Regimes for the European Corporate Economy: Regulating the European Financial Markets

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Abstract

This paper outlines the development of new regulatory regimes in the European Union to handle the pan-European trading and regulation of trading in corporate securities between 2001 and 2005, and the parallel build-up of regulatory states at the national level to manage the new responsibilities of the member states. The development of policy regimes greatly facilitates the work of the European Union in passing future regulation. I speak of policy regimes because each designates the key participants and coordinates their activity in different ways.

1 Introduction

This paper[1] examines the development and operation of 3 policy regimes built up by the European Union between 2001 and 2005 to create and regulate a single market in company shares: an EU company law regime to handle cross-border share transfers; a securities trading and regulation regime, and an accounting standards regime. Each of these regimes represents an important innovation in European regulation and European governance because they go beyond setting out policy requirements for the member states through directives. Instead they also set up long-term policy networks and modes of governance, and incorporate these modes

[1] This paper draws on the author's habilitation (professorial) thesis in political science at the University of Bremen, due for completion in autumn 2006.

of governance into directives contained within the policy regime. They explicitly identify decision-makers in the policy process, the means of their interaction and the degree of policy decision-making delegation to the European Commission or other bodies. In the case of accounting standards, this is a non-EU body, the International Accounting Standards Board.

This paper examines types of governance of financial market regulation, focusing on the intergovernmental measures to create a pan-European market for securities, the strong degree of delegation to the Commission and the International Accounting Standards Board to ensure statutory regulation of securities transactions in European financial markets, and simultaneously, the reliance of European regimes on the coordination of nationally-based bodies to implement European regulation. It aims to help the reader understand why the regimes are structured so differently, and what consequences this has for the development of financial market regulation in Europe.

2 Analytical Approach

Policy areas are central to the organisation of the European Union's work, but the development of distinct policy regimes to organise the work of the EU institutions and the member states is a new innovation. This is qualitatively different than what came before because earlier directives were modest in scope, set minimum standards, did not delegate as many responsibilities to European bodies like the Commission, and did not prescribe interaction between the Commission and the member states, or between the member states themselves. The directives preceding 2001 in the policy areas under investigation here made no demands on the organisational structure of the member states in the way that the directives of the regimes demand. In contrast, the regimes presented here fulfil not only the modest requirements of Krasner 'principles, norms, rules and decision-making procedures around which actors' expectations converge,'[2] but also of Haggard and Simmons' 'multilateral agreements among states which aim to regulate national actions within an issue-area' and Young's 'conjunction of convergent expectations and patterns of behaviour or practice.'[3]

These three regimes demand in effect the building up of a regulatory state at the national level, which is a great change for countries relying on self-regulation of business, in the context of regulatory regimes at the European level. Effectively, all three regimes target the *development of regulated shareholder capitalism* over self-regulating capitalism at the

[2] Young, Oran R. (2000) *Governance in World Affairs*. Ithaca: Cornell University Press, p. 495.
[3] Ibid.

European and national levels. The model for this type of regulation is different than the type of regulated capitalism suggested by Hooghe and Marks,[4] however. Whereas those authors suggest that left-of-centre political actors promote regulated capitalism and European integration together to tame capitalist forces, the development of regulatory regimes outlined here means that it is just as likely that right-of-centre political actors promote European regulated capitalism to attract international portfolio investment as much as to control it.

The development of regulated shareholder capitalism can be seen in the increasing transfer of authority from the City and codes of governance to statutory regulators and codification in the United Kingdom, which traditionally has a shareholder-oriented approach to regulatory issues. It can also be seen in Germany, where the shareholder orientation of law and regulation is far newer. The result is that European modes of governance increasingly involve the coordination of decentralised actors responsible for the definition, implementation and enforcement of commonly determined policy.[5]

A liberal constructivist approach to regime development

The development of regimes for regulated shareholder capitalism in the European Union is dependent on normative commitments at the European and national levels. *European governance mechanisms*, in this case regimes for regulatory provisions, are *constructed on the basis of shared understandings* between the member states, the Commission, and increasingly the Parliament about the legitimate roles that EU and member state actors have to play in all stages of the policy process. The outcome of these negotiations need not be the same in all policy areas, as we might expect if we were to adopt the oft-cited assumption that perceptions of identity and roles determine the behaviour of decision makers in an encompassing way when dealing with specific actors.[6] They also need not be based on deep conviction of all the parties involved in the negotiations, but all actors that can block the negotiations must accept them, grudgingly or not. This ability to construct new understanding is one reason why I am optimistic about the potential for governments and EU institutions to reach agreements on policy regimes despite the persistence of politicised differences over the nature of European

[4] Hooghe, Lisbeth and Gary Marks (1999) ‘The making of a polity: the struggle over European integration,’ in Herbert Kitschelt, Peter Lange, Gary Marks and J. Stephens (eds) *Continuity and Change in Contemporary Capitalism*. Cambridge University Press, 70-97.

[5] Tömmel, Ingeborg (2007) ‘Governance und Policy-Making im Mehrebenensystem der EU,’ *PVS* 2007, 2 (forthcoming).

[6] The Wendtian identification of other governments as friends, rivals or enemies, for example, brackets the possibility that the same government (or European institution) for that matter might be viewed differently according to the policy area.

integration per se,[7] as political agents retain significant opportunities to construct organising principles that go beyond the inherited structures that liberal constructivism tends to expect.

The understandings of the member states in particular are informed by *policy ideas* that include not only beliefs about what ought to be regulated and how, but that also allow government leaders and organised civil society to compare and contrast the approaches of other actors, including the other member states and the preferences of EU bodies. Norm convergence across countries on regulation questions is compatible with harmonisation and delegation, whilst norm conflict is not. Under conditions where norm conflict amongst the member states of the EU prevails, they may even have an interest in acting collectively to preserve their differences in a regime build to do that. This has indeed happened in one of the cases studied here, for company law and regulation.

This approach leads to two hypotheses about the nature of regime development that I hope to demonstrate in this paper. First, the qualitatively more meaningful regulation of the single market (rather than ad hoc directives and regulations) through policy regimes is limited to those cases where European institutions and the member states have reached *agreement on the nature of integration*: the actors playing the key roles, the structure of decision-making and the nature of their interaction. Where this has been achieved, it should be possible to complete the necessary legislation to regulate a policy area quickly by referring to these principles in each piece of legislation. The counterfactual to this hypothesis would allow for regulation of a policy area without explicit agreement on these principles.

Second, *public sensitivity* at the national level about the possible impact of harmonised rules across the EU *determines the degree of delegation* to the Commission or other supranational bodies that the member states are willing to approve through EU legislation. Public sensitivity to strengthened regulation protecting outsider shareholders in financial market transactions has been low in Germany and the UK thanks to the fact that politicians are speaking to a fairly small public, and because that public supports the interests of outside shareholders. A similarly small public monitors changes in accounting standards, so that the delegation of certain rule-making capacities to the International Accounting Standards Board was made possible through EU commitments in 2001. In contrast, measures to enhance the development of a single European market in company shares attracted great public attention about the possibility of takeovers and mergers in the member states and implications for a long list of

[7] See Shawn Donnelly (2006) 'Founding Myths of European integration and implications for Turkey,' in Nanette Neuwahl and Haluk Kabaalioglu (eds) *European Union and Turkey*. Istanbul: Turkish University Association for European Community Studies, pp. 95-118.

normative beliefs about the company and its responsibilities embedded in company law. This leads to firm member state control, coupled with intergovernmental coordination. This then suggests that political coalitions[8] are affected by the amount of public controversy inherent in the topic at hand.

If this hypothesis is true, then we should be able to see strong parallels between domestic regulation and European regulation, particularly where domestic regulatory changes precede European ones. If it is not, then we should either see no connection between the two levels[9] or only situations in which national regulation responds to conform to European legislation rather than preceding it.

This approach has the advantage of contributing to the growing literature on differentiated modes of governance in the European Union, with correspondingly different developments in regulation, and which correspond to different theories of integration. Unlike (neo)functionalist and liberal institutionalist theories, I allow that either European or member state impetuses may drive regime creation. Under conditions of high public sensitivity, regime creation is likely to be initiated by rulings of the European Court of Justice. More specifically the member states react to rulings that enforce the terms of the Treaties in ways that rob them of regulatory capacity in highly sensitive areas: company regulation in this case. Under conditions of low public sensitivity, a high degree of convergence in the regulatory expectations of the member states is still required.

We are therefore not confronted only with top-down effects on the norms and institutions of individual countries, with or without national filters[10] as the Europeanisation literature often suggests, and not a simple bottom-up effect.[11] For the intergovernmental company law regime, the ECJ's *Centros* 1999[12] ruling guaranteeing freedom of incorporation for companies in the single market pushed member state action. They chose collectively to protect core competencies from Europeanisation. The securities trading regime followed from the recognition of the member states that (a) promoting financial markets at home and in Europe

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[8] Callaghan, Helen and Höpner, Martin (2004) *Parties or Nations? Political Cleavages over EU Efforts to Create a Single European Market for Corporate Control.* Paper presented to the Politics and Economics Section of the German Political Science Association meeting on EMU, 3-4 December 2004, Cologne.
[9] Including cases of 'poor fit' in which national adaptation to European rules fails to materialise. See Tanja Börzel (2002) *States and Regions in the European Union: institutional adaptation in Germany and Spain*. Cambridge: Cambridge University Press.
[10] Börzel, Tanja. (2002) *States and Regions in the European Union: institutional adaptation in Germany and Spain*. Cambridge: Cambridge University Press; Busch, Andreas (2003) *Staat und Globalisierung: das Politikfeld Bankregulierung im internationalen Vergleich*. Wiesbaden: Westdeutscher Verlag.
[11] Radaelli, Claudio (2004)) 'Europeanisation: solution or problem?' European Integration Online Papers. Vol 8, Nr. 16. http://www.eiop.or.at/eiop/texte/2004-016a.htm, pp. 4-8.
[12] Case C-212/97, 9 March 1999.

brings economic rewards and (b) investor protection is required against fraudulent schemes. Similar convergence of thinking on accounting standards across the member states led as well to their willingness to delegate competences to supranational actors. I concentrate in this paper not only on the construction of the regimes, but also the method of interaction between national and European governance actors.

In doing so, I distance myself from the concept of the undifferentiated European regulatory state[13] and join the search for differentiated modes of governance. Knill & Lenschow[14] provide a typology of differing modes of governance based on the degree of commitment of the member states and the degree of rule specificity that combine to generate four modes of governance: (hierarchic) regulation; new statutory instruments (framework directives), self regulation and the open method of coordination. Framework directives differ from traditional regulation in their focus on goals for other legislation rather than rules. The open method of coordination is reserved for the pursuit of goals without any commitment whatever.[15]

Recently the informal activities of pan-European networks have attracted attention. Eberlein and Grande (2005) point to a gap between the European commitments of the members states on the one hand and the implementation and enforcement at the national level on the other, that the member states bridge with transnational coordinating networks. Puetter[16] has also drawn attention to the development of informal governance in the economic policies of the euro zone members as a reaction to incomplete institutionalisation at the European level. Neyer[17] also draws our attention to the advantages of deliberative forms of governance to manage politics in policy systems without a central source of authority, as we find in the EU. All of these point to interactions without commitment. They focus our attention on interaction without firm structure. What if these two are combined?

I not only see differing modes of governance in individual directives, but also identifiable principles that pervade the directives contained within the regimes and constitute the structure within which actors work together. These principles identify the governing actors and the means of their cooperation specifically for the policy area at hand, and must be accepted by the regime's decision-makers before they can have any impact. These principles can involve

[13] Majone, Giandemenico (1996) *Regulating Europe*. London: Routledge.
[14] Knill, Christopher und Lenschow, Andrea (2003) 'Modes of Regulation in the Governance of the European Union: towards a comprehensive evaluation,' *European Integration Online Papers*. 7, 1. http:www.eiop.or.at/eiop/2003-001a.htm
[15] Schäfer, Armin (2005) *Die Neue Unverbindlichkeit: wirtschaftspolitische Koordinierung in Europa*. Frankfurt: Campus-Verlag.
[16] Puetter, Uwe (2006) *The Eurogroup*. Manchester: Manchester University Press.
[17] Neyer, Jürgen (2004) 'Explaining the unexpected: efficiency and effectiveness in European decision-making,' *Journal of European Public Policy* 11, 1: 19-38.

quite different modes of binding national and European actors into policy governance from one area to the other. In all cases, however, the member states have ensured that the European regimes promote the development of a regulatory state at the national level, with differing degrees of interdependence with European counterparts. In this sense my approach has a certain similarity with Milward's thesis that integration is constructed to save the nation state in the face of new challenges.[18]

3 Three Regimes

I compare below the negotiations and results of European and national legislation in Germany and Britain to examine the hypotheses. The two countries still demonstrated in the early 2000s quite different legal and regulatory structure corresponding to liberal and coordinated types of capitalism. Although early literature on the subject placed faith in the continuity of institutional arrangements due to their embedding in social and political circumstances,[19] newer literature investigates social-political changes in specific policy areas. Streeck and Thelen[20] refer to institutional gaps that actors use to liberalise formal institutional arrangements governing societal actors. I wish to show here that policy areas with small publics are easier to liberalise than policy areas with large publics attached to institutionalised rights. We therefore want to see how strongly governments respond to national and European pressure for change, and which topics are beyond serious reform, because they touch on core institutionalised interests.

The first regime deals with enhancing European capital markets by promoting the pan-European market for company shares.

The Company Law Regime (with relevance to financial markets)

The company law regime is designed to provide the regulatory infrastructure and the legal certainty for companies to restructure in the single market. It does, in fact, law down the principles of member state responsibility for regulation, of a 'real seat' method of determining

[18] Milward, Alan (1992) *The European Rescue of the Nation State*. Berkeley: University of California Press.
[19] Hollingsworth, J. Rogers (1997) 'Continuities and changes in social systems of production: the cases of Japan, Germany and the United States,' in J. Rogers Hollingsworth und Robert Boyer (eds) *Contemporary Capitalism: the embeddedness of institutions*. Cambridge: Cambridge University Press, 265-310; Hall, Peter and David Soskice 'Introduction,' in Hall and Soskice, eds (2000) *Varieties of Capitalism*. Oxford University Press.
[20] Streeck, Wolfgang und Thelen, Kathleen (2005) 'Introduction,' in Streeck und Thelen (Hrsg.) *Beyond Continuity: institutional change in advanced political economies*. Oxford University Press, 1-38.

which national regulators take the lead in applying company law, and of a special ‘breakthrough rule’ to make cross-border mergers and takeovers possible despite numerous persistent impediments in European countries that the regime does not deal with.

Company law directives relevant to financial markets were designed by the Commission to protect the interests of outside shareholders when companies are bought and sold, especially across countries. Its plans targeted the behaviour of management, companies, shareholders and regulators in creating legal certainty over what rules apply, which regulatory authorities have jurisdiction over what part of the process, and how they must interact. It would have preferred to move the member states to accept a single set of rules, particularly after the European Court of Justice had forced national governments.

Instead, the regime structure is intergovernmental, with the explicit intention of preserving national autonomy on issues where norm conflict on the details of company regulation and high public sensitivity are combined. The rules reinforce direct and undivided responsibility of national governments to legislate and regulate. In doing so, the member states brought the Commission and the Parliament to accept their prevalence in this policy area, even if grudgingly.

Striking at the national level is the lack of norm convergence in takeover or merger regulation, with the exception of the breakthrough rule. Legislative change in the UK in the *Company Law Reform Bill* was still pending at the time this paper was written, whilst the German *Securities and Takeover Act* was promulgated to assert the distinctiveness of German rules in advance of European negotiations on the corresponding directives.

The Takeover Directive, the Merger Directive and the Migration Directive designated for the first time national cartel offices and national tax authorities as the appropriate regulators of cross-border dealings and set out rules for coordinating the regulators. Table 1 provides information on the main directives that apply here, as well as illustrative examples of how they have been implemented in the UK and Germany.

Table 1 *Regulation of cross-border share transactions in Europe, Germany, UK*

EU	Coordination	Germany	UK
Takeover Directive 2004 - Breakthrough rule on takeover barriers - Shareholder protection	Takeovers approved by national rules and statutory regulator of offering company, defensive measures set aside by breakthrough rule at 75% mark, special government powers to prevent takeovers.	Securities and Takeover Act (STA) 2004 *(Wertpapier- und Übernahmegesetz)* permits defence against takeover bids with shareholder perrmission. Cartel office remains statutory regulator	Takeover rules remain more shareholder-friendly than EU compromise on breakthrough rules Takeover Panel becomes a statutory regulator to comply with formal EU requirements, to be implemented in *Company Law Reform Bill* (pending)
Merger Directive 2004 - Managing cross-border mergers	Managed like the Takeover Directive	Covered by STA	Regulated by Takeover Panel
Migration Directive 2005 - Managing and controlling cross-border change of company seat	Migration approved by national tax authorities based on seat of operations	German firms prevented from leaving jurisdiction without moving operations	Pays attention to operations only for tax purposes.

In sum, the company regulation regime may be inconsistent in its lack of a firm and unconditional commitment to the free transfer of company shares in the single market, but it does demand the identification or creation of appropriate regulators in the member states for the first time, sort out legal jurisdiction issues, and mandate the form of interaction between national regulators. It also, through the breakthrough rule, asserts the principle that the member states and company statutes should not stand in the way of a pan-European market in company shares, even if this principle is weakened by the clause allowing national governments to grant exceptions. But it is now the prerogative of governments, and not of companies now to grant such exemptions. These loopholes, and the strong role of the member states in coordinating their action underlines the continuing political sensitivity of opening up the single market in company shares. They provide a regulatory reaction to the multiple rulings of the ECJ that force them to open up their borders to the movement of companies and trading in their shares.

The Securities Regulation Regime

Financial market law and regulation were developed in the service of creating a single European capital market, particularly with measures for ensuring market integrity. This means ensuring the equal treatment of investors and policing and prosecuting criminal activity on the part of managers and financial market participants dealing in company shares. The securities regulation regime requires the member states to build up their own regulatory capacities, but to increasingly use rules determined at the European level. This delegation of responsibility to the European Commission, coupled with the establishment of new committees to oversee and advise it in the course of fulfilling its duties, was made possible by a prior shift in national politics away from self-regulation and toward statutory regulation of market forces. Germany and the United Kingdom are used as two examples to briefly illustrate the changes and their timing in relation to EU legislation. Despite the convergence across member states, it was still necessary for them to agree with the Commission and the European Parliament on specific principles of interaction in the new policy system. This was created by the Lamfalussy process to implement the Financial Services Action Plan.

The Commission's broad strategy for achieving a deep, liquid capital market with high levels of confidence in information and supervision was the Financial Services Action Plan of 1999. It directly affects the way that companies present their financial and annual operating reports to investors, how they are audited, and other measures on corporate governance discussed below. The regimes for company law and financial market regulation are therefore intricately interlinked. Despite this, the financial market regulation regime is multilevel in nature, with a strong role for the European Commission and regulatory committees binding it to Member States and market participants (those being regulated), rather than an intergovernmental model, as in the case for company law.

The FSAP on its own only put issues on the agenda for the Council to consider. Basic questions of rights and responsibilities of the actors involved in the regulatory process had to be sorted out before substantive questions of regulatory standards could be dealt with. For this reason, implementation of the FSAP failed to materialise until 2003. The Lamfalussy Group, tasked by the Commission with finding a organising principle for the work of the Commission and the member states provided this missing link, which the Council accepted at the

Stockholm Council (March 2001). In order to support the EU's activities, the Commission established the *European Securities Committee* (ESC), staffed by regulatory and legal experts of the Member States[21] and the *Committee of European Securities Regulators* (CESR).

The Commission describes the pattern of regulation developed in the FSAP under the Lamfalussy Process as follows:

> The new approach for securities markets regulation comprises four-levels: namely broad framework principles included in legislation adopted by the European Parliament and Council (Level 1), measures implementing those Directives and adopted by the Commission after advice from the Committee of European Securities Regulators (CESR) and the agreement of the European Securities Committee, consisting of high-level representatives of the Member States (Level 2), co-operation among regulators (Level 3) and enforcement (Level 4).[22]

The principles of the four-level regime constitute a significant delegation of rule-making authority to the European level with increasing involvement of the collective group of national regulators toward the implementation phases of the policy process. This means the simultaneous development of national regulatory states and their embedding in common rule making.

Corresponding movements to regulate at the national level reflect a high degree of norm convergence (despite previously highly differentiated norms) for the UK and Germany toward regulated shareholder capitalism. The timing of these changes is also significant in supporting the second hypothesis, as the legislative, normative and regulatory changes are set in motion before the passage of European legislation. This is more obvious in the German case, which made sweeping legislative changes, whereas the UK government relied on its Financial Services Authority to implement the kind of regulations foreseen at the European level before legislative changes were introduced in the Company Law Reform Bill (pending).

Each of the following directives was designed with these regime principles in mind, making it easy to pass legislation and to institutionalise the means of interaction between European and national regulators. This interaction is dealt with in more detail after the discussion of the directives that are contained within the regime.

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[21] European Commission, Decision 2001/528/EC

[22] European Commission, *Securities: Commission adopts two technical measures to implement the Prospectuses and Market Abuse Directives*. Brussels, IP04/563, 29 April 2003, p. 3.

The Securities Directives: FSAP Regulation with Corporate Governance Aspects

Together, the directives discussed below are known to the Brussels policy community as the Securities Directives, as they deal with the behaviour of the company and those close to it who affect the price of company shares, and the ability of market investors to assess the financial fortunes of the company. The Listing Directive, the Prospectus Directive and the Transparency Directive are three related pieces of legislation devoted to both minimum standards on structural requirements of listed companies, and ongoing information disclosure to the investing public. The Commission's Directorate General Internal Market, Financial Markets Division, works with the European Securities Committee on level one legislation, whilst CESR is the most prevalent regulator starting with level two (implementation). Passage by Council and Parliament was unproblematic in all cases, often without debate in the Council.

Table 2 provides a summary of the legislation and the features of the financial market regulation regimes, with EU directives and corresponding national provisions. After the directives have been discussed, the main actors, their roles and the governance of the securities regime are investigated.

Table 2: The Securities Directives and national implementation

EU	Coordination	Germany	UK
Listing Directive 2001 - Minimum standards and mutual recognition for stock market listing rules	Commission determines regulations in cooperation with national securities regulators (CESR) and finance ministries (ESC). National implementation through listing authorities.	Second Financial Market Promotion Act 1994 establishes statutory regulator	Financial Services Markets Act (FSMA) 2000 assigns listing authority to FSA
Prospectus Directive 2003 - Minimum standards, mutual recognition for prospectus rules	Same system used for Listing Directive.	Investment Modernisation Act 2003 at same time	Financial Services Authority (FSA) regulations precede

Market Abuse Directive 2003 -Criminalises securities trading fraud and market manipulation	Same system used for Listing Directive. National regulator is the financial services regulator	Investor Protection Improvement Act *2004*	FSA regulations precede, Company Law Reform Bill codifies
Transparency Directive 2004 - Common standards on company reporting	Same system used for Listing Directive. National regulator is the financial services regulator	Transparency and Publicity Act 2002 precedes	FSA regulations and Combined Code of Corporate Governance precede, Company Law Reform Bill codifies
Statutory Audit Directive 2005 - Common rules on company auditor independence	Same system used for Listing Directive. National regulator is the recognised chamber of accountants.	Statutory Auditor Reform Act 2003 precedes	Financial Reporting Review Panel made independent regulator 2003

Interaction of Securities Trading Regulators

The *European Securities Committee* plays several roles in the governance process of financial market regulation. It consults as a whole at the European level with the European Commission and votes on regulations proposed by the Commission to flesh out the securities directives. As officials from the Finance or Treasury ministries of the member states, the members also act as a transmission belt between the Commission and national governments, permitting national demands to be made at the EU level, and permitting national administrations to remain abreast of changes in the pipeline that may require adjustments to national legislation.

The *Committee of European Securities Regulators* is the centrepiece of the regime's operation after directives belonging to the regime have been passed. In accordance with the Lamfalussy Process, all of the directives set out the main policy commitments of the member states, the .

The agenda for CESR's work is provided primarily by the securities directives. These raise issues of rule formulation, implementation and enforcement that CESR has a central role in defining and coordinating according to the Lamfalussy process. That same process ensures that the legislation passed is of a framework nature, and that there remains room for fleshing out details. CESR's role is twofold. It advises the Commission on what changes to EU rules ought to be made, and provides a means for national regulatory authorities to coordinate their activities. To the extent that they enjoy the authority to pass secondary legislation within their home jurisdictions, CESR also allows its members to share information amongst themselves about the transposition of EU into national rules.

This leaves questions about the degree of discretion left to national regulators, national legislators, the transposition of European directives, and the overall impact on the quality and diversity of financial market regulation. Although the regime provides for the Commission to pass increasingly detailed regulations, these must still be transposed into national legislation (or regulations) and implemented by national regulatory authorities. If a member state were to not respect the minimum standards set through the Lamfalussy process, then it would be in breach of EU law. On the other hand, there is nothing to prevent a member state from 'gold plating' the directives, i.e. legislating even more restrictive rules on financial markets than is required by EU legislation. Between 2001 and 2005, the German government did this repeatedly, often but not always with the blessing of the opposition, whilst the British government did not. In that country, the Financial Services Authority is targeted to become responsible for implementing the EU legislation, but the Blair government bundled most of its commitments to the securities directives in an omnibus Company Law Reform Bill tabled in May 2006.

CESR's committee and working group structure gives the best indication of the body's activities in regulating European financial markets. Table 3 lists CESR's expert groups and operational groups. Those relevant to the directives discussed above are deal with below.

Table 3: Expert and Operational Groups within CESR

Group	*Tasks*	*Legislative Basis*
Prospectus	Details of levels 2 (complete), level 3.	Prospectus Directive
Transparency	Rules on data storage, filing, ease of access.	Transparency Directive; Market Abuse Directive.
CESR-POL (political relations)	Market abuse regulation consultations completed May 2005; discussion of accepted market practices.	Market Abuse Directive
CESR-FIN (ancial)	- SCE: Regulatory supervision of listed	- SCE: several

- Subcommittee Enforcement (SCE) - Subcommittee Endorsement (SISE) - Audit Task Force - Equivalence Group	companies - SISE: Alternative standards on financial (performance) information - Audit monitors modernisation of statutory audit regulation - Equivalence compares International Accounting Standards (IAS) and national Generally Accepted Accounting Practice	- SISE: Transparency Directive - Statutory Audit Directive - IAS Directive
Mediation Task Force	Mediates between national regulators with conflicting claims of jurisdiction	
Credit Rating Agencies	Application of IOSCO Code	
MIFID (Market in New Financial Instruments)	Level 2 details on - Market transparency - Intermediaries (organisational requirements, conflict of interest rules, client order handling rules) - Cooperation and Enforcement	Financial Instruments Markets Directive 2004; Market Abuse Directive.
Investment Management	Rules applying to regulation of investment trusts	UCITS (investment trusts) Directive

CESR’s working group on *prospectus rules* completed its first round of level 2 consultations in October 2005, which concentrate on creating rules of concrete implementation for the framework of the Prospectus Directive, and has since moved on to discussing level 3 issues, which concentrate on coordination of the appropriate financial services regulators of the member states. The working group on transparency has the most responsibilities with regard to the securities directives, covering the Transparency Directive and the Market Abuse Directive’s requirements on company information disclosure to the public.

The Market Abuse Directive proved to be less than easy to deal with, and so CESR's political group (CESR-POL) was formed between October 2004 and May 2005 to sort out what sort of activities are acceptable and which are not. In particular, implementing the directive required discussions about what constitutes accepted market practices by company management and the financial services industry, that are also acceptable to the regulators and the finance ministries.

Another operational group, CESR-FIN, was created with three subcommittees to deal with issues of enforcement (level 4), reporting standards, auditing procedures and accounting standards. The subcommittee on enforcement (SCE) is focused on the supervision of companies listed on stock exchanges in the single market, and therefore serves to allow national regulators to exchange views and mutually monitor the efficacy of their activities. The subcommittee on endorsement (SISE) is focused on standards for reporting on company performance with 'alternative' means. This is not as yet very well defined, but could conceivably encompass directors' reports that comment on issues of importance to stakeholders (like employees or the community in which the company does business) rather than shareholders.

The Audit Task Force, also within CESR-FIN, is responsible for providing advice to the Commission on the modernisation of the statutory audit, and its application by the auditing chambers in the member states. Finally, the Equivalence group is focused on the development and use of International Accounting Standards by the European Union. As has been mentioned, accounting standards have a regime of their own, but CESR plays a role in observing developments and providing advice from the point of view of its impact on financial market regulation in its areas of jurisdiction. Accounting standards have strong effects on transparency and are applicable to MAD, as one might imagine. Finally, CESR has set itself a Mediation Task Force to internally sort out jurisdictional conflicts amongst the national regulators. Despite the directives' provisions for assigning jurisdiction, disputes apparently do arise, and CESR provides both coordination and informal adjudication functions in this regard. This is not a formal procedure, and there are no formal rights that the national regulators could demand before the European Court of Justice, and it is not something that CESR provides open information on.

CESR's work is not simply intergovernmental. Its committees and groups invite market participants (i.e. interested lobby and corporate actors) to take part in its consultation process, and the business sector takes advantage of this opportunity to have their say before recommendations are made to the Commission. CESR's reports take great note of the responses when formulating the reports. This raises the question of whether there may be capture of CESR by financial sector interests, as a standard question of regulation. CESR appears to place value on using the consultation process to try to avoid unnecessary regulation or unintended consequences of their decisions. How far business lobbies are able to push back regulatory recommendations of CESR is unclear at present, but it is notable that the consultation process focuses on market participants and not on actors, even institutionalised lobbies, with strong opinions on the matter, such as shareholder rights lobbies. This gives the impression of a rather one-sided consultation process.

Another aspect of CESR's work within the context of European financial market regulation is its close interaction with other bodies active in the policy field. CESR has observer status in all of the regulatory and management committees staffed by national civil servants responsible for regulations attached to the securities directives. This are the Financial Services Committee, the European Securities Committee, the Accounting Regulatory Committee, to the UCITS Committee, responsible for regulating unit trusts, and to EFRAG, the private European professional association of accounting and auditing experts, which also advises the Commission on the adoption of new International Accounting Standards. CESR keeps a close watch on all stages of the rule-making process.

In sum, we see the strong and quick development of a regulatory regime in Europe for financial services between 2001 and 2005. These cover the financial services sector dealing in company shares, unit trusts and new financial instruments. The regime is based on an elaborate set of principles that require the member states of the EU to develop strong regulatory capacity, to coordinate their activities through CESR, and to delegate ongoing authority to create new regulations to the European Commission with CESR making recommendations and the European Securities Community in a position to supervise and intervene in the process on the part of national executives acting collectively. The regime is therefore truly multilevel in nature, in which European and national actors work together.

The timing of changes to financial market law and regulation made in two sample member states, Germany and the UK, show that national level changes were at least as quick if not faster than developments at the European level. This demonstrates that in contrast to the case with company law directives, the member states had already undergone convergent internal transformations before agreeing to the establishment of a policy regime in 2001. This confirms that there were no strong public concerns about negative policy implications of delegating rule-making authority to the European level. On the contrary, financial market regulation at the European level allowed the approximation of regulation across the member states, and just as important, help regulators deal with cross-border transactions as well as in-country issues.

The Accounting Standards Regime

Accounting standards are central to the quality of financial and other information made available to financial markets, and in those policy circles that deal with such issues, there has been a great deal of activity since the beginning of the 2000s to promote an overhaul and harmonisation of standards to increase the transparency and comparability of company reports within countries and between them. Within countries, the concern about connections between corporate collapses and accounting standards is paramount, whilst in the context of European financial markets, the comparability of company accounts is in the forefront. Improving regulation in this area involves the International Accounting Standards Board (IASB), the European Commission, an EU regulatory committee known as the Accounting Regulatory Committee, and the national (accounting) standard setters of each EU member state. CESR and its international equivalent, IOSCO[23], are involved in an observer capacity. The accounting regime demands that the EU member states assign national standard setters responsible to government to recommend concrete accounting rules that apply principles set by the IASB. The policy regime also required the development of explicitly defined rules setting out the rights and responsibilities of the Commission, member states and IASB before work could proceed. Given the small public interested in the topic, early decisions in the member states to use international standards before the issue arrived at the EU level, and the decision of all actors to use international accounting standards as a supplement to national standards rather than as alternatives, the erection of the regime was early and uncomplicated. This led to the creation of a multilevel regime, in which a private actor, the IASB, would form the centre of the activity, rather than the Commission.

International Accounting Standards (IAS) Regulation (1606/2002, amended 2238/2004)

After winning approval for the launch of the Financial Services Action Plan, the Commission brought the Council and the Parliament to harmonise accounting standards by adopting

[23] International Organisation of Securities Exchange Regulators

International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS) as set by the International Accounting Standards Board (IASB) in London. The Commission cited ensuring the transparency of information for investors, furthering the integration of financial markets in the EU, and improving access of EU companies to finance as its main reasons. IFRS seeks to provide a clear view of the current market value of all assets and liabilities that the company has, and often differs from generally accepted accounting practices (GAAP) in national jurisdictions, which prescribe differing degrees of transparency and averaging the value of assets and liabilities for reporting, dividend calculation and taxation purposes. Directive 2001/65/EC amended the Fourth and Seventh Directives to permit the practice of 'fair value accounting.'[24] It also won limited support for implementing IFRS. The regulation set up an Accounting Regulatory Committee to aid the Commission in the assessment of accounting standards, but IFRS enforcement remained in national jurisdiction. At the international level the Commission has an advisory seat on the IASB's Standards Advisory Council alongside accounting experts from around the world in an attempt to exert some influence.

Member state support for IAS reflected a demand for increased information for European financial markets, both for normal investment and criminal investigation purposes.[25] It required more of an expansion of national accounting law rather than an overhaul. The new standards were used for information only, rather than creating adjustment pressure on dividend practices or on national taxation systems, and affected only the largest companies. The requirement that member states set up accounting standards boards, where they did not already exist, and to endow them with the statutory mandate to read you accounting standards and represent that member state within the IASB in the future development of IFRS constitutes the structural changes that bind national and international networks together in a multilevel system of governance centred on a private standard-setting body. Table 4 shows the applicable European and national implementation of the IAS decision.

[24] Official Journal L 283, 27.09.2001. See also COM (2001)80 (COM 2001a).
[25] Interviews with German and British officials.

Table 4: The IAS Directive and national implementation

EU	Coordination	Germany	UK
IAS Directive 2001	IASB sets IAS, IFRS independently with input from Standards Advisory Council (with national input, EU observer status) Commission reviews International Accounting Standards for use in EU in consultation with national standard setters in Accounting Regulatory Committee	Investment Facilitation Act 1998 allowed IAS, US-GAAP financial reports German Accounting Standards Committee and German Standardisation Board created to represent German interests to IASB, implement IAS and IFRS in Germany	Government demands development of IAS, recognition by EU Commission, pushes IASB to adopt standards more quickly Financial Reporting Council made independent

The German and British cases an early willingness to adopt IAS standards in one form or another. In Germany, companies were permitted to issue financial records using IAS after 1998. In Britain, the Accounting Standards Board and its parent organisation, the Financial Reporting Council (FRC), felt, if anything, that IAS was not being modernised quickly enough. The only changes that the passage of the IAS directive in 2001 made on these countries was that it required Germany to create national standard setters to engage with the IASB and recommend the implementation of IAS to the German government, and that it required Britain to make the FRC a statutory body acting under the power of law, rather than under the power of convention. This shows that the mode of adopting principles-based IAS posed no problem for countries with codified standards (Germany, similar to most of continental Europe) and countries with self-regulation (UK). It required, however, the build-up of a national regulatory state to interact internationally and apply international standards.

There has been some controversy amongst the EU member states about how well the Standards Advisory Council is able to advise the IASB, and whether the Board actually listens to it. In particular, there has been concern that the Board apparently expects the SAC to communicate its decisions and thinking to the delegations represented on the Council, including national standard setters, rather than the other way around after IASB constitutional changes in 2005. The French Finance Ministry in particular protested against plans to relegate national standard setters to conveyors of Board decisions.[26] The questionable utility of the SAC, coupled with the lack of signalling by the Board to include stakeholders in discussions about the proposed standards may also have something to do with the fact that the stakeholder community has not involved itself in the process.

Details of Standards and Backlash

Another controversy has arisen from the intent of the member states to ensure that their newly developed national standard setters will continue to have responsibility for making some concrete rules in national jurisdictions.

The easy accommodation of national standards and international principles came under question with the IASB's 2005 reform. Specifically, IFRIC's role as an interpreter of IFRS is raising the possibility of rule-based standards through the back door, thereby challenging the role that national standard setters have in influencing the rules they apply, and threatening greater constraints on commercial codes in civil law countries.[27] The overall thrust of the IASB's reorganisation in 2005 was to centralise the organisation and place more emphasis on top experts who would communicate decisions to the national standard setters. Upgrading IFRIC to develop more concrete rulings created the possibility of a more binding and thick form of private regulation than had previously been the case and has been resisted accordingly in some countries. France has laid protest on this account (ibid.), and the German government maintains that the palate of IAS rules will not crowd out national standards as laid out in the Commercial Code, which will continue to be used for taxation purposes. The reluctance of national governments to accept such rulings is one important reason why IFRIC has passed only six interpretations to date.

Conclusions

This paper has presented information on the negotiation, development and operating structures of three policy regimes. All require the confirmation or the development of a statutory regulatory structure in the member states of the European Union that replaces self-regulation. All of them contain rules and mechanisms for the coordination of national

[26] Bracchi, A. (Conseil National de Compabilité) Letter to IASB (Warren McGregor), 29 July 2005.
[27] Donnelly, Shawn (2007) 'The International Accounting Standards Board,' *New Political Economy* (forthcoming, March 2007).

authorities and their regulatory activities. Company law directives play a role in creating the regulatory space for trading in company shares in the single market for the first time. Securities directives secure a regulatory framework for trading in company shares and unit trusts with the purpose of ensuring investor protection and financial system stability. Accounting directives and related regulations ensure transparency for investors in the single market.

The regimes differ however in the manner in which they are governed. We have seen through the timing of national and European legislation that the securities regime and the accounting standards regime created no serious public issues for Germany and Britain, and that both were ahead of the EU in terms of their changed thinking toward statutory regulation and shareholder-oriented governance. This context of norm convergence was the prerequisite for national governments to embed their regulatory structures in newly structured multilevel forms of governance that delegate some rule making functions to supranational actors: to the Commission in the case of the securities regime, and to the IASB in the case of accounting standards. Norm convergence toward shareholder-friendly statutory regulation was seen as a necessity in both countries as an important part of promoting economic investment and growth, and the delegation that followed was facilitated by the relatively small public interest in these rules and regulations.

Such delegation was only unthinkable in the case of the company law regime, which touched on issues of great importance to the broad publics of the countries involved, and generated strong resistance on the part of national governments and societal actors to change existing arrangements. The member states of the EU were able to preserve the distinctiveness of their company regulation and their direct and undivided responsibility by creating an intergovernmental regime that the Commission and Parliament eventually accepted for fear of achieving no agreement at all.

The result is a highly differentiated regulation structure in the EU that supports the hypotheses set out above. Agreement on the founding principles of policy regimes was required to the extent that it defined the nature of integration, the actors, structure and mode of interaction and the balance of European and national elements of regulation. The degree of norm convergence or norm divergence in the substance of regulation, demonstrated by the content and timing of domestic legislation, proved to be key in determining whether a regime could delegate authority beyond the nation state. This provides us with improved understanding of the changing nature of the regulation of the European corporate economy, the reasons for its development, and the prospects for future development.

References

Börzel, Tanja (2002) *States and Regions in the European Union: institutional adaptation in Germany and Spain*. Cambridge: Cambridge University Press.

Bracchi, A. (Conseil National de Compabilité) Letter to IASB (Warren McGregor), 29 July 2005

Busch, Andreas (2003) *Staat und Globalisierung: das Politikfeld Bankregulierung im internationalen Vergleich*. Wiesbaden: Westdeutscher Verlag.

Callaghan, Helen and Höpner, Martin (2004) *Parties or Nations? Political Cleavages over EU Efforts to Create a Single European Market for Corporate Control.* Paper presented to the Politics and Economics Section of the German Political Science Association meeting on EMU, 3-4 December 2004, Cologne.

Donnelly, Shawn (2006) 'Founding Myths of European integration and implications for Turkey,' in Nanette Neuwahl and Haluk Kabaalioglu (eds) European Union and Turkey. Istanbul: Turkish University Association for European Community Studies, pp. 95-118.

-- (2007) 'The International Accounting Standards Board,' *New Political Economy 12, 1: forthcoming*

European Commission (2003) *Securities: Commission adopts two technical measures to implement the Prospectuses and Market Abuse Directives.* Brussels, IP04/563, 29 April 2003.

European Commission COM (2001)80 (COM 2001a).

European Union (2001) *Official Journal* L 283, 27.09.2001.

Hooghe, Lisbeth and Gary Marks (1999) 'The making of a polity: the struggle over European integration,' in Herbert Kitschelt, Peter Lange, Gary Marks and J. Stephens (eds) *Continuity and Change in Contemporary Capitalism*. Cambridge University Press, 70-97.

Hollingsworth, J. Rogers (1997) 'Continuities and changes in social systems of production: the cases of Japan, Germany and the United States,' in J. Rogers Hollingsworth und Robert Boyer (Hrsg.) *Contemporary Capitalism: the embeddedness of institutions*. Cambridge: Cambridge University Press, 265-310.

Knill, Christopher und Lenschow, Andrea (2003) 'Modes of Regulation in the Governance of the European Union: towards a comprehensive evaluation,' *European Integration Online Papers*. 7, 1. http:www.eiop.or.at/eiop/2003-001a.htm

Majone, Giandemenico (1996) *Regulating Europe*. London: Routledge.

Milward, Alan (1992) *The European Rescue of the Nation State*. Berkeley: University of California Press.

Neyer, Jürgen (2004) 'Explaining the unexpected: efficiency and effectiveness in European decision-making,' *Journal of European Public Policy* 11, 1: 19-38.

Puetter, Uwe (2006) *The Eurogroup*. Manchester: Manchester University Press.

Radaelli, Claudio (2004)) 'Europeanisation: solution or problem?' *European Integration Online Papers*. Vol 8, Nr. 16. http://www.eiop.or.at/eiop/texte/2004-016a.htm.

Schäfer, Armin (2005) *Die Neue Unverbindlichkeit: wirtschaftspolitische Koordinierung in Europa*. Frankfurt: Campus-Verlag.

Streeck, Wolfgang und Thelen, Kathleen (2005) 'Introduction,' in Streeck und Thelen (Hrsg.) *Beyond Continuity: institutional change in advanced political economies*. Oxford University Press, 1-38.

Tömmel, Ingeborg (2007) 'Governance und Policy-Making im Mehrebenensystem der EU,' *PVS* 2007, 2 (forthcoming).

Young, Oran R. (2000) *Governance in World Affairs*. Ithaca: Cornell University Press.