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A REPORT ON THE TRANSATLANTIC FINANCIAL SERVICES REGULATORY DIALOGUE

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Abstract

The Transatlantic Financial Markets Dialogue led by the SEC and the European Commission has achieved some notable successes, particularly with respect to the consolidated supervision of financial conglomerates and the development of a plan to achieve convergence in corporate financial reporting. On both sides of the Atlantic there is a clear ongoing commitment to the Dialogue as a key mechanism for the development of efficient and credible regulatory solutions that guarantee effective investor protection and a high level of business efficiency. This paper reports on a two-day roundtable discussion that took place at Cambridge University, UK, in September 2005 to explore ways in which the academic community can contribute to this transatlantic debate. Lively discussion between the policymakers, regulators, market participants and academics who attended the roundtable yielded a number of thematic concerns, which, the paper suggests, could form the basis of a programme for further work. Finally, the paper announces the establishment of a seminar series, to be based in the UK, on the Transatlantic Financial Services Regulatory Dialogue and invites contributions.

Keywords: financial markets, regulation, European Union, transatlantic, dialogue, cross-border services

TRANSATLANTIC FINANCIAL SERVICES REGULATORY DIALOGUE

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I The Evolving Transatlantic Financial Market

In recent years, EU and U.S. financial markets have experienced an unprecedented period of change characterised by a number of themes.

Market interconnections

First and most fundamentally, international financial markets have become ever more interconnected. Around the world, the corporate sector increasingly looks to international financial markets as a major source of new capital. At the same time, institutional investors are seeking to diversify their portfolios through the acquisition of securities outside their home markets. Financial firms have responded by strengthening their presence in the international marketplace. U.S. and EU links are particularly strong: 15% of total capital raised by EU companies through equity issues occurs through primary offers in the U.S..[1] Over 50% of U.S. foreign direct investment in the banking and finance sectors is in Europe, while approximately 75% of European foreign direct investment in the banking and insurance sectors is invested in the U.S.[2] The integration of transatlantic markets has been linked to a potential reduction of 60% in trading costs on both sides of the Atlantic, a 50% increase in trading volumes, and a 9% decline in the cost of equity capital.[3]

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[1] Figures quoted in the Testimony of Alexander Schaub, Director–General, DG Internal Market of the European Commission before the Committee on Financial Services, U.S. House of Representatives May 13, 2004, available via http://europa.eu.int/comm/internal_market/finances/docs/general/2004-05-13-testimony_en.pdf (accessed April 2006).

[2] HM Treasury, Financial Services Authority, and Bank of England, *After the EU Financial Services Action Plan: A New Strategic Approach* (2004), p. 35.

[3] European Commission, *A Stronger EU-US Partnership and a More Open Market for the 21st Century*, COM (2005) 196, p. 9.

Product innovations

Accompanying this intense pace of market developments has been the growth of new products and financing techniques, including an explosion in hedge funds and other innovative investment vehicles. The EU, in particular, has seen a dramatic change in its financial landscape with a deeper demand for market-based investments, the emergence of a population of sophisticated institutional investors, a deepening of liquidity, and an expansion in the range of product and financing techniques. In response to these developments, the EU adopted and is now close to concluding the Financial Services Action Plan (FSAP),[4] a major effort to upgrade its regulatory framework for a more integrated and more heavily regulated European financial market.

Challenges of financial scandals

While the transatlantic financial markets have become deeper and more inter-connected, both sides of the ocean have been rocked by major financial scandals, epitomised by the Enron-Worldcom debacles in the United States in 2001 and 2002 followed by the Parmalat failure in Europe shortly thereafter. The regulatory response to these scandals, most notably the Sarbanes-Oxley Act of 2002 in the United States, has been substantial, with major and not fully anticipated extraterritorial implications, particularly for foreign issuers with securities listed on U.S. exchanges.

Institutional innovations

This period of rapid change has also seen major institutional innovation, with the arrival of important new supervisory and regulatory bodies, internationally, regionally, and domestically, provoking allied questions as to the effectiveness of institutional governance. In the U.S., important institutional developments include the establishment of the Public Company Accounting Oversight Board (PCAOB) and more aggressive Securities and Exchange Commission (SEC) and stock exchange oversight of corporate

[4] *Implementing the Framework for Financial Markets: Action Plan* COM (1999) 232 (the FSAP).

governance. Internationally, the International Accounting Standards Board (IASB) is now a key standard-setter for financial markets worldwide. In the EU, a new law-making process for securities markets has been developed under the Lamfalussy process for delegated securities law-making: the Committee of European Securities Regulators (CESR) which advises the Commission on legislation has emerged as a key influence on policy development and on the evolving pan-EU supervisory structure. The Lamfalussy structures have now been extended to the banking, insurance, asset management, and pension sectors and are increasingly playing an important role in EU financial market supervision.

Retail participation in capital markets

The role of retail investors in the capital markets is changing.[5] This development is most pronounced in the segmented European capital markets where direct individual participation in capital markets has traditionally been less substantial than in the United States.[6] On both sides of the Atlantic, changes in public pension policy have been one reason for greater retail participation in capital markets. The reduction of public pension programmes in many European jurisdictions, along with proposals to privatise social welfare provision at least to some degree, has prompted regulatory officials to consider the need for enhanced consumer protections and financial literacy programmes.[7] The extent to which cross-border transactions should be regulated with an eye towards replicating protections designed for retail investors in domestic markets is a matter of continuing debate in policy circles. So too is the very notion of investor protection: investor protection in a liberalised international marketplace could be argued to depend on the promotion of effective diversification practices which might suggest that

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[5] See, for example: L. Stout, "The Investor Confidence Game" (2002) 68 *Brooklyn Law Review* 407; A. Jackson, "The Aggregate Behaviour of Individual Investors" (2003), available at SSRN: http://www. ssrn.com/abstract=536942 (accessed May 2006).

[6] See, for example: European Commission, *Financial Integration Monitor 2004* SEC (2004) 559.

[7] In its White Paper, *Financial Services Policy 2005-2010* COM (2005) 629, December 2005, p. 7 the Commission noted that "[a]s the public sector gradually withdraws from financing some aspects of social systems, there is a need for increased awareness and direct involvement of citizens in financial issues."

regulators should facilitate access to foreign investments even at the cost of some lessening of the degree of protection provided or at least non-uniformity in the mechanisms of investor protection.

II The Establishment of a New Network to Contribute to Transatlantic Dialogue on Financial Markets

The Move Towards Dialogue

The global economic significance of capital markets and their intensifying interdependence have led U.S. and EU policymakers to recognise the need for structured dialogue and cooperation with a view to ensuring efficient and credible solutions that guarantee effective investor protection and a high level of business efficiency. The U.S. EU Financial Markets Dialogue between the SEC and the European Commission, which is bolstered by the formal contacts that are also maintained between CESR and the SEC and the Commodities Futures Trading Commission (CFTC), aims to promote better mutual understanding of regulatory approaches, address potential conflicts from regulatory overspill, and consider regulatory issues of common interest. It has achieved some notable successes, particularly with respect to the consolidated supervision of financial conglomerates[8] and with the development of a plan to achieve convergence in corporate financial reporting.[9] A commitment to dialogue is also evident in the Commission's 2005 Report on *A Stronger EU-U.S. Partnership and More Open Market*

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[8] See the European Financial Conglomerates Committee and Banking Advisory Committee's July 2004 Guidance on the equivalence of the U.S. supervision regime, available via http://europa.eu.int/comm/internal_market/financial-conglomerates/docs/guidance-usa-final-060704_en.pdf (accessed April 2006).

[9] Political agreement was reached in April 2005 on a "roadmap" for convergence on IAS/IFRS and U.S. GAAP. See European Commission Press Release, "Accounting Standards: EU Commissioner McCreevy sees agreement with SEC as progress toward equivalence", available via http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/469&format=HTML&aged=0&language=EN (accessed April 2006).

for the 21 Century which acknowledges the need for convergence and functional equivalence between the U.S. and the EU in key areas of market regulation.[10]

The market seems to agree with the emphasis that policymakers and regulators on both sides of the Atlantic are now placing on dialogue in shaping responses to policy concerns:[11] a recurring theme of the recent swathe of reports in 2004 and 2005 assessing the EU's FSAP reforms is the need for effective transatlantic cooperation and dialogue.[12]

In the recent White Paper on the European Commission's financial services policy priorities up to 2010, the Commission described the goals of the EU-U.S. Financial Markets Dialogue as being: "exchanging information, identifying potential regulatory problems upstream and seeking mutually acceptable solutions."[13] Both partners in the Dialogue can be expected to call upon the expertise of a wide range of epistemic groups to assist them in the achievement of these goals.

The Academic Community and the Transatlantic Dialogue

There are good reasons to suggest that the academic community can make a significant contribution to the development of the Dialogue.

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[10] COM (2005) 196.

[11] See, for example, the comments of Anthony Belchamber, chief executive of the UK Futures and Option Association: "No one should underestimate the importance of this dialogue. Regulatory complexity and duplication is beginning to impose a cost burden that is…..forcing up trading and investment costs for customers and leading to needless commercial inefficiencies." Reported in I. Simensen, "US and EU financial regulators discuss transatlantic framework", *Financial Times*, September 14 2005

[12] "The Group would emphasise the enormous value of a continuous and formalised dialogue between the EU and the US, and other major financial centres worldwide, in promoting upstream convergence and ensuring that there are no adverse spillover implications for outside jurisdictions resulting from new regulation": Securities Expert Group, *Financial Services Action Plan: Progress and Prospects* (May 2004), p. 14, available via
http://europa.eu.int/comm/internal_market/finances/docs/actionplan/stocktaking/report-securities_en.pdf (accessed April 2006).

[13] N. 7 supra, p 15.

Firstly, the role of cross-border dialogues among regulatory officials has been the subject of recent and illuminating academic work. Braithwaite and Drahos, for example, suggest that regulatory dialogues are a key way in which government officials deal with the uncertainties of the world. Through such dialogues, officials discover the state of their relations with their counterparts in other jurisdictions as well as information about regulatory cooperation among officials in other jurisdictions.[14] Moreover, Braithwaite and Drahos contend, webs of dialogue are relatively good (compared to more coercive mechanisms) at delivering effective forms of global regulation because the dialogue: (1) defines issues; (2) enhances the contracting environment so that complex interdependency and issue linkage can motivate agreement and compliance; (3) constitutes normative commitments; (4) institutionalises habits of compliance; and (5) institutionalises informal praise and shame for defection from the regime.[15] By examining the Transatlantic Financial Services Dialogue in light of this evolving academic literature, scholars may be able to provide valuable insights in assessing the extent to which that Dialogue is succeeded in providing the benefits thought to have been achieved through dialogues in other contexts.

Secondly, academics can play a critical role in deciphering the content and significance of the Transatlantic Dialogue for the general public. Cross-border negotiations on the regulation of financial services are notoriously difficult for the public to understand. Not only is the subject matter inherently complicated, but officials often prefer to proceed with some degree of confidentiality, both to facilitate deliberations and also to prevent financial instability. The number of parties to the Transatlantic Financial Services Dialogue adds a further layer of complexity. On the U.S. side, many different regulatory agencies participate in the dialogue; on the other side, both EU officials and representatives of certain key Member States play critical roles. Given this multi-faceted complexity, one of the challenges to the Transatlantic Financial Services Dialogue is that the resulting decisions may lack democratic legitimacy because the process is too opaque

[14] J. Braithwaite and P. Drahos, *Global Business Regulation* (CUP, 2000) 562 - 563.

[15] Ibid, 556.

for the public to comprehend and hold their own officials accountable. The intensity of accountability concerns is likely to be correlated to the range of matters achieved through a dialogic mechanism: self-evidently, a purely information-sharing dialogue is much less troubling than a dialogue that plays a normative role.[16] Given the risks and costs of financial regulation, particularly with the increased sophistication of market actors, a necessary minimum prerequisite for optimal regulation is that it emerges from an effective governance framework. A particular risk is that the growing community of national, regional, and international standard setters, subject to varying degrees of accountability, may create an unhealthy bias in favour of regulatory solutions to transatlantic issues. Academic input can act as a corrective.

Thirdly, the new emphasis on dialogue in financial services regulation is part of a broader trend away from command-and-control systems to more cooperative approaches, a trend which is driven by the globalisation of the policy process.[17] Scholars have recognised the need for a better understanding of cooperative initiatives across a range of fields and have been striving towards it.[18] The EU-U.S. Financial Services Dialogue can benefit from careful assessment of its operations and achievements as compared to those of similar initiatives in other areas.

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[16] A.M. Slaughter, "Agencies on the Loose? Holding Government Networks Accountable" in G.A. Bermann, M. Herdegen and P.L. Lindseth, *Transatlantic Regulatory Cooperation Legal Problems and Political Prospects* (OUP, 2000) 521 – 546.

[17] S. Picciotto, Sol "Introduction: Reconceptualizing Regulation in the Era of Globalization" (2002) 29 *Journal of Law and Society* 1. Competition or anti-trust regulation is one area where heavy reliance has been placed on transatlantic dialogue: I. Maher, "Competition Law in the International Domain: Networks as a New Form of Governance" (2002) 29 *Journal of Law and Society* 111. So too is international trade: D. Coen and W. Grant, "Corporate Political Strategy and Global Public Policy: a Case Study of the Transatlantic Business Dialogue" (2001) 13 *European Business Journal* 37 (reviewing the Transatlantic Business Dialogue (TABD), set up in 1995 as a joint initiative of the European Commission and U.S. State Department). Other sectors where there have been initiatives to establish structures for transatlantic dialogue are telecommunications, cyberspace, biotechnology and industrial and intellectual property: Bermann, Herdegen and Lindseth, *Transatlantic Regulatory Cooperation*, p. 7.

[18] The collection of papers in Bermann, Herdegen and Lindseth, *Transatlantic Regulatory Cooperation* emerged from a conference at Columbia Law School which had as its central purpose the aim of achieving a better understanding of the processes of transatlantic regulatory cooperation.

Fourthly, recent law and economics scholarship has deepened understanding of how markets behave and of the relationship between regulation and economic activity.[19] Important evidence is also emerging of how market actors have responded to the recent adoption of more intense regulation. The insights yielded by this scholarship are directly relevant to the subject-matter of the Financial Markets Regulatory Dialogue.

There is good reason for academics to be interested in the EU-U.S. Financial Markets Regulatory Dialogue. The Dialogue is taking shape at a critical stage in policy development on both sides of the Atlantic. In the EU, after a hectic period of law reform, a period of assessment and reflection is underway. In the U.S., the ramifications of the Sarbanes-Oxley Act and related reforms are becoming clearer. Uncertainties persist, however, in a range of significant areas, including the impact of law on market behaviour and the effectiveness of governance in the expanding range of standard-setters. Uncertainty heightens the need for careful and properly-informed consideration of recent policy developments and of the appropriate responses to new challenges in the transatlantic context. There are thus exciting opportunities for scholars to establish research agenda that encompass real problems and have the credibility to influence policy agenda-setting by the principals in the Financial Markets Dialogue.

What are the ways in which academics can most usefully contribute to the debate on the development of appropriate regulatory responses to transatlantic financial market activity? How can academics identify the key issues that need to be addressed and ensure that they have properly understood their practical significance? Is there scope for establishing closer contact between U.S. and EU scholars so that the academic case for regulatory action can be developed within an environment of cooperative knowledge-sharing that is akin to, and therefore likely to fit well with, that which the principals in the EU-U.S. Financial Markets Dialogue are seeking to promote? In particular, how can U.S. financial market scholarship, which reflects its wide experience of long-established, sophisticated regulation be combined most effectively with the expertise that EU

[19] Epitomised perhaps by the "law matters" scholarship. See generally, S. Choi, "Law, Finance, and Path Dependence: Developing Strong Securities Markets" (2002) *Texas Law Review* 1657.

academics have recently developed assessing large-scale and accelerated regulatory design, across an integrating market with developing market sectors? It was with a view to exploring questions such as these that the authors of this paper organised at Cambridge University the first of what is hoped will be a series of seminars on transatlantic financial services regulatory dialogue. The remaining parts of this article describe the organisation of the seminar (Part III), summarise the deliberations (Part IV) and outline a programme for further work (Part V). Part VI concludes.

III Seminar organisation

The seminar brought together U.S. and EU academic experts on the regulation of financial markets, senior officials from the European Commission, the SEC and the PCAOB, heads and senior officers of EU member state national financial regulatory agencies, representatives of the International Organization of Securities Commissions (IOSCO) and the IASB, which are amongst the most significant international norm-creating bodies in the world, and leading figures from the financial services industry and the professions. Financially supported by a grant from the British Academy, as well as by Harvard Law School, the Cambridge University Endowment for Research in Finance (CERF) and a private-sector source,[20] some 40 participants met for a two day intensive roundtable discussion.

The aim of the meeting was to shape and inform a research agenda, to develop contacts between academics, regulators and financial market participants, and to explore mechanisms whereby academic discourse could best contribute to the broader transatlantic regulatory dialogue. With that in mind, the discussion was organised around a series of topics, on which background papers and short position papers were circulated in advance. In keeping with the agenda-forming nature of the event, participants were

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[20] Herbert Smith LLP in association with Gleiss Lutz and Stibbe.

not expected to produce fully developed research papers.[21] The topics were: differences and similarities in U.S. and EU regulatory structures; transnational integration (embracing multinational offerings and prospectuses; cross-listing; delisting); trading screens and clearing and settlement; auditing and accounting governance and regulation; credit rating agencies; supervisory cooperation (embracing home and host country regulation; mutual recognition); and hedge funds.

IV Summary of deliberations

A number of key themes emerged from the discussion. It also became clear that these overarching themes were common to discrete areas of financial market regulation which raise very particular problems in the transatlantic context, including financial reporting, financial conglomerates, credit rating agencies, and hedge funds.

Transatlantic regulatory dialogue proceeds from the premise that, as financial markets become more interconnected and market participants increasingly operate on a global scale, regulatory problems can no longer be solved on a national or even regional basis. In order to prevent problems from simply re-emerging elsewhere, financial regulators must necessarily take a global view. The interdependent nature of regulation and markets is fundamental to any assessment of the regulatory environment.

But when local authorities all start taking a global view, questions of coordination and cooperation take centre stage. Global solutions can be vulnerable to divergent enforcement and implementation. Close attention must therefore be given to mutual recognition and equivalence devices and the way in which they are implemented in

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[21] However, some of the papers considered at the seminar have since been further developed and have appeared as working papers (see, e.g., H.E. Jackson, "Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications" Harvard Law and Economics Discussion Paper No. 521, (2005), available at SSRN: http://ssrn.com/abstract=839250) or have been accepted for publication as journal articles (see, e.g. N. Moloney, "The EC and the Hedge Fund Challenge: A test case for EC securities policy after the Financial Services Action Plan" [2006] *Journal of Corporate Law Studi*es 1; H. Jackson et al., "Foreign Trading Screens in the United States'[2006] *Capital Markets Law Journal* (forthcoming)).

particular areas. Similarly, where coordinated solutions to the challenges of interdependence are developed, their success depends ultimately on the effectiveness of supervision.

Finally, as regulators and policymakers adopt devices and processes to establish mutual recognition and equivalence standards, they should also be aware of the governance structures in which they operate and the principles upon which these structures are based. Political scientists have defined governance as the establishment and operation of a set of rules of conduct that define practices, assign roles, and guide interaction in order to address collective action problems.[22]

Interdependence

At the seminar Alexander Schaub (Director General, DG Internal Market and Services, European Commission) spoke of the "vertiginous speed"[23] of financial market integration and continued: "When markets move together, regulators and supervisors have to follow suit. Rules and supervision that date from the times when the effect of regulation stopped at national or continental borders – or when runners took round orders on pieces of paper - are inadequate now."[24] This view was strongly supported by other participants. It was widely accepted that policy responses to new, and mutual, regulatory and market challenges have to be considered in an interdependent transatlantic environment.

The Sarbanes-Oxley reforms are a good example of a regulatory initiative that was intended to address issues that transcend national boundaries. Ethiopis Tafara (SEC), a seminar participant, has commented in a jointly-written paper on the interest, concern, and debate that Sarbanes-Oxley has generated outside the United States: "When the SEC was created, no one could have imagined that revisions to the U.S. securities laws could

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[22] O. Young *International Governance: Protecting the Environment in Stateless Society* (Itahca, NY: Cornell University Press, 1990) pp. 31-33.

[23] A. Schaub, "EU Regulatory Relations with Third Countries", speech at St John's College, Cambridge, Friday 30 September 2005.

[24] Ibid.

have such an impact abroad."[25] According to Tafara and his co-author, "the SEC recognizes that its rules applicable to non-U.S. market participants must be implemented in a reasonable and measured way that fosters cooperation and consensus building … Our willingness to address foreign concerns is a testament to the importance that we place on open dialogue and to the strong relationships we have with our non-U.S. counterparts."[26] The SEC has undoubtedly made significant efforts to accommodate the legitimate concerns of foreign firms about the way in which Sarbanes-Oxley applies to them. However, the discussion at the seminar confirmed that some sticking points about the impact of US regulatory requirements on foreign issuers still remain. The fact that delisting does not terminate an issuer's reporting requirements as long as the issuer has still at least three hundred US shareholders is a particular target for criticism.[27] In an address at the seminar, Schaub referred to the US position as the "Hotel California syndrome" - You can check out any time you like. But you can never leave - and reiterated the concerns of the European Commission and European industry that it was out of date, complicated and practically unworkable.[28] In December 2005, the SEC proposed a relaxation of the requirements for de-registration that would allow a non-US company to de-register if less than 5% of its shareholders are US investors.[29] The European Commission rejected the proposal as inadequate on the grounds that most European companies registered in the US have more than 5% of their shareholdings held by US institutional investors.[30] The Commission has countered by proposing that the

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[25] E. Tafara and R.D. Strahota, "Fostering an International Regulatory Consensus", available via http://usinfo.state.gov/journals/ites/0205/ijee/tafara.htm (accessed April 2006).

[26] Ibid.

[27] Rule 12g3-2(a) under the Securities Exchange Act, codified in 17 C.F.R. 240.12g3-2(a).

[28] Schaub speech, n. 23 supra.

[29] Securities and Exchange Commission, Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports under section 15(d) of the Securities Exchange Act of 1934, Proposed **R**ule, **[**Release No. 34-53020; International Series Release No. 1295; File No. S7-12-05], available via
http://www.sec.gov/rules/proposed/34-53020.pdf (accessed April 2006).

[30] European Commission letter (G3/PP/D (20060 2945) of 1 March 2006, available via
http://europe.eu.int/comm/internal_market/securities/docs/us/ec010306_en.pdf (accessed April 2006).

SEC exclude institutional investors and other so-called accredited investors from the five percent calculation. The SEC stated that it will consider the Commission proposal, but has not yet made a decision.

Whether local laws should apply to foreign entities and the problems of regulatory duplication or incompatibility that may arise where they do so apply are issues of concern not only to corporate issuers but also in relation to many other facets of the financial services industry. For example, the application of exchange regulation under the US Securities Exchange Act of 1934 has sparked controversy when European trading platforms have attempted to locate remote screens in the United States. Discussion at the seminar indicated that this specific issue may be fading in significance as new trends and initiatives provide alternative mechanisms for US investors to access foreign securities markets. However, market ingenuity in the facilitation of investor access to foreign markets does not remove the underlying concern of national regulators in ensuring that their investors are adequately protected and may instead merely shift the focal points within the financial services industry around which such concerns converge. As Jackson, Gurevich and Fleckner noted in a paper included in the seminar documentation, "the real question for the SEC is not whether it should maintain its hard line with respect to remote trading screens, but rather how it should protect investors in a world in which cross border investment is becoming increasingly commonplace."[31] In the near future, similar issues to those considered in relation to trading screens may arise with respect to the application of U.S. clearing and settlement requirements to foreign clearing agencies. This theme was addressed at the seminar by Eric Pan. Pan suggested that regulatory barriers need to be addressed by the United States and the European Union to encourage greater market competition among clearing and settlement systems. One regulatory barrier that he identified as being ripe for reconsideration was the limited exemption from US registration requirements that the SEC has afforded to European clearing agencies, which do not currently extend to the clearing and settlement of U.S. equities. Similar concerns have already arisen with respect to the SEC's new rules for the regulation of

[31] H.E. Jackson, M. Gurevich and A.M. Fleckner, "The Controversy Over the Placement of Remote Trading Screens From Foreign Exchanges in the United States".

hedge fund advisers[32] where, controversially, the SEC's has refused to exempt from US regulation offshore advisers already regulated in their home jurisdiction.

Not all disputes involving the application of financial laws to foreign actors concern US requirements. The side effects of the EU's Financial Conglomerates Directive[33] acted as a driving force behind the establishment of the EU-U.S. Dialogue, as Schaub acknowledged at the seminar.[34] This Directive could have resulted in the imposition of EU regulatory requirements on some U.S. firms but that result was effectively sidestepped by certain changes in U.S. supervisory regimes that paved the way for EU supervisors to deem U.S. regimes to be "equivalent" and therefore within the scope of an exemption provided by the Directive.[35]

Implementation

Arguments in favour of transnational solutions based on "equivalence" or "mutual equivalence" collapse if confidence in the deliverability of consistent, effective application and enforcement by supervisors is lacking. In the wake of the FSAP, for example, the European agenda has turned sharply towards implementation and supervision in order to ensure the projected benefits of the FSAP are realised. Post-FSAP assessments all point to the need to bridge the gap between regulatory solutions and effective implementation and market supervision,[36] while the Lamfalussy structures and particularly CESR are developing practical tools for networked-based supervision.[37]

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[32] SEC Rule on Registration Under the Investment Advisers Act of Certain Hedge Fund Advisers (2005).

[33] Directive 2002/87/EC OJ (2003) L35/1.

[34]Schaub speech, n. 23 supra.

[35] General guidance from the European Financial Conglomerates Committee to EU supervisors: the extent to which the supervisory regime in the United States of America is likely to meet the objectives of supplementary supervision in Directive 2002/87/EC (Financial Conglomerates Committee, 06.07.2004).

[36] European Commission Green Paper, *Financial Services Policy 2005-2010*, COM (2005) 177 (March 2005); European Commission White Paper, *Financial Services Policy 2005-2010* n. 7 supra.

[37] CESR, Preliminary Progress Report, *Which Supervisory Tools for the EU Securities Market?* (October 2004) CESR 04-333f.

In the transatlantic context, supervision and implementation risks become acute in the auditing and accounting sphere. Post-Sarbanes-Oxley, the EU-U.S. auditing environment provides a rich dataset for any assessment of implementation and supervision risks: the U.S. PCAOB now claims oversight over foreign (EU) auditors of U.S. firms at a time when major reforms (the Eighth Directive)[38] are being introduced into the EU auditing regime. Lewis Ferguson (legal counsel of the PCAOB), led a seminar discussion on the way in which oversight of the auditing profession is evolving so as to meet the challenge of interdependence. The PCAOB has said that it wants to: "develop an efficient and effective cooperative arrangement where reliance may be placed on the home country system to the maximum extent possible. Such an arrangement has the positive effects of reducing potential conflicts of laws and minimizing unnecessarily duplicative burdens and costs for accounting firms."[39] The PCAOB regime for foreign auditors now incorporates local privacy and confidentiality requirements and a "sliding scale" of supervision which takes into account the similarities and differences between the foreign and PCAOB regime. Lighter supervision follows where it is satisfied that the home country supervisor is rigorous and independent from the accounting profession. Ferguson also emphasized the development of cooperative PCAOB work practices, including joint investigations, and the added value the PCAOB can add to the oversight of highly specialised audits in home countries.

Notwithstanding these cooperative efforts, the evolving transatlantic context for auditing looks set to place substantial strains on the new Eighth Directive regime for statutory auditors. Although Member States are now required to establish public oversight systems for statutory auditors and audit firms, reliance on the "home country system" under the PCAOB model remains problematic as does effective cooperation with the PCAOB. There is no EU supervisory body which can liaise directly with the PCAOB, coordinate

[38] Directive on statutory audit of annual accounts and consolidated accounts and amending Council Directives 78/660/EEC and 83/349/EEC (adopted October 2005, not yet published in the Official Journal).

[39] PCAOB Release No 2003-020 at 1 (Oct. 28, 2003).

joint investigations, and ensure that equivalent and robust standards of supervision apply across the EU which might dilute the intensity of pan-EU PCAOB intervention under the PCAOB's "sliding scale" mechanism. Although the Eighth Directive is designed to develop a harmonised approach to supervision of the statutory audit, Ferguson noted that the PCAOB deals with the different supervisors on an individual basis and does not apply an EU "quality label" to Member State supervisors in deciding how to manage the supervision of EU auditors based on the quality of the home supervisory regime. The establishment by the Commission of the European Group of Auditors' Oversight Bodies in December 2005 may, however, support more effective cooperation with the PCAOB, the development of effective supervisory tools, and deepen confidence in the EU oversight regime, particularly if it supports the adoption of International Standards on Auditing in the EU, as is envisaged in the Eighth Directive.[40]

Ferguson emphasized the importance of communications with the EU on the upstream development of the Directive but also highlighted the importance of the implementation phase in addressing the challenge of interdependence and providing a stable basis for PCAOB and EU relations. National oversight combined with EU coordination may provide the best model for dealing with the new auditing environment, but much will depend on national implementation of the oversight requirements. Dialogue can promote understanding of this interdependent environment for auditing at a critical point for EU/U.S. relations.

Implementation and supervision risks also arise in the transatlantic context with respect to accounting standards (International Accounting Standards (IAS)/International Financial Reporting Standards (IFRS) and US GAAP in particular). David Devlin (President, Federation of European Accountants) led a seminar discussion on accounting standards. Although IFRS are designed to support convergence in financial reporting, and while most attention has focused on the development of the standards, he pointed to the serious

[40] European Commission Press Release, "Internal Market: 'European Group of Auditors' Oversight Bodies' Created", 14 December 2005, available via http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1596&format=HTML&aged=0&language=EN&guiLanguage=en (accessed April 2006).

risks represented by ineffective implementation and enforcement. While he argued that identical treatment of IFRS was not required and that divergences within certain parameters were acceptable, effective enforcement was essential if the new regime was to work. In the EU, Member States and their national authorities and oversight structures remain responsible for ensuring compliance with IFRS/IAS: the range of bodies involved in policing financial reporting, from regulators to private review bodies is considerable. Different supervisory structures and reporting cultures impact on the enforcement process, notwithstanding that the adoption in the EU of IAS/IFRS has as its objective the introduction of a common reporting standard. Particular difficulties arise where different reporting bodies provide different interpretations on IAS/IFRS application and take different decisions on the enforcement of what are interpreted as breaches of the reporting regime. In order to promote comparability a common approach to enforcement is being developed by CESR and specifically its CESR-Fin committee.[41]

The effectiveness of EU implementation and supervision of IFRS has implications for the transatlantic regulatory environment. The new approach to implementation is designed in part to counter the perceived threat of U.S. interpretations of IAS/IFRS becoming the standard model, given potentially diverging, inconsistent, and weak enforcement between Member States. But more positively, it also reflects the connection between more effective enforcement of IAS/IFRS and the wider goal of convergence between US GAAP and IAS/IFRS in the interests of more efficient capital-raising. In discussion at the Cambridge seminar, Tafara highlighted the SEC's current focus on the interpretation, application, and enforcement of IFRS, for example, in developing a response to the US GAAP/IFRS convergence controversy.

Enforcement and implementation questions also emerged across a number of other sessions. The discussion of credit rating agencies (CRAs), for example, considered how a balance could be achieved between managing the risks posed by credit rating agencies internationally and avoiding the dangers of overly cautious behaviour by CRAs fearful of

[41] On the standing sub-committee on enforcement within CESR-Fin, see http://www.cesr-eu.org/index.php?page=groups&mac=0&id=15 (accessed April 2006).

regulatory risk, particularly given the increasing reliance on CRAs in the Basel II environment. In particular, discussions focused on whether the IOSCO Code on Credit Rating Agencies could operate effectively without an enforcement mechanism.[42]

Governance issues

Governance has been described as the process and institutions, both formal and informal, that guide and constrain the collective activities of groups.[43] The principles that underlie any governance structure can be analysed within the principal-agent framework.[44] These principles can be summarised as *effectiveness* in the way decisions are reached, the *accountability* - procedurally and substantively - of the decision-makers to those who are subject to the decisions, and the *legitimacy* of the decision-making process in a broader social and political sense, in which those who are subject to the decisions accept the governance structure as legitimate.

A plethora of international financial standard-setting bodies exist and can be assessed in regard to whether their decision-making processes and institutional structures are compatible with principles of good governance. The Cambridge seminar discussed in particular the role of the IASB headquartered in London. The IASB now exerts the dominant influence on the content of financial reporting by EU issuers, and has become a major point of focus for US/EU dialogue, following the adoption of IAS/IFRS as the reporting standard for EU public companies and given ongoing controversy as the relationship between U.S. GAAP and IAS/IFRS.

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[42] IOSCO, *Code of Conduct for Rating Agencies* (2004).

[43] See definition in R. Keohane and J. Nye, *Power and Interdependence* (Boston: Harper-Collins, 2001) p. 12.

[44] A. Drazen, "Conditionality and Ownership in IMF Lending: A Political Economy Approach" *IMF Staff Papers 49* (2002, special issue) pp. 36-38.

Professor Geoff Whittington, an IASB Board member, discussed the structure of the IASB and reminded the participants that the IASB was not composed of regulators or government representatives, but of academics and experts from the accounting and auditing industry. They are not regulators, but *standard setters*. The IASB is responsible for electing its Board members and staff. It is accountable to the professional bodies and firms who funded its operations. It is not funded nor directly accountable to state bodies, regulators or agencies. It is the responsibility of the IASB to adopt standards that could provide accurate measures of economic value for companies and firms operating in all countries. According to Whittington, implementation and enforcement should be left to national authorities.[45] As noted above, however, the implementation and enforcement process remains a key risk for effective international financial reporting in an interdependent reporting environment.

IFRS have been controversial for financial regulators because they require increased market sensitivity in defining financial instruments and in valuing bank and financial assets. The market sensitive requirements of IFRS (and IAS) have attracted criticism by some national authorities who claim that these standards are biased in favour of Anglo-American financial practices. Some have argued that this can be attributed to the composition of the IASB and to the fact that most of its members are trained in Anglo-American accounting systems, while very few hail from civil law jurisdictions or developing countries.[46]

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[45] The national counterpart of the IASB in the United States is the Financial Accounting Standards Board (FASB), a private sector body composed of representatives from the accounting and auditing industries. The FASB was delegated substantial autonomy by the SEC in the 1960s to devise and recommend standards for the accounting industry that would be relied on by U.S. investors to assess the financial health of listed companies and firms. The adoption of the Sarbanes-Oxley Act put an end to the FASB's relative autonomy by requiring direct oversight and approval of FASB standard setting by the newly-created Public Company Accounting Oversight Board (PCAOB). It can now be said that the FASB is directly accountable to the public through the PCAOB and the SEC. There is no similar direct accountability for the IASB.

[46] In 2004, the European Commission stated that the IASB was not an accountable body because its Board and staff were not sufficiently representative of civil law European countries. It was argued that the IASB's accounting methods were too Anglo-centric in their approach and did not fairly represent civil law practices. The Commission called for the IASC and IASB to expand its membership to include more representatives from civil law jurisdictions and emerging economies. See P. Walton. "The European Union and the IASB" (February 2005) *IFRS Direct*, available via http://www.acccaglobal.com/ifrs/directarticles (accessed May 2006).

The International Accounting Standards Commission (IASC), which oversees the IASB, has reacted to criticism of its organisational and governance structure. It published a consultation document in November 2003 entitled *Identifying issues for the IASC Foundation Constitution Review* and appointed a committee to review the IASB's Constitution.[47] The IASC's review of its constitutional arrangements was a response to concerns raised by European regulatory bodies and professional associations that IASC decisionmaking was disproportionately influenced by North American and UK accounting bodies and practitioners.[48] As part of the review, the IASB undertook an internal review of its own operating procedures and considered related issues of due process that led to a number of proposals to enhance the transparency of the IASB standard setting process. Some of the proposals included improved accessibility and transparency of the IASB deliberative process, improved IASB responsiveness to constituents' comments, and extending consultation to include more stakeholder groups before announcing proposals and standards.

In addition, the IASC has agreed to a number of reforms including an expansion of the membership of its Board of Trustees to include members from Latin America, the Middle East, and Africa.[49] Although the IASC and IASB have taken significant steps in improving their governance practices, the global reach of their accounting standards mean that their decisionmaking processes will continue to be a cause of public policy

[47] At the IASC Trustees meeting in Brussels on 4 November 2003, the IASC announced the appointment of a committee to review the IASB's constitution. The constitution establishes the operating procedures of both the IASC Foundation and the IASB and requires a review every five years. The constitution provides that the IASC has responsibility for the IASB's operating procedures. See Deloitte Touche, *IAS Plus, IASC Foundation and Constitution Review – 2003-2005.* http://www.iasplus.com/restruct/constreview.htm

[48] Concerns were also raised regarding the composition of the IASC Board of Trustees. See *Strengthening the IASB's deliberative processes* (24 March 2004).

[49] IASC, *Changes in the IASCF Constitution* (Report of the IASC Foundation Trustees, July 2005).

concern and should continue to be closely scrutinised by public and private sector bodies.[50]

Governance concerns arise across the international regulatory environment and were a recurring theme of the meeting. The growing influence of CESR in pan-EU supervision, in international regulatory dialogue, and in the development of new regulatory solutions to emerging problems (with respect to hedge funds and CRAs, for example) raises governance risks, particularly with respect to accountability. So does the influence of IOSCO in these areas[51] given that IOSCO is increasingly becoming the forum of choice for powerful market actors to influence the international policy debate, raising concerns as to the governance risks of what have been termed "closed policy networks.".[52]

V Programme for further work

With the Dialogue mechanism now in place, a number of questions require further consideration in light, in particular, of the thematic concerns which emerged at the first meeting.

Promoting regulatory co-ordination

An overarching and recurring issue in the EU-U.S. financial services dialogue concerns the extraterritorial application of local laws. The standard solution to extra-territorial application of financial regulations is an exemption from host-country requirements for foreign entities subject to acceptable regulatory oversight in their home jurisdiction. The difficulty, of course, is determining which home rules are acceptable. Many formulations are possible: home rules that are identical to host country requirements; rules that are

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[50] See A. Fleckner, FASB and IASB: Organization and Influence (Aug. 15, 2005). Several seminar participants continued work on this subject at a March 2006 conference on the Future of IASB-Funding hosted by the European Commission, Deutsche Bundesbank, and Deutsches Aktieninstitut in Frankfurt.

[51] IOSCO, *The Regulatory Environment for Hedge Funds: A Survey and Comparison* (March 2006); IOSCO, *Code of Conduct for Rating Agencies* (2004).

[52] G. Underhill and X. Zhang, "Global Structures and Political Imperatives: In Search of Normative Underpinnings for International Financial Order" in Underhill and Zhang (eds.), *International Financial Governance Under Stress: Global Structures Versus National Imperatives* (CUP, 2003) p.77.

harmonised around international standards; rules that are substantially equivalent; rules from jurisdictions that provide reciprocal arrangements for foreign entities; and many other possibilities and combinations of possibilities.

In recent years, EU and U.S. officials have gained considerable experience working through these issues in a variety of contexts, from qualitative disclosure requirements to the convergence of accounting standards. In a number of areas, practical accommodations have been reached; in others, considerable work still needs to be done. While the appropriate scope of exemptions from extra-territorial application of home country requirements must necessarily be addressed on a case by case basis, experience in recent years suggests a number of recurring questions where solutions in one area may provide guidance more broadly.

(1) To what extent do existing exemptions in host company regulation – whether private placement exemptions or exemptions for institutional investors and wealthy individuals – provide adequate alternatives to exemptions for extra-territorial application of host country requirements? Should host country authorities be concerned if their regulatory requirements inhibit retail investors from investing in foreign markets and increasing potential gains from diversification.
(2) To what extent can determinations of acceptability be based on formal legal requirements in home jurisdictions and when should such determinations also consider enforcement efforts and compliance levels in home jurisdictions?
(3) In determining how strictly to police foreign firms seeking direct access to local capital markets, to what extent should host country regulators take into account the fact that local investors may have alternative means of effecting foreign investments – for example, through direct access to secondary trading markets in foreign jurisdictions?
(4) In some situations, might strict rules for direct access have the perverse effect of channeling local investors into less regulated and less transparent alternative mechanisms for making foreign investments?

(5) To what extent should host country regulators be concerned if domestic firms are subject to regulatory requirements that are somewhat more onerous than those imposed on foreign entities through their home country supervision?

(6) In which areas does it make sense for accommodations to be negotiated on a regional basis at the EU level and in which cases do accommodations need to be determined at the member state level?

(7) To what extent should U.S. regulators be concerned about variation in regulatory enforcement efforts and compliance across EU member states?

(8) Where non-governmental standards setting bodies have a role in setting home country requirements, to what extent should host country regulators concern themselves with the governance structure of these standard setting bodies in foreign jurisdictions?

Promoting "better regulation"

It is essential that solutions to international problems and the development of best practice domestically in light of experience in other jurisdictions be evidence-based. Regulators increasingly accept the importance of cost-benefit analysis domestically (it has long formed part of the U.S. regulatory process and also has been implemented with some rigour by the UK's Financial Services Authority (FSA)) while in the EU the Commission has recently embraced cost-benefit analysis of the FSAP, albeit *ex post facto*.[53] The impact of regulatory overspill on transatlantic market integration, and particularly capital-raising by EU issuers, now has an evidence-based context with the recent delisting and de-registration movement by EU issuers from the US post Sarbanes-Oxley. Similarly, the extent of (and the drivers for) cross-listings is now clearer and can be channelled into policy development with respect to exchange regulation.

Examining regulatory intensity

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[53] White Paper n. 7 supra; European Commission, *FSAP Evaluation, Part I: Process and Implementation* (November 2005), available via http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/051028_fsap_evaluation_part_i_en.pdf (accessed April 2006).

More generally, the level of regulatory intervention, the appropriateness of particular devices (disclosure, operational controls, and liquidity controls, for example), and the effectiveness of supervision must be assessed across all policy areas in the new international context. Although regulation now appears to be a growth industry in both the U.S. and EU, the role of regulatory competition in managing risk remains important, if unclear - as the market reaction to Sarbanes-Oxley suggests. The appropriate role of international soft law standards (and particularly IOSCO) also forms part of this debate as does the role of market discipline, which is emerging as a leading technique for managing hedge fund and credit rating agency risk internationally.

What are the drivers of regulation? Is there a relationship between the new emphasis on dialogue in financial services regulation that emphasises cooperative approaches between the regulator and industry and the increased intensity of regulation? In other words, is there a necessary link between process-oriented dialogue and increased intensity in regulation? Is the move away from command-and-control systems to a more process-oriented approach that involves dialogue a necessary and/or desirable component of a more heavily regulated EU/U.S. financial regulatory regime?

Promoting best practice and regulatory learning

Wholly apart from issues of regulatory coordination, another goal of the EU-U.S. financial services dialogue is to assist in the development of best practices for a wide range of regulatory challenges. As sources of investment and the investor base widen, it becomes ever more critical for regulatory systems to strike the right balance between facilitating issuers' and intermediaries' low cost access to markets and investor protection concerns, particularly as retail access widens. Mutual learning and sharing of experiences is all the more important given the cross-border implications of many of the new challenges faced by regulators.

Important current policy challenges include: how best to manage retail investor access to the markets; the appropriate treatment of previously unregulated gate-keeper entities such

as credit rating agencies (see further below); the management of the many risks posed by the burgeoning hedge fund industry; the development of new capital standards for financial conglomerates (see further below); and the policing of off-shore financial centres. In this facet of the EU-US financial services dialogue, there are lessons to be learned on both sides. With its long tradition of policing U.S. capital markets, the SEC has considerable experience in protecting retail investors from market abuses. European regulators, most notably the United Kingdom's FSA, have developed unique expertise in developing risk-based regulatory systems with particular focus on cost and efficacy. In the area of privatising public pension plans and enhancing financial literacy, a number of European jurisdictions have experiences that may be useful for US authorities.

The Lamfalussy architecture provides the EU with a new institutional system for supervisory cooperation and policy development. Its effectiveness, and how it will respond to the new challenges faced by policy-makers, holds lessons for policy-makers beyond the EU. The Lamfalussy system casts light on the process of financial market rule-making, on rule-making between sovereign states (albeit in the particular institutional and constitutional context of the EU), and on how supervisory oversight of multi-jurisdictional and cross-sector risks, concerning hedge funds, trading systems, and financial conglomerates, for example, can be coordinated. How best to learn from each other in these and a host of other areas is a major goal of the EU-U.S. financial dialogue.

Comparing bilateral dialogues and larger, international structures

Bermann, Herdegen and Lindseth have suggested that "one of the challenges facing transatlantic leaders is that of strengthening the transatlantic network without deepening the conditions leading to the exclusion from global governance of other regions of the world".[54] In the same volume, Mavroidis comments that "the political will to deepen transatlantic cooperation" raises questions about multilateral perspectives.[55] Discussing

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[54] Bermann, Herdegen and Lindseth, *Transatlantic Regulatory Cooperation*, note 16 supra, p. 4.

[55] Ibid, p. 264.

the Transatlantic Economic Partnership between the EU and the U.S. in the area of international trade, he suggests that the TEP should serve as a "vehicle to move all willing countries forward towards enhanced communication and integration and should avoid serving as another 'another limited membership group' inaccessible to the many".[56] Public pronouncements by principals in the EU-U.S. Financial Markets Dialogue indicate that it is not their intention to create an "exclusive club" from which other regions or countries are excluded. Thus, the European Commission has stated that it intends to widen dialogues and cooperation on financial issues with other countries, such as Japan, China, Russia and India, reflecting as far as possible industry priorities.[57]

Bilateral dialogues between major regulators are therefore increasingly occurring worldwide. The Australia/New Zealand Dialogue, for example, has recently supported the development of the TransTasman mutual recognition regime for prospectuses. But are there risks to these webs of dialogue developing internationally? How can these initiatives be coordinated? Clearly, regulatory questions arise which are of particular interest for bilateral relationships but regulatory learning will be enhanced if the process through which these initiatives emerge can, in some form, be communicated. Do bilateral, regional mechanisms operate more effectively than large, international structures in this new international context? IOSCO, the IASB, the Financial Stability Forum, the Basel Committee, and similar organisations all provide regulators with fora for multilateral discussions, but do they suffer from political risks and the inevitable weight of expectation attached to pronouncements from major multilateral bodies? How can more fluid dialogue mechanisms feed into these more traditional structures? When should US and EU officials rely on multilateral organisations such as IOSCO or the Basel Committees to develop international standards and assist in the development of the transatlantic market? How effective is cost-benefit analysis in the norm-setting bodies? How effective are their governance structures?

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[56] Ibid, p. 270.

[57] White Paper n. 7 supra. p 15.

Specific Policy Design Issues

(i) Credit Rating Agencies

From a policy development perspective, the management of conflicts of interests and faulty incentive structures in companies and market actors and structures more generally have emerged as major themes of the post-Enron reform movement internationally. Following the initial focus on board governance and auditing reforms in initiatives such as the Sarbanes-Oxley reforms and the EU Company Law Action Plan,[58] the role of credit rating agencies in market gate-keeping and promoting efficient markets and pricing, given the recent series of debt-based corporate scandals, has moved centre stage. IOSCO and the Basel Committee have played key roles in highlighting the importance of rating agencies. IOSCO emphasises the important role played by rating agencies in determining the creditworthiness of issuers in the capital markets, whilst Basel II requires banks to use rating agency assessments to determine regulatory risk weights under the standardised approach for measuring credit risk. CRAs are now, therefore, a regulatory priority requiring international coordination and effective policy design.

(ii)Financial Conglomerates

The Joint Forum on Financial Conglomerates has defined financial conglomerates as heterogeneous bodies ". . . whose primary business is financial, whose regulated entities engage to a significant extent in at least two of the activities of banking, insurance and securities business, and which are not subject to uniform capital adequacy requirements".[59] The increasing size and scope of financial conglomerates is the result of growing consolidation in the financial services industry.[60] The distinguishing factor in the recent wave of financial consolidation in Europe and the US has been that

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[58] European Commission, *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* COM (2003) 284.

[59] See Joint Forum, *Supervision of Financial Conglomerates,* Report of BIS/IAIS/IOSCO, papers prepared by the Joint Forum on Financial Conglomerates (February, 1999) p. 7.

[60] The Group of Ten has defined consolidation to be the result of 'combinations of existing firms, growth among leading firms, or industry exit by weaker firms' Group of Ten, *Report on Consolidation in the Financial Sector*, (January, 2001) p. 31.

consolidating firms tend to operate as a single economic unit, coordinating and combining their business activities to maximise their gains from their alliances, while creating a concentration in the ownership of financial assets. Two types of financial consolidation have been identified, namely, cross-category consolidation and cross-border consolidation. Cross-category consolidation relates to the merger or acquisition of different financial institutions, often resulting in a "financial conglomerate" that offers a combination of diverse services and products. For example, this would apply to the merger of a merchant bank and insurance company.[61] In contrast, a cross-border consolidation involves a merger or acquisition between the same type of financial institutions (e.g., two banks) but which operate in two or more countries. [62]

Regulation in the field of banking supervision may have a great impact on consolidation trends. Depending on the regulatory approach, financial institutions may opt for consolidation in a certain way, meaning they may either opt for cross-category consolidation or border consolidation. Further, regulation may also affect the form of consolidation. Proactive banking authorities which issue high standards of prudential regulation have greatly influenced the structure of the banking sectors in the U.S. and Europe.[63]

Regarding the regulation of financial conglomerates, Europe and the U.S. have followed distinctly different approaches. The U.S. approach has traditionally focused on separating commercial banking from investment banking.[64] This is due to differing views

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[61] See Group of Ten, *Report on Consolidation in the Financial Sector*, pp. 47-48.

[62] See O. Ruding 'The Transformation of the Financial Services Industry", (Basel, BIS), Financial Stability Institute, *Occasional Paper,* No. 2, (2002, March).

[63] Ibid.

[64] Among the legal instruments which restrict banking practices in the U.S. are the Bank Holding Company Act of 1956, the Glass-Steagall Act of 1933, and the Gramm-Leach-Bliley Act of 1999. Gramm-Leach-Bliley has substantially reduced the barriers for banks to engage in non-banking financial services. The legislation allows banks to establish Financial Holding Companies through which they are permitted to establish subsidiaries to engage in the securities and insurance business.

on the concepts of "banking" and "commerce".[65] In contrast, the European approach focuses on the distinction between "banking" and "investment". Moreover, the European countries have relatively relaxed regulations on ownership and participation of commercial banks in non financial firms, and allow a combination of banking and investment. However, this participation is not totally unrestricted. All EU countries abide by the Banking Directive 2000/12EC,[66] which imposes some restrictions in this area. Moreover, some EU states (e.g., the UK) have additional regulations in place, such as authorisation procedures, but the European approach generally is more liberal than that of the U.S..

A concern which often arises is which type of consolidation is preferred and fostered by a particular regulatory approach. Depending on the desirability of consolidation, a particular country may prefer cross-border mergers, as opposed to cross-sector mergers, among different institutions at the national level. In this sense, if a certain type of consolidation is not desired, the regulations in place may effectively prevent it from happening. Such was the case in the 1980s in the US when banking sector consolidation was restricted by the Glass-Steagal Act of 1933, which limited affiliations of commercial banks and securities firms and the Bank Holding Company Act of 1956, as amended, which effectively barred the consolidation of the banking industry across state boundaries.

The different regulatory approaches between Europe and U.S. regarding banking and financial consolidation and the regulation of conglomerates highlight the need to have an effective dialogue between EU and U.S. supervisors. Such a dialogue has become critical for effective supervisory coordination given the increasing number of cross-border mergers, and the need to ensure a "level playing field" to market participants. The Joint

[65] J. Santos, "Banking and Commerce: How Does the United States Compare to Other Countries?", Federal Reserve Bank of Cleveland, (1998 Q IV) *Economic Review* 14.

[66] 2000/12/EC, OJ 2000 L126/1.

Forum on Financial Conglomerates has led efforts to improve supervisory coordination.[67] The Forum has released a set of documents dealing with financial supervision and consolidation. As such, the need for conglomerate-specific supervision has been recognised.[68] However, the effective supervision of conglomerates will require ongoing coordination and cooperation between European and U.S. regulators. In the transatlantic dialogue, academics can play an important role by helping to assess broader trends in financial markets and the role of regulation in minimizing the social costs of financial risk-taking and what this means for accommodating firm practices with market realities and societal needs.

Issues on the horizon

Inevitably, any financial markets dialogue is dynamic and the agenda expands with international developments. Recent developments concerning the ongoing reports of mergers between U.S. and European securities exchanges, and, in particular, the May 2006 agreement between Euronext and the New York Stock Exchange to merge, provide a vivid example of this.

Once major U.S. and European exchanges are under common control, the possibility of a truly integrated transatlantic capital market will be one step closer. However, the full consolidation of trading markets on both sides of the Atlantic will also pose a number of difficult regulatory challenges, a number of which will be difficult to address until the convergence of corporate financial reporting standards has been achieve. At that point, however, the prospects for a much more fully integrated transatlantic market may in fact be realized.

(8) Considering the purposes of regulation in an evolving international context

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[67] The Joint Forum on Financial Conglomerates established in 1996 by the Basel Committee, IOSCO and IAIS.

[68] In particular, three documents set important principles in the field: the “Capital Adequacy Principles Paper”, the “Fit and Proper Principles”, and the “Principles for Supervisory Information Sharing”.

Finally, the effectiveness of this work agenda ultimately depends on productive discussion of the purposes of regulation in an evolving international context. In the absence of a secure understanding of the purposes of regulation it becomes difficult, for example, to assess supervisory intensity, develop mutual recognition and equivalence mechanisms, or consider which agency or forum is best placed to take forward a particular problem.

Particular issues arise concerning investor protection, arguably the fundamental concern for the world's financial market regulators and often used as cover for political and national interests. Should regulators place investor protection more fully in the international context and embrace diversification as an aspect of investor protection? Should the international response to hedge funds, for example, regard wider range, sophisticated investments as an opportunity and not just a risk for investors? As a paper prepared for the seminar by Gkantinis noted: "As the hedge fund industry expands on a global scale, various jurisdictions develop simultaneously an interest in regulating its members. Policy goals, regulatory tactics, resources and approaches overlap and often clash causing a series of additional burdens for investors that seem to be unavoidable. And yet, investor protection is a regulator's primary mission."[69]

Can investor protection be recast to embrace non-domestic investors? Given their accountability to domestic politicians and constituencies, can domestic regulators, operating through home country control mechanisms (and notwithstanding "bonding" by issuers internationally with major regulatory regimes through listing decisions) be incentivised to pursue investor protection in an international context?[70] How important is international competitiveness to regulators in designing regulatory solutions to international problems as compared to traditional investor protection?

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[69] S. Gkantinis, "A Recent SEC Initiative: Registration of Hedge Fund Advisers."

[70] On the "home bias" of regulators (specifically the SEC) which means "scarce regulatory resources are expended in a discriminatory way, with disproportionately less being devoted to extraterritorial enforcement" see D Langevoort, "Structuring Securities Regulation in the European Union: Lessons from the US Experience" (2004), available at SSRN: http://www. ssrn.com/abstract=624582 (accessed May 2006).

Understanding the purpose of regulation can also throw light on otherwise problematic measures. As James Palmer (a participant in the seminar, partner of Herbert Smith) commented, the EU's Prospectus Directive,[71] which establishes an extensive disclosure regime for retail offers, may not be a success in promoting pan-EU capital-raising. But it can also be regarded as an exercise in "regulation as marketing," designed to promote a retail equity culture through the establishment of a retail-oriented disclosure regime for public offers. How, therefore, can attempts to promote retail activity internationally as governments withdraw from social welfare, education, and pension provision, be designed to avoid damaging wholesale markets and efficient capital-raising?

VI Conclusion

This paper suggests more questions than answers. This is appropriate as it is the product of an initiative that was designed initially to establish a research agenda. The next stage – to take forward the work programme that has emerged from the deliberations at the Cambridge seminar – is rather daunting but fascinating. Much is at stake because sub-optimal financial services regulatory policy decisions have the capacity to generate significant costs for suppliers and consumers of financial services and to undermine competition. When he appeared before the Committee on Financial Services of the U.S. House of Representatives in May 2004, Alexander Schaub said the structured dialogue between the SEC and the European Commission needed to be with the full support and involvement of industry, businesses and end-users: it was not enough for the bureaucrats and regulators to talk and resolve issues together as they had to communicate more effectively, and ensure that they were resolving the right issues.[72] The Cambridge seminar confirmed that academics too can play a role in helping to find regulatory solutions that will withstand global scrutiny and work effectively.

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[71] Directive 2003/71/EC, OJ 2003 L344/64.

[72] Testimony, n. 1 supra.

A series of seminars on issues related to the Transatlantic Financial Services Regulatory Dialogue is planned for 2006/7. This seminar series will be based in the UK. Persons who would be interested in presenting a paper or in attending as a discussant are invited to contact Eilís Ferran, one of the authors of this paper.