate to their meetings seems to pose the same problems observed within the EU external relations field. In the latter context, due to its international organization nature the EU is usually not permitted to become full member of other international organizations, but only act as an observer. Similarly, at the global level, the European Community has, in general, no voting rights. It can participate in the global bodies’ activities and discussions during the decision-making process but the final decision does not depend on the EU’s consent.

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77 Rachel Frid, *The relations between the EC and International organizations. Legal theory and practice*, 119 (1995). Some authors have also pointed out that EC accession to international organizations as full member is prevented both by Member states who are afraid of losing their international power and by other members of the considered international organization, mostly because of issues concerning voting weights (see, Piet Eckhout, *External relations of the European Union* 200-201(2004)).
Generally speaking, due to the administrative nature of the BCBS, IOSCO and IAIS, the EU is represented within those bodies through the Commission or the European Central Bank. Standard setting bodies’ membership is never awarded to the Council, contrarily to what happens in the international context, where decisions related to economic and monetary issues are usually left to that institution.\footnote{The Commission shall only be fully associated to the negotiations (Zilioli & Selmayr, supra note 46, 282).}

Overall, except for the above-mentioned difference, standard setters approach to EC’s representation is slightly similar to that envisaged within the international relations field.

Does the European Community solve the problems of representation within global standard setting bodies using similar tools of those employed in the international framework? Here, issues arise when the European Community does not have exclusive competence on matters international organizations are dealing with or when it is not provided with voting rights within an international organization.\footnote{In the first case, both the EU and Member states become contracting partners through the so-called mixed agreements (on this issue see, David O’Keeffe & Henry G. Schermers (eds.), Mixed agreements (1983); Joseph H.H. Weiler, The external legal relations of non-unitary actors: mixed and the federal principle, in The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration 130 (Joseph H.H. Weiler ed., 1999). In general, EU external relations give rise to a high number of questions, in particular related to the way in which the internal division of competence may be accordingly maintained at}
duty of co-operation laid down in Article 10 of the EC Treaty. According to that provision, Member states shall facilitate the achievement of the Community’s tasks and abstain from any measure that could jeopardize the attainment of the

the international level. For economic and financial matters that problem is becoming more and more relevant. As it has been traditionally recognized, economic policy generally belongs to Member states. However, in practice the division of powers in such matters is not always easy to define (INGOLF PERNICE & FRANK HOFFMEISTER, The division of economic policy powers between the European Community and its Member states – status quo and proposals de lege ferenda, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION 363 (ARMIN VON BOGDANDY, PETROS C. MAVROIDIS & YVES MÉNY (eds.), 2002). Also, the Treaty does not provide an explicit external competence of the EU in the economic policy, so it is necessary to turn to the parallelism doctrine. As a consequence, representation of the European Union within international organizations which deals with economic and financial issues has always been a crucial point of the debate on EU international activity. The accomplishment of the Monetary Union has made the situation worse. After 1999, monetary competence has been hand from the Member states over the EU. Some scholars suggest that the EU external representation should be reconsidered accordingly (see, ZILIOLI & SELMAYR, supra note 46, 273; RAMON TORRENT, What is the ECB the central bank of?: reaction to Zilioli and Selmayr, 36 COMMON MKT L. REV. (1999), at 1229; ERIK DENTERS, Representation of the EC in the IMF, in INTERNATIONAL MONETARY LAW 211 (MARIO GIOVANOLI ed., 2000). This is a problematic issue mainly for two reasons. On the one hand, since monetary issues are strongly related to many economic matters, it is hard to define within which boundaries the EU exclusive monetary policy shall be limited. On the other hand, as monetary policy is formulated by the European Central Bank, the latter has become a new international player, raising some problems concerning the division of representative powers also among EU institutions.
objective of the Treaty. In dealing with external actions, the ECJ insists on the requirement of unity in the international representation of the EU. In other words, in so far as an international organization deals with matters falling in the scope of the Communities competence or governed by Community law, Member states have to coordinate their positions.

The EC Treaty does not provide for any rules on how to negotiate in the mentioned cases. In order to achieve the “close association” required by ECJ jurisprudence, Member States and the EU have in practice developed many instruments to reach a common position prior to when the formal decision within the international organization takes place. Consensus among Member states is achieved through coordinating meetings conducted by the institutions of the European Community at different levels, the exchange of information and documents, formal and informal agreements both among Member states and between the latters and the EU.

Given that the duty of cooperation also applies to administrative authorities of Member states, such as those who are members of the BCBS, IOSCO and IAIS, one might ask if the European Community has developed

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81 FRID, supra note 77, 190-193; ECKHOUT, supra note 77, 212-216.

82 The procedure is based on an analogy with EC treaty provisions concerning explicit external competence and EC institutions internal agreements (FRID, supra note 77, 192).
similar tools to assert its interests in fields regulated by the global standard setters. In fact, a real coordination, similar to that which characterizes international negotiations, does not take place during the decision-making process of global standard setters. The Commission, together with its Member states’ “representatives”, plays an active role at the discussion board but negotiations are not preceded by the endorsement of a common position among the European Union and its Member states’ “representatives”.

The apparent lack of coordination is scaled down if we consider some particular features of the global – European systems interaction. Within international organizations made up of states, international and national decision-making processes are usually clearly distinguished. At first, agreements are negotiated internationally and afterwards implemented nationally (or at the EC level).

The procedures for concluding an agreement at the global level are not as rhythmical and defined as they are at the international level. In particular, the decision-making process for the adoption of certain rules at EC and global levels may take place side by side, mutually influencing each other.

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On the duty of cooperation and administrative authorities, see ZILIOLI & SELMAYR, supra note 46, 334, 338; MOLONEY, supra note 45, 132.

Informal interview with an official of the European Commission, DG Internal Market (April 2008).

For a description of the “life cycle” of EC international agreements see, EECKHOUT, supra note 77, 169.
An example is given, within the banking sector, by the negotiations that ended with the publication of the *Basel II* accord by the BCBS\textsuperscript{86}. On that occasion, the global procedure was undertaken when the work on a review of the EU rules on capital standards was underway\textsuperscript{87}. As a consequence, the procedure for the adoption of the Directive n. 2006/48/CE implementing the *Basel II* went on in parallel with the drafting of the *Basel II* itself\textsuperscript{88}.

The willingness to coordinate the two procedures is very clear in the drafting works. In order to avoid overlapping exercises, for example, the EC and global public consultation processes were duly matched up. In particular, the Commission's consultative paper was focused on issues of particular concern in the EU context, complementing the BCBS' broader-based document. Moreover, following each Basel Committee's decision to extend its timetable, the EC procedure agenda was rescheduled accordingly in order to ensure consistency between EC and global rules\textsuperscript{89}. The closed collaboration described allowed the Commission to present a proposal on a directive concerning capital adequacy

\textsuperscript{86} There are many other cases of parallel working. For a further example concerning the Joint Forum review of credit risk transfer (CRT) activity, see Joint Forum, *Credit risk transfer* (March 2005), http://www.bis.org/publ/joint13.htm (last visited Aug. 14, 2008).


\textsuperscript{88} BARR & MILLER, supra note 21, 29.

immediately after a final text of the *Basel II* was agreed. The directive n. 2006/48/CE was afterwards endorsed almost at the same time as the publication of a comprehensive version of the *Basel II*.

Indeed, the EC timing mirrored that of the Basel process with the aim of ensuring that European credit institutions were not put at a disadvantage *vis-à-vis* their competitors from third countries. Also, considering the common interest of financial stability and the similarity of technical details provided, the importance of implementing both the new *Basel II* and the new EU legislation was simultaneously pointed out.

At the same time, however, the procedure at the EU level was tailored in order to properly represent European interests and specificities during the

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90 The final version of the *Basel II* was endorsed in June 2004 while the directive proposal COM (2004) 486 Final was presented July 14, 2004.

91 The directive was adopted the 14th of June 2006 and the BCSB Basel II was published the 2nd of June 2006, information available at http://www.bis.org/publ/bchsca.htm (last visited Aug. 14, 2008).


negotiations at the Basel Committee\textsuperscript{94}. The same or similar issues were rebounding from the EC to the global level and vice-versa, rising new questions for discussion and leading to a redefinition of each level’s set of rules.

The example offered by the banking sector is particularly useful for highlighting the potential role of actors involved in the EC decision-making process may perform and, ultimately, to answer the question concerning EC interests’ representation at the global level.

As a matter of fact, when the European and the global process are parallel, it is not difficult to imagine that the Committee of Regulators may represent the place where the position of the European Community on a certain issue is settled\textsuperscript{95}. In that case, the EC committees serve as a coordinating space for national authorities and the Commission to discuss and reach an agreement prior to the negotiation in Global standard setting bodies framework.

Coherence between the points agreed within the Committee of Regulators and those carried out at the global board of discussion is granted by several mechanisms. Of course, within each national authority different persons who take part either to an EC or a global body coordinate their work through information

\textsuperscript{94} See, for example, European Commission, Call for technical advice (No.4) from the Committee of European Banking Supervisors (CEBS) (March 9, 2005), http://ec.europa.eu/internal_market/bank/calls/index_en.htm (last visited Aug. 14, 2008).

\textsuperscript{95} In practice, this happens naturally when the issue tackled at global level have already been addressed at the European one, as it was the case of the II Pillar of the Basel II. As a matter of fact, on that issue the EC work where more forward compared to that of the Basel Committee (informal interview with an official of the CEBS (April 2008).
sharing and meetings, when the person takes part in the global or EC committees is not the same\textsuperscript{96}. Furthermore, the Commission or the European Central Bank are represented at both levels. Finally, some other means are informally provided. For example, by mutual consent, the CEBS’ President has so far been appointed among national authorities that also hold the BCBS’ membership\textsuperscript{97}.

The possibility that the Committee of Regulators may increasingly become the place to set EC positions is not so remote considering the rising call for speeding up the adoption of EC regulation coming from European institutions\textsuperscript{98}. The parallel working of the EC and the standard setters is thus highly likely to become standard in order to respond quickly to market turmoil and to keep up with international guidance given by the FSF or the IMF\textsuperscript{99}.

With the aim of achieving the same goal some ideas for strengthening cooperation among national supervisory authorities are currently being

\textsuperscript{96} Informal interview with an official of the Italian Central Bank (April 2008) and with an official of the CEBS (April 2008).

\textsuperscript{97} Even though this is simply a practice, candidates coming from BCBS member authorities are considered to have more chance to be appointed because of their greater power (informal interview with an official of the CEBS (April 2008).

\textsuperscript{98} See, for example, Jean-Claude Trichet, President, European Central Bank, Keynote speech at the First CEBS Conference: Towards the review of the Lamfalussy approach – market developments, supervisory challenges and institutional arrangements (May 9, 2007), http://www.bis.org/review/r070510a.pdf (last visited Aug. 14, 2008).

\textsuperscript{99} According to the Council point of view, the FSF and the IMF should serve as an early warning system to prevent financial crisis. At the EU level, similar role is supposed to be played by the Council Committees (see, Council ECOFIN Interim Report 7290/08, supra note 39.
discussed\textsuperscript{100}. Among them, it has been proposed to include in the mandate of national supervisors a clause that would require them to cooperate with other Member States’ authorities\textsuperscript{101}. This may further foster the need to converge on a European common position among national authorities on oversight issues. The Committees of Regulators may thus become the natural place for coordination beside the “parallel working” circumstances.

Since oversight traditionally belongs to national authorities’ competence, the underlined pre-eminent role held by Committees of Regulators can be seen as a useful instrument to preserve the internal division of power between the EU and its Member states, as well as the independence of national authorities. These Committees are not EC institutional bodies in their own right, but rather a network of national authorities. While Committees of Regulators are accountable for their achievements towards supervisory convergence at EU level through periodic reporting to the Financial Services Committee (FSC) and the European Parliament, their members are ultimately accountable to their national constituencies.

Moreover, the plenary composition of the mentioned EC bodies guarantees that decisions taken at global level are agreed among all EU Member states. Even if the type of actors operating at the EU and global levels are the same (namely,  

\begin{itemize}
  \item \textsuperscript{100} See, Council ECOFIN Report, supra note 99.
  \item \textsuperscript{101} An agreement on the issue has been reached at the informal ECOFIN meeting of April 2008 and it has been formalized at the Council ECOFIN meeting of May 2008 (see, Concil ECOFIN Conclusions (May 15, 2008), http://register.consilium.europa.eu/pdf/en/08/st08/st08515-re03.en08.pdf (last visited Aug. 14, 2008)).
\end{itemize}
national supervisory authorities), the composition of the bodies may vary from the EU context to the global one. More precisely, standards setters do not necessarily operate in a plenary composition. In fact, in some cases, not all EU member states authorities are also members of the standard setters. For example, the Basel Committee counts only eight out of the twenty-seven actual EU Member states among its members. Through the transposition into EC law global standards become binding also for those Member states which are not involved in standard setters’ decision-making process, and as a result, the way in which the EU and the EU Member states participate to those bodies’ activities appears quite relevant.

IX. Global standards setters’ accountability

Considering the observed attempt of the EU to have its say on financial supervision, one might ask if it has also developed any instruments of accountability to control the activity of global financial regulators. In other words, does the potential increasing role of the European Community have any consequence at the global level?

As it has been pointed out, although standard setters’ activity has a strong impact on governments, those bodies are not directly legitimated by states and, ultimately by a democratic control. The problem of accountability for global
standard setters has recently given rise to a lively debate. Traditional instruments of accountability, such as electoral or supervisory ones, are lacking. Some scholars have underlined that conceptual categories used for national or international systems cannot even be employed at global level due to the different hallmarks of global bodies and the peculiar context within which they operate. The basic questions of “who is accountable to whom for what, with what sanctions, and under what standards and procedures if any” should therefore be redefined.

In fact, there is not even a single answer for each of the above-mentioned questions. Different surveys may be envisaged depending on the angle through which we look at global bodies.

Relying upon the administrative nature of financial standard setters, for example, some commentators assert that accountability problems are less

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104 The quoted sentence is taken from STEWART, supra note 4, 10.
worrying than they may appear\textsuperscript{105}. As a matter of fact, global bodies’ members are national authorities accountable to their respective States, so standard setters are indirectly accountable to those States which may control global bodies’ activity through the medium of administrative authorities’ domestic mechanisms of legitimacy.

Some critical aspects may, however, be raised if we change the perspective. First of all, domestic accountability instruments cannot indeed be considered a valid mechanism of control for states that are not “represented” within the standard setters. Furthermore, through domestic accountability mechanisms States can at best control their administrative authorities’ behavior during the standard setters’ decision-making process but not the global body as a whole. This also implies that the degree of accountability to national governments depends on the decision-making system used by the standard setter. As a matter of fact, the more the latter moves away from the consensus system the more the opinion of each standard setter’s member loses weight. So the independence of global standard setting increases, increasing accordingly the need for accountability mechanisms concerning the mentioned body in itself and not attributable to the sum of its members.

Some scholars look at the development of procedural instruments, such as transparency, stakeholders’ participation or reasons given by standard setting bodies as a possible solution to the problem of legitimacy\textsuperscript{106}.

\textsuperscript{105} \textsc{Zaring}, \textit{supra} note 103, 41.

\textsuperscript{106} \textit{See}, for example, \textsc{Zaring}, \textit{supra} note 103, 42; \textsc{Stewart}, \textit{supra} note 4, 17-18, 22-23.
As the majority of global bodies, also the BCBS, the IOSCO and the IAIS have recently made a move towards a more transparent decision-making process. Financial standard setters’ decisions are published on their websites, as well as the main conclusions of their meetings. Moreover, the standard setters enmesh stakeholders and third regulatory authorities through auditions or notice and comment procedures. Still, the BCBS, the IOSCO and the IAIS sometimes give reasons when adopting decisions that diverge from the consultative process’ outcomes.

Yet, the above-mentioned mechanisms depend on global standard settings’ will. Those who participate in the notice and comment procedure or consult the documents published do not have any rights against standard setters. They cannot ask, for instance, to have access to documents which are not on the website, nor to take part to the decision-making process if the standard setter did not invite them to do so.

In general, mechanisms of accountability that are developing at the global level are far from perfect. Indeed, they are not part of a centralized governing system and it cannot even be said that the global legal order is ruled over by general principles concerning openness and other procedural instruments.

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107 See, BATTINI (ed), supra note 14 and, in particular, Bertezzolo, supra note 27, 15.

In fact, in order to assess accountability mechanisms one should first consider what we can expect from global governance.

Some scholars argue that a democratic process cannot be imagined at the transnational level, considering that neither national nor international systems are perfectly democratic. Moreover, the majority agrees that the global level will not substitute the national one and that, even in a globalized world, states will keep an important role.

What we can envisage as standard setters’ accountability is thus a set of mechanisms that prevent global bodies from acting of their own free will as much as possible.

Furthermore, as far as the BCBS, IOSCO and IAIS are concerned, a less stringent checking system should be provided for global bodies, considering the

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110 KEOHANE, supra note 109, 9; RAUSTIALA, supra note 2, 11; SLAUGHTER, supra note 2, 159;


111 BENNER, REINICKE & WITTE, supra note 109, 199.
independence and autonomy granted nationally to authorities dealing with financial supervision.

Taking into account deficiencies that characterize global and domestic mechanisms of accountability, some scholars suggest considering the two set of instruments together in order to have a more comprehensive overview of the system of checks and balances in which global bodies are inserted\textsuperscript{112}. According to that perspective, the two levels supplement each other, contributing to the overall accountability of global standard setters.

From this standpoint the insertion of the EC system between the national and the global levels adds further mechanisms of accountability over standard setters. Besides the initiatives undertaken by European institutions during the implementation of global standards\textsuperscript{113}, Committees of Regulators offer an indirect instrument of accountability of the Global bodies because of their similar composition. Within the EC system, Committees of Regulators are asked to publish their draft advice for comments and to also disclose their activity before negotiations at global level take place. Moreover, the European Parliament, the Commission and the European Central Bank are kept informed on the Committees of Regulators’ work through hearings, regular reporting and the participation in those bodies’ meetings\textsuperscript{114}. Decisions of national authorities concerning global

\textsuperscript{112} BARR \& MILLER, \textit{supra} note 21, 364.

\textsuperscript{113} On the use of that instruments for the \textit{Basel II}, see BARR \& MILLER, \textit{supra} note 21, 29.

\textsuperscript{114} Some doubts on Committees of regulators’ accountability have been risen concerning decisions taken within the 3 level framework of the Lamfalussy process (see Inter-Institutional Monitoring Group (Nov. 17, 2004), \textit{supra} note 61, 28).
standards are thus assessed twice: at the EC and at national level. The proposal of inserting an EC mandate of cooperation at the national level would extend domestic accountability further: national authorities would be also be accountable nationally for the compliance of their activity to EC cooperative goals\textsuperscript{115}.

\textbf{X. Recollecting ideas}

For the European Union, the global dimension of financial supervision regulation represents a new battleground where the latter is trying to find its role. The aim is achieved by relying upon national authorities. Those authorities however, are given a \textit{European} role.

The framework drawn by the Lamfalussy reform changes the perspective in which national authorities operate, adding new constraints to their activity. Domestic authorities are asked to take European interests into account and to coordinate their positions in order to make them consistent with European priorities. In practice, by setting up \textit{ad hoc} permanent bodies that bring together Member States’ national authorities the EC has created the conditions for EC interests to be embodied at global level.

\textsuperscript{115} According to A-M. Slaughter a similar reference should be inserted in the national mandate allowing national authorities to undertake transnational negotiations (see, SLAUGHTER, supra note 2, 171).
The Committees of Regulators represent a bridge between the European and the global levels. In both contexts these bodies, whose members come from the same national authorities as those of the global standard setters’, are gaining importance. Apart from playing a leading role during the EC regulatory process, if we look at the current developments of EU position at global level, they have outlook to become the main link between EC and global financial dimension. In this perspective, the Committees of Regulators perform a twofold task: being the most important instrument for global standards to get into the EC system and, at the same time, being a “filter” provided by the EC system as an a-posteriori or/and an a-priori check on global standards.

Indeed, within the mentioned EC bodies problematic issues concerning oversight are discussed during the implementation of global standards in order to make them suitable to the EC financial market specificities. Furthermore, when the EC and global decision-making process proceed simultaneously Committees of Regulators also provide a place where regulatory measures are discussed before negotiations take place at global level and where a common EU position is eventually fixed.

In general, the EC and the global systems of rules are not competing against one another. On the contrary, regulatory initiatives undertaken within the EC system stimulates those of global standard setters and vice-versa. The decision to regulate a certain issue may come from either the EC or the global level. Once the global regulatory procedure starts, the EC decision-making process is tailored accordingly. In this case, the processes proceed in parallel, influencing each other
mutually. Overall, EC and global bodies share the common goal of refraining from issuing conflicting sets of rules.

The observed interactions are fostered by the similarities characterizing the two levels. In practice, the structure drawn up in the Lamfalussy report turns out to work similarly to the global one. Both are characterized by close relationships among actors taking part in the decision-making process either within the same sector or among related fields. Banking, securities and insurance supervision are regulated consistently in order to avoid antinomies and to fill gaps that may occur.