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The EU and IOSCO: An Ever Closer Cooperation?

Antonio Marcacci



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European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

The research leading to these results has received funding from the European Research Council under the European Union’s Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement n. [269722].



Abstract

The paper examines the International Organization of Securities Commissions (IOSCO), and it analyzes the role played by the European Union in the landscape of international finance. The aim is to test how far we can conceive of the EU as the heir to the traditional State rule-makers in the sphere of international financial soft-law. In order to do all this, we will first of all describe the historical context in which IOSCO was born, its legal nature, governance procedures and decision-making processes. Then, we will turn to look at the EU and its financial services law, its internal and external competence in order to understand the formal (and informal) role played by the EU in IOSCO. Finally, we will give an account of the quality and quantity of the implementation of IOSCO rules into EU Law of financial services. The result seems to suggest that the European Union is very likely to play an ever increasing role not only within IOSCO but also as a key actor on the global stage of international financial (soft-)law.

Keywords

IOSCO, financial regulation, transnational law, EU external relations, international financial architecture

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THE EU AND IOSCO: AN EVER CLOSER COOPERATION?

Antonio Marcacci

Introduction

Setting the Stage: The End of Bretton Woods and the Spread of International Financial Markets

The demise of the Bretton Woods Agreements in the early '70s brought about radical changes in international finance and, thus, in international financial law. It was the turning point with which we must start in order to describe the general economic and legal conditions which saw the birth of our current financial framework.

The Bretton Woods system was a financial and monetary system established by the Allied nations in July 1944 during the final phase of the Second World War.¹ The most important feature of the Bretton Woods agreement was the setting up of a new international pegged-exchange system: all contracting Governments bound themselves to keep a monetary policy that maintain a fixed rate of their national currencies vis-à-vis the US dollar. In turn, the US dollar was itself pegged to gold. Furthermore, the Bretton Woods agreements also established two major international financial institutions: the International Monetary Fund and the World Bank.

After having experienced the collapse of the gold-standard system, the catastrophic protectionist policies, the “beggar-thy-neighbor” devaluations and currency manipulations during the 1930s,² the Allies (and the US in particular) sought to use gold to build regulated systems of currency exchanges and payments.³ Mostly because of the strength of the US economy, the new monetary system was based on the US dollar.

Although, on the one hand, the Bretton Woods Agreements were aimed at stabilizing the exchange rates between nation-states' currencies, on the other hand, the Conference members were also aware of the necessity to leave some margin for movements between currencies so a “crawling peg” exchange rate adjustment system was created. According to this regulatory framework, national currencies could vary within a band of $\pm 1\%$ (which later became $\pm 1.5\%$, and then $\pm 2.5\%$) through periodic small changes in par value.⁴ The International Monetary Fund, meanwhile, had the institutional goal of being the shock-absorber of international monetary imbalances through the management of its reserves of national currencies and gold. This system gave the nation-states the possibility to temporarily bankroll their balance of payments problems by buying foreign currency with its own national currency, but it was also supposed to tame inflationary drifts (and an excessive creation of liquidity) thanks to a series

¹ See: James, Harold (1996), *International Monetary Cooperation Since Bretton Woods*, Washington, DC, New York and Oxford.: IMF/Oxford University Press.

² Ibid. At 32.

³ In the words of Catherine R. Schenk: “After 1945, the regulation of international financial markets became more intense and widespread as part of the system designed to avoid the chaos that had characterized international economic relations in the 1930s.” Schenk, Catherine R. (2010) “The regulation of international financial markets from the 1950s to the 1990s” in Stefano Battilossi & Jaime Reis, eds. *State and Financial Systems in Europe and the USA: Historical Perspectives on Regulation and Supervision in the Nineteenth and Twentieth Centuries*. Ashgate. At 221.

⁴ James, Harold (1996), *International Monetary Cooperation Since Bretton Woods*, Washington, DC, New York and Oxford.: IMF/Oxford University Press. At 213.

of monetary obligations constraining the use of national currencies to buy foreign currencies.⁵ In such a system, cross-border operations were restricted by tight controls and the supply of US dollars, which was to represent the gauge of a new international liquidity, was supposed to be in the hands of the US monetary authorities.

After the very stiff and regulated Bretton Woods system was fully established, as of 1958⁶ a new phenomenon arose: that of the Eurodollars⁷. These were “dollar deposits with, and dollar loans granted by, banks outside the United States”⁸. In this new market, first and foremost based in the City of London⁹ and populated by American financial institutions, banks accepted dollars from both banks and non-bank lenders and loaned dollars to other banks as well as to non-bank borrowers: “In the Eurodollar market, therefore, a deposit is usually transferred from a nonbank lender to a nonbank borrower along a chain of banks rather than by a single bank”¹⁰. Most importantly for us, the Eurodollar market was deliberately designed to be beyond the reach of the Bretton Woods tight rules and it can be considered as the first unregulated¹¹ international financial market: “It was on British soil, but eventually, many of its players were American. So neither country could unilaterally close it down”¹². The Eurodollars market grew very fast and deeply contributed to the expansion of the quantity of dollars kept abroad.

After the ‘60s, the US increasingly had problems in coping with the requirements of the Bretton Woods Agreements. In particular, in 1971 the British, French, Swiss, and German monetary authorities made several choices¹³ that contributed to a deterioration in the US situation. This was characterized by a constant loss of gold accelerated by an increase of reserves of US dollars kept abroad¹⁴, and a chronic balance of payments deficit, mainly caused by the cost of the Vietnam War. Together these were the reasons that prompted the American decision to abandon the Bretton Woods agreements and direct the world towards a system of free fluctuations of currencies. On August 15th 1971, the US President Richard Nixon announced the end of the convertibility of the US dollar to gold, thus putting an end to the Bretton Woods fixed-exchange rates system.

Choosing to make the dollar irredeemable *sine die* brought with it the implied possibility of creating international liquidity to be used for exchanges and investments in international financial markets, without fearing inflationary pressures within the US.¹⁵ After a period of uncertainty, currencies started to be traded like any other commodities and their exchange rate was determined by the supply-demand

⁵ Amato, Massimo & Luca Fantacci (2009), *Fine della finanza*: Donzelli Editore. At 171.

⁶ Ibid. At 130.

⁷ See: Einzig, Paul (1977), *The Euro-dollar system: practice and theory of international interest rates*: Macmillan.

⁸ Rich, George (1972) "A Theoretical and Empirical Analysis of the Eurodollar Market," 4 *Journal of Money, Credit and Banking* 616-635. (3). At 616.

⁹ As reported by Altman: “The most important foreign markets for dollar deposits are in Montreal, Toronto, London, and a number of cities in continental Western Europe.” Altman, Oscar L. (1961) "Foreign Markets for Dollars, Sterling, and Other Currencies", 8, (3). At 313.

¹⁰ Rich, George (1972) "A Theoretical and Empirical Analysis of the Eurodollar Market," 4 *Journal of Money, Credit and Banking* 616-635. (3). 616.

¹¹ Amato, Massimo & Luca Fantacci (2009), *Fine della finanza*: Donzelli Editore. At 131.

¹² Rajan, Raghuram & Luigi Zingales (2003), *Saving capitalism from the capitalists*: Random House Business Books. At 262.

¹³ In May 1971 the Bundesbank, the German Central Bank, found itself no longer able to maintain the Deutsche Mark’s peg to the US Dollar and, on May 5th 1971, the German Federal Government let the Deutsche Mark float. At this moment, other countries, like the UK, France and Switzerland, decided to redeem their dollars for gold: with a fixed rate of \$35 per ounce and an open market value between \$40 and \$58 per ounce, such a redemption would have meant great losses for the US. See: Jagerson, John & S. Wade Hansen (2011), *All About Forex Trading*: McGraw-Hill Professional. At 18.

¹⁴ See: Triffin, Robert (1960), *Gold and the dollar crisis: the future of convertibility*: Yale University Press.

¹⁵ Amato, Massimo & Luca Fantacci (2009), *Fine della finanza*: Donzelli Editore. At 130.

mechanism. In particular, in January 1976, the Jamaica Agreement signed by the IMF updated the IMF's Articles of Agreement by accepting the free floating of currency rates¹⁶. The new Foreign Exchange Market was born and, like the Eurodollars market, was unregulated.

Given this new economic context where huge amounts of capital can flow into and out of nation-states and "domestic securities markets are increasingly being integrated into a global market"¹⁷, during the '70s we witness the transformation of the legal tools used to regulate international finance and the dawn of a new phenomenon, that of the transnational regulatory networks such¹⁸ as the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors (IAIS), and the International Organization of Securities Commissions.

1. The Global Standard Setter for Finance: The International Organization of Securities Commissions (IOSCO)

a. The Birth of IOSCO: From a Pan-American Forum to a World Organization¹⁹

Born in 1974 as a pan-American forum, IOSCO was originally named the "Inter-American Conference of Securities Commissions"²⁰. Its first meeting was held in Caracas,²¹ Venezuela, in September 1974. The idea of holding this Conference originated with the International Finance Corporation (IFC), the private sector lending arm of the World Bank Group which deals with developing countries, that provided the necessary funds.²² In 1971, indeed, the then president of the World Bank, the former US Secretary of Defense Robert McNamara, decided to establish a "Financial Market" department within the IFC aimed at improving the financial infrastructure of developing countries.²³ In the same period, the American federal regulator for securities markets, the Securities and Exchanges Commission, also set up its Office of International Affairs.²⁴ The first jurisdictions to attend the Conference were Argentina, Brazil, Quebec, Ontario, Chile, the United States, Mexico, Panama and Venezuela and some non-American countries, such as the French *Commission des Opérations en Bourse*, took part as observers.²⁵ During its first years, IOSCO operated in quite an

¹⁶ Jagerson, John & S. Wade Hansen (2011), *All About Forex Trading*: McGraw-Hill Professional. At 21.

¹⁷ As per the Preamble of IOSCO By-Laws (See: International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>.)

¹⁸ Zaring, David (1998) "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations," 33 *Texas International Law Journal* 281-330. (2). At 282.

¹⁹ This section was previously analyzed by the author in: Marcacci, Antonio (2012) "IOSCO: The World Standard Setter for Globalized Financial Markets," 12 *Richmond Journal of Global Law and Business* 23-43. (1).

²⁰ Also called the "Inter-American Association of Securities Commissions" in Sommer, A.A. Jr. (1996) "IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities," 17 *Northwestern Journal of International Law & Business* 15-29. At 15.

²¹ International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 49.

²² This information was reported by Mr. Irving M. Pollack, SEC commissioner from 1974 through 1980, to Dr. Régis Bismuth and published in Dr. Bismuth's Ph.D. dissertation: Bismuth, Régis (2009) "La coopération internationale des autorités de régulation du secteur financier et le droit international public", University Paris 1 Panthéon-Sorbonne. At 207.

²³ Ibid. At 207.

²⁴ Ibid. At 207.

²⁵ Ibid. At 207.

informal fashion, and a confirmation of this is the fact that the first Annual Report was adopted only in 1988.²⁶

At the Quito Conference held in 1983, the “Inter-American Conference of Securities Commissions” became the “International Organization of Securities Commissions”, with France, Indonesia, Korea, and the United Kingdom becoming official members in 1984. As soon as it went global, IOSCO started accepting more and more members and this is clear by reading the list of signers of the so-called “Rio Declaration”. On November 7th 1986, the Executive Committee adopted a Resolution Concerning Mutual Assistance (the so-called “Rio Declaration”) aimed at binding the signatory members “to provide assistance on a reciprocal basis for obtaining information related to market oversight and protection of each nation’s markets against fraudulent securities transactions.”²⁷ This document, which is the oldest policy document published in the IOSCO official website, makes it evident how fast the organization was developing into an international body: many of its signatories were securities regulators from non-American jurisdictions, like the Australian Securities and Investments Commission (which signed on the 31st October 1987), or the Italian *Commissione Nazionale per le Società e la Borsa* (which signed on the 31st March 1987). By 1994, IOSCO had amassed seventy ordinary members, nine associate members, and thirty-five affiliate members,²⁸ thereby covering eighty-five percent of the world’s securities markets.²⁹

Currently, IOSCO has 115 ordinary members (most of them are public financial market regulators), eleven associate members (often regulators other than those dealing with regulated capital markets), and seventy-five affiliate members (usually stock and futures exchanges or dealers associations) from all around the world.³⁰ It covers more than ninety-five percent of the world’s securities and futures markets,³¹ and it is not only the key global institution producing international standards for financial regulation,³² but it also has wider global responsibilities as one of the three members of the Joint Forum of international financial regulators, alongside the Basel Committee on Banking Supervision and the International Association of Insurance Supervisors, established in 1996.

After looking at its evolution, we can conclude that IOSCO is not so much the successor of the Inter-American Conference, as its continuum.³³ And a formal, but very good, example of this conclusion is the fact that IOSCO annual meetings are numbered from the beginning of the Inter-American Association and not from the formal establishment of IOSCO itself, whose first meeting in Rio de Janeiro in was, indeed, called the Twelfth Annual Conference.³⁴

²⁶ Sommer, A.A. Jr. (1996) "IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities," 17 *Northwestern Journal of International Law & Business* 15-29. At 16.

²⁷ International Organization of Securities Commissions - IOSCO (1986) "A Resolution Concerning Mutual Assistance ("Rio Declaration")," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES1.pdf>.

²⁸ International Organization of Securities Commissions - IOSCO (1994) "IOSCO Annual Report 1994," Montreal. At 26-32.

²⁹ Ibid. At 4.

³⁰ See: <https://www.iosco.org/lists/index.cfm?section=general>

³¹ See: <https://www.iosco.org/about/index.cfm?section=background>

³² Brummer, Chris (2010a) "Post-American Securities Regulation," 98 *California Law Review* 327. (2).

³³ Sommer, A.A. Jr. (1996) "IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities," 17 *Northwestern Journal of International Law & Business* 15-29. At 16.

³⁴ Ibid. At 16.

i. IOSCO's controversial legal nature

As regards the Organization's legal nature, not even at the "founding" Ecuador Conference IOSCO was it endowed with any formal legal solution.³⁵ At the Paris Conference of 1986, the first one held outside the Americas, it was decided to set up a permanent General Secretariat.³⁶ However, it was only in 1987 that IOSCO was formally incorporated as a non-profit corporation under the Quebec law by an act³⁷ of the Quebec Parliament,³⁸ and its Secretariat was formally established in Montreal, an important financial center that had previously been one of the leading non-US markets for US dollar deposits.³⁹ Even now IOSCO still has neither a charter nor a formal founding treaty⁴⁰, but is governed by By-Laws passed by the organization members in 1984.⁴¹

These By-Laws are, *mutatis mutandis*, the "Constitution" of IOSCO.⁴² They have been reformed over time⁴³ and the last change took place in 2010. The document distinguishes the different nature of the members (ordinary, associate and affiliate – see below), it defines the structure of the organization (see below), the "statutory" establishment of the Annual Meetings and a system of "sanctions" that can be imposed upon members in case of "repeated failure to pay contributions".⁴⁴ Importantly, the By-Laws document does not specify the legal nature of IOSCO, but it more simply states that securities regulators have decided to come together in the International Organization of Securities Commissions in order to achieve some specific aims, such as cooperation and information sharing.

If we look at the Quebec Act of 1987, we find that it states that: "*il est opportun de reconnaître à l'Organisation un statut de personne morale sans but lucrative*"⁴⁵. With Article 7 clarifying that: "*L'Organisation possède la personnalité juridique; elle a notamment la capacité de contracter, d'acquérir et d'aliéner des biens ainsi que d'ester en justice.*" Thus, IOSCO was established under the Quebec Law as a Nonprofit Legal Person with all the rights and duties typical of such organizations. Importantly, the Quebec Act does not tell us anything about IOSCO's functioning, governance procedures or operational bodies since everything is left to the IOSCO By-Laws: "*Sous*

³⁵ Bismuth, Régis (2009) "La coopération internationale des autorités de régulation du secteur financier et le droit international public", University Paris I Panthéon-Sorbonne. At 208.

³⁶ See : <https://www.iosco.org/about/index.cfm?section=background>

³⁷ *Loi concernant l'Organisation Internationale des Commissions de Valeurs*, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re} session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456.

³⁸ Sommer, A.A. Jr. (1996) "IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities," 17 *Northwestern Journal of International Law & Business* 15-29. At 16.

³⁹ As regards the mention of the then most important financial centers, see: Altman, Oscar L. (1961) "Foreign Markets for Dollars, Sterling, and Other Currencies", 8, (3). At 313.

⁴⁰ Slaughter, Anne-Marie (2000) "Governing the Global Economy through Government Networks" in Michael Byers, ed. *Role of Law in International Politics*. Oxford University Press. At 184.

⁴¹ Zaring, David (1998) "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations," 33 *Texas International Law Journal* 281-330. (2). At 292.

⁴² Marcacci, Antonio (2012) "IOSCO: The World Standard Setter for Globalized Financial Markets," 12 *Richmond Journal of Global Law and Business* 23-43. (1).

⁴³ As indicated in the Appendix to the Annex 1 of the latest available version of the IOSCO By-Laws [See: International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>.] an important reform of By-Laws occurred in 1996.

⁴⁴ IOSCO By-Laws, Part 12, Art. 77. See: *ibid*. At 20.

⁴⁵ *Préambule de la Loi concernant l'Organisation Internationale des Commissions de Valeurs*, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re} session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456. Article 1 restates that : "Une personne morale sans but lucratif est constituée sous la dénomination sociale «Organisation internationale des commissions de valeurs»".

réserve de la présente loi, les statuts de l'Organisation internationale des commissions de valeurs en vigueur le 30 novembre 1987 continuent de régir l'Organisation jusqu'à ce qu'ils aient été modifiés, remplacés ou abrogés."⁴⁶

In 1999 the headquarters of the IOSCO General Secretariat were moved to Madrid.⁴⁷ With the *Disposición Adicional Tercera. Régimen de la Organización Internacional de Comisiones de Valores* of the act *Ley 55/1999, de 29 de diciembre, de Medidas fiscales, administrativas y del orden social*⁴⁸ adopted by the Spanish Parliament, IOSCO was incorporated under the Spanish Law. This Spanish Act acknowledges IOSCO as an *asociación de utilidad pública* and, by referring to Art. 4 de la *Ley 191/1964, de 24 de diciembre*⁴⁹, it clarifies that this means that IOSCO is deemed to be an association whose statutory aims are "*de cooperación para el desarrollo*" (cooperation for the development) and "*de fomento de la economía social*" (to nurture the social economy). It is further specified that IOSCO is a nonprofit entity (*carecer de ánimo de lucro*).

Thus, nowadays IOSCO can be classified as multilateral regulatory network of (usually public) regulators with the formal structure of a private-law based nonprofit entity incorporated by a statutory act.

ii. IOSCO's "statutory" aims

As regards its statutory goals, the Quebec Act incorporating IOSCO stated that:

"L'Organisation a pour objet de permettre à ses membres de mieux accomplir leur mission, et notamment d'échanger des informations en vue de développer les marchés de valeurs et d'améliorer leur fonctionnement, de coordonner les activités de ses membres et d'adopter ou de proposer l'adoption de normes communes."⁵⁰

Thus, exchange of information in order to better develop financial markets, operational coordination and the adoption of common rules were the original goals of IOSCO. The Spanish Act, instead, does

⁴⁶ Article 8 de la Loi concernant l'Organisation Internationale des Commissions de Valeurs, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re} session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456. The centrality of IOSCO By-Laws was acknowledged by the Quebec Act in other articles: "Sont membres de l'Organisation, les commissions de valeurs et organismes similaires qui le 30 novembre 1987 sont membres de l'Organisation internationale des commissions de valeurs et tout autre organisme qui le deviendra par la suite conformément aux statuts de l'Organisation" (Art. 3); "Les dirigeants et membres de comités de l'Organisation internationale des commissions de valeurs en fonction le 30 novembre 1987, le demeurent jusqu'à ce qu'ils aient été remplacés conformément aux statuts de l'Organisation" (Art. 5); "Le secrétaire général est désigné conformément aux statuts de l'Organisation. Il dirige le secrétariat général et prend les décisions nécessaires à son administration" (Art. 6).

⁴⁷ International Organization of Securities Commissions - IOSCO (1999) "A Resolution on the Relocation of the IOSCO General Secretariat to Madrid," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES18.pdf>. Alongside Madrid, other cities presented their candidature: Amsterdam, Basel, Frankfurt, London, Paris and Singapore. See: <http://www.iimv.org/noticias/iosco1.htm>. The reason why Madrid was chosen is linked to the generosity of the Spanish Government which was willing to provide the most attractive solution. See: Bismuth, Régis (2009) "La coopération internationale des autorités de régulation du secteur financier et le droit international public", University Paris I Panthéon-Sorbonne. At 231.

⁴⁸ Ley 55/1999, de 29 de Diciembre, de Medidas fiscales, administrativas y del orden social, Boletín Oficial del Estado, 30 Diciembre 1999, n° 312, p. 46095, n° 24876.

⁴⁹ Ley 191/1964, de 24 de Diciembre, de asociaciones, Boletín Oficial del Estado, 28 Diciembre 1964, n° 311, p. 17334-17336.

⁵⁰ Art. 2, Loi concernant l'Organisation Internationale des Commissions de Valeurs, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re} session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456.

not mention the Organization's aims in details, but it simply refers to IOSCO as an *asociación de utilidad pública*.⁵¹

After some changes occurred over the years, the Organization's official goals are now defined in the 2010 Resolution on IOSCO's Mission, Goals and Priorities⁵² with which the Organization's members officially declare themselves to be working:

- "to cooperate in developing, implementing and promoting adherence to internationally recognized and consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks";
- "to enhance investor protection and promote investor confidence in the integrity of securities markets, through strengthened information exchange and cooperation in enforcement against misconduct and in supervision of markets and market intermediaries";
- "to exchange information at both global and regional levels on their respective experiences in order to assist the development of markets, strengthen market infrastructure and implement appropriate regulation".⁵³

It is also important to mention the so-called **operational priorities**. These are a set of temporary objectives established "in order to help focus common efforts and coordinate actions"⁵⁴. These "operational priorities" can be seen as the organization's mid-term policy aims, and they can be characterized as being much more detailed, more flexible and less formal than the statutory goals.⁵⁵

Quite recently, in 2010, a set of operational priorities for the period from 2010 to 2015 was adopted in order to adapt the IOSCO's work to the post-crisis international financial environment. Indeed, the Presidents' Committee stated that IOSCO was now to focus on three main operational priorities dealing with: the systemic risk issue, the implementation of IOSCO most important rules (Objectives and Principles and MMOU), and the role of IOSCO as a credible actor in the global financial scene.

In particular, the first priority concerns how to "identify and seek to address systemic risks to the fair and efficient functioning of markets"⁵⁶ and, with this in mind, a new Standing Committee on Risk and Research and a new Research Department were set up. The Standing Committee was formed in April 2011 by the Executive Committee and is composed of experts from the financial regulators of the most important markets. The small Research Unit, whose first work on mitigating systemic risk was published as an IOSCO discussion paper in February 2011, will be turned into an independent

⁵¹ Marcacci, Antonio (2012) "IOSCO: The World Standard Setter for Globalized Financial Markets," 12 *Richmond Journal of Global Law and Business* 23-43. (1).

⁵² International Organization of Securities Commissions - IOSCO (2010e) "Resolution on IOSCO's Mission, Goals and Priorities," Madrid Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf>.

⁵³ Ibid. At 1-2.

The 2010 Annual Report also restates the Organization's aims: "IOSCO aims to maintain and improve the international regulatory framework for securities markets via the setting of international standards; to identify and address systemic risks to the fair and efficient functioning of markets; as well as to strengthen our role within the international financial community in order to advance the implementation of the high-level IOSCO Objectives and Principles of Securities Regulation (IOSCO Principles)." International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 4.

⁵⁴ International Organization of Securities Commissions - IOSCO (2010e) "Resolution on IOSCO's Mission, Goals and Priorities," Madrid Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf>. At 2.

⁵⁵ Marcacci, Antonio (2012) "IOSCO: The World Standard Setter for Globalized Financial Markets," 12 *Richmond Journal of Global Law and Business* 23-43. (1).

⁵⁶ International Organization of Securities Commissions - IOSCO (2010e) "Resolution on IOSCO's Mission, Goals and Priorities," Madrid Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf>. At 2. On systemic risk, see also: International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. – New Focus on Systemic Risk. At 6

Research Department as of January 2012⁵⁷. This Unit is to evolve by developing a network of external experts, gathering data, analyzing and producing reports that serve the IOSCO's standards setting activities.⁵⁸ The Research Unit is also tasked with preparing an *Annual Global Securities Regulation Risk Outlook* indicating the most significant financial systemic risks at a global level.⁵⁹ As the 2010 Annual Report states: "The standing committee and the research unit complement each other and work together where appropriate to maximize efficiency".⁶⁰ Finally, it saw the strengthening of the links between IOSCO, other international financial standard setters and other global bodies with missions complementary to that of IOSCO with the aim of improving the anti-systemic risk research activity⁶¹. The systemic risk issue is probably the most innovative priority and, indeed, represents a sign of the times in financial history.⁶²

The second priority deals with the necessity to "maintain and improve the international regulatory framework for securities markets via the setting of international standards"⁶³ and, in order to do so, it was recommended to undertake a systematic and periodic review of the IOSCO Objectives and Principles of Securities Regulation, the systematic implementation of the IOSCO Objectives and Principles, and the full implementation of the IOSCO MOU.⁶⁴

Finally, the third priority concerns the strengthening of "IOSCO's role within the international financial community in order to advance the implementation of high-level objectives and principles of securities regulation"⁶⁵ and, in his vein, there were suggestions made in favor of the promotion of IOSCO's positions in relevant policy fora; and more proactive coordination with stakeholders, in particular with the investors and bodies representing the industry. Interestingly, IOSCO seems to be concerned with becoming more involved at global level not only vis-à-vis the financial industry, but also a propos investors. Unfortunately, the document does not specify whether it refers to institutional and professional investors or all investors, thus also including retail investors. However, it is very significant that the safeguarding of investors' wellbeing has not only become, as we have seen above, a core object of IOSCO, but it has also developed into a temporary policy aim.

b. The Governance of IOSCO

The IOSCO By-Laws establish three different of membership: full, associate and affiliate members. In order to become a member of the Organization, a body must apply in writing to the Secretary General (Article 10 of the By-Laws) and its application must be accepted by the Presidents Committee upon a

⁵⁷ International Organization of Securities Commissions - IOSCO (2011b) "Mitigating Systemic Risk A Role for Securities Regulators - Discussion Paper ",Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>. At 57.

⁵⁸ International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report",Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 6.

⁵⁹ International Organization of Securities Commissions - IOSCO (2011b) "Mitigating Systemic Risk A Role for Securities Regulators - Discussion Paper ",Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>. At 57.

⁶⁰ International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report",Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 6.

⁶¹ International Organization of Securities Commissions - IOSCO (2010e) "Resolution on IOSCO's Mission, Goals and Priorities," Madrid Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf>. At 2-3.

⁶² Moreover, the revision of IOSCO Principles in 2010 added eight new principles concerning systemic risks in markets. See: International Organization of Securities Commissions - IOSCO (2010b) "Objectives and Principles of Securities Regulation " Madrid Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD329.pdf>.

⁶³ International Organization of Securities Commissions - IOSCO (2010e) "Resolution on IOSCO's Mission, Goals and Priorities," Madrid Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf>. At 2.

⁶⁴ Ibid. At 2.

⁶⁵ Ibid. At 3.

recommendation of the IOSCO Board (Article 14).⁶⁶ However, the application requirements change if the application concerns full, associate or affiliate membership.

Full members enjoy the right to be part of IOSCO's most important organs, like the Emerging Market Committee and the IOSCO Board (or the Technical Committee before the reform). Article 6 of the By-Laws states that: "A securities commission or a similar governmental body that is not a member is eligible for ordinary membership of the Organization". The public nature requirement is further on strengthened by Article 7.1 and Article 7.2 which recognize that a self-regulatory body, such as a stock exchange, is eligible for ordinary membership only when its country of origin does not have a governmental regulatory body. It is then specified that if a governmental regulatory body is subsequently established, then the ordinary membership of the self-regulatory body lapses. Currently IOSCO has 115 ordinary members.

In order to become a full member, an applicant must convey: (a) a brief description of the securities regulations existing in its country, including the bodies which exercise regulatory functions with regard to securities market; (b) a translation of the primary securities legislation of its country in one of the official languages of the Organization; (c) a declaration, signed by the president of the applicant body, that the body has reviewed and accepts the present By-Laws and Resolutions adopted by the Presidents Committee. (Article 11).

It is clear that IOSCO By-Laws do not delve into the nature and the depth of the regulatory powers enjoyed by a country's securities commission. This is mainly because this legal aspect varies greatly from country to country, usually on the basis of the administrative law culture underlying their national traditions. However, IOSCO By-Laws seem to imply that a securities commission or a similar governmental body must have at least (some) secondary regulatory powers (with the primary regulatory powers remaining with the Legislature), and either broad or narrow enforcement mechanisms. A broad enforcement mechanism implies that the national securities commission has all the powers needed to directly enforce securities laws (like the US Securities and Exchange Commission⁶⁷), while a narrow mechanism implies that the national securities commission can only impose administrative sanctions, report a possible breach to another (more powerful) authority, like a Ministry or a Court, and initiate a legal action (like the German *Bundesanstalt für Finanzdienstleistungsaufsicht* - BaFin⁶⁸).

The concern about the actual dimension of the enforcement powers of its ordinary members has been a constant characteristic of IOSCO. The old Preamble to IOSCO's By-Laws stated that the Organization's Members had to "provide mutual assistance to ensure the integrity of the markets by a vigorous application of the standards and by effective enforcement against offences"⁶⁹, while the new one still emphasizes the importance of enforcement powers but puts them within a wider framework: "[the Members must] cooperate in developing, implementing and promoting adherence to internationally recognized and consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks"⁷⁰. Moreover, Principle 8 of the Objective and Principle of Securities Regulation, clearly states

⁶⁶ Before the reform occurred in 2011, Article 14 of IOSCO By-Laws provided for the Technical Committee to carry out the task of recommending the admittance of a new member.

⁶⁷ According to the Securities Exchange Act, sec. 30A (d), the SEC can either carry out an enforcement proceeding before a so-called Administrative Law Judge (a figure that does not exist in Europe) or initiate a civil action before a federal court.

⁶⁸ According to the German Securities Trading Act (WpHG), sec. 38, 39 I-III., BaFin can impose fines in cases of administrative offences.

⁶⁹ International Organization of Securities Commissions - IOSCO (2003) "Objectives and Principles of Securities Regulation" Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> (2003)

⁷⁰ International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>.

that “The regulator should have comprehensive enforcement powers” and Principle 9 provides that “The regulatory system should ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program.”⁷¹

In particular, in November 1997, the Presidents’ Committee passed a Resolution on Enforcement Powers as regards information sharing. The point of the Presidents’ Committee was that, without the full authority of obtaining information, the entire enforcement mechanism (both domestic and cross-border) could not operate. With this Resolution each ordinary member was asked to ensure that it or another authority in its jurisdiction had the necessary power to obtain information relevant to investigating and prosecuting potential violations so that such information could be shared with other members.⁷²

As regards the **associate** membership, this is usually reserved for associations of public regulatory bodies from countries that already have their national regulatory body as a full member (Article 8.1). The expression “association of public regulatory bodies” is, actually, quite vague and it covers bodies with some jurisdiction over a country’s market subdivision. Moreover, any other body with an appropriate responsibility for securities regulation, other than a self-regulatory body, can apply to become an associate member (Article 8.2). A clear example of this “double” nature of the associate membership is given by the US, which sees both the Commodity Futures Trading Commission and the North American Securities Administrators Association, Inc. as associate members, with the United States being primarily represented by the Securities and Exchange Commission. Currently, IOSCO has eleven Associate Members and, in order to become one, a potential candidate must simply include a description of the body itself and its mission (Article 12).

As regards the **affiliate** membership, this is reserved to self-regulatory bodies or international bodies with an appropriate interest in securities regulation (Article 9.1). In order to become an affiliate member, an applicant must (a) include a description of its own structure and mission; and (b) be endorsed in writing by the ordinary member, or ordinary members⁷³, of its country (but only when this condition is applicable) (Article 13). Currently IOSCO has 68 self-regulatory organizations registered as Affiliate Members. They gather in the SRO Consultative Committee – SROCC – and play an important consultative role within the Organization. As regards the international bodies with an appropriate interest in securities regulation, these are only seven, and among them are the International Monetary Fund, the International Capital Market Association, and the Asian Development Bank.

i. The distribution of competences within the organization

A key aspect of IOSCO governance is the fact that the Organization operates through a network of committees.⁷⁴ And this was confirmed by the “Resolution of the Presidents’ Committee on Amendment to IOSCO’s By-laws to reflect change in structure”⁷⁵ adopted by the Presidents’

⁷¹ International Organization of Securities Commissions - IOSCO (2010b) "Objectives and Principles of Securities Regulation " Madrid Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD329.pdf>.(2010)

⁷² International Organization of Securities Commissions - IOSCO (1997) "A Resolution on Enforcement Powers," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES14.pdf>.

⁷³ The plural form is necessary as some federal jurisdictions have more than one ordinary member. In the case of Canada: the Ontario Securities Commission and the Autorité des marchés financiers du Québec. See: http://www.iosco.org/lists/display_members.cfm

⁷⁴ Sommer, A.A. Jr. (1996) "IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities," 17 *Northwestern Journal of International Law & Business* 15-29. At 17.

⁷⁵ International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO’s By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>. (Annex 1)

Committee in 2010. As of the 2012 Annual Meeting,⁷⁶ the Organization will be comprised of the following organs:

1. the Presidents Committee;
2. the IOSCO Board;
3. the Emerging Markets Committee;
4. the General Secretariat;
5. the Regional Committees;
6. the Consultative Committees.

The **Presidents' Committee** is the IOSCO's formal decision-making organ. It meets once a year at the Annual Conference and is made up of all the Presidents of the member agencies,⁷⁷ both regular and associate, with each ordinary member having one vote at meetings⁷⁸ and the associate members having the right to attend and speak at meetings.⁷⁹ The Presidents' Committee plays, by and large, a formal leading role for the organization and "has all the powers necessary or convenient to achieve the objectives of the Organization".⁸⁰ This implies that the Presidents' Committee makes the most important decisions by: adopting the resolutions which can reformulate the IOSCO mission aims, setting up the Organization's Operational Priorities, and, more importantly, amending the By-Laws; accepting the admission of new members; recognizing the Regional Committees; determining the annual contribution of members; and imposing sanctions upon members.⁸¹ In order to operate, a quorum of the Presidents' Committee is achieved when the majority of the ordinary members attend the Annual Meeting.⁸²

The **IOSCO Board** will replace the Executive⁸³ and the Technical⁸⁴ Committees and the Advisory Board of the Emerging Markets Committee.⁸⁵ This new Board will run the governance, standards

⁷⁶ The Presidents' Committee conferred upon the Executive Committee the authority to do all it is deemed necessary for the amendments to take effect before the 2012 Annual Meeting. *See: ibid.* At 1.

Moreover, the Presidents' Committee also indicated a bridge period, running from the 2012 Annual Meeting to the 2014 Annual Meeting, during which a transitional IOSCO Board will be constituted and will carry out all the functions and wield all the powers conferred upon the formal IOSCO board. *See: International Organization of Securities Commissions - IOSCO (2010d) "Resolution of the Presidents' Committee on Transitional Arrangements for the IOSCO Board," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES29.pdf>.*

⁷⁷ International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. *Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>.* At 47.

⁷⁸ *ibid.* Art. 27

⁷⁹ *ibid.* Art. 30.

⁸⁰ *ibid.* Art. 26.

⁸¹ *ibid.* Art 26.

⁸² *ibid.* Art. 35.

⁸³ The Executive Committee was the second key body of IOSCO. It acted as the executive arm of the organization and its members were elected every two years at the Biennial Meeting. [International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. *Available at: http://www.iosco.org/annual_reports/2010/.*] It was composed of nineteen members: the Chairman of the Technical Committee, the Chairman of the Emerging Markets Committee; the four Chairmen of the four Regional Committees; one ordinary member elected by each Regional Committee from among the ordinary members of that region; and nine ordinary members elected by the Presidents' Committee. [*ibid.*] Importantly, if, on the one hand, the Presidents' Committee was the formal decision-making organ which officially made the most important decisions; on the other hand, the Executive Committee actually took some important decisions and formally undertook all the actions necessary to achieve IOSCO's objectives. [*ibid.* At 47] And this was also evident by the fact that unlike the Presidents' Committee which meets once a year, the Executive Committee met periodically during the year. [*ibid.* At 47]

setting, and development functions of the Organization⁸⁶, mainly through the submission of Resolutions⁸⁷ and the drafting of the Presidents' Committee's agenda⁸⁸ (to be both approved by the Presidents' Committee). Furthermore, it will prepare the program of activities and the IOSCO annual budget (to be afterwards approved the Presidents' Committee)⁸⁹, appoint the Secretary General⁹⁰, recommend regional groupings of members for recognition by the Presidents Committee as Regional Committees⁹¹, recognize Consultative Committees⁹² (others beyond the SROCC), and recommend the Presidents' Committee when sanctions should be imposed upon members.⁹³ Moreover, the Board will also appoint the Secretary General for a period of up to three years⁹⁴ and designate the members of a Consultative Committee.⁹⁵ Finally, the Board will monitor the organization's activities concerning its policy and standards setting, its regulatory capacity building, its market development strategy, its membership admission procedure, and its outreach and research programs.⁹⁶

Thus, the IOSCO Board, by replacing the Technical Committee and the Executive Committee, will become the key (and, actually, the only) executive organ of IOSCO: it will be the policy-making body handling the core activity of the Organization. In the words of the recently amended By-Laws: "IOSCO Board takes all decisions and undertakes all actions necessary or convenient to achieve the objectives of the Organization"⁹⁷. The legal tool employed by the Board to carry out its activity will be the "Protocol": this will be used in order to detail the administrative matters necessary or convenient for performing or giving effect to the By-Laws.⁹⁸ It is still unclear how these protocols will actually work, but they look very much like "administrative decrees" typical of an executive body.

(Contd.)

⁸⁴ The Technical Committee was established in 1987 by the Executive Committee in order "to study critical issues affecting countries with developed securities markets" [Lichtenstein, Cynthia C. (1991) *Bank for International Settlements: Committee on Banking Regulations and Supervisory Practices' Consultative Paper on International Convergence of Capital Measurement and Capital Standards*, 30 *International Legal Materials*. (4).], for this reason it could be said to do the "grunt work" [Sommer, A.A. Jr. (1996) *IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities*, 17 *Northwestern Journal of International Law & Business* 15-29.] for the most developed economies. It was made up of eighteen agencies that regulate some of the worlds' larger, more developed and internationalized markets. Its *raison d'être* is to "review major regulatory issues related to international securities and futures transactions and to coordinate practical responses to these concerns." [International Organization of Securities Commissions - IOSCO (2011a) *"2010 IOSCO Annual Report"*, Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 47].

⁸⁵ International Organization of Securities Commissions - IOSCO (2011a) *"2010 IOSCO Annual Report"*, Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 4.

⁸⁶ International Organization of Securities Commissions - IOSCO (2010c) *"Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure,"* Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>. At 4.

⁸⁷ Ibid. Art 26, Part 4.

⁸⁸ Ibid. Art. 40.2(h), Part 5.

⁸⁹ Ibid. Art. 40.2(a), Part 5.

⁹⁰ Ibid. Art. 40.2(d), Part 5.

⁹¹ Ibid. Art. 40.2(e), Part 5.

⁹² Ibid. Art. 40.2(f), Part 5.

⁹³ Ibid. Art. 40.2(i), Part 5.

⁹⁴ Ibid. Art 21, Part 3.

⁹⁵ Ibid. Art. 23, Part 3.

⁹⁶ International Organization of Securities Commissions - IOSCO (2011a) *"2010 IOSCO Annual Report"*, Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 5.

⁹⁷ International Organization of Securities Commissions - IOSCO (2010c) *"Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure,"* Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>. Art. 40.1, Part 5.

⁹⁸ Ibid. Art. 41.1, Part 5.

As regards its term and composition, the Board is to be constituted for two years and established during the IOSCO Biennial Meeting.⁹⁹ The Board members choose a Chairman and a Vice-Chairman from among themselves and these posts last for the term of the Board, namely after two years. These IOSCO Board members are: (a) the members of the existing Technical Committee¹⁰⁰; (b) the Chairman and Vice Chairman of the Emerging Markets Committee; (c) the Chairman of each Regional Committee; and (d) two ordinary members elected by each Regional Committee from among the ordinary members of that region.

The **Emerging Markets Committee** is the other specialized committee, and it promotes the development and improves the efficiency of emerging securities and futures markets by means of: establishing principles and minimum standards, preparing training programs and “facilitating the exchange of information and transfer of technology and expertise.”¹⁰¹ Its work is carried out by five Working Groups (analogous to the IOSCO Board’s Standing Committees) covering the following topics: Disclosure and Accounting; Regulation of Secondary Markets; Regulation of Market Intermediaries; Enforcement and Exchange of Information; and Investment Management.

Importantly, the Emerging Markets Committee has established several Task Forces tasked with studying, analyzing and assessing different (and very hot) issues. These are made up of: the “EMC Chairman’s Task Force”, established in October 2008 in order to evaluate the aftermaths of the global financial crisis on emerging markets, identify relevant regulatory issues and give formal suggestions as regards future developments¹⁰²; the “EMC Task Force on OTC Markets and Derivatives Trading”, which produced the report on OTC Markets and Derivatives Trading in Emerging Markets to help regulators examine OTC markets in their home jurisdictions; the “EMC Task Force on Securitization”, whose report on *Securitization and Securitized Debt Instruments in Emerging Markets* gave important insights into how to handle securitization markets in emerging market jurisdictions; and, finally, the “EMC Task Force on the Development of Corporate Bond Markets in Emerging Markets”, established in January 2011 and tasked with producing a report to be used as assessment tool for evaluating the state of development of corporate bond markets in emerging markets.¹⁰³

In addition to the IOSCO Board and the Emerging Markets Committee, IOSCO has four **Regional Committees**, which meet mostly to discuss problems specific to their respective regions and jurisdictions: Africa/Middle-East Regional Committee; Asia-Pacific Regional Committee; European Regional Committee; and Inter-American Regional Committee. A regional committee acts as a forum in which its members discuss topics of special interest,¹⁰⁴ as well as coordinating the distribution of information among its members,¹⁰⁵ and providing recommendations and reports on specific regional issues.

⁹⁹ Ibid. Art. 37.1, Part 5.

¹⁰⁰ The current members of the Technical Committee are the securities regulators of: Australia, Brazil, China, France, Germany, Hong Kong, India, Italy, Japan, Mexico, the Netherlands, Ontario, Québec, Spain, Switzerland, United Kingdom and the United States. See: International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 47.

¹⁰¹ <http://www.iosco.org/about/index.cfm?section=workingcmnts> . The Emerging Markets Committee has set up Working Groups in these areas: Disclosure and Accounting; Regulation of Secondary Markets; Regulation of Market Intermediaries; Enforcement and the Exchange of Information; Investment Management .

¹⁰² International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 14.

¹⁰³ Ibid. At 16.

¹⁰⁴ International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>. Art. 60(a), Part 8.

¹⁰⁵ ibid. Art. 60(b), Part 8.

Self-Regulatory Organizations (SROs) play an important role within the IOSCO structure: they are members of the **SRO Consultative Committee (SROCC)**.¹⁰⁶ The SROCC was established in 1989 and currently has 69¹⁰⁷ members representing securities and derivatives markets, mainly from the most developed economies. The most important stock exchanges of the world are members of the SROCC, for instance: New York Stock Exchange, London Stock Exchange, Tokyo Stock Exchange, National Stock Exchange of India, Shanghai Stock Exchange, Cayman Islands Stock Exchange, Euronext and Deutsche Börse AG. Their participation at IOSCO is aimed at making “a constructive input in the work of IOSCO”.¹⁰⁸ The SROCC is constantly in contact with the IOSCO Board in order “to provide substantive input on their regulatory initiatives.”¹⁰⁹ Within the Committee, the SROCC members are committed to working together and to the sharing of mutually useful regulatory information to ensure compliance with and enforcement of their securities laws and regulations.¹¹⁰

The aims of the SROCC are: to improve the effectiveness and value of self-regulation so as to promote the efficiency, transparency and integrity of markets; to contribute to regulatory policy development; to identify potential investor protection and market integrity issues; effectively address the wide range of issues in securities markets; and, importantly, share experiences as SROs with other members and interested parties through seminars and training programs.¹¹¹

The SROCC is involved in the law-making process to the extent that it can make its voice heard. Its role is emphasized by the Model for effective Regulation,¹¹² which highlights how SROs provide valuable industry input both in terms of codes of good conduct and master agreements, and in terms of the standardization of common practices. Thus, on the one hand the SROCC is an (informal) consultative body for the IOSCO Board; on the other hand, SROs and their normative productions are conceived as tools devised to achieve a “tighter degree of compliance by the market participants operating within the self-regulatory framework.”¹¹³

Generally speaking, the 2010 Annual Report explicitly recognizes that self-regulatory organizations “augment regulatory resources, including establishing and enforcing rules, codes of conduct, developing standard documentation and best practices and taking disciplinary action for non-compliance”¹¹⁴. Moreover, the value of self-regulation has been directly acknowledged by the Objectives and Principles of Securities Regulation since 1998, as it states that “the regulatory regime should make appropriate use of Self-Regulatory Organizations (SROs) that exercise some direct

¹⁰⁶ Marcacci, Antonio (2012) "IOSCO: The World Standard Setter for Globalized Financial Markets," 12 *Richmond Journal of Global Law and Business* 23-43. (1).

¹⁰⁷ In particular, the committee members are: 17 regulatory membership organizations, 43 exchanges (including the World Federation of exchanges), 4 clearing and settlement agencies, and 5 investor protection funds. International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 18.

¹⁰⁸ International Organization of Securities Commissions - IOSCO (2009) "2008 IOSCO Annual Report", Madrid Available at: http://www.iosco.org/annual_reports/annual_report_2008/. At 25.

¹⁰⁹ Ibid. At 25.

¹¹⁰ See: <http://www.iosco.org/committees/srocc/index.cfm?srocc=links>

¹¹¹ International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 19.

¹¹² International Organization of Securities Commissions - IOSCO (2000) "Model for effective Regulation - IOSCO SRO Consultative Committee (SROCC)," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD110.pdf>.

¹¹³ Ibid.

¹¹⁴ International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 18.

oversight responsibility for their respective areas of competence, to the extent appropriate to the size and complexity of the markets.”¹¹⁵

The main reasons why IOSCO relies on self-regulation are to allow for the observance of ethical standards provided by SROs and to enable a quicker and more flexible response to the changing market conditions compared to that provided by government authorities. Furthermore, Self-Regulatory Organizations have the expertise and knowledge that public regulators often lack.¹¹⁶ However, the IOSCO document states that “actions of SROs will often be limited by applicable contracts and rules”¹¹⁷ and that “SROs should be subject to the oversight of the regulator and should observe standards of fairness and confidentiality when exercising powers and delegated responsibilities,”¹¹⁸ so as to reaffirm that authority still lies in the regulators’ hands. In this perspective, the Objectives and Principles of Securities Regulation states that an SRO is required to meet some authorization conditions.¹¹⁹ It is further specified that, even when self-regulation is used, the regulator should retain the authority to inquire into matters affecting investors or the market. Thus, it is made clear how, once an SRO is operating, the regulator should assure that the exercise of the SRO’s power is “in the public interest, and results in fair and consistent enforcement of applicable securities laws, regulations and appropriate SRO rules.”¹²⁰ Conflicts of interest are, therefore, seen as one of the main issues, especially when an SRO carries out both the supervision of its members and the regulation of a market sector.¹²¹

Finally, the General Secretariat in Madrid carries out all the necessary administrative and organizational tasks, keeps the records of the Organization¹²²; ensures that the By-Laws and Resolutions are kept up to date¹²³; monitors whether the members comply with the By-Laws and Resolutions¹²⁴; examines membership applications so as to ensure that they comply with the By-Laws¹²⁵; represents the Organization in meetings with or presentations to other groups and bodies¹²⁶; and prepares the Annual Report of the Organization¹²⁷. Before the reform, the Secretary General was appointed for a period of up to three years by the Executive Committee while now the appointing body is the IOSCO Board.¹²⁸

The IOSCO governance should look like the following picture, which makes clear the central role played by the newly-established IOSCO Board:

¹¹⁵ International Organization of Securities Commissions - IOSCO (2003) "Objectives and Principles of Securities Regulation " Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>

¹¹⁶ International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report", Madrid. Available at: http://www.iosco.org/annual_reports/2010/. At 18

¹¹⁷ International Organization of Securities Commissions - IOSCO (2003) "Objectives and Principles of Securities Regulation " Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ International Organization of Securities Commissions - IOSCO (2001) "Issues Paper on Exchange Demutualization," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD119.pdf>

¹²² International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>. Art. 51(a), Part 7.

¹²³ Ibid. Art. 51(b), Part 7.

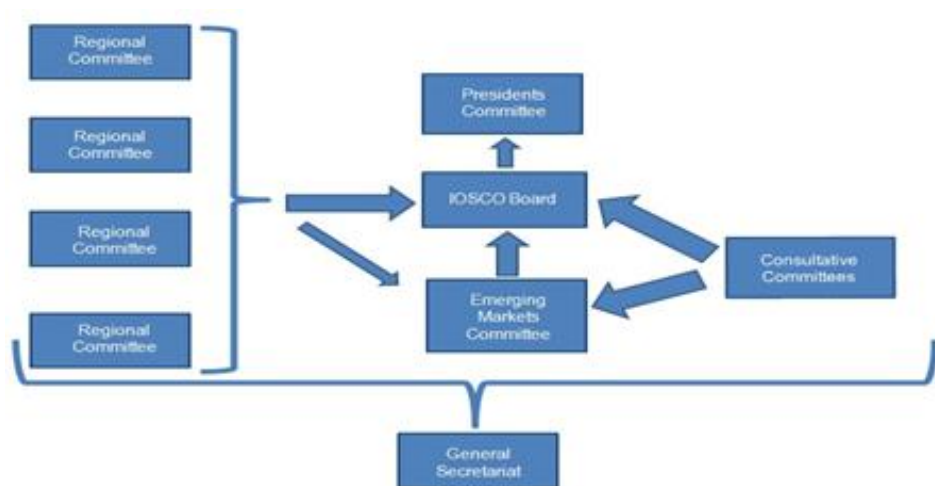
¹²⁴ Ibid. Art. 51(c), Part 7.

¹²⁵ Ibid. Art. 51(d), Part 7.

¹²⁶ Ibid. Art. 51(g), Part 7.

¹²⁷ Ibid. Art. 51(h), Part 7.

¹²⁸ Ibid. Art. 21.



ii. The IOSCO decision making procedure

The Preamble of the IOSCO Bylaws officially recognizes that the best way to achieve the Organization's aims is through consensus.¹²⁹ Generally speaking, deciding through consensus means that the final deliberation is based on the "fairly prevailing opinion" on a particular subject, namely the common core shared by the participants.¹³⁰ This is actually the method through which the members' unanimity can be more easily achieved. Within this process an important role is played by the chairperson because s/he facilitates the achievement of the consensus.

As regards IOSCO, all this means that before issuing a document, a general consensus on its content must be achieved: only if this is achieved can a guideline be supported and adopted by the Organization, or more specifically by the Presidents' Committee. For this reason, IOSCO may look pretty democratic due to the fact that each Member has one seat and one vote at the Presidents' Committee, in which all the Organization's "sovereign" powers are vested. However, the Presidents' Committee only meets once a year and most of the core "normative" work has, in practice, always been carried out by the Technical Committee, an elite body with no pre-established procedural rules. Indeed, slightly more precise (though still slender) rules concerning the decision-making process are provided only for amendments to the By-Laws, where article 36.3 of the By-Laws specifies that "A Resolution to amend the By-Laws must have the support of 2/3 of the members in attendance" [of the Presidents' Committee Annual Meeting], and for the procedures to be followed when conducting public consultations.

In the last case, in 2005 the Executive Committee published the "IOSCO Consultation Policy and Procedure"¹³¹ with the aim of clarifying for all interested parties the procedures through which they can submit comments on work projects aimed at the adoption of international standards and principles for the capital sector. In this document, the Executive Committee provides for several formal steps to be followed and states that, from now on, IOSCO "will generally include the conduct of a public consultation as part of" these work projects, granting the IOSCO SRO Consultative Committee the delicate bridge-role with the international financial community. Importantly, this document introduces a kind of self-"comply or explain" principle, namely it states that IOSCO will take comments into account in framing Final Reports and will provide a summary explanation of the manner in which public comments have been addressed or the reasons why they have not been addressed in a memorandum accompanying Final Reports".¹³² This attitude clearly hints that the Self-Regulatory Organizations are granted some voice in the decision-making process and this is evident by the quantity (and quality) of the SROs' comments on Reports that are publicly available on the Organization's official website.¹³³ Unfortunately, the same cannot be said for consumer associations as

¹²⁹ Ibid.

¹³⁰ See: Calliess, Galf-Peter (2007) "The Making of Transnational Contract Law," 14 *Indiana Journal of Global Legal Studies* 469-483 (2). At 479.

¹³¹ IOSCO Executive Committee (2005b) "IOSCO Consultation Policy and Procedure." Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf>.

¹³² Ibid. At 4.

¹³³ A very good example of this is the "Comments received in response to Consultation Report on the IOSCO Technical Committee Work Program" (available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD251.pdf>) of June 2007, where 16 privately-run stakeholders (plus one public regulator not a member of the Technical Committee) submitted their comments. Another (albeit smaller) example can be the "Board Independence of Listed Companies - Responses to the Consultation Report" (available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD234.pdf>) which conveys the comments made by the following SROs: European Association of Listed Companies, Gruppo Borsa Italiana, Singapore Exchange Limited, Taiwan Stock Exchange Corp, The Association of Capital Market Intermediary Institutions of Turkey;

no comments seem to have been submitted.¹³⁴ However, it is also true that there are no rules prohibiting a consumer association from submitting a comment on a publicly available report.

Another very important aspect of the IOSCO rule-making procedure is the fact that the IOSCO Board relies heavily on “working committees” in order to accomplish its tasks. Indeed, it set up specialized standing committees and its work is substantially carried out through these bodies. These standing committees meet regularly and work according to the instructions they receive from the IOSCO Board. There are six permanent committees at the moment and they cover the following areas: Multinational Disclosure and Accounting; Regulation of Secondary Markets; Regulation of Market Intermediaries; Enforcement and the Exchange of Information; Investment Management; Credit Rating Agencies.¹³⁵ These standing committees are made up of experts from IOSCO full members¹³⁶ and they are designed to be work under the consensus method, as does the entire Organization.

An example of this quite informal decision-making procedure can be found in the “Indexation: Securities Indices and Index Derivatives” Report.¹³⁷ In May 2002, the Technical Committee (now IOSCO Board) mandated its Standing Committee on the Regulation of Secondary Markets to write a report concerning the indexation of securities indices and index derivatives. For several months, the Standing Committee worked on the issue, prepared a first draft of the report, and then sent it to the Technical Committee, which, during the 17th and 18th February 2003 meeting, approved and issued the report.¹³⁸

¹³⁴ The relationship between public regulators and consumer associations still unfolds at the domestic level, as a couple of IOSCO documents seems to suggest. *See*: the “Report On Securities Activity On The Internet II” of June 2001 (available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD120.pdf>) on the consultations carried out by the then Bundesaufsichtsamt für den Wertpapierhandel (Federal Securities Supervisory Office - BAWe) now part of BaFin; or the “Principles on Point of Sale Disclosure Consultation Report” of November 2009 (available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD310.pdf>) on the Committee of European Securities Regulators (CESR) and its public consultations with market participants and EU retail consumer associations.

¹³⁵ *See*: <http://www.iosco.org/about/index.cfm?section=workingcmnts>

¹³⁶ The members of a Standing Committee change over time. In 2003, for instance, the Standing Committee on the Regulation of Secondary Markets was made of experts coming from the following IOSCO members: Australian Securities and Investments Commission; Comissao de Valores Mobiliarios, Brazil; Commission des valeurs mobilières du Québec, Québec, Canada; Ontario Securities Commission, Ontario, Canada; Commission des Opérations de Bourse, France; Bundesanstalt für Finanzdienstleistungsaufsicht, Germany; Deutsche Bundesbank, Germany; Securities and Futures Commission, Hong Kong; Commissione Nazionale per le Società e la Borsa, Italy; Financial Services Agency, Japan; Securities Commission, Malaysia; Comision Nacional Bancaria y de Valores, Mexico; Securities Board of the Netherlands; Monetary Authority of Singapore; Comision Nacional del Mercado de Valores, Spain; Swiss Federal Banking Commission, Switzerland; Financial Services Authority, United Kingdom; Commodity Futures Trading Commission, United States of America; Securities and Exchange Commission, United States of America. *See*: IOSCO Executive Committee (2003b) “The Report On Transparency Of Short Selling”, Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD147.pdf>. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD147.pdf>

¹³⁷ IOSCO Executive Committee (2003a) “Indexation: Securities Indices and Index Derivatives.” Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD143.pdf>.

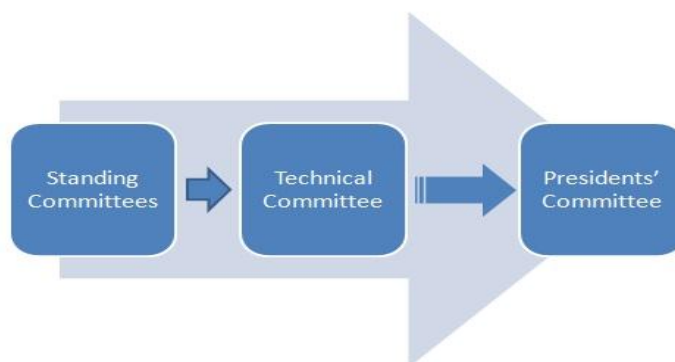
¹³⁸ *Ibid.* 1. Other examples can be The Report On Transparency Of Short Selling (<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD147.pdf>) when the Technical Committee asked the Standing Committee on the Regulation of Secondary Markets to “prepare a report examining the role that greater transparency of short selling might play in securities markets and the forms such transparency might take”; or the Policies on Error Trades – Final Report when the Technical Committee instructed the Standing Committee on the Regulation of Secondary Markets, “in coordination with the IOSCO SRO Consultative Committee, to examine the policies of organized, regulated securities and derivatives exchanges that require regulatory authorization (exchanges or markets), and of their regulators, concerning the resolution of transactions that are executed in error either due to the actions of a market user or through malfunction of a trading system (error trades).” (IOSCO Executive Committee (2005c) “Policies on Error Trades.” Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD190.pdf>. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD208.pdf>); or The Final Report on Anti-Money Laundering Guidance For Collective Investment Schemes, where the Standing Committee on Investment Management prepared a consultation

Alongside the already existing Standing Committee, the IOSCO Board/Technical Committee can establish special task forces to deal with particular subjects, like the 2003 Task Force on credit rating agencies (CRAs) made up of the Technical Committee's principal representatives,¹³⁹ or the Chairmen's Task Force on the Subprime Crisis formed in 2007.¹⁴⁰ These "special" Task Forces usually draft documents that serve to help in the preparation of the Technical Committee's reports.

The following picture gives quite an indicative idea of this decision-making process:

To sum up, the Standing Committees examine issues, analyze data, and study different policy options. They then forward their findings, commentaries and drafted reports to the IOSCO Board/Technical Committee which, on the basis of this work, will enact its own documents or simply approve and issue the Standing Committees' reports. If the issue at hand concerns the Organization's main objectives and an official position needs to be taken, then the Technical Committee's document is forwarded to the Presidents' Committee which uses it to comply with its statutory duties.

Importantly, unlike previously under the Technical Committee, the recent governance reform



establishes clearer rules concerning the internal decision-making process of the new "core" body. Article 44.1 states that half of the IOSCO Board constitutes a quorum and Article 44.2 provides that if necessary, namely if unanimity is not achieved, decisions are put to a vote and must have the support of the majority of the members in attendance. In the event of a tie, the Chairperson has the casting vote. Moreover, the Chairperson is also responsible for reporting the work of the IOSCO Board to the Presidents Committee during each Annual Meeting (Article 46) and s/he also has the power to ask other persons to attend the IOSCO Board's meetings (Article 47). The Standing Committee system will still operate with the IOSCO Board replacing the Technical Committee.

(Contd.) _____

report on the issue of anti-money laundering (IOSCO Executive Committee (2005a) "Anti-Money Laundering Guidance For Collective Investment Schemes - Final Report." Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD205.pdf>. (Available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD205.pdf>).

¹³⁹ IOSCO Executive Committee (2008b) "The Role Of Credit Rating Agencies In Structured Finance Markets - Final Report", Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD263.pdf>. At 2.

¹⁴⁰ IOSCO Executive Committee (2008a) "Report on the Subprime Crisis - Final Report", Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD273.pdf>.

2. The EU in the Landscape of International Financial Law

a. The Legal Grounds for the EU to be an International Player of Financial Law

i. The explicit powers for the EU external action concerning the law of financial services

As regards the internal dimension of European law on financial services, the EEC Treaty and its successors do not provide the Community/Union with a patent, clear and exclusive competence¹⁴¹ unlike, for instance, the Common Commercial Policy.¹⁴² This implies that the EU law on financial services must be grounded on more general legal bases, like that concerning the internal market.

In this context the legal *lender of last resort* was Article 2 TEC¹⁴³, largely replaced by Article 3 TEU, which reads that “The Union shall establish an internal market” and “an economic and monetary union”. More concretely, the EC/EU law on financial services is entrenched in the so-called free movement of capital, free provision of services and freedom of establishment, as provided for by Article 14 TEC¹⁴⁴ now Article 26 TFEU, which states that “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.” Whenever it was not possible to establish a single European financial market through the four freedoms, harmonizing measures were adopted in order to build the single European market on common harmonized rules.¹⁴⁵

Specifically speaking, practically all the legislation concerning financial services enacted over the years has been widely based on Article 50 TFEU (former Article 44 TEC) on freedom of establishment and Article 53 TFEU (former Article 47 TEC) on the taking up and pursuing of activities by self-employed persons. An important role has also been played by Article 62 TFEU (former Article 55 TEC) on services; and Article 115 TFEU (former Article 94 TEC) and Article 114 TFEU (former Article 95 TEC) on measures for the approximation of Member State’s rules.¹⁴⁶ Importantly, the directives dealing with the issuance and trade of securities are generally based on Article 50 TFEU, while the directives dealing with financial intermediaries and their activities are usually based on Article 53 TFEU.

It is worth noting that **Article 63 TFEU** (ex Article 56 TEC)¹⁴⁷ provides for an **exclusive competence** of the EU as regards the prohibition of all restrictions on capital movements not only between Member States but also between Member States and third countries. However, it has not been used as a legal basis for legislation on financial services and only recently it has been utilized.¹⁴⁸ The main reason for not using Art. 63 as the legal basis for the EU law on financial services should be that the freedom of capital movements simply represents the general framework within which it is possible to realize a common European financial market. However, this framework cannot be enough. Further rules

¹⁴¹ Article 67(1) of the Treaty of Rome simply stated that “during the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.”

¹⁴² Article 207 TFEU, ex Article 133 TEC.

¹⁴³ See: Moloney, Niamh (2008), *EC Securities Regulation*, 2nd ed., Oxford: Oxford University Press. At 6.

¹⁴⁴ See: *ibid.* At 6.

¹⁴⁵ *Ibid.* At 8. Former art. 3(1)h TEC was substantially replaced by art. 3 and 6 TFEU.

¹⁴⁶ *Ibid.* At 8.

¹⁴⁷ Article 63 TFEU corresponds to the ex Article 56 TEC in the post-Amsterdam numeration, and this corresponded to the then Article 73b TEC introduced by the Maastricht Treaty. The predecessor of Article 73b was Article 67 of the Treaty of Rome (mentioned in note 140).

¹⁴⁸ Moloney, Niamh (2008), *EC Securities Regulation*, 2nd ed., Oxford: Oxford University Press. At 1032.

concerning financial instruments and financial institutions are needed and these do not concern the free movement of capital *sic et simpliciter*. Thus, most of the EU legislation dealing with financial law is entrenched in arts. 50 and 53.

Due to the fact that financial services may fall into the macro category of services, it might be thought that they are covered by EU's **exclusive competence** on trade, the so-called **Common Commercial Policy – CCP**. Before the entry into force of the Lisbon Treaty, the EC had exclusive competence as regards trade in goods and shared competence as regards trade in some services and commercial aspects of intellectual property (former Article 133 (5) and (6) TEC). In Opinion 1/94 the ECJ deals with the relationship between the pre-Lisbon CCP and the provision of services in general. Within the legal framework of the time, the Court clarified that only those services provided on a cross-border basis by a supplier established in one Member State to a consumer resident in another Member State could fall within the remit of trade in services as envisaged by the CCP.¹⁴⁹ The reasoning behind this decision was the fact that services provided across borders are sufficiently similar to the trade in goods covered by then Article 113¹⁵⁰ (Article 133 TEC according to the post Amsterdam numeration). Here the ECJ simply followed the same logic adopted by Article 1(2) of the GATS,¹⁵¹ which defines the “trade in services” as follows:

For the purposes of this Agreement, **trade in services** is defined as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.¹⁵²

So, in the pre-Lisbon regime, for a service to fall inside the CCP its provision had to be inherently cross frontier. And since financial services are widely provided by branches of financial firms legally established in another Member State, then financial services legislation could not but end up falling in the remit of freedoms of establishment (Article 50 TFEU and Article 53 TFEU) and not in that of the CCP. Under the pre-Lisbon regime, the CCP did not clearly cover financial services due to the way they are supplied.

With the entry into force of the **Lisbon Treaty**, the EU has been endowed with an exclusive competence for trade in goods and services, commercial aspects of intellectual property and foreign direct investment. This reform aims at giving the EU full powers as regards international agreements dealing with trade in goods and trade in services and does so by shifting from shared to exclusive competence, and putting an end to many mixed agreements.¹⁵³ Article 207(1) TFEU clearly states:

¹⁴⁹ Opinion 1/94, *WTO Agreement* [1995] ECR I-5267. [44]. As reported by Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 228.

¹⁵⁰ Opinion 1/94, *WTO Agreement* [1995] ECR I-5267. [44]. As reported by Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 228.

¹⁵¹ See: Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 228.

¹⁵² General Agreement on Trade in Services, OJ 1994 L 336/190.

¹⁵³ “Mixed agreements” are accords concerning areas of shared competence between the EC and Member States. Such a shared competence implied that an agreement had to be ratified both at European and national levels, thus granting any Member State unhappy about the content of an agreement the power to entirely veto it. See: Bungenberg, Marc, (2008) "The Common Commercial Policy after Lisbon" Presented at the Hebrew University Jerusalem, 14 July 2008. At 7.

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to **trade in goods and services**, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

It might be thought that this new, large, and solid legal basis could be also used to conclude international agreements concerning financial services. However, as regards services, the Lisbon Treaty modifies the depth of competences *without* modifying the subject matter of these competences: it does not seem to change the content of the competence in order to grant the EU an exclusive competence covering *all* issues concerning services. The TFEU, indeed, only refers to “trade in services” and this seems to confirm the intention to continue using the categorization adopted by the GATS/WTO and already followed by the ECJ in its Opinion 1/94. If this is so, then financial services are to remain outside the “new” CCP due to the way in which they are provided (freedom of establishment VS cross-frontier provision of services).

Finally, we may consider the possibility of grounding financial services legislation in the brand-new exclusive competence regarding **foreign direct investments**. However, foreign direct investments cannot be assimilated to financial services: the former concern an investment made by a company established in country A directly in the territory of country B; whilst the latter concern the provision of services related to financial needs, from banking to investment. Moreover, the European Commission has also clarified that foreign direct investments do not even cover portfolio investments.¹⁵⁴ Since portfolio investments concern funds passively invested in securities, the European Commission’s statement of exception eliminates altogether any remote and hypothetical connection between financial services and foreign direct investments.

Thus, even under the Lisbon Treaty, the only explicit external competence regarding financial markets concerns the prohibition of free movements of capital between the Member States and third countries but this does not cover the legislation dealing with financial services. Similarly, notwithstanding the fact that art. 32 TEU clearly states that the EU has legal personality (“The Union shall have legal personality”), this does not enable the EU Commission to freely negotiate whatever kind of agreement it may want. All this means that if the EU wishes to enter into international binding agreements concerning the provision of financial services, it must do so by supporting its external activity through implied external powers arising from Article 50, Article 53, Article 62, Article 115, and Article 114.

ii. The doctrine of the implied external powers ...

Generally speaking, the doctrine of the implied powers has always stated that the EEC/EC/EU could act externally, by concluding agreements with third countries, even in circumstances where the Treaties do not envisage an explicit power for doing so. However, such an “external power” does not apply every single time the EEC/EC/EU wishes to enter into an international agreement, but only when several requirements are met. The ECJ has been the author of this doctrine by both setting up the conditions for its existence and delimiting its concrete application.¹⁵⁵

¹⁵⁴ DG Trade - European Commission (January 27, 2010) "The impact of the Lisbon Treaty on trade policy ", Brussels. Available at: http://trade.ec.europa.eu/doclib/docs/2010/january/tradoc_145753.pdf. At 3.

¹⁵⁵ For a complete and exhaustive review and analysis of this topic, see: Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law*, 2nd ed. Oxford: Oxford University Press.

The first case dealing with the so-called implied powers was the **1971 AETR case**, which stands for the European agreement on transport.¹⁵⁶ On that occasion, the ECJ mentioned for the first time the possibility for the then EEC to act externally on the basis of implied powers deriving from explicit competences granted by the Treaties. The ECJ stated that once a piece of European legislation is adopted with the aim of developing a common policy as prescribed by the Treaties, then, on the one hand, the EEC has the power to act externally in order to preserve the integrity of the harmonizing rules, and, on the other hand, the “Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”.¹⁵⁷

If the 1971 AETR case establishes that the then EEC can enjoy implied external powers once an internal policy has already been developed, the **1976 Kramer case** pushes the boundary a bit further by stating that the Community has implied external powers even when common rules are yet to be adopted.¹⁵⁸ However, with the aim of avoiding a legislative vacuum, the ECJ carefully clarifies that the Member States still enjoy a transitional concurrent competence which would give way only when the Community’s competence is exercised.¹⁵⁹ A year later, with the **Opinion 1/76**, the ECJ even stated that “internal competence may be effectively exercised only at the same time as external competence” where the conclusion of an international agreement was “necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.”¹⁶⁰ However, this Opinion is still a special case and the Court subsequently specified that internal harmonizing legislation is usually a pre-requisite for the Community to exercise exclusive implied powers.¹⁶¹

Two other Opinions help give a clearer overview: **Opinion 1/94**¹⁶² on the competence of the Community to conclude international agreements concerning services and the protection of intellectual property (the specific case we have already seen and concerning the GATS/WTO Agreement), and **Opinion 1/2003**¹⁶³ on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁵⁶ Case 22/70, *Commission v. Council* [1971] ECR 263.

¹⁵⁷ *Ibid.* [17]

¹⁵⁸ Joined cases 3, 4 and 6-76, *Cornelis Kramer and others* [1976] ECR 1279.

¹⁵⁹ Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 245.

¹⁶⁰ Opinion 1/76, *Rhine Navigation Agreement* [1977] ECR 741. [115], as reported by Cremona, see note above, at 245. Interestingly, in this opinion the ECJ restates that “whenever community law has created for the institutions of the community powers within its internal system for the purpose of attaining a specific objective, the community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies”. And the ECJ keeps saying that “It is, however, not limited to that eventuality. Although the internal community measures are only adopted when the international agreement is concluded and made enforceable, the power to bind the community vis-à-vis third countries nevertheless flows by implication from the provisions of the treaty creating the internal power and in so far as the participation of the community in the international agreement is necessary for the attainment of one of the objectives of the community”

¹⁶¹ Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 245.

¹⁶² Opinion 1/94, *WTO Agreement* [1995] ECR I-5267.

¹⁶³ Opinion 1/03, *Lugano Convention* [2006] ECR I-1145.

These two Opinions use two different grounds to justify the competence of the Community to enter into international agreements. Firstly, Opinion 1/94 follows the so-called *effet utile* approach,¹⁶⁴ which means that the EC/EU has the authority to undertake international obligations when this is needed in order to achieve a specific Treaty objective even in the absence of an expressed provision. Conversely, Opinion 1/2003 follows the so-called *pre-emption* approach,¹⁶⁵ which means that the competence of the EC/EU to enter into international agreements can arise directly from legislative measures (such as Directives or Regulations) adopted by the European institutions, as happened in the AERT case where internal policy had already been developed and the EEC was recognized as having the power to act externally in order to preserve the integrity of the harmonizing internal rules.¹⁶⁶

However, both approaches highlight one important feature of the implied powers: these are unavoidably connected either to an internal objective or an internal policy, but such strong connections also represent the limits to the EU's implied external powers. This is because the EU can act externally only on internal bases, so that an *external* policy independent of the necessities and functioning of an *internal* regime is just not possible. An independent external policy is possible only when explicit powers are conferred.¹⁶⁷

Importantly, we also need to focus on the **level of harmonization** pursued by the EU law and the way it affects the *depth* of its external action, namely whether the EC has **shared or exclusive competence**. In Opinion 1/94, the ECJ clearly stated that the EC could acquire exclusive external competence "where the Community has achieved complete harmonization of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries."¹⁶⁸ Importantly, the Court also said that this "is not the case in all service sectors" and it decided that the "competence to conclude GATS is shared between the Community and the Member States".

So, when a high degree of harmonization in all sectors covered by an agreement is not achieved, then the EC and Member States can only conclude *mixed agreements*, as was seen in the WTO/GATS case. Mixed agreements are accords concerning areas of shared competence between the EC and Member States. This shared competence implies that an agreement must be ratified both at the European and national levels, thus granting any Member State unhappy about the content of an agreement the power to entirely veto it.¹⁶⁹ Moreover, when the EU adopts minimum harmonizing legislation according to a competence which is internally shared, then a shared external competence is possible¹⁷⁰ and this is likely to leave considerable room for Member States to maneuver. However, the ECJ never fully clarified the distinction between the existence of implied external powers and the nature of their competence.¹⁷¹

¹⁶⁴ Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 221.

¹⁶⁵ Ibid. At 221.

¹⁶⁶ For a complete and exhaustive analysis of these two different approaches: *ibid.*

¹⁶⁷ Ibid. At 222.

¹⁶⁸ Opinion 1/94, *WTO Agreement* [1995] ECR I-5267. [96-98]

¹⁶⁹ Bungenberg, Marc, (2008) "The Common Commercial Policy after Lisbon" Presented at the Hebrew University Jerusalem, 14 July 2008. At 7.

¹⁷⁰ Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press. At 248.

¹⁷¹ Ibid. At 249.

The Lisbon Treaty seems to resolve and clarify the issue of the exclusive/shared competence as regards the EU's external action. Indeed, the **Article 3 TFEU** states that: "*The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*" The effect of this provision seems to overcome the implied shared competence and, hence, eliminate the issue of mixed agreements altogether.¹⁷² This seems to be confirmed by reading Article 3 in combination with Article 216 TFEU,¹⁷³ which summarizes the implied powers principle and *constitutionalizes* this doctrine. Indeed, **Article 216** states that "the Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope." Article 216, thus, clearly reaffirms that the scope of the Union's powers to conclude an agreement with one or more third countries or international organizations is based on either the *pre-emption* approach or the *effet utile* approach. Finally, it should be noted that the picture is completed by Article 218 TFEU (ex Article 300 TEC) which establishes the procedure to be followed when the EU negotiates and concludes this kind of agreements.

iii. ... and its application to the EU law of financial services

After having exposed laid out an evolutionary account of the doctrine of implied powers, it would be logical to test whether this can be applied to the EU law on financial services. As mentioned above, the legal basis upon which the EC/EU has enacted directives and regulations is connected to the completion of the single market and the freedoms of establishment and to provide services. In this context, no explicit external competence is granted to the EC/EU, and if it wants to enter a binding international agreement it must do so through implied powers and by complying with the procedure set down in Article 218 TFEU. The deeper level of internal harmonization, the stronger the need for implied powers.

As regards the applicability of the doctrine of implied powers to financial services, it might be useful to see the evolution of the EU law of financial services over the years and notice a shift from minimum (such as the Investment Services Directive – Directive 93/22/EEC) to maximum **harmonization** (like the Markets in Financial Instruments Directive – Directive 2004/39/EC), symbolizing the growing attention being paid to it by the EC.¹⁷⁴ The increasing use of maximum harmonization in the pre-Lisbon regime also implied that, in potential cases of binding international agreements concerning financial services, the EU's competence was likely to be exclusive. However, we have just come to see how, under the current post-Lisbon regime, the EU seems to enjoy exclusive external competence all the time.

So, up to now, we have verified that under the Lisbon Treaty, on the one hand, the EU financial services law still falls outside the CCP, hence, it does not enjoy any *explicit* external competence. On the other hand, the EU does enjoy *implied exclusive* external competence stemming from Article 3 and

¹⁷² Craig, Paul & Gráinne de Búrca (2011), *EU Law: Text, Cases, and Materials: Fifth Edition*: Oxford University Press. At 82; Cremona, Marise (2008b) "Defining Competence In EU External Relations: Lessons from the Treaty Reform Process" in Alan Dashwood & Marc Maresceau, eds. *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*. Cambridge University Press. At 61.

¹⁷³ Cremona, Marise (2008b) "Defining Competence In EU External Relations: Lessons from the Treaty Reform Process" in Alan Dashwood & Marc Maresceau, eds. *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*. Cambridge University Press. At 62.

¹⁷⁴ On the use of full harmonization, see: Micklitz, Hans-Wolfgang (2009) "The Targeted Full Harmonisation Approach: Looking behind the Curtain" in Geraint Howells and Reiner Schulze, ed. *Modernising and Harmonising Consumer Contract Law*. München: Sellier European Law Publishers.

Article 216 TFEU, no matter the degree of harmonization. From this standpoint, we can test whether a situation similar to that which occurred for the Open Skies cases may also take place for international financial law agreements. The Open Skies cases are a clear example of the implied powers-related “fight” between Member States and the EU institutions when it comes to negotiating agreements with third countries, in particular with the US. As the US is the biggest financial market in the world, is not a great leap to imagine that something similar might take place in international financial law as well.

The **Open Skies cases**¹⁷⁵ concerned air transport agreements between several European countries and the United States. Before the Commission made the decision to take these EU Member States to the Court, it had requested – unsuccessfully – three times to have the right to negotiate international air transport agreements while several Member States had been negotiating their own bilateral agreements with the US.¹⁷⁶ The Commission grounded its action on three points: the bilateral agreements breached the principles of freedom of persons and corporations as set up by Article 49 TFEU (former art. 43 TEC); the Member States had lost their negotiating power due to the fact that the then EC had already legislated on the field at issue; finally, those bilateral agreements were likely to violate not only the EC competition law, but also undermine the freedom to provide services throughout the Union.¹⁷⁷

In November 2002, the Court decided that: many of the bilateral agreements under examination breached several aspects of both EC primary treaty law and secondary legislation; the bilateral agreements breached the principle of freedom of establishment of corporations because these agreements gave other Member States’ airlines a treatment different from that reserved for the signatory Member State’s airlines (the so-called “nationality clauses”); once EU legislation has been enacted to implement an internal policy, then the EU’s jurisdiction is projected externally.¹⁷⁸

The Open Skies cases are particularly important because they implicitly, but clearly, stated that it is not possible for a Member State to seek to obtain advantages exclusive to it when negotiating bilateral agreements with foreign states.¹⁷⁹ If we apply the same patterns to financial law, we may imagine a bilateral agreement between a Member State and the US concerning, for instance, the opportunity for a signatory Member State’s financial firm to operate in the US enjoying a competitive advantage with respect to other Member States’ financial firms. The same would be true for a US financial firm operating in the signatory Member State and enjoying a competitive advantage with respect to other Member States’ financial firms.

Nevertheless, what must be noticed when examining international financial law is the legal nature of the international “agreements” signed by the contracting parties. Indeed, unlike fields such as aviation, trade or monetary affairs, international financial law is established through networks made up of domestic public bodies (like IOSCO) which enter into non-binding soft-law commitments.¹⁸⁰ Therefore, the question here is not so much whether the EU can use implied powers to enter into binding international agreements in a field, like financial law, almost entirely covered by European legislation; but rather, we must query whether the European Commission can freely “negotiate” non-

¹⁷⁵ Case C-466/98 *Commission v United Kingdom* [2002g] ECR I-9427. Case C-467/98 *Commission v Denmark* [2002c] ECR I-9519. Case C-468/98 *Commission v Sweden* [2002f] ECR I-9575. Case C-469/98 *Commission v Finland* [2002d] ECR I-9627. Case C-471/98 *Commission v Belgium* [2002b] ECR I-9681. Case C-472/98 *Commission v Luxembourg* [2002e] ECR I-9741. Case C-475/98 *Commission v Austria* [2002a] ECR I-9797.

¹⁷⁶ de Mestral, Armand (2003) "The Consequences of the European Court of Justice's 'Open Skies' Decisions" *World Markets Series Available at: http://www.touchbriefings.com/pdf/12/avi_1-19_lr.pdf* At 23

¹⁷⁷ *Ibid.* At 23

¹⁷⁸ *Ibid.* At 23.

¹⁷⁹ *Ibid.* At 23.

¹⁸⁰ Brummer, Chris (2010b) "Why Soft Law Dominates International Finance - And Not Trade," 13 *Journal of International Economic Law* 623-643. (3). At 623.

binding soft-law commitments without complying with the procedure set up by Article 218 TFEU. The reason for this is that there are no binding agreements in this field, only soft-law commitments.

In this respect, the European Court of Justice has drawn a clear line between hard- and soft-law regulatory agreements. As regards the first type of agreements, characterized by having binding¹⁸¹ effects on the contracting parties and by being capable of generating liability at the international level in case of non-performance,¹⁸² in Case C-327/91¹⁸³ the ECJ clearly stated that the authority of the Commission was tempered by the formal procedures set down by the Treaty (such as Article 218 TFEU, ex Article 300 TEC and original Article 228 EEC Treaty), which provide for a primary role of the Council in the field of international agreements, with the Commission's negotiating powers limited to the extent of the authorization granted to it by the Council. The ECJ additionally specified that the institutional balance between the Council and the Commission was not susceptible to being modified even in cases of exclusive competences of the EC. Conversely, in Case C-233/02,¹⁸⁴ the ECJ clearly held that the European Commission is endowed with the power to negotiate and conclude soft-law regulatory agreements with no binding effects on the contracting parties.

Given that this case law of the ECJ clearly establishes different regimes for binding and non-binding international agreements, the leeway left to the European Commission to enter into international financial law commitments and "negotiate" the contents of non-binding agreements is much broader than the discretion it would have under the implied powers doctrine. Furthermore, even if a struggle between the Commission and some Member States, such as that which occurred in the Open Skies cases, was to appear as regards international financial regulatory agreements, the European Commission would be likely to win – not because of the implied powers doctrine but because of the primacy of EU law also concretized through harmonization rules. Indeed, once the content of these soft-law regulatory agreements is incorporated into harmonized European rules, the Member States cannot avoid being bound to it and any soft-law commitments to third countries end up being an empty shell.

b. The Legally Ambiguous Involvement of the EU in IOSCO and its Growing (Political) External Influence

i. The legally ambiguous involvement of the EU in IOSCO ...

As regards the formal status of the European Union in IOSCO, the European Commission is merely an Affiliate Member. It is represented through its Directorate General for Internal Market and Services, and more specifically by Unit G3 of its Directorate G which focuses on Financial Services Policy and Financial Markets. It goes without saying that this seems to be too little in light of the impact that EU Law has had on its Members' national financial laws in the last decades. As of February 2012, the European Securities and Markets Authority (ESMA) is also registered as an affiliate member.¹⁸⁵ However, from a more legalistic viewpoint, we cannot hide the actual legal weaknesses of the EU. This weakness can be found both in the internal aspect, i.e. the legal basis of the European law for financial services, and from the external point of view, i.e. the capacity of the EU to conclude international agreements concerning international financial law.

¹⁸¹ As the Court held in Opinion 1/75 of November 11th, 1975: "in its reference to an "agreement", the second subparagraph of article 228 (1) of the treaty uses the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation" (Opinion 1/75 of November 11th, 1975 [1975] ECR 1355).

¹⁸² # 25, Case C-327/91, *French Republic v Commission* [1994] ECR I-3641.

¹⁸³ Ibid.

¹⁸⁴ Case C-233/02, *French Republic v. Commission* [2004] ECR I-2759..

¹⁸⁵ See: http://www.iosco.org/display_org.cfm?orgID=376

However, after studying the IOSCO's By-Laws, one comes to realize that the big hurdle for the Commission (or ESMA) to fully join IOSCO is not so much about the EU's legal bases concerning financial law, as it is to do with the requirements necessary to become an IOSCO full member. Indeed, IOSCO By-Laws clearly provide that, in order to become ordinary member, a potential applicant must be either a securities commission or a similar governmental body, and there is no EU body that can fulfill this requirement.

The new ESMA, recently established by Regulation 1095/2010¹⁸⁶, does not have the required regulatory powers. This stems from the fact that, traditionally speaking, European agencies¹⁸⁷ cannot enjoy full decision-making and rule-making powers. Unfortunately, this core deficiency remains even though ESMA has a recognized legal personality, and is a permanent and relatively independent body.¹⁸⁸ Thus, as ESMA looks like a *mélange* between an agency and a coordinator of agencies prevents it from achieving full IOSCO membership status. In September 2011, the ESMA Management Board discussed the possibility of becoming an observer on the IOSCO Board and an IOSCO associate member "if proposed changes to IOSCO's by-laws are adopted at its next annual meeting"¹⁸⁹. Therefore, the decision to allow ESMA become an affiliate member in February 2012 looks like a politically fair compromise.

Importantly, despite all these hurdles, the European Commission has played a much more active – although still informal – role in the international financial arena since the 2007-2008 financial crisis broke out. This watershed coincides with the elaboration and signature of the Lisbon Treaty at the end of 2007 and its entry into force on 1st December 2009. It is worth noting that, even if the Lisbon Treaty does not confer upon the EU any extra competence as regards the law on financial and banking services, it does introduce some changes in the remit of the EU external action¹⁹⁰ which are likely to give the EU a more prominent international role. Furthermore, given the essential soft nature of international financial law¹⁹¹, a deeper involvement of the EU in the global arena may have important implications for the EU financial law.

Before 2007, cooperation between IOSCO and EU bodies was already taking place but it was extremely informal. In 2004, for instance, within the framework of its activity on credit risk transfer, the Joint Forum of Basel Committee on Banking Supervision (BCSB),¹⁹² IOSCO and the International

¹⁸⁶ OJ L 331/84, 15.12.2010.

¹⁸⁷ Moreover, it should be noted that "no one common definition of an agency may be identified" [Everson, Michelle (1995) "Independent Agencies: Hierarchy Beaters?," 1 *European Law Journal* 180-204. (2).] and the literature has not unanimously agreed on it yet.

¹⁸⁸ Griller, Stefan & Andreas Orator (2010) "Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine," 35 *European Law Review* 3-35. (1).

¹⁸⁹ European Securities and Markets Authority - ESMA (2011) "Summary Of Conclusions - ESMA/2011/MB/98". At 3. (Available at: http://www.esma.europa.eu/system/files/2011_MB_98_.pdf)

¹⁹⁰ A very important innovation introduced by the Lisbon Treaty is the creation of the High Representative of the Union for Foreign Affairs and Security Policy, tasked with representing the Union abroad and chairing the Foreign Affairs Council. Moreover, the Lisbon Treaty provides the EU with "legal status", consolidated by a reinforced competence as regards the conclusion of international agreements if these fall within a Union's legislative act or are necessary to carry out an internal competence or the necessity to preserve common European rules. For a more exhaustive examination, See: Craig, Paul (2008) "The Treaty Of Lisbon, Process, Architecture And Substance," 33 *European Law Review* 137-166. (2).; and Cremona, Marise (2008a) "Coherence Through Law: What Difference Will the Treaty of Lisbon Make? ," 3 *Hamburg Review of Social Sciences* 11-36. (1).

¹⁹¹ On this topic: Brummer, Chris (2010b) "Why Soft Law Dominates International Finance - And Not Trade," 13 *Journal of International Economic Law* 623-643. (3).

¹⁹² "The Basel Committee on Banking Supervision provides a forum for regular cooperation on banking supervisory matters. Its objective is to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide. It seeks to do so by exchanging information on national supervisory issues, approaches and techniques, with a view to promoting common understanding. At times, the Committee uses this common understanding to develop

Association of Insurance Supervisors (IAIS)¹⁹³ officially declared that they had “undertaken efforts to coordinate with similar projects initiated in the European Union”¹⁹⁴, in particular, European Bank’s Bank Supervision Committee (BSC), Committee of European Insurance and Occupational Pension Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR), the predecessor of the European Securities Markets Authority.¹⁹⁵ More specifically, as regards the relationship between IOSCO and the Committee of European Securities Regulators, the latter was explicitly mentioned in the “Final Communiqué of the XXXI Annual Conference of the International Organization of Securities Commissions (IOSCO)”¹⁹⁶, which took place in Hong Kong from 5-8 June 2006. The Final Communiqué reads that IOSCO was planning to establish an *International Financial Reporting Standards Database* and that, for this reason, it was liaising with the CESR because it had already developed and implemented a similar database for use in the European Union.

However, things become much more interesting as the financial crisis starts looming. On November 6th 2007, the Trustees of the International Accounting Standards Committee Foundation (IASCF), the oversight body of the International Accounting Standard Board (IASB), announced a strategy to enhance the organization’s governance and its public accountability as including, among other things, the establishment of a formal reporting link to official organizations.¹⁹⁷ On the next day, November 7th 2007, the European Commission, the Financial Services Agency of Japan, the International Organization of Securities Commissions (IOSCO), and the US Securities and Exchange Commission adopted a joint statement in which they proposed the establishment of a new monitoring body within the IASC Foundation, tasked with reviewing and commenting on the IASB’s work program; participating in and having the final approval in the selection of the IASCF Trustees; and reviewing the Trustees’ oversight activities.¹⁹⁸ In this joint statement, all the signatories are defined as the “authorities responsible for capital market regulation” – thereby putting the European Commission on the same level of the US Securities and Exchange Commission.¹⁹⁹ In May 2008, the IASC Trustees announced the establishment of a round-table discussion to be held in the following weeks.²⁰⁰ The day before this round-table was held, on June 18th 2008, the “world’s securities authorities – represented

(Contd.)

guidelines and supervisory standards in areas where they are considered desirable. In this regard, the Committee is best known for its international standards on capital adequacy; the Core Principles for Effective Banking Supervision; and the Concordat on cross-border banking supervision.” From the official website of the BCBS, <http://www.bis.org/bcbs/about.htm>

¹⁹³ “Established in 1994, the International Association of Insurance Supervisors (IAIS) represents insurance regulators and supervisors of some 190 jurisdictions. Since 1999, the IAIS has welcomed insurance professionals as Observers. Currently there are more than 120 Observers representing industry associations, professional associations, insurers and reinsurers, consultants and international financial institutions. The IAIS issues global insurance principles, standards and guidance papers, provides training and support on issues related to insurance supervision, and organizes meetings and seminars for insurance supervisors. The IAIS works closely with other financial sector standard setting bodies and international organizations to promote financial stability. It holds an Annual Conference where supervisors, industry representatives and other professionals discuss developments in the insurance sector and topics affecting insurance regulation.” From the official website of the IAIS, <http://www.iaisweb.org/About-the-IAIS-28>

¹⁹⁴ See: <http://www.bis.org/press/p041021b.htm>

¹⁹⁵ See: <http://www.iosco.org/news/pdf/IOSCONEWS76.pdf>.

¹⁹⁶ See: <http://www.iosco.org/news/pdf/IOSCONEWS97-English.pdf>

¹⁹⁷ See: International Accounting Standards Committee Foundation Press Release of November 6th, 2007, available at: <http://www.iasplus.com/pressrel/0711governancepr.pdf>.

¹⁹⁸ See: the Joint Statement of the European Commission, the Financial Services Agency of Japan, the International Organization of Securities Commissions (IOSCO) and the US Securities and Exchange Commission on work to enhance the governance of the IASC Foundation, available at: <http://www.iasplus.com/resource/0711governancestatement.pdf>.

¹⁹⁹ Also in the IOSCO Open Letter to G-20 Meeting of November 2008 (available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD282.pdf>) the European Commission, the Financial Services Agency of Japan, and the US Securities and Exchange Commission are referred as the “authorities of the three largest securities markets”.

²⁰⁰ See: <http://www.iasplus.com/pressrel/0805iascfproposals.pdf>

by IOSCO, as well as the European Commission, the Japan Financial Services Agency and the US Securities and Exchange Commission, the securities authorities in the world's three largest capital markets"²⁰¹ issued a joint press-release to welcome the upcoming Roundtable organized by the IASCF regarding the creation of an IASCF Monitoring Group. At the meeting of the IASC Trustees on 15 and 16 January 2009, the decision to establish a formal link to the Monitoring Board of public authorities was definitively taken²⁰². At the moment, the members of the Monitoring Board consist of the Emerging Markets Committee and the Technical Committee of IOSCO, the European Commission, the Financial Services Agency of Japan (JFSA), and US Securities and Exchange Commission (SEC). The main responsibilities of the Monitoring Board are to ensure that the IASC Trustees carry out their duties as defined by the IFRS Foundation Constitution, and to approve the appointment or reappointment of the Trustees.²⁰³

A second important example of this "post-crisis upgrade" is given by the 2008 invitation sent to the European Commission to join (another) Monitoring Group. This is a forum, established in 2005, whose main mission is to "cooperate in the interest of promoting high-quality international auditing and assurance, ethical and education standards for accountants".²⁰⁴ Its original members were IOSCO, the Financial Stability Forum, the Basel Committee on Banking Supervision (BCBS), the International Association of Insurance Supervisors (IAIS) and The World Bank.²⁰⁵

This Monitoring Group invitation was followed by an invitation to join, under the status of observer, the working group on the review of the "Recommendations for Central Counterparties" jointly set up by the Committee on Payment and Settlement Systems (CPSS)²⁰⁶ and the IOSCO Technical Committee. This working group aims at reviewing the application of the "2004 CPSS-IOSCO Recommendations for Central Counterparties"²⁰⁷ on standards for risk management of a central counterparty and clearing arrangements for over-the-counter (OTC) derivatives. The working group's participants consist of representatives from: the central banks already members of the CPSS; the securities commissions already members of the IOSCO Technical Committee; and, finally, the International Monetary Fund and the World Bank.²⁰⁸ The first chairpersons of this working group were Daniela Russo, from the European Central Bank, and Jeffrey Mooney, from the US Securities and Exchange Commission.²⁰⁹ Interestingly, by reading some specialized on-line newspaper articles, it seems that this "invitation" was a somewhat troublesome: as of February 2010, the EU institutions

²⁰¹ European Commission Press Release of June 18th, 2008, IP/08/966
(<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/966&format=HTML&aged=0&language=EN&guiLanguage=en>).

Also, the Securities and Exchange Commission Release No. 2008-112, June 18th, 2008
(<http://www.iasplus.com/usa/sec/0806iascfmonitoring.pdf>)

²⁰² See: <http://www.iasplus.com/pressrel/0901monitoringboard.pdf>

²⁰³ See: <http://www.ifrs.org/The+organisation/Governance+and+accountability/Monitoring+Board.htm>

²⁰⁴ Monitoring Group (2009) "Press release: Monitoring Group announces adoption of formal Charter." Available at http://ec.europa.eu/internal_market/auditing/docs/other/190509_press_release.pdf

²⁰⁵ In 2005 the Monitoring Group also established the Public Interest Oversight Board aimed at exercising a comprehensive oversight over all activities of International Federation of Accountants likely to affect the public interest so as to ensure that such activities served the public interest (see: <http://www.iosco.org/library/pubdocs/pdf/PIOBPD1.pdf>) Among the members of the PIOB there were also two observers were nominated by the European Commission.

²⁰⁶ The CPSS was established by the G10 Central Banks in 1990 but now it directly reports to the Governors of the Global Economy Meeting instead of the G10 Governors. Its secretariat is hosted by the Bank for International Settlements. Its official web page states that it "serves as a forum for central banks to monitor and analyze developments in domestic payment, clearing and settlement systems as well as in cross-border and multicurrency settlement schemes." See: <http://www.bis.org/cpss/cpssinfo.htm>

²⁰⁷ See: <http://www.bis.org/publ/cpss64.htm>

²⁰⁸ See: <http://www.bis.org/press/p090720.htm>

²⁰⁹ See: <http://www.bis.org/press/p090720.htm>

were excluded from this working group, to the disappointment of EU officials²¹⁰ but, by the end of March 2010, the European Commission (EC) was granted the status of observer.²¹¹

However, the great leap forward was the OTC Derivatives Working Group. This was established in April 2010 after the G-20 leaders' declaration of September 2009 requesting that, by the end of 2012, all standardized over-the-counter contracts be traded on exchanges (or, if appropriate, electronic trading platforms) and cleared through central counterparties so as to improve transparency, mitigate systemic risk, and protect against market abuse.²¹² The Group was officially chaired by the CPSS, IOSCO and the European Commission and was tasked with setting out "policy options supporting the consistent implementation of appropriate measures regarding trading, clearing, and reporting across jurisdictions."²¹³ The regulatory options prepared by the OTC Working Group were incorporated into a report, and later submitted to the G-20 Finance Ministers and Central Bank Governors in October 2010 by way of a Financial Stability Board Report.²¹⁴

The OTC Derivatives Working Group was quickly followed by the Task Force on OTC Derivatives Regulation. This was established in October 2010 with the aims of: developing international standards concerning OTC derivatives regulation in the areas of clearing, trading, trade data collection and reporting, and the oversight of certain market players; coordinating other international initiatives concerning the regulation of OTC derivatives; and serving as an internal IOSCO forum that IOSCO members can consult when dealing with issues concerning OTC derivatives regulation.²¹⁵ Importantly, the Task Force is led by²¹⁶ the US SEC, the US CFTC, the UK FSA and the Securities and Exchange Board of India. Meanwhile, the European Securities Markets Authority (ESMA), the European Commission, the Committee on Payment and Settlement Systems (CPSS), and the OTC Derivatives Supervisors Group have a formal right to appoint observers to the Task Force.

Thus, what seems to be clear as regards the role of the EU in IOSCO, and in the international financial regulatory arena in general, is the increasing role of the EU Commission (or its agencies). Importantly, this increasing role does not have the same legal features which characterize both international financial law and IOSCO standards: it is soft, *legally informal*. Indeed, IOSCO's standards are non-binding insofar as any EU external action in the financial services domain is not supported by hard legal grounds. All this leads to the assumption that the EU is very likely to play an increasingly prominent role in the global financial landscape, and it will be helped in doing so by the soft-law dimension in which it operates and by the new general external powers granted by the Lisbon Treaty.

ii. ... And the EU's growing (political) external influence

The Lisbon Treaty, which entered into force on December 1st 2009, provides the EU with a coherent external action framework for the first time. It gathers together all the aspects of the EU's external

²¹⁰ Clark, Joel (February 24, 2010) "EU exclusion from CPSS/Iosco working group 'could hinder global regulation'," *Risk magazine*. Available at <http://www.risk.net/risk-magazine/news/1593233/eu-exclusion-cpss-iosco-hinder-global-regulation>

²¹¹ Clark, Joel (March 29, 2010) "European Commission admitted to CPSS/Iosco working group on CCPs," *Risk magazine*. Available at <http://www.risk.net/risk-magazine/news/1598785/european-commission-admitted-cpss-iosco-ccps>

²¹² Statement No. 13, *Leaders' Statement: The Pittsburgh Summit* (September 24 – 25, 2009), available at http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf

²¹³ IOSCO Executive Committee (2011) "Report on Trading of OTC Derivatives", Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD345.pdf>. At 2.

²¹⁴ Ibid. At 2. See: Financial Stability Board - FSB (2010) "Implementing OTC Derivatives Market Reform." Available at http://www.financialstabilityboard.org/publications/r_101025.pdf.

²¹⁵ International Organization of Securities Commissions - IOSCO (2010a) "IOSCO forms Task Force on OTC Derivatives Regulation." Available at: <http://www.iosco.org/news/pdf/IOSCONEWS191.pdf>. At 2.

²¹⁶ Ibid. At 4.

formal leeway under the umbrella of the “Union’s external action”. To be exact, the Lisbon Treaty brings together: the Common Foreign and Security Policy;²¹⁷ Common Commercial Policy; economic, financial and technical co-operation with foreign countries; humanitarian aid; and the external aspect of any other policy as indicated by Article 21(3) TEU which clearly states that “the Union shall ensure consistency between the different areas of its external action and between these and its other policies”.²¹⁸ All this is now enshrined in Title V of the Treaty of the European Union and in Part V of the Treaty of the functioning of the European Union.

The simplification brought by the Lisbon Treaty is clear: we now have one relevant grouping in each Treaty, whereas before there was Title V TEU dealing with the common foreign and security policy, while the Treaty establishing the European Community (TEC) provided Title IX on Common commercial policy; Title XX on Development cooperation; Title XXI on Economic, financial and technical cooperation with third countries, international agreements, restrictive measures, international relations and instruments among the general and final provisions (Part Six).²¹⁹ Alongside this simplification, the Lisbon Treaty also enhances the external competence of the EU as we have already seen under the Common Commercial Policy.

Moreover, the Lisbon Treaty links all EU external action to the Union’s founding values, as is clearly stated by Article 3 TEU and by Article 21 (1) TEU: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.

This link between the EU’s external action and the EU’s values is also confirmed by Article 207 (1) TFEU on the EU’s trade policy, when it states that “*The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.*” This provision implies that the recently strengthened CCP can now be used not only for economic goals, but also for human rights purposes, thus possibly even paving the way for conditionality in trade policy²²⁰ and for putting human rights/democracy clauses in international agreements.²²¹ The use of conditionality in the common commercial policy may be also reinforced by the expanding role of the European Parliament. This latter had more powers as regards CCP agreements vested in it by the Lisbon Treaty and, in 2006, declared it would give its consent only to commercial agreements containing human rights clauses.²²²

Even if an analysis of the new EU external action clearly goes far beyond the scope of this paper, it is important to highlight its main features in order to understand the overall external dimension in which the EU now plays. This is because it is quite reasonable to assume that, if the EU gains more (legally

²¹⁷ Even if the Common Foreign and Security Policy – CFSP was inserted into the “Union’s external action” section, it still follows a different decision-making procedure, as stated by Article 24 TEU: “the common foreign and security policy is subject to specific rules and procedures.”

²¹⁸ As reported by Pollet-Fort, Anne (2010) “Implications of the Lisbon Treaty on EU External Trade Policy”, Eu Center In Singapore, (Background Brief No 2). Singapore. Available at: <http://www.eucentre.sg/articles/141/downloads/LisbonImpactonTrade-rev6Mar.pdf>. At 5.

²¹⁹ As reported by *ibid.* At 8.

²²⁰ Cremona, Marise (2006) “A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treat”, European University Institute, (Law Working Paper No. 2006/30). At 30.

²²¹ On this topic see: Bartels, Lorand (2005), *Human Rights Conditionality in the EU’s International Agreements*, Oxford, New York: Oxford University Press.

²²² Resolution of the European Parliament of 14 December 2006, EP-Doc. A 6 – 4/2006 as reported by Bungenberg, Marc, (2008) “The Common Commercial Policy after Lisbon” Presented at the Hebrew University Jerusalem, 14 July 2008.

grounded) powers to conclude both bilateral and multilateral binding agreements with foreign countries which even go beyond its mere economic goals by including new *hot* political aims, then its influence on the international scene is very likely to grow, especially in informal standard-setting forums. What we have just come to see in the case of IOSCO and the role played by the EU in the last three or four years seems to prove this assumption.

3. The Implementation of IOSCO Standards through EU Law: The Case of Investor Protection

a. The EU Law on Investor Protection

i. The most important pieces of European legislation

The Undertakings for Collective Investment in Transferable Securities (UCITS) Directives

UCITS is not a simple single directive, but a set of directives enacted in Europe since 1985. The first text was Directive 85/611/EEC²²³, the so-called UCITS I. An attempt to reform UCITS I was made in the early '90s, but it failed (the so-called UCITS II proposal). In 2001, Directive 2001/107/EC²²⁴ and Directive 2001/108/EC²²⁵ were enacted (the so-called UCITS III). Finally, in 2009, Directive 2009/65/EC²²⁶, the so-called UCITS IV, was adopted and it was followed by two implementing Commission Recommendations (583/2010 and 584/2010)²²⁷ and two Commission directives (2010/42/EU and 2010/43/EU)²²⁸.

This set of directives regulates collective investment schemes and it principally aims at creating a single European market by allowing funds to be managed on a cross-border basis through a system of mutual recognition and authorization. For the purpose of this paper, the last directive, UCITS IV, followed by Regulation 583/2010, are particularly important. This is because it has introduced the Key Information Investor document, which replaced the simplified prospectus.

The simplified prospectus was introduced by Directive 2001/107/EC in order to enhance the provision of effective investor information. Afterwards, the Commission Recommendation 2004/384/EC²²⁹ was adopted in order to clarify the contents and present "some of the elements of information which have to be included into the simplified prospectus".²³⁰ The recommendation specified that the simplified prospectus was "designed to provide clear information about the essentials the investor should know before investing in a fund, and be easily understood by the average retail investor."²³¹ The simplified prospectus was "also designed to facilitate the cross-border marketing of units of UCITS, and be used as a single marketing tool throughout the Community."²³² Therefore, the two key elements of this

²²³ OJ L 375/3, 31.12.1985.

²²⁴ OJ L 41/20, 13.2.2002.

²²⁵ OJ L 41/35, 13.2.2002.

²²⁶ OJ L 302/32, 17.11.2009.

²²⁷ OJ L 176/1, 10.7.2010 and OJ L 176/16, 10.7.2010.

²²⁸ OJ L 176/28, 10.7.2010 and OJ L 176/42, 10.7.2010.

²²⁹ OJ L 199/30, 07/06/2004.

²³⁰ Recommendation 2004/384/EC, Recital #2.

²³¹ Recommendation 2004/384/EC, Recital #1.

²³² Recommendation 2004/384/EC, Recital #1.

Recommendation were: the notion of an average retail investor and a single market for units of UCITS.

However, the simplified prospectus proved to be inefficient, due to the following problems: inconsistent implementation across Member States; insufficient harmonization (mainly in respect of costs, fees, and statistical data); it was unnecessarily costly for the industry and of a very limited use to investors;²³³ use of a weak legal instrument, a Recommendation, to clarify the simplified prospectus content; investor-unfriendly content (too long and complex, not meaningful and incomprehensible for the *average* retail investor as defined by the Recommendation); and the format/design did not allow different funds to be compared.²³⁴

To overcome the above mentioned problems, the simplified prospectus was replaced by a stand-alone, pre-contractual document: the Key Information Investor document (KII). This document was designed to help create a single market for investment funds and to provide retail investors with better disclosure, more comprehensible content, and standardized formats which facilitate the comparison between products. Moreover, the KII must contain the investment objectives and policy of the UCITS, its risk-reward profile, all the costs and associated charges, the UCITS past performance, and, finally, a range of practical information.²³⁵ All this aims at reinforcing investors' confidence through providing them with more comprehensible information.

The Key Information Investor document needs to be written in plain language and have a clear layout. To begin with, it must avoid: jargon, complex concepts and specialist language; words with different meanings in normal usage which could be misleading; and legalistic or foreign words. Further, it not only sets out the essential pre-defined information, but also requires that complex information must be presented clearly using short sentences of no more than 25 words with a clear layout.²³⁶ As regards the layout, the KII needs to be clear, appealing and attract the investor's attention, without appearing to be a formal legal document: "the right design choices make a document easier to read and its information easier to understand."²³⁷

The Key Information Investor is intended to be an optimized and investor-friendly version of the simplified prospectus. Indeed, Recital 59 affirms that: "A single document of limited length presenting the information in a specified sequence is the most appropriate manner in which to achieve the clarity and simplicity of presentation that is required by retail investors, and should allow for useful comparisons, notably of costs and risk profile, relevant to the investment decision." Thus, Article 78(5) states that the KII needs to "be presented in a way that is likely to be understood by retail investors".

²³³ As officially stated in the Internal Market and Services Directorate General web site (http://ec.europa.eu/internal_market/investment/investor_information_en.htm).

²³⁴ See DG Internal Market and Services - The European Commission (15 May 2006) "Workshop on simplified prospectus - Annotated agenda of 1st Meeting", [Http://Ec.Europa.Eu/Internal_Market/Investment/Docs/Other_Docs/Prospectus/Annotated-Agenda-2nd_En.Pdf](http://Ec.Europa.Eu/Internal_Market/Investment/Docs/Other_Docs/Prospectus/Annotated-Agenda-2nd_En.Pdf).

²³⁵ Deloitte Global Services Limited (2010) "Key investor information - Structure avoids confusion", [Http://Www.Deloitte.Com/Assets/Dcom-Luxembourg/Local%20assets/Documents/Brochures/English/2010/Lu_Keyinvestorinformation_20102010.Pdf](http://Www.Deloitte.Com/Assets/Dcom-Luxembourg/Local%20assets/Documents/Brochures/English/2010/Lu_Keyinvestorinformation_20102010.Pdf). At 3.

²³⁶ Ibid.4.

²³⁷ A Plain English Handbook - the Office of Investor Education and Assistance - U.S. Securities and Exchange Commission - August 1998

The prospectus directive

Directive 2003/71/EC, the so-called Prospectus Directive,²³⁸ is, like the Market in Financial Instrument Directive – MiFID (*see below*), a full harmonization directive. This Directive applies to all firms which want to issue their securities within the securities market of a Member State, no matter where the firm comes from. A directly applicable Regulation (809/2004/EC) completes Directive 2003/71/EC. The regulation defines the information that shall be included in a prospectus and that which must be incorporated by reference; it also provides a standard format and information on how a prospectus should be published. The Committee of European Securities Regulators (CESR) played a significant role in defining the information included in a prospectus, and, indeed, the regulation was largely based on its technical advice.²³⁹

The core aim of the Directive is the creation of a single passport for issuers (like the MiFID does for investment services providers – *see below*) in order to establish a single European market for securities and financial services. Investor protection through market transparency is an ancillary, though essential, goal for the creation of a single market, and it is explicitly mentioned in Preambles 12, 16, 18, 19, 20, 21, 29 and in articles 21.3, 21.4 and 23.2.2, of the directive. The implementing regulation is more technical and has only general references (such as article 28.5, or more implicitly, preamble 30).²⁴⁰

Directive 2010/73/EC,²⁴¹ in amending the Prospectus Directive, introduced a categorization of clients which overcomes the original “one size fits all” approach: now “qualified investors” are aligned with the “professional client” as provided by MiFID (*see below*). However, securities offers that are addressed only to “qualified investors” do not have to be accompanied by a prospectus: this is to reduce the costs on the side of the issuers. Moreover, now the intermediaries can use the categorization already built for MiFID in order to easily and quickly identify those clients who are “qualified”.²⁴²

Recital 21 of the Prospectus Directive requires that a prospectus has a summary of no more 2,500 words. Directive 2010/73/EC now requires that the summary convey the so-called “key information”, namely those elements which describe “the essential characteristics of, and risks associated with, the issuer, any guarantor, and the securities offered or admitted to trading on a regulated market”²⁴³. Moreover, now the summary must “be drawn up in a common format in order to facilitate comparability of the summaries of similar securities”²⁴⁴.

All this has been done “in order to aid investors when considering whether to invest in [] securities”²⁴⁵. Leaving apart the emphasis on helping investors understand an offered security, the amending directive does not significantly change the 2,500-word content of the summary, so we need

²³⁸ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L-345, 31 December 2003, 64.

²³⁹ de Brito, Jorde & Sônia Teixeira da Mota (2005) “The pros and cons of the Prospectus Directive ” *Available at: <http://www.iflr.com/Article/1984744/The-pros-and-cons-of-the-Prospectus-Directive.html>*

²⁴⁰ Van Dyck, Tom (2009) “(Opt-out) Intermediation as an Alternative for Ensuring a True Protection for European Retail Investors?,” *Catholic University of Leuven (KUL) Working Paper*.

²⁴¹ OJ L 327/1, 11.12.2010.

²⁴² See Fischer-Appelt, Dorothee (2010) “Prospectus Directive Amendments – discussion of key changes,” 4 *Law and Financial Markets Review*. (5). At 495.

²⁴³ Recital 15, Directive 2010/73/EC.

²⁴⁴ Art. 1.5, Directive 2010/73/EC.

²⁴⁵ Art. 1.5, Directive 2010/73/EC.

to wait for the implementing legislation to see how the final structure and the actual content of the summary will be.²⁴⁶

The *ex-ante* enforcement of the Prospectus Directive is carried out by national regulators. The Directive provides that prospectuses are to be approved, in advance of publication, by the competent authority of the home Member State. A national regulator's approval will be deemed granted by a "positive act at the outcome of the scrutiny of the completeness of the prospectus by the home Member State's competent authority including the consistency of the information given and its comprehensibility."²⁴⁷ While national regulators must verify whether or not the examined prospectus complies with the requirements established by the Prospectus Directive, the competent authority's approval does not represent a guarantee that an investment will be successful.

The *ex-post* enforcement of the Prospectus Directive is largely left to domestic tools: "Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus."²⁴⁸ Moreover, it is stated that "without prejudice to the right of Member States to impose criminal sanctions and without prejudice to their civil liability regime, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with".²⁴⁹ However, the Directive does provide quite clear rules concerning persons subject to civil liability.²⁵⁰

The Markets in Financial Instruments Directive (MiFID)

The Markets in Financial Instruments Directive of the European Parliament and the Council, 2004/39/EC²⁵¹, amended in 2008 by Directive 2008/10/EC²⁵², is probably the most important of the implementation steps of the Financial Services Action Plan²⁵³. Legally speaking, the so-called MiFID is based on the "right of establishment" as provided by the Articles of Chapter 2 - Title IV on "free movement of persons, services and capital" of the Treaty on the Functioning of the European Union.

MiFID replaced the Investment Services Directive (so-called ISD), 93/22/EEC²⁵⁴, which had governed European investment services market for more than a decade. MiFID is much broader than its predecessor, dealing with a wider range of issues and in more depth. However, what it is of most importance in our analysis is the shift in the level of harmonization: whereas the ISD envisaged a minimum harmonization of national legislation and a mutual recognition mechanism (namely, a financial service is regulated by the State where the service takes place, no matter whether the provider comes from that State or not); MiFID is built around home country control (a service is

²⁴⁶ Fischer-Appelt, Dorothee (2010) "Prospectus Directive Amendments – discussion of key changes," 4 *Law and Financial Markets Review*. (5). At 491.

²⁴⁷ Art. 6.1, let. q, Directive 2003/71/EC. OJ L 345, 31.12.2003.

²⁴⁸ Art. 6.2, Directive 2003/71/EC. OJ L 345, 31.12.2003.

²⁴⁹ Art. 25.1, Directive 2003/71/EC. OJ L 345, 31.12.2003

²⁵⁰ "civil liability attaches to those persons who have tabled the summary including any translation thereof, and applied for its notification, but only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus" Art. 5.2. let. d, Directive 2003/71/EC. OJ L 345, 31.12.2003 Thus, the issuer, the offeror or the person asking for the admission of securities to trading in a regulated market and any underwriters or advisers are responsible towards those investors who buy securities within 12 months from the publication of the prospectus.

²⁵¹ OJ L 145/1, 30.4.2004

²⁵² OJ L 76/33, 19.3.2008

²⁵³ COM(1999) 232.

²⁵⁴ OJ L 141/27, 11.6.1993.

regulated by the firm's home State) and seeks maximum harmonization of contract-related conduct-of-business rules.

MiFID was conceived as the cornerstone for the European investment services market and, therefore, follows a sector-related vertical legislative approach – in that it regulates one specific sector instead of dealing with one aspect crossing several sectors. It officially aims at ensuring a level playing field for service providers and, thus, creating a more competitive cross-border financial market²⁵⁵, with reduced costs for raising capital.²⁵⁶ For this reason, indeed, a key aspect of MiFID is the creation of a single passport for investment firms which allows them, once authorized by their home country authority, to operate throughout the Union. Within this framework, the regulation of the relationship between retail investors and investment firms is an important element, even though the protection of the retail private investor is “certainly not at the heart of this Directive”.²⁵⁷

The dominant topic which drives MiFID's provisions is the existence of an information asymmetry between the customer and the service provider, and it tries to solve this problem by shaping contract clauses concerning the provision of information from a broker/dealer to a client. In order to do so, MiFID provides that an exchange of information between clients (concerning their needs) and investment firms (concerning the characteristics of the services offered) should take place even before a contract is concluded, at the point of sale and even after it, depending on the nature of the contract. All this is designed to improve the client/firm relationship. At the same time, with the intention of building a fully-fledged single European retail financial market, MiFID prohibits Member States from adopting additional rules for the different national markets, even if they would perhaps be more suitable. By the same token, MiFID and its implementing Directive 2006/73²⁵⁸ provide new conduct of business measures for financial investment services, requiring professionals to receive information from their own customers related to their financial knowledge and needs, and thus giving advice that better suits their customers' situation.

To make all this possible, MiFID relies on the role of law in designing a retail investor fit for a fully-fledged single European retail financial market²⁵⁹, and on public rather than private enforcement through business and consumer organizations. This is because, while Article 52 of the MiFID constitutes a rather enigmatic provision on collective enforcement and does not give a strong position to stakeholders, the role of supervisory administrative bodies is clarified and reinforced by Articles 48-51. Indeed, MiFID provides a whole range of powers that must be made available to competent authorities, including the power to carry out on-site inspections or to adopt any type of measure to ensure that investment firms and regulated markets comply with legal requirements.

²⁵⁵ Haas, François (2007) "The Markets in Financial Instruments Directive: Banking on Market and Supervisory Efficiency ". At 5.

²⁵⁶ Chlistalla, Michael, Uwe Schweickert & Roland Wittner (2006) "Markets in Financial Instruments Directive - The Way Forward in European Securities Market Integration? ". At 2.

²⁵⁷ Micklitz, Hans-Wolfgang (2009) "The Targeted Full Harmonisation Approach: Looking behind the Curtain" in Geraint Howells and Reiner Schulze, ed. *Modernising and Harmonising Consumer Contract Law*. München: Sellier European Law Publishers.

²⁵⁸ OJ L 241, 2.9.2006.

²⁵⁹ On the role of law, see Moloney, Niamh (2005) "Building a Retail Investment Culture through Law: The 2004 Markets in Financial Instruments Directive " 6 *European Business Organization Law Review* 341-421. (3). At 363.

- ii. The relationship between financial firms and retail investors and the contract-related rules for the provision of investment services

Categorization of clients

One of the most important aspects introduced by MiFID in 2004 was the new categorization of clients on the basis of their financial knowledge, needs and experience. In Article 11(1) of the Investment Services Directive (ISD) it was already envisaged that Member States would draw up rules of conduct that must “take account of the professional nature of the person for whom the service is provided.”²⁶⁰ However, the ISD did not mention any harmonizing rationale to be followed by Member States and they were free to implement the provision in many ways.²⁶¹ Conversely, MiFID requires firms to adopt efficient written internal policies and procedures to categorize clients.²⁶²

MiFID provides for three categories:

Retail clients: As noted above, MiFID avoids strictly defining what a retail client is, and it just gives a residual account: “Retail client means a client who is not a professional client”.²⁶³ However, it is clear that retail clients are those who need greater protection and MiFID compels financial firms to provide suitable and appropriate services and products to this category.

Professional clients: A professional client is a “client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs”.²⁶⁴ In addition, a professional client needs to meet the criteria listed in Annex II of the Directive. The rationale of this category is to reduce the costs borne by financial firms as a result of the expansive level of protection granted to retail investors. In order to do so, MiFID lowers the level of protection for those customers who already possess the experience and knowledge necessary to understand the risk involved in products or services.

Eligible counterparts: An eligible counterpart is usually an institution or a firm supposed to possess knowledge so wide as to exempt an investment firm from the obligations described above. An eligible counterpart can be credit institutions, central banks, investment funds, pension funds, national public authorities (governments), international organizations, etc. etc.

As we have already seen in the 2010 directive amending the Prospectus Directive, the categorization of customers delineated by MiFID has been used (and is very likely to be used again in the near future) as the starting point for a legal evolution which differentiates legal solutions on the basis of clients’ characteristics. Moreover, although the MiFID classification is not used, Directive 94/19/EC on deposit-guarantee schemes also provides for the differential treatment of bank clients depending on their level of sophistication: the rationale of that is the need to avoid a typical *moral hazard* situation²⁶⁵.

However, the UCITS IV Directive still requires a uniform level of investor protection for all investment undertakings that raise capital from the public, without considering the level of

²⁶⁰ OJ L 141, 11.6.1993.

²⁶¹ See Kruithof, Marc & Walter VanGerven (2010) "A Differentiated Approach to Client Protection: The Example of MiFID", Financial Law Institute - Universiteit Gent, (WP 2010-07).

²⁶² Section II.2. in Annex II to MiFID. OJ L 145/1, 30.4.2004.

²⁶³ OJ L 145/1, 30.4.2004.

²⁶⁴ OJ L 145/1, 30.4.2004.

²⁶⁵ Namely, a situation where those who have uncommon information would take advantage at the expenses of unconscious investors.

sophistication of the unit holders and without differentiating between types of investors.²⁶⁶ Indeed, the term retail investor is used only as a benchmark to measure the clarity of information which has to be disclosed.²⁶⁷

Conflict of interests and conduct of business

Conflicts of interest are a very complex phenomenon²⁶⁸ which can be addressed by both organizational duties and conduct requirements. The organizational duties aspect falls outside the scope of this paper as it concerns the internal structure and the governance configuration of companies. The conduct of business, on the other hand, is a key element and is concretized through the following obligations: to act fairly, honestly and in the best interests of the investors; to provide fair, clear and not misleading information; to give both ex-ante and ex-post contractual information; to use the suitability and appropriateness tests when assessing securities; to comply with the best execution rules and other measures.²⁶⁹

However, it is worth noting that article 18 of MiFID provides the possibility for firms to adopt internal policies in order to identify, prevent, resolve and disclose actual and potential conflicts of interest generated in situations within the firm, between the firm and its clients, and amongst its clients when providing investment services. Each financial firm needs to have efficient policies which, for instance, resolve the problem of internal managers exercising inappropriate influence over the way retail advisers recommend securities to their customers. At the moment, this objective seems to be far from being achieved.

Importantly, MiFID provides that if a conflict of interest arises when a service is being sold, the provider has to disclose the existence of the conflict: such a communication of the conflict is sufficient to discharge the conflict itself. This is contrary to other previous legislation (like the Italian equivalent) where the client needed to officially authorize the conflict for it to be overcome.²⁷⁰

Suitability and appropriateness

The suitability and appropriateness tests were introduced by Article 19(4,5) of MiFID. These features originate from the traditional *know your merchandise* and *know your customer* rules (*see below in the US section*), and aim to disclose a client's knowledge and experience, their inclination to risk and their financial situation, so that investment firms can assess whether a service is suitable and appropriate for their customers.

The suitability test applies to both retail and professional clients as well as to discretionary portfolio management and investment advisory services. The suitability test has been conceived as a tool for providers to obtain all the necessary information in order to assess the clients' financial knowledge and expertise, their financial situation and goals, so as to recommend investments suitable to the clients' needs. If a customer does not want to reveal specific information or the product requested or offered is "inadequate" according to the client's financial picture, then the investment firm cannot

²⁶⁶ Kruithof, Marc & Walter VanGerven (2010) "A Differentiated Approach to Client Protection: The Example of MiFID", Financial Law Institute - Universiteit Gent, (WP 2010-07). At 9.

²⁶⁷ Ibid.9.

²⁶⁸ See Kumpan, Christoph & Patrick C. Leyens (2008) "Conflicts of Interest of Financial Intermediaries - Towards a Global Common Core in Conflicts of Interest Regulation," 4 *European Company and Financial Law Review* 72-100. (1).

²⁶⁹ See Moloney, Niamh (2005) "Building a Retail Investment Culture through Law: The 2004 Markets in Financial Instruments Directive" 6 *European Business Organization Law Review* 341-421. (3). At 379.

²⁷⁰ Antonucci, Antonella (2009) "Regole di condotta e conflitto di interesse" in De Poli Matteo, ed. *La nuova normativa MiFID*. Padova: Cedam. At 57.

execute the operation: the suitability test can prevent investment products from being offered or securities from being inserted into clients' portfolio.²⁷¹

The appropriateness test applies to retail clients and it has to be carried out when providing execution-only services and reception and transmission of orders, thus it does not concern cases of discretionary portfolio management and investment advisory services. The appropriateness test was conceived as a tool for providers to request the necessary information about clients' financial knowledge and expertise in the field related to a product requested by the customers themselves, in order to evaluate whether the requested product is appropriate or not. However, "the "appropriateness" cannot stop banks from executing their clients' orders",²⁷² thus the "burden" of the risk entirely rests on the customer's shoulders.

Disclosure and Information duties

Information duties have always played a key role in the field of EU consumer protection law and, given the potential vulnerability of investors, marketing disclosure is also a core concern for EU retail investment policy.²⁷³ Beyond the suitability and appropriateness tests, MiFID strongly highlights the importance of information disclosure during both the pre-trade and post-trade stages. Article 19(2) states that "all information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such." Article 19(3) is the key disclosure provision and it states that information needs to be provided in a comprehensible form about:

1. the investment firm itself and its services;
2. the financial instruments offered and the investment strategies proposed; with appropriate guidance on, and warnings of, the risks associated with investments in those instruments or in respect of particular investment strategies;
3. execution venues, costs and associated charges.

Article 19(3) clarifies that, in this way, customers "are able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis." Finally, it recommends a standardized format as the best way to communicate this information. The objective of Article 19(3) and (2) is conceiving an informed and empowered investor through the provision of relevant and comprehensible information.²⁷⁴ This idea is reinforced by Article 19(8), which provides that the client must receive adequate reports from the investment firm on the service provided.

UCITS' newly conceived "key information document" follows the same parameters, and the idea of a standardized prospectus is also driven by the "information disclosure" paradigm. Unlike MiFID, whose appropriateness and suitability tests propagate the idea that the best way to protect investors is through mandatory disclosure alone, the Prospectus Directive is entirely designed upon the disclosure model, so that it can be said that the prospectus disclosure is "the prototype of the disclosure paradigm"²⁷⁵; rational investors can read the prospectus and, on basis of that, they are capable of choosing one security over another.²⁷⁶

²⁷¹ Casey, Jean-Pierre & Karel Lannoo eds. (2009) *The MiFID Revolution*: Cambridge University Press. At 55.

²⁷² Ibid. 55.

²⁷³ Moloney, Niamh (2005) "Building a Retail Investment Culture through Law: The 2004 Markets in Financial Instruments Directive " 6 *European Business Organization Law Review* 341-421. (3). At 384.

²⁷⁴ Ibid.386.

²⁷⁵ Eddy Wymeersch, The reforms of the European Financial Supervisory System, ECFR 2010, 240-265. At 242.

²⁷⁶ Van Dyck, Tom (2009) "(Opt-out) Intermediation as an Alternative for Ensuring a True Protection for European Retail Investors?," *Catholic University of Leuven (KUL) Working Paper*. At 3.

It may be argued that a more technical directive, such as the Prospectus Directive, is unlikely to include sophisticated tools such as appropriateness and suitability tests. And this is correct. It can also be added that the 2010 amendment differentiates between retail investors and qualified investors and it is likely to break the “disclosure paradigm”. However, the fact is that the underlying idea can prove to be misleading: by reading a prospectus (usually poorly designed and full of technical terms and concepts, notwithstanding the “summary” and the “key information” conveyed in it) a retail investor is supposed to understand all the content and to be able to make an efficient decision. This justification for disclosure is as weak as suggesting that retail investors can choose to invest their savings in a listed company after reading its IFRS-standardized²⁷⁷ account books.

Best execution and other measures

Putting it simply, “best execution” is about investors receiving the most favorable terms available for their trades.²⁷⁸ Indeed, Art. 21 states that “Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. [...] Member States shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result.” Furthermore, Recital 66, 2nd level Commission Directive 2006/73/EC specifies that “An investment firm should apply its execution policy to each client order that it executes with a view to obtaining the best possible result for the client in accordance with that policy.”²⁷⁹

So, here we have a couple of key elements necessary to define an “execution” as “best”: all reasonable steps [means] through which to achieve the best possible result. The MiFID best execution commitment can be described as “an obligation of means”²⁸⁰ and investment firms are required to take all reasonable steps in order to obtain the best possible result.²⁸¹

Three main principles underneath MiFID’s best execution are:

- an obligation of means to achieve the best net result for the client, by involving factors that determine whether or not this best net result has been accomplished;²⁸²
- the documentation of a firm’s execution policy that includes the execution venues and the documentation of the parameters that justify these choices.²⁸³ A firm needs to adopt a best execution policy and agree with its client on the very nature of this policy;
- at the request of the client, a firm needs to be able to demonstrate that the execution object of the client’s claim has been carried out in accordance with the agreed execution policy and that the execution policy allows the achievement of the best possible result on a consistent basis.²⁸⁴

²⁷⁷ The IFRS Foundation is the oversight body of the International Accounting Standards Board (IASB). Its aim is to develop a single set of high quality, understandable, enforceable and globally accepted financial reporting standards based upon clearly articulated principles, as stated in its website: <http://www.ifrs.org/Home.htm>

²⁷⁸ Macey, Jonathan R. & Maureen O'Hara (1997) "The Law and Economics of Best Execution," 6 *Journal of Financial Intermediation* 188-223. At 188.

²⁷⁹ OJ L 241, 2.9.2006.

²⁸⁰ D'Hondt, Catherine & Jean-René Giraud (2007) "MiFID: the (in)famous European Directive?," *EDHEC Position Paper*. At 18.

²⁸¹ Ibid. At 18.

²⁸² Ibid. At 18.

²⁸³ Ibid. At 18.

²⁸⁴ Ibid. At 18.

This “best possible result” must include various elements, without emphasizing a specific one²⁸⁵, such as account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.²⁸⁶ All these elements are listed in Art. 21. Moreover, European investment firms also consider further criteria such as the categorization of clients (either retail or professional), the characteristics of the client order, the type of financial instrument chosen, and the transaction costs involved.²⁸⁷ CESR has also reaffirmed the importance of the total consideration of various factors: “speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost factors “only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client”.”²⁸⁸

Other measures which are worth noting are inducements and client order handling. Through the rules on inducements, MiFID provides that banks may no longer receive any implicit management fees. Finally, the “client order handling” complements “best execution” as regards the quality of the services provided, on the basis of the clients’ characteristics

b. The IOSCO’s Documents and the Issue of Investor Protection²⁸⁹

IOSCO’s Objectives and Principles of Securities Regulation, Memoranda of Understanding and, to a lesser extent, its Codes of Conduct are the core documents of its *normative* activity. From a formal viewpoint, IOSCO standards and principles are not directly binding among the Organization’s Members. Moreover, they are deliberately broad, because they aim to ease not so much the incorporation of detailed rules, as the assimilation of a specific content. So, it looks as if, on the one hand, IOSCO recognize there is “no single prescription or roadmap to good regulation in the field of securities”²⁹⁰, while, on the other hand, this roadmap must necessarily lead to a predefined objective.

The Memoranda of Understanding are the oldest instrument used by IOSCO members. The MOUs were originally bilateral and it is only recently that IOSCO began adopting multilateral MOUs.²⁹¹ A MOU is a cooperative tool used by the contracting parties in order to facilitate their functional needs on specific areas. Due to the extreme flexibility inherent in financial markets since the end of the ‘70s, the classical international law tools began to look inadequate, too burdensome and, above all, inefficient for the cross-border enforcement of securities laws.²⁹² Given this landscape, Memoranda of Understanding looked like a very good compromise, able to evade “obstacles and introduce a more flexible, lower-profile alternative.”²⁹³

²⁸⁵ We will see how in the US best execution the “price” factor plays a more prominent role.

²⁸⁶ D’Hondt, Catherine & Jean-René Giraud (2007) “MiFID: the (in)famous European Directive?,” *EDHEC Position Paper*. At 18.

²⁸⁷ Bošković, Tanja, Caroline Cerruti & Michel Noël (2010) “Comparing European and U.S. securities regulations: MiFID versus corresponding U.S. regulations”, World Bank Publications. Washington, DC. At. 24.

²⁸⁸ CESR/07-050b. At 8.

²⁸⁹ IOSCO’s normative production has been analyzed by the author in: Marcacci, Antonio (2012) “IOSCO: The World Standard Setter for Globalized Financial Markets,” 12 *Richmond Journal of Global Law and Business* 23-43. (1).

²⁹⁰ Brummer, Chris (2010a) “Post-American Securities Regulation,” 98 *California Law Review* 327. (2).

²⁹¹ International Organization of Securities Commissions, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information 12 (May 2002), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf>.

²⁹² These traditional tools “were seen as inadequate because they [were] too general and inflexible for highly technical and rapidly evolving securities markets in which intense surveillance of legal activities [was] needed to detect illegal activities.” Porter, Tony (1993), *States, Markets, and Regimes in Global Finance*, New York: Macmillan.

²⁹³ Raustiala, Kal (2002) “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law,” 43 *Virginia Journal of International Law*.

The very first bilateral Memoranda of Understanding drafted within IOSCO were signed in the 1980s. However, much more recently, a Multilateral Memoranda of Understanding was drafted in order to set up “an international benchmark for cross-border co-operation critical to combating violations of securities and derivatives law”²⁹⁴. This MMoU was developed by a Special Project Team established by IOSCO after the events of September 11th 2001, to set down actions that domestic financial authorities could take in order to reinforce cooperation and information sharing.²⁹⁵ At the 2005 Annual Conference, held in Colombo, Sri Lanka, the Presidents’ Committee decided that, as of January 1st 2010, the Organization’s ordinary and associate members could apply to become, and be accepted as, signatories of the MMoU, or express a formal commitment to seek the legal authority to enable them to become MMoU signatories.²⁹⁶ The goal of MMoU is to establish a system of information sharing to be activated when an investigation is being carried out.²⁹⁷

In 1990, IOSCO adopted the “Report on International Conduct of Business Principles”, one of the first documents dealing with fairness, information about customers, information for customers and conflicts of interest for the transnational financial markets. In this document, the term fairness is taken to encompass an obligation to avoid misleading and deceptive acts of representations.²⁹⁸ Particularly important is the combination of the Principle of information about customers with the Principle of information for customers. The former provides that a firm should seek, and receive, from its customers certain information concerning their financial situation, investment experience and investment objectives relevant to the services to be provided, and this is perceived as a necessary element in enabling the firm to fulfill any suitability requirements.²⁹⁹ Such a principle-based rule is shaped by the renowned “know your customer” principle.³⁰⁰

On the other side, the Repot requires a firm to provide timely and accurate reports to the customer about business undertaken for or with the customer and to make adequate disclosure of all the relevant material information necessary for investors to make informed investment decisions.³⁰¹ In particular, the conflict of interest principle envisages that a firm should try to avoid conflicts of interest and, when they cannot be avoided, should ensure that its customers are fairly treated.³⁰² This principle implies that conflicts of interest can be managed, and that proper management to ensure fair treatment of customers requires information disclosure, internal rules of confidentiality, or other appropriate methods.³⁰³

²⁹⁴ http://www.iosco.org/library/index.cfm?section=mou_main

²⁹⁵ http://www.iosco.org/library/index.cfm?section=mou_main

²⁹⁶ http://www.iosco.org/library/index.cfm?section=mou_main

²⁹⁷ The areas covered by the MMoU are the following: insider dealing and market manipulation; misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives; solicitation and handling of investor funds, and customer orders; the registration, issuance, offer, or sale of securities and derivatives; the activities of market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and markets, exchanges, and clearing and settlement entities. See: http://www.iosco.org/library/index.cfm?section=mou_main.

²⁹⁸ International Organization of Securities Commissions - IOSCO (1990) "A Resolution on International Conduct Of Business Principles," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES4.pdf>.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

In September 1998, IOSCO adopted its “Objectives and Principles of Securities Regulation”³⁰⁴ (the so-called IOSCO Principles), which were redrafted in 2003 and revised in 2010 (when 8 principles were added)³⁰⁵. This document lists 38 principles of securities regulation, which are inevitably general in order to be applicable to many different jurisdictions. They represent an attempt to establish what IOSCO deems to be the fundamental elements of an effective regulatory system.³⁰⁶ The Principles are drafted at a broad conceptual level in order to accommodate the differences in the laws, regulatory framework, and market structures among its Member jurisdictions.³⁰⁷ IOSCO has officially stated that, in drafting the Principles, it wanted to “avoid being overly prescriptive in its requirements while, at the same time, providing sufficient guidance as to the core elements of an essential regulatory framework for securities”³⁰⁸.

The “Objectives and Principles of Securities Regulation” are important for three main reasons: they establish higher standards of regulation across jurisdictions, improve the depth of cooperation between different regulators, and provide a chance to regulate foreign jurisdictions in domestic regulatory arrangements.³⁰⁹ The “Objectives” follow three main goals:

- The protection of investors;³¹⁰
- Ensuring that markets are fair, efficient and transparent;
- The reduction of systemic risk.

The document clearly specifies that the 38 principles must be practically implemented into the domestic legal framework in order to achieve the goals described above. These 38 principles are grouped into nine categories: a) Principles Relating to the Regulator; b) Principles for Self-Regulation; c) Principles for the Enforcement of Securities Regulation; d) Principles for Cooperation in Regulation; e) Principles for Issuers; f) Principles for Auditors, Credit Rating Agencies, and other information providers; g) Principles for Collective Investment Schemes; g) Principles for Market Intermediaries; f) Principles for the Secondary Market.

Full disclosure of that information – which is considered as “material” for investors when making investment decisions – is thought to be “the most important means for ensuring investor protection”.³¹¹ Through (enough) information investors are believed to be “better able to assess the potential risks and

³⁰⁴ International Organization of Securities Commissions - IOSCO (2003) "Objectives and Principles of Securities Regulation " Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>

³⁰⁵ The recently added principles deal with issues like: hedge funds; credit rating agencies and auditor independence and oversight; monitoring, mitigation and management of systemic risk; regular review of the perimeter of regulation; management, avoidance and disclosure of conflicts of interest and misalignment of incentives. See: http://www.financialstabilityboard.org/cos/cos_100601.htm

³⁰⁶ Lucy, Jeffrey (2003) "The single market for financial services in the EU and its impact on globalisation", Australian Securities & Investments Commission ASIC, [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EABC_speech_031103.pdf/\\$file/EABC_speech_031103.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EABC_speech_031103.pdf/$file/EABC_speech_031103.pdf), Sydney.

³⁰⁷ International Organization of Securities Commissions - IOSCO (2008) "Methodology for Assessing implementation of the IOSCO objectives and principles of securities regulation," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD266.pdf>.

³⁰⁸ Ibid.

³⁰⁹ Lucy, Jeffrey (2003) "The single market for financial services in the EU and its impact on globalisation", Australian Securities & Investments Commission ASIC, [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EABC_speech_031103.pdf/\\$file/EABC_speech_031103.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EABC_speech_031103.pdf/$file/EABC_speech_031103.pdf), Sydney. At 5.

³¹⁰ The Document specifies in note # 2 that the term “investor” is intended to include customers or other consumers of financial services.

³¹¹ International Organization of Securities Commissions - IOSCO (2003) "Objectives and Principles of Securities Regulation " Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> . At 5.

rewards of their investments and, thus, to protect their own interests”.³¹² Importantly, Part E, which deals with Principles for Issuers, directly mentions both investor protection and accounting and auditing standards: these are held to be key components of disclosure requirements and they should be of a “high and internationally acceptable quality”.³¹³

In 2008, the Joint Forum of International Regulators adopted the “Customer suitability in the retail sale of financial products and services” document. The document is not a regulatory device, but rather a survey of the different national approaches towards customer suitability. Although the document highlights the need for a more detailed approach to financial advising, which takes into account the customers’ profile and their inclination to risks, there are no really new advancements made in regulatory terms. It is worth noting that the Joint Forum of International Regulators recognizes the importance of a matter such as customer suitability in the retail sector. However, it does not draft any international guidelines, unlike IOSCO’s information disclosure principles.

c. EU Law and the Soft Incorporation of IOSCO Standards

The implementation of IOSCO soft-laws is itself soft. This means, for instance, that a principle of the “Objectives and Principles of Securities Regulation” is not implemented as such, but it shapes the content of domestic legislation. This happens, for example, in the case of Principle 16 which states that “[t]here should be full, accurate and timely disclosure of financial results, risk and other information which is material to investors’ decisions”³¹⁴ and regarding Principle 10.3 on Timely Disclosure of Information,³¹⁵ stating that “[i]nvestors should be provided with the information necessary to make informed investment decisions on an ongoing basis.”³¹⁶

The principle of full, timely and accurate disclosure of current and reliable information material to investment decisions is directly related to the objectives of investor protection and “fair, efficient and transparent markets”.³¹⁷ Many other documents issued by IOSCO stress the importance of disclosure: IOSCO Technical Committee, “Public Document No. 16, International Equity Offers - Changes in Regulation Since April 1990”, September 1991; IOSCO Technical Committee, “Public Document No. 38, International Equity Offers - Changes in Regulation Since April 1992”, October 1994; IOSCO, “IOSCO Resolution No. 44: Resolution on IASC Standards”, May 2000; IOSCO Technical Committee, “IOSCO Public Document No. 141, General Principles Regarding Disclosure of Management’s Discussion and Analysis of Financial Condition and Results of Operations”, February 2003.³¹⁸ The importance of full disclosure is incorporated throughout the entire Prospectus Directive, in recitals 43 and 88 and art. 19(3) of UCITS, and art. 19 of MiFID.

However, Article 19 of MiFID also deals with the “know-your-customer” rule and the suitability rule, as it regulates the management of clients’ assets. In this vein, Principle 31 also provides that “Market intermediaries should be required to establish an internal function that delivers compliance with standards for internal organization and operational conduct, with the aim of protecting the interests of

³¹² Ibid.. At 5.

³¹³ Ibid.. At 5.

³¹⁴ Ibid.

³¹⁵ Ibid. *Based on:* International Organization of Securities Commissions - IOSCO (2002) “Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities,” Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>, *ibid.*

³¹⁶ International Organization of Securities Commissions - IOSCO (2003) “Objectives and Principles of Securities Regulation” Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>

³¹⁷ Ibid.

³¹⁸ *For a more comprehensive list, see:* Van Dyck, Tom (2009) “(Opt-out) Intermediation as an Alternative for Ensuring a True Protection for European Retail Investors?,” *Catholic University of Leuven (KUL) Working Paper*. At 4.

clients and their assets and ensuring proper management of risk, through which management of the intermediary accepts primary responsibility for these matters”.

Finally, the same circumstance takes place for Principle 36, which establishes that “Regulation should be designed to detect and deter manipulation and other unfair trading practices”, and is incorporated into UCITS recital 58, and, again, art. 19 of MiFID; while the same is true for Principle 17 (“Holders of securities in a company should be treated in a fair and equitable manner”), which is implemented throughout the general terms and conditions of MiFID.

A similar IOSCO “presence” can be easily found in other pieces of EU legislation like the Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate; or the Regulation (EC) No 1060/2009 on credit rating agencies. This approach characterizes the incorporation of IOSCO standards at the domestic level as a “soft” approach to implementation: here standards are not directly incorporated as if there were a legally binding obligation to do so, but they are implemented particularly because the European Commission voluntarily decides to do so – it does that because it thinks these standards are beneficial for the European internal financial market.

Conclusions

By reading this, the answer to the question “is a greater role for both Europe and IOSCO looming?” cannot but be “Yes”. Indeed, IOSCO has been growing exponentially over the last two decades and it has become more and more defined, structured and organized. Moving from the old to the new text of the By-Laws conveys a more established set of procedures applicable to the body responsible for carrying out the Organization’s main policy tasks. Indeed, while the old version did not mention anything about the internal procedures of the Technical Committee, the new one provides for some procedural rules of the new IOSCO Board. So, generally speaking, the new By-Laws make IOSCO look more like a proper international organization even though there is still a long way to go before it turns into something fully fledged like the WTO or the IMF.

As far as the European Union is concerned, it has been playing an increasingly pronounced role in the international financial arena and it has done so, not so much as a proper state-like agent, but as a hybrid actor, able to progressively replace its (traditional) Member States in the global regulatory battlefield where soft-rules are produced. This trend is corroborated by the very recent appointment of a senior official of the European Commission as the new IOSCO Secretary General. Thus, even in light of the “soft-law leeway” granted by the ECJ case law, it is highly likely that the years to come will see the EU assuming a leading international role as regards the production international financial standards.

Cases

Case 22/70, *Commission v. Council* [1971] ECR 263.
Joined cases 3, 4 and 6-76, *Cornelis Kramer and others* [1976] ECR 1279.
Opinion 1/76, *Rhine Navigation Agreement* [1977] ECR 741.
Case C-327/91, *French Republic v Commission* [1994] ECR I-3641.
Opinion 1/94, *WTO Agreement* [1995] ECR I-5267.
Case C-475/98 *Commission v Austria* [2002a] ECR I-9797.
Case C-471/98 *Commission v Belgium* [2002b] ECR I-9681.
Case C-467/98 *Commission v Denmark* [2002c] ECR I-9519.
Case C-469/98 *Commission v Finland* [2002d] ECR I-9627.
Case C-472/98 *Commission v Luxembourg* [2002e] ECR I-9741.
Case C-468/98 *Commission v Sweden* [2002f] ECR I-9575.
Case C-466/98 *Commission v United Kingdom* [2002g] ECR I-9427.
Case C-233/02, *French Republic v. Commission* [2004] ECR I-2759.
Opinion 1/03, *Lugano Convention* [2006] ECR I-1145.

Bibliography

- Altman, Oscar L. (1961) "Foreign Markets for Dollars, Sterling, and Other Currencies", 8, (3).
- Amato, Massimo & Luca Fantacci (2009), *Fine della finanza*: Donzelli Editore.
- Antonucci, Antonella (2009) "Regole di condotta e conflitto di interesse" in De Poli Matteo, ed. *La nuova normativa MiFID*. Padova: Cedam.
- Bartels, Lorand (2005), *Human Rights Conditionality in the EU's International Agreements*, Oxford, New York: Oxford University Press.
- Bismuth, Régis (2009) "La coopération internationale des autorités de régulation du secteur financier et le droit international public", University Paris 1 Panthéon-Sorbonne.
- Bošković, Tanja, Caroline Cerruti & Michel Noël (2010) "Comparing European and U.S. securities regulations: MiFID versus corresponding U.S. regulations", World Bank Publications. Washington, DC.
- Brummer, Chris (2010a) "Post-American Securities Regulation," 98 *California Law Review* 327. (2).
- Brummer, Chris (2010b) "Why Soft Law Dominates International Finance - And Not Trade," 13 *Journal of International Economic Law* 623-643. (3).
- Bungenberg, Marc, (2008) "The Common Commercial Policy after Lisbon" Presented at the Hebrew University Jerusalem, 14 July 2008.
- Calliess, Galf-Peter (2007) "The Making of Transnational Contract Law," 14 *Indiana Journal of Global Legal Studies* 469-483 (2).
- Casey, Jean-Pierre & Karel Lannoo eds. (2009) *The MiFID Revolution*: Cambridge University Press.
- Chlistalla, Michael, Uwe Schweickert & Roland Wittner (2006) "Markets in Financial Instruments Directive - The Way Forward in European Securities Market Integration? ".
- Clark, Joel (February 24, 2010) "EU exclusion from CPSS/Iosco working group 'could hinder global regulation'," *Risk magazine*.
- Clark, Joel (March 29, 2010) "European Commission admitted to CPSS/Iosco working group on CCPs," *Risk magazine*.
- Craig, Paul (2008) "The Treaty Of Lisbon, Process, Architecture And Substance," 33 *European Law Review* 137-166. (2).
- Craig, Paul & Gráinne de Búrca (2011), *EU Law: Text, Cases, and Materials: Fifth Edition*: Oxford University Press.
- Cremona, Marise (2006) "A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treat", European University Institute, (Law Working Paper No. 2006/30).
- Cremona, Marise (2008a) "Coherence Through Law: What Difference Will the Treaty of Lisbon Make? ," 3 *Hamburg Review of Social Sciences* 11-36. (1).
- Cremona, Marise (2008b) "Defining Competence In EU External Relations: Lessons from the Treaty Reform Process" in Alan Dashwood & Marc Maresceau, eds. *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*. Cambridge University Press.
- Cremona, Marise (2011) "External Relations and External Competence of the European Union: The emergence of an integrated policy" in Paul Craig & Gráinne De Búrca, eds. *The Evolution of EU Law, 2nd ed.* Oxford: Oxford University Press.
- D'Hondt, Catherine & Jean-René Giraud (2007) "MiFID: the (in)famous European Directive?," *EDHEC Position Paper*.

- de Brito, Jorde & Sônia Teixeira da Mota (2005) "The pros and cons of the Prospectus Directive " Available at: <http://www.iflr.com/Article/1984744/The-pros-and-cons-of-the-Prospectus-Directive.html>
- de Mestral, Armand (2003) "The Consequences of the European Court of Justice's 'Open Skies' Decisions" World Markets Series Available at: http://www.touchbriefings.com/pdf/12/avi_1-19_lr.pdf
- Deloitte Global Services Limited (2010) "Key investor information - Structure avoids confusion ", Http://Www.Deloitte.Com/Assets/Dcom-Luxembourg/Local%20assets/Documents/Brochures/English/2010/Lu_Keyinvestorinformation_20102010.Pdf.
- DG Internal Market and Services - The European Commission (15 May 2006) "Workshop on simplified prospectus - Annotated agenda of 1st Meeting", Http://Ec.Europa.Eu/Internal_Market/Investment/Docs/Other_Docs/Prospectus/Annotated-Agenda-2nd_En.Pdf.
- DG Trade - European Commission (January 27, 2010) "The impact of the Lisbon Treaty on trade policy ", Brussels. Available at: http://trade.ec.europa.eu/doclib/docs/2010/january/tradoc_145753.pdf.
- Einzig, Paul (1977), *The Euro-dollar system: practice and theory of international interest rates*: Macmillan.
- European Securities and Markets Authority - ESMA (2011) "Summary Of Conclusions - ESMA/2011/MB/98".
- Everson, Michelle (1995) "Independent Agencies: Hierarchy Beaters?," 1 *European Law Journal* 180-204. (2).
- Financial Stability Board - FSB (2010) "Implementing OTC Derivatives Market Reform."
- Fischer-Appelt, Dorothee (2010) "Prospectus Directive Amendments – discussion of key changes," 4 *Law and Financial Markets Review*. (5).
- Griller, Stefan & Andreas Orator (2010) "Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine," 35 *European Law Review* 3-35. (1).
- Haas, François (2007) "The Markets in Financial Instruments Directive: Banking on Market and Supervisory Efficiency ".
- International Organization of Securities Commissions - IOSCO (1986) "A Resolution Concerning Mutual Assistance ("Rio Declaration")," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES1.pdf>.
- International Organization of Securities Commissions - IOSCO (1990) "A Resolution on International Conduct Of Business Principles," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES4.pdf>.
- International Organization of Securities Commissions - IOSCO (1994) "IOSCO Annual Report 1994," Montreal.
- International Organization of Securities Commissions - IOSCO (1997) "A Resolution on Enforcement Powers," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES14.pdf>.
- International Organization of Securities Commissions - IOSCO (1999) "A Resolution on the Relocation of the IOSCO General Secretariat to Madrid," Montreal. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES18.pdf>.

- International Organization of Securities Commissions - IOSCO (2000) "Model for effective Regulation - IOSCO SRO Consultative Committee (SROCC)," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD110.pdf>.
- International Organization of Securities Commissions - IOSCO (2001) "Issues Paper on Exchange Demutualization," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD119.pdf>
- International Organization of Securities Commissions - IOSCO (2002) "Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD132.pdf>.
- International Organization of Securities Commissions - IOSCO (2003) "Objectives and Principles of Securities Regulation " Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>
- International Organization of Securities Commissions - IOSCO (2008) "Methodology for Assessing implementation of the IOSCO objectives and principles of securities regulation," Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD266.pdf>.
- International Organization of Securities Commissions - IOSCO (2009) "2008 IOSCO Annual Report",Madrid Available at: http://www.iosco.org/annual_reports/annual_report_2008/.
- International Organization of Securities Commissions - IOSCO (2010a) "IOSCO forms Task Force on OTC Derivatives Regulation." Available at: <http://www.iosco.org/news/pdf/IOSCONEWS191.pdf>.
- International Organization of Securities Commissions - IOSCO (2010b) "Objectives and Principles of Securities Regulation " Madrid Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD329.pdf>.
- International Organization of Securities Commissions - IOSCO (2010c) "Resolution of the Presidents Committee on Amendment to IOSCO's By-Laws to reflect change in structure," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf>.
- International Organization of Securities Commissions - IOSCO (2010d) "Resolution of the Presidents' Committee on Transitional Arrangements for the IOSCO Board," Madrid. Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES29.pdf>.
- International Organization of Securities Commissions - IOSCO (2010e) "Resolution on IOSCO's Mission, Goals and Priorities," Madrid Available at: <http://www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf>.
- International Organization of Securities Commissions - IOSCO (2011a) "2010 IOSCO Annual Report",Madrid. Available at: http://www.iosco.org/annual_reports/2010/.
- International Organization of Securities Commissions - IOSCO (2011b) "Mitigating Systemic Risk A Role for Securities Regulators - Discussion Paper ",Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>.
- IOSCO Executive Committee (2003a) "Indexation: Securities Indices and Index Derivatives." Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD143.pdf>.
- IOSCO Executive Committee (2003b) "The Report On Transparency Of Short Selling",Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD147.pdf>.
- IOSCO Executive Committee (2005a) "Anti-Money Laundering Guidance For Collective Investment Schemes - Final Report." Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD205.pdf>.
- IOSCO Executive Committee (2005b) "IOSCO Consultation Policy and Procedure." Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf>.

- IOSCO Executive Committee (2005c) "Policies on Error Trades." Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD190.pdf>.
- IOSCO Executive Committee (2008a) "Report on the Subprime Crisis - Final Report", Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD273.pdf>.
- IOSCO Executive Committee (2008b) "The Role Of Credit Rating Agencies In Structured Finance Markets - Final Report", Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD263.pdf>.
- IOSCO Executive Committee (2011) "Report on Trading of OTC Derivatives", Madrid. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD345.pdf>.
- Jageron, John & S. Wade Hansen (2011), *All About Forex Trading*: McGraw-Hill Professional.
- James, Harold (1996), *International Monetary Cooperation Since Bretton Woods*, Washington, DC, New York and Oxford.: IMF/Oxford University Press.
- Kruithof, Marc & Walter VanGerven (2010) "A Differentiated Approach to Client Protection: The Example of MiFID", Financial Law Institute - Universiteit Gent, (WP 2010-07).
- Kumpan, Christoph & Patrick C. Leyens (2008) "Conflicts of Interest of Financial Intermediaries - Towards a Global Common Core in Conflicts of Interest Regulation," 4 *European Company and Financial Law Review* 72-100. (1).
- Lichtenstein, Cynthia C. (1991) "Bank for International Settlements: Committee on Banking Regulations and Supervisory Practices' Consultative Paper on International Convergence of Capital Measurement and Capital Standards," 30 *International Legal Materials*. (4).
- Lucy, Jeffrey (2003) "The single market for financial services in the EU and its impact on globalisation", Australian Securities & Investments Commission ASIC, [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EABC_speech_031103.pdf/\\$file/EABC_speech_031103.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EABC_speech_031103.pdf/$file/EABC_speech_031103.pdf), Sydney.
- Macey, Jonathan R. & Maureen O'Hara (1997) "The Law and Economics of Best Execution," 6 *Journal of Financial Intermediation* 188-223.
- Marcacci, Antonio (2012) "IOSCO: The World Standard Setter for Globalized Financial Markets," 12 *Richmond Journal of Global Law and Business* 23-43. (1).
- Micklitz, Hans-Wolfgang (2009) "The Targeted Full Harmonisation Approach: Looking behind the Curtain" in Geraint Howells and Reiner Schulze, ed. *Modernising and Harmonising Consumer Contract Law*. München: Sellier European Law Publishers.
- Moloney, Niamh (2005) "Building a Retail Investment Culture through Law: The 2004 Markets in Financial Instruments Directive " 6 *European Business Organization Law Review* 341-421. (3).
- Moloney, Niamh (2008), *EC Securities Regulation, 2nd ed.*, Oxford: Oxford University Press.
- Monitoring Group (2009) "Press release: Monitoring Group announces adoption of formal Charter."
- Pollet-Fort, Anne (2010) "Implications of the Lisbon Treaty on EU External Trade Policy", Eu Center In Singapore, (Background Brief No 2). Singapore. Available at: <http://www.eucentre.sg/articles/141/downloads/LisbonImpactonTrade-rev6Mar.pdf>.
- Porter, Tony (1993), *States, Markets, and Regimes in Global Finance*, New York: Macmillan.
- Rajan, Raghuram & Luigi Zingales (2003), *Saving capitalism from the capitalists*: Random House Business Books.
- Raustiala, Kal (2002) "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law," 43 *Virginia Journal of International Law*.

- Rich, George (1972) "A Theoretical and Empirical Analysis of the Eurodollar Market," 4 *Journal of Money, Credit and Banking* 616-635. (3).
- Schenk, Catherine R. (2010) "The regulation of international financial markets from the 1950s to the 1990s" in Stefano Battilossi & Jaime Reis, eds. *State and Financial Systems in Europe and the USA: Historical Perspectives on Regulation and Supervision in the Nineteenth and Twentieth Centuries*. Ashgate.
- Slaughter, Anne-Marie (2000) "Governing the Global Economy through Government Networks" in Michael Byers, ed. *Role of Law in International Politics*. Oxford University Press.
- Sommer, A.A. Jr. (1996) "IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities," 17 *Northwestern Journal of International Law & Business* 15-29.
- Triffin, Robert (1960), *Gold and the dollar crisis: the future of convertibility*: Yale University Press.
- Van Dyck, Tom (2009) "(Opt-out) Intermediation as an Alternative for Ensuring a True Protection for European Retail Investors?," *Catholic University of Leuven (KUL) Working Paper*.
- Zaring, David (1998) "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations," 33 *Texas International Law Journal* 281-330. (2).

