



Transnational Law Beyond Bi-Polarity

The FSB Key Attributes of Effective Resolution Regimes for Financial Institutions in national, European and transnational Law

Chantal Bratschi

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

Florence, 20 April 2015

European University Institute

Department of Law

Transnational Law Beyond Bi-Polarity

The FSB Key Attributes of Effective Resolution Regimes for Financial Institutions in National, European, and Transnational Law

Chantal Bratschi

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Professor Hans-W. Micklitz, European University Institute, (EUI Supervisor)
Professor Dennis Patterson, European University Institute
Professor Horatia Muir Watt, Sciences-Po Paris
Professor Moritz Renner, Universität Bremen

© Chantal Bratschi, 2015

No part of this thesis may be copied, reproduced or transmitted without prior permission of the author

Abstract

According to Jessup, the field of transnational law studies those aspects of law that are neither national nor international. The common challenge of the field is to overcome the tension between the non-state regulatory phenomena that it studies and the state origin of the lens – law – that it uses.

This thesis structures one particular debate in transnational law – the resolution of large financial institutions in national, European, and transnational law - according to this challenge, by critically examining the notion of bi-polarity, defined as the reliance on distinctions that are based on the distinction between non-state and state.

The proposed framework – formalized as a matrix with six rows that distinguish the parameters to understand the implications of the non-state/state distinction and three columns that represent the legal contexts in which transnational phenomena affect law - illustrates the current debate on transnational law and its need to overcome bi-polarity.

Acknowledgements

The law department of the European University Institute offers a Ph.D. program that fosters in-depth and timely research in a European, and increasingly global, environment. In my opinion, this is a commendable endeavor, and I extend my gratitude to all who have contributed to the development of this program and the valuable experience it is. I furthermore thank the Staatssekretariat für Bildung and the Helvetic Confederation for the scholarship program they sustain, allowing students from Switzerland to come and study at the EUI.

While I was able to conduct my research under very fortunate conditions, I have been even more fortunate to have Professor Hans-Wolfgang Micklitz as my supervisor. My thesis benefitted tremendously from the challenging questions he asks, the creativity he encourages and the persistence he demands. His enthusiasm for my research question and academia in general fostered in me the persistence, patience and confidence I needed to achieve my academic goals.

During my studies, I was given the opportunity to further my research at the Institute of Banking Law at the University of Bern and the University of Michigan Law School. I am very grateful to Professor Susan Emmenegger and Professor Michael Barr for welcoming me as a research scholar at their respective institutions. Their advice on Swiss, U.S. and international banking regulation has been very valuable.

However, the EUI remained the main base for my research. Great thanks go to the staff of the EUI library and Siobhan Gallagher, Marlies Becker and Rossella Corridori of the law department. They made my research and life in general so much easier.

My thanks also go to Helena Hallauer, who provided tireless feedback to the drafts of my thesis. The way she challenged my arguments with a critical mind, a high standard of logic and the knowhow of an experienced practitioner of transnational law benefited my thesis and was important in sustaining my passion for my research. Ernest Hunter Brooks proved to be a very patient editor who corrected typos as well as grammatical mistakes with equal care. Independent of the help of Helena and Hunter, all mistakes remain of course entirely mine.

During my Ph.D. I did not only spend time at scholarly institutions in Bern, Ann Arbor and Florence. I also spent many hours in the Länggasse Quartier, at Woodberry Gardens, in Nina's kitchen and of course the bro house. I sat on the steps of Santo Spirito, the EUI Terrace, via Ghibellina and, most of all, in the kitchen of via dei Servi. The memories and people attached to these places are extremely dear to me and will remain so, even when I will have forgotten about the technicalities of transnational law. Finally, I am grateful to my parents and my sister Petra who made it possible for me to visit all these places by believing in me and letting me know that I could always return to the great company they provide.

To my parents, Josiane and Peter Bratschi

Thesis Summary

Following Jessup, the field of transnational law studies those aspects of law that are neither national nor international. The common challenge of the field is to overcome the tension between the non-state regulatory phenomena that it studies and the state origin of the lens – law – that it uses.

This thesis structures one particular debate in transnational law – the resolution of large financial institutions - according to this challenge, by critically examining the notion of bi-polarity, defined as the reliance on distinctions that are based on the distinction between non-state and state.

The framework may be summarized in a matrix, as below (Chart I). Its rows distinguish six parameters according to which the implications of the non-state/state distinction for law can be disentangled.

Its columns represent the legal contexts in which transnational phenomena affect law. The column of national law entails all law produced within and by the state; namely national and international law. European law entails the law of the European Union and transnational law entails all regulatory phenomena that do not fit the other categories.

From applying the framework on the debate on the regulation of the resolution of large financial institutions to the three contexts of transnationalization, the field of transnational law can be structured according to its success in transcending the non-state/state dichotomy.

From the application to national law, it appears that the debate is largely bi-polar, opposing non-state and state visions of transnationalization. The importance of courts in questions of transnationalization emerges as a consequence of this bi-polarity: it falls upon the court to find the compromises between opposed approaches.

In European law, a difference between parameters becomes visible. In the first three categories of the framework – legality, politics and governance – the law-making of the EU blurs bi-polar categories. However, in the remaining three – legitimacy, values and polity – the outcomes depend largely on the institutions of the EU.

Transnational law approaches that focus on law-making parameters are motivated by the same desire to overcome bi-polarity. However, with regard to the legitimacy, values and polity parameters, the debate is split between top-down and bottom-up approaches, and this only recreates bi-polarity. The framework provided below (Chart II) illustrates the current debate on transnational law and its need to overcome bi-polarity.

	National law		European law		Transnational law	
Legality	Procedural	Formal	Procedural	Formal	Procedural	Formal
Legitimacy	Thin	Thick	Thin	Thick	Thin	Thick
Politics	De-Politicized	Politicized	De-Politicized	Politicized	De-Politicized	Politicized
Values	Dependent	Independent	Dependent	Independent	Dependent	Independent
Governance	Assimilated	Disintegrated	Assimilated	Disintegrated	Assimilated	Disintegrated
Polity	Supranational	National	Supranational	National	Supranational	National

Chart I: The framework for the analysis of the debate on transnationalization and law according to bi-polarity

	National law	European law	Transnational law
Legality			
Politics		Several examples in the parameters of legality, politics and governance show that European law-making can overcome bi-polarity.	While different in degree, the same blurring of bi-polar categories as in European law-making can be observed
Governance	The non-state/state tension is put in the context of the co-existence of organizational principles in legal thinking and the importance of state institutions. Bi-polarity becomes an index of law's dependence on the state.		
Legitimacy			
Values		In the parameters of legitimacy, values and polity bi-polarity persists	In these parameters bi-polarity reemerges, dividing bottom-up and top-down approaches.
Polity		Authors forward either state like or non-state like visions of European law in these parameters.	Bottom-up approaches, ex. System Theory
		Alternatively, they forward multilevel	Top-down approaches, ex. Global Constitutionalism

Chart II: The debate on transnationalization and law according to the framework

0. Overview of the Thesis	17
0.1. Structuring the debate on law and transnationalization: A Framework	18
0.2. Outcome of the framework: Transnational law beyond bi-polarity?	21
0.3. Context of illustration: The Key Attributes	23
0.4. Methodology	26
1. Setting the Scene: Framework, Outcomes and Context of Illustration	29
1.1. Framework for the Analysis of Transnationalization and Law	29
1.1.1. Bi-polarity: the non-state/state distinction in law.....	29
1.1.2. The parameters of a law beyond the state.....	32
1.1.2.1. Legality.....	32
1.1.2.2. Legitimacy.....	34
1.1.2.3. Politics	35
1.1.2.4. Values.....	36
1.1.2.5. Governance.....	37
1.1.2.6. Polity	38
1.1.3. The different contexts of law and transnationalization	38
1.1.3.1. National Law.....	39
1.1.3.2. European law.....	41
1.1.3.3. Transnational law.....	44
1.1.3.3.1. Bi-polarity and the field of transnational law.....	44
Global constitutionalism and constitutional pluralism	45
Global administrative law (GAL)	47
Private law beyond the nation state	49
Private regulation.....	50
1.1.3.3.2. A framework for the field of transnational law	50
1.2. Outcomes from the framework: a plea for an approach to transnational law beyond bi-polarity	51
1.2.1. National law: Bi-polarity and dependence on state institutions	51
1.2.2. European law: differences between parameters	53
1.2.3. Transnational law: haunted by another bi-polarity.....	54
1.3. Context of illustration: The FSB Key Attributes of Effective Resolution Regimes for Financial Institutions	55
1.3.1. The KAs as a piece of transnational law.....	58

1.3.2.	Resolution of large financial institutions: non-state/state tensions in all parameters of law.....	59
1.3.3.	The Key Attributes in the three contexts of transnationalization and law.....	61
2.	The Bi-polar Debate on National Law and Transnationalization	64
2.1.	Bi-polar approaches to the legality of law	65
2.1.1.	Procedural legality approaches.....	66
2.1.2.	Formal legality approaches.....	68
2.2.	Bi-polar approaches to the legitimacy of law	70
2.2.1.	Thin legitimacy approaches.....	71
2.2.2.	Thick legitimacy approaches.....	73
2.3.	Bi-polar approaches to politics and law	74
2.3.1.	De-politicization approaches.....	74
2.3.2.	Politicization approaches.....	75
2.4.	Bi-polar approaches to the consideration of social and market interest in law. 78	
2.4.1.	Dependent considerations of social and market interests approaches.....	78
2.4.2.	Independent consideration of social and market interests approaches	81
2.5.	Bi-polar approaches to governance structures in law	83
2.5.1.	Assimilated governance approaches.....	83
2.5.2.	Dis-integrated governance approaches	85
2.6.	Bi-polar approaches to the polity of national law.....	87
2.6.1.	Supranational polity approaches.....	87
2.6.2.	National polity approaches	88
2.7.	Conclusion: Persisting non-state/state tension and the importance of courts.. 90	
3.	The Bi-polar Debate on European Law and Transnationalization.....	93
3.1.	Bi-polar approaches to the legality of European law.....	95
3.1.1.	Procedural legality approaches.....	96
3.1.2.	Formal legality approaches.....	98
3.2.	Bi-polar approaches to the legitimacy of European law.....	99
3.2.1.	Thin legitimacy approaches	100
3.2.2.	Thick legitimacy approaches.....	102
3.3.	Bi-polar approaches to politics and European law.....	104
3.3.1.	De-politicization approaches.....	105
3.3.2.	Politicization approaches.....	107
3.4.	Bi-polar approaches to values in European Law.....	108
3.4.1.	Dependent consideration of social and market interests approaches	109

3.4.2.	Independent consideration of social and market interest approaches	111
3.5.	Bi-polar approaches to the governance structure of European Law	113
3.5.1.	Assimilated governance approaches.....	114
3.5.2.	Dis-integrated governance approaches	116
3.6.	Bi-polar approaches to the polity of European Law	117
3.6.1.	Supranational polity approaches.....	117
3.6.2.	National polity approaches	118
3.7.	Conclusion: Differences between Parameters	119
4.	The Bi-polar Debate on Transnational Law and Transnationalization.....	121
4.1.	Bi-polar approaches to the legality of transnational law	122
4.1.1.	Procedural legality approaches.....	122
4.1.2.	Formal legality approaches.....	125
4.2.	Bi-polar approaches to the legitimacy on transnational law	127
4.2.1.	Thin legitimacy approaches.....	127
4.2.2.	Thick legitimacy approaches.....	129
4.3.	Bi-polar approaches to politics in transnational law	130
4.3.1.	De-politicization approaches.....	131
4.3.2.	Politicization approaches.....	132
4.4.	Bi-polar approaches to the values of transnational law	133
4.4.1.	Dependent consideration of social and market interests approaches	134
4.4.2.	Independent consideration of social and market interests approaches	135
4.5.	Bi-polar approaches to the governance of transnational law	136
4.5.1.	Assimilated governance approaches.....	137
4.5.2.	Dis-integrated governance approaches	138
4.6.	Bi-polar approaches to the polity of transnational law	140
4.6.1.	Supranational polity approaches.....	141
4.6.2.	National polity approaches	142
4.7.	Conclusion: Mixed Approaches to Legality, Politics and Governance but persisting bi-polarity in the other parameters	143
5.	Conclusions from the framework: a plea for an approach to transnational law beyond bi-polarity.....	145
5.1.	National law: Bi-polarity and dependence on state institutions	146
5.1.1.	Bi-polarity in legal thinking: the co-existence of organizational principles and transnational law.....	147
5.1.2.	Management through state institutions: the example of courts.....	150

5.1.3.	National law: The limits of overcoming the co-existence of organizational principles in law-making and the importance of state institutions.....	153
5.2.	European law: differences between parameters	156
5.2.1.	Legality, politics and governance: accommodation between organizational ideals in law-making.....	157
5.2.2.	Legitimacy, values and polity: Coexisting organizational ideals in European law and importance of European institutions	160
5.2.3.	European law: No blueprint for Transnational Law	164
5.3.	Overcoming bi-polarity in law-making or choosing sides? Bi-polarity and the limits of transnational law	167
5.3.1.	GAL: Overcoming bi-polarity in law-making.....	169
5.3.1.1.	Transnational legality: GAL and regulation by information.....	169
5.3.1.2.	Re-politicization in transnational law: GAL and peer review	171
5.3.1.3.	Integrated governance in transnational law: GAL and networks	173
5.3.2.	System Theory: overcoming bi-polarity at the system level.....	175
5.3.2.1.	Transnational legitimacy: self-reflexive legitimacy or a thin common philosophical horizon?	177
5.3.2.2.	Values in transnational law: internal system rationality or external pressures to self-limitation?	179
5.3.2.3.	Transnational polity: the functional polity or a global civil society?.....	181
5.3.3.	Transnational law and bi-polarity: law-making, bottom up or top down?	182
6.	Thesis summary: Law Beyond Bi-polarity?	185
7.	Bibliography	187

0. Overview of the Thesis

This thesis poses a framework for the structuring of the field of transnational law, as well as a starting point of a more promising way forward.

Transnational law according to Jessup, is the law that is neither national nor international.¹ It refers to developments like regulation by private actors or informal meetings of national executives and challenges our understanding of law. Not only do these developments cause practical difficulties as conflicts between regulatory developments and national law intensify, but the relevance of the law as a means of regulation of social interaction itself is at stake. However, current legal thinking continues to struggle to reconcile the non-state character of the developments with the state origin of law.

The effort to clarify the meaning of these developments for law has led to the field of transnational law. The field entails approaches as varied as global constitutionalism, global administrative law, private law beyond the state, and private regulation. The names of the different approaches point to the struggle of the field to reconcile the need to stretch beyond the state (global) with the statist origin (ism) of the mother discipline.

This thesis puts the tension between non-state and state and the question of how this tension can be addressed at the core of the debate of transnationalization of law, the framework it proposes as well as the approach it suggests.

Chapter 1 will propose a framework. The framework will allow the classification of approaches to transnationalization in national, European and transnational law, according to their stances regarding the non-state/state distinction. This distinction will be made with regard to the legitimacy, legality, politics, values, governance and polity of law. Each parameter will distinguish approaches that embrace the non-state tendency and approaches that remain faithful to the state origin of law. From this structuring exercise the elements of an approach to transnational law will be taken.

The analysis of the debate of national law and transnationalization in Chapter 2 will reveal that most of the debate can be split in non-state/state categories. This importance of the non-state/state distinction in legal thinking will be referred to as bi-polarity throughout this thesis.

¹ Jessup, Philip C., "Transnational law", Yale University Press, New Haven, 1956.

The analysis of national law links bi-polarity to the importance of courts and other state institutions and therewith bi-polarity becomes an indication of state dependence. Bi-polarity - the competition of a non-state and a state position in legal thinking- makes law dependent on a managerial effort by state institutions, and is hence identified as one of the factors that limit law in its ability to account for transnationalization. Legal thinking in transnational law must hence focus on ways to overcome this bi-polar view, as the practice cannot rely exclusively on institutions in the transnational context.

The structuring of the debate on European law and transnationalization in Chapter 3 will show that bi-polarity of legal thinking can be overcome in questions of legality, politics and governance, where a management between the poles develops in law-making. In the parameters of legitimacy, values and polity, bi-polarity persists and European institutions play an important role. The approaches in European law are hence classified between the ones that focus on law-making and aim at expanding it, the ones that focus on the difficulties to overcome bi-polarity in legitimacy, values and polity and the third group that proposes multilevel approaches in order to address the discrepancy between the two groups of parameters.

In Chapter 4, the debate on transnational law will show that a large portion of the discussion does not fit the non-state/state categories. With regard to the law-making parameters a parallel to European law can be drawn as similar ways of overcoming bi-polarity in law-making can be observed. However, in the parameters of legitimacy, values and politics, bottom-up approaches are presented in opposition to top down approaches and in this sense a bi-polar tension persists.

These insights will be brought together in Chapter 5 and the outcome of a structuring of transnational law according to bi-polarity will be forwarded.

In the following, the framework, the outcome of it, the example that will be used for illustration and the overall methodology will be introduced.

0.1. Structuring the debate on law and transnationalization: A Framework

Transnationalization of law - the development of law that is neither national law nor international law – challenges the understanding of law by definition as it asks for the

engagement of law with something foreign; not law. A multitude of approaches has developed aiming to address the meaning of transnationalization for law. Yet the resulting body of writing has reached a stage where its size and internal doctrinal quarrels undermine the insights that were most certainly produced. Therefore a structured overview of existing literature is in order.

The framework of this thesis will allow classifying approaches to transnationalization according to their stances on the non-state/state distinction with regard to different parameters of law. The classification is made according to the non-state/state tension at the heart of the transnationalization debate. The framework consists of rows representing the different parameters of law affected by the non-state/state distinction and columns distinguishing between the different legal contexts in which the transnationalization debate is held.

	National law		European law		Transnational law	
Legality	Procedural	Formal	Procedural	Formal	Proc.	Formal
Legitimacy	Thin	Thick	Thin	Thick	Thin	Thick
Politics	De-politicized	Politicized	De-politicized	Politicized	De-pol.	Politicized
Values	Dependent	Independent	Dependent	Independent	Dependent	Independent
Governance	Assimilated	Disintegrated	Assimilated	Disintegrated	Assimilated	Disintegrated
Polity	Supranational	National	Supranational	National	Suprana.	National

Chart I: The framework for the analysis of the debate on transnationalization and law according to bipolarity

The parameters are legality, legitimacy, values, politics, governance and polity of law. They result from breaking down or ‘disentangling’ the non-state/state distinction: the three sub-distinctions of the non-state/state distinction are the non-law/law, the private/public and the international/national distinction.

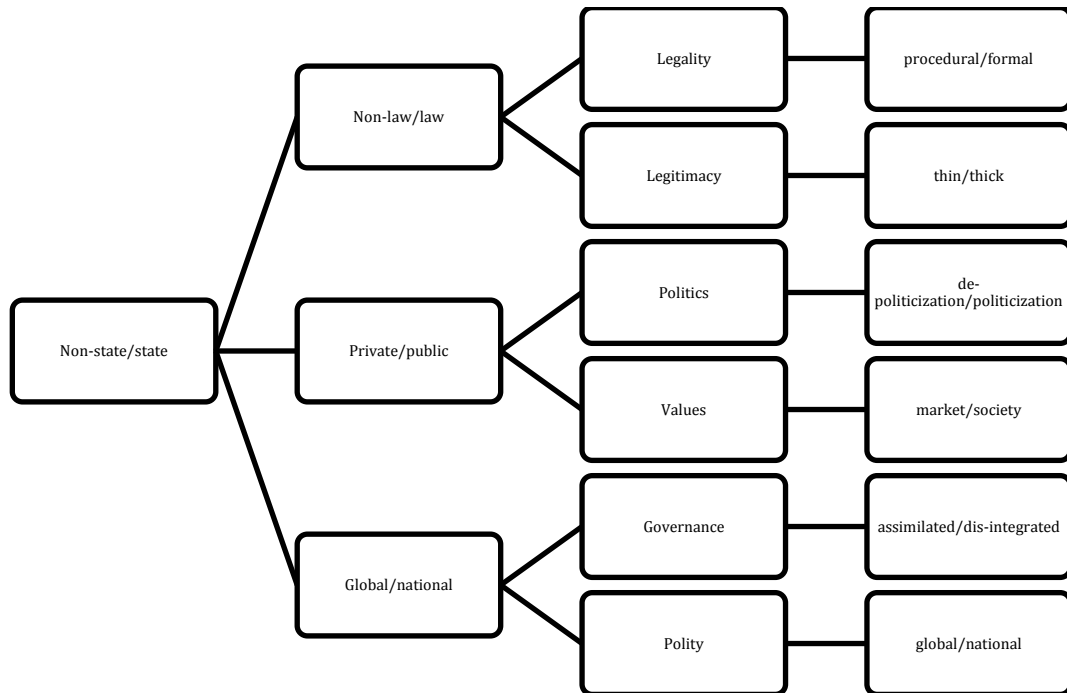


Chart III: Disentangling the non-state/state distinction

The non-law/law distinction refers to the consequence of the non-state/state distinction on the meaning of law. It has a formal component (the parameter of legality) and a component on substance (legitimacy). The private/public distinction reflects to relationships of power between dominant and weaker parties. It again has two perspectives: an economic one, the market/society relation (the parameter of values of law) and a political one, the regulated/regulator relationship (the parameter of politics). The national/global distinction refers to the state and the environment beyond or around the state. It has an institutional component (the parameter of governance) and an identity component (the parameter of polity). These six parameters of ‘law beyond the state’ provide the horizontal categories of the grid according to which vertically the challenge of transnationalization can be disentangled. Within each parameter the state non-state distinction will be manifest in a different tension.

The columns of the framework of the transnationalization debate represent the different legal contexts in which this debate is held. It is distinguished between national law, European law and transnational law. National law is defined here to entail all state-produced law, be that nationally or internationally through treaties.² European law refers to the law of the European Union and transnational law is defined in the negative sense as all law that does not figure in

² International law in the context of this thesis is hence part of the context of national law.

the first two categories. In all three contexts, the debate will be structured according to the stances taken with respect to the non-state/state within the different parameters. In Chapter 4, the non-state/state categories will be transformed into spectra and applied to the theories of transnational law. The result will be a specific framework for the field of transnational law.

Structuring the transnational law debate accordingly will demonstrate the impact of the transnational state/non-state tensions in the different contexts of law and the ways these tensions are dealt with. It will also highlight which parameters of law could be the best fit to focus the effort of overcoming this tension on. The insights gained from the structuring exercise will be used as the starting points of an approach to transnational beyond bi-polarity. While Chapters 2, 3, and 4 will structure the debate in national, European and transnational law, Chapter 5 will focus on these insights.

0.2. Outcome of the framework: Transnational law beyond bi-polarity?

From each chapter and its bi-polar categorization of the transnationalization debate an insight on bi-polarity and transnationalization will be drawn and summarized in an outcome of the framework in chapter 5.

From the analysis of the debate in national law, it will become clear that bi-polarity in legal thinking is paralleled by a practice of state institutions that produce compromises. The persisting bi-polarity will be put in the wider context of contemporary legal thinking. The inability of the debate to overcome bi-polar categories will be portrayed as an illustration of the co-existence of organizational principles in contemporary legal thinking. This co-existence and the dependence on state institutions it entails, ultimately limits legal thinking to the confines of the state. It is institutions of the states that make the compromises between bi-polar arguments. Overcoming bi-polarity is hence crucial for transnationalization in the context of national law.

The analysis in European law, will show that with regard to some parameters – legality, politics and governance-, the legal debate has moved beyond bi-polarity and found compromises also on the theoretical level. In other parameters – legitimacy, values and polity - the practical compromises depend on European institutions. This put into question the relationship between European law-making and its theoretical backdrop regarding legitimacy, values and polity. Around this questions the approaches to European law can be classified into

the ones that encourage law-making in spite of persisting tensions in the other parameters, authors that insist on limiting law-making according to the latter parameters or build on European institutions to find compromises in legitimacy, values and polity or multilevel approaches that combine law-making on European level with legitimacy, values and polity from the Member State level.

In the context of transnational law, the same difference between law-making parameters and theoretical backdrop parameters can be seen. In law-making ways can be seen of overcoming bi-polarity. Global Administrative Law (GAL) provides examples of how this can be achieved. Yet, at the same time, it faces difficulties to provide answers to questions of legitimacy, values and polity and remains limited to the improvement of transnational law-making. The approaches that elaborate on the parameters of legitimacy, values and polity can be divided in bottom-up and top-down approaches. However, as the analysis according to System Theory will show, a 'new' tension between bottom-up and top-down emerges. Transnational law remains hence haunted by bi-polarity in all three contexts of law. With this conclusion, this thesis lies the foundation for a plea to overcome bi-polarity in legal theory.

	National law	European law	Transnational law
Legality			<div style="border: 1px solid black; padding: 5px; text-align: center;"> While different in degree, the same blurring of bi-polar categories than in European law-making can be observed </div>
Politics		<div style="border: 1px solid black; padding: 5px;"> Several examples in the parameters of legality, politics and governance show that European law-making can overcome bi-polarity. </div>	
Governance	<div style="border: 1px solid black; padding: 5px;"> The non-state/state tension is put in the context of the co-existence of organizational principles in legal thinking and the importance of state institutions. Bi-polarity becomes an index of law's dependence on the state. </div>		
Legitimacy			
Values		<div style="border: 1px solid black; padding: 5px;"> In the parameters of legitimacy, values and polity bi-polarity persists </div>	<div style="border: 1px solid black; padding: 5px; text-align: center;"> In these parameters bi-polarity reemerges, dividing bottom-up and top-down approaches. </div>
Polity		<div style="border: 1px solid black; padding: 5px;"> Authors forward either state like or non-state like visions of European law in these parameters. </div>	<div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 5px; text-align: center;"> Bottom-up approaches, ex. System Theory </div> <div style="border: 1px solid black; padding: 5px; text-align: center;"> Top-down approaches, ex. Global Constitutionalism </div> </div>
		<div style="border: 1px solid black; padding: 5px;"> Alternatively, they forward multilevel </div>	

Chart II: The debate on transnationalization and law according to the framework

0.3. Context of illustration: The Key Attributes

It is beyond doubt that the main contribution of this thesis is the framework for the structuring of the theoretical debate around law in the context of transnationalization. Yet, while the primary ambition of this thesis is a theoretical one, the framework will be illustrated in a practical context. A specific piece of transnational law will be taken and the debate it spurred in the three different contexts will be structured according to the non-state/state distinction.

The pieces in question are the Financial Stability Board Key Attributes of Effective Resolution Authorities (Key Attributes, KAs)³ and the parallel developments in the European

³ FSB Recommendations, "Key Attributes of Effective Resolution Regimes for Financial Institutions" October 2011 endorsed at the G-20 Summit in Cannes, November 2011.

Union.⁴ Mandated by the G20, the Financial Stability Board developed the Key Attributes as recommendations in the wake of the financial crisis of the late 2000s as part of its framework for systemically important financial institutions (SIFIs).⁵ The framework has been developed in the context of a general effort to address the danger of failing large financial institutions, without creating moral hazard. The crisis has shown that the failure of large financial institutions can be tremendously painful and expensive.⁶ Yet the bail-outs have not only caused public outrage, but also, it has been suggested that they contributed to further risk taking by institutions that knew or assumed that their failure would be prevented (moral hazard).⁷ The FSB Key Attributes entail recommendations for national authorities for the building of resolution regimes that would allow for an orderly resolution without causing harm to the financial system or taxpayers, while at the same time inflict enough pain on the institution to prevent the creation of moral hazard and institutions becoming ‘too big to fail’ (tbtbf).⁸ The example is chosen as it illustrates many of the factors that complicate the role of law in a context of transnationalization.

The financial sector in general is paradigmatic for the variety of ways in which this tension emerges: it is an industry with an incredibly high volume of cross-border interactions that at the same time faces an enormous effort of regulation at the national level. The cross-border nature and complexity of the activity and the power and wealth of the private actors involved

⁴ For a summary of the general approach, Draghi Mario, “The future of global financial stability”, in the *European View*, 9, 2010, pp. 23-27. More specifically on the issue of bank resolution, Alexander Kern, “Bank Resolution and Recovery in the EU: Enhancing Banking Union”, *European Law Academy Forum*, 14, 2013, pp. 81-93 and “Reforming European Financial Supervision: Adapting EU Institutions to Market Structures”, *Academy of European Law*, Trier, 11 June 2011. Attinger Barbara Jeanne, “Crisis Management and Bank Resolution: Quo Vadis, Europe?”, *Legal Working Paper Series*, No. 13, European Central Bank, 2011.

⁵ Group of 20, London Declaration, 2009, for the framework consult FSB Statement, “Policy Measures to Address Systemically Important Financial Institutions”, 4 November 2011. For an analysis of the Key Attributes refer to Huepkes Eva, “Resolving systemically important financial institutions (SIFIs): The Financial Stability Board key attributes of effective resolution regimes”, in LaBrosse John Raymond, Olivares-Caminal and Singh Dalvinder, (eds.), “Financial Crisis Containment and Government Guarantees”, Edward Elgar, Northampton, 2013

⁶ For example: Summe Kimberly Anne, “Lessons Learned from the Lehman Bankruptcy”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.

⁷ In general on moral hazard for bank: Galloway Tina M., Lee Winson B. and Roden Dianne M., “Banks’ changing Incentives and Opportunities for Risk Taking” in *Journal of Banking & Finance*, Vol. 21, Issue 4, 1997, pp. 509-527, a general account in the context of the last crisis: Schnurman Mitchell, “The Big Bank Model Must Change to Avoid Future Bailouts”, in Gerdes Louise I., (ed.), “Are Government Bailouts Effective?”, Greenhaven Press, Detroit, 2013 and a specific example in context of the last crisis: Eisenbeis Robert A., Frame W., Wall Larry D., “An Analysis of the Systemic Risk posed by Fannie Mae and Freddie Mac and an Evaluation of the Policy Options for Reducing Those Risks”, in the *Journal of Financial Service Research*, 31, 2007, pp. 75-99. However, not all authors agree on the issue of moral hazard: Moosa Imad A., “The Myth of Too Big to Fail”, Palgrave Macmillan, New York, 2010.

⁸ “The “too-big-to-fail” (TBTF) problem arises when the threatened failure of a SIFI leaves public authorities with no option but to bail it out using national public funds to avoid national and international financial instability and economic damage.” FSB, TBTF Progress report, 2013, p. 2.

illustrate the challenges nation states face. The legal status of the KAs, developed to address this challenge, is unclear but led to reforms on national as well as European levels.⁹ The private actors that are regulated are very powerful, yet at the same time also dependent on a degree of regulation and embedded in national jurisdictions. Lastly, the financial market illustrates the enormous wealth and possible destruction of it that is at stake in cross-border interaction and hence the importance of regulating it.

From a methodological point of view, the choice of example demands justification as it covers such a small piece of regulation. In the vast reforms that took place in the wake of the crisis of the late 2000s, these regulations are not only a mere needle in the haystack, but they also risk losing their relevance altogether as the reformist enthusiasm on which they ultimately depend vanishes. However, the limited scope is justified to allow combining the theoretical focus of this thesis with a useful overview of an illustrative example.

The debate on the introduction of the key attributes in national law will illustrate that non-state and state arguments compete and that it is left to state institutions like courts to find a compromise between the two.¹⁰

In the EU, the attributes were introduced into European law via the Bank Recovery and Resolution Directive (BRRD).¹¹ However the debate moved beyond arguments on national level about resolution or bankruptcy. Approaches that adopt a non-state approach to European law justify the development of a single resolution mechanism by its contribution to the functioning of the common market, while approaches that insist on a state-like future for the EU aim for the development of a banking union based on a treaty change. However, with

⁹ The ‘legal status’ of the KAs has been debated. This will be further discussed in Chapter 4. For a general account refer to Riles Annelise, “Is New Governance the Ideal Architecture for Global Financial Regulation”, in *Monetary and Economic Studies*, November 2013, p. 77. Describing how the ‘recommendations’ develop into ‘international standards’.

¹⁰ Kroener William F. III, “Expanding FDIC-Style Resolution Authority”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009 in the same book but defending an opposite argument: Jackson Thomas H., “Chapter 11F: A Proposal for the Use of Bankruptcy to Resolve Financial Institutions”, the dispute on the appropriate approach in national law is also taken up in Scott Kenneth E. and Taylor John B., “Bankruptcy Not Bailout: A Special Chapter 14”, Hoover Institution Press, Stanford, 2012 and Wright Robert E., “Bailouts: Public Money, Private Profit”, Columbia University Press, New York, 2010. In Chapter two it will be discussed according to examples taken from the practice, taken from the FSB Peer Review Report, “Thematic Review on Resolution Regimes”, 11 April 2013.

¹¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173, 12.6.2014, p. 190–348.

regard to legality, politics and governance, the debate cannot be easily classified in the bi-polar categories. It appears that European law-making has moved beyond the bi-polar categories. However, with regard to legitimacy, values and polity the tensions remain. The debates on the role of the European Court of Justice¹² and the uncertainties regarding the banking union¹³ will be forwarded as illustrations of this tension.

The transnational context is the actual ‘home’ context of the key attributes. With their dubious legal status¹⁴ they fit in no other category. The functioning of the FSB, the measures that aim at enhancing the collaboration between states, as well as processes like peer review and disclosure mechanisms will hence be looked at in this context. Global administrative law proves to be a promising approach, as it captures the developments that go beyond bi-polarity. However, this success is limited to the parameters of law-making. In the parameters of legitimacy, values and politics bi-polar categories persist.

By developing a framework and applying it to the Key Attributes, this thesis structures the debate on law and transnationalization according to bi-polarity. Ultimately, even if bi-polar tensions persist, the exercise will provide insights into the meaning of the non-state/state distinction for legal theory.

0.4. Methodology

Some clarification is in place regarding the aim of this thesis and how it will be approached. The crucial elements of this theoretical exercise are on one hand the bi-polarity – the non-state/state tension – that is inspired from Jessup’s definition of Transnational law and six parameters that are forwarded to disentangle the meaning of it for law.

The ambition is limited to a structuring of the debate for two reasons:

¹² Grimmel Andreas, “Judicial Interpretation or Judicial Activism? The Legacy of Retentionism in the Studies of the European Court of Justice”, in the *European Law Journal*, Vol. 18, Issue 4, pp. 518-353, 2012. Azoulai Loïc, “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the conditions for its Realization”, in the *Common Market Law Review*, 45, 2008, pp. 1335-1356.

¹³ An introduction in the Banking Union project from the commission Commission Statement, “Finalizing the Banking Union: European Parliament backs Commission’s proposals (Single Resolution Mechanism, Bank Recovery and Resolution Directive, and Deposit Guarantee Schemes Directive)”, Statement/14/119, Brussels, 15 April 2014. In way of illustration of some worries with regard to the Union, Veron Nicolas, “A Realistic Bridge Towards European Banking Union”, Bruegel Policy Contribution, Issue 20013/09, June 2013 a more positive picture is drawn in Alexander Kern, “Bank Resolution and Recovery in the EU: Enhancing Banking Union”, *European Law Academy Forum*, 14, 2013, pp. 81-93 at criticism from the point of view of legitimacy: Scharpf Fritz W., “Political Legitimacy in a Non-optimal Currency Area”, MPIfG Discussion Paper, 13/15, 2013.

¹⁴ Riles, 2013, p. 77.

I have chosen a theoretical perspective and I am presenting the various approaches of transnational law, I am not discussing whether a thesis or approach is right or wrong, whether there is evidence or not, whether transnational law is more constitutional or more private or something in between. My intention is to structure the debate around the leading academic discourses and to demonstrate why particular theories are strong with regard to some parameters and weak with regard to others. That is why I let the academics speak for themselves. I quote them where necessary, which might be sometimes a bit of a burden sometimes.

The purely theoretical approach is put into a practical context. Again, the aim is not to provide an application of a specific theory to a context or to prove or disprove its suitability for such an exercise. Nor is it to develop or argue the existence of a ‘lex resolutionis’.¹⁵ The recourse to a practical context is made to help illustrate the contingencies of the theoretical debate and provide a red thread through the theoretical analysis. Among the many reasons why the Key Attributes of Effective Resolution Regimes offer themselves to this analysis their relevance in the three context and the way they illustrate differences between these contexts, the powerful illustration of the challenges of transnationalization provided by the financial market and the wide and interesting academic debate that they have spurred.

They will be presented in detail in part 1.3 and provide for illustration of the bi-polar arguments in the following chapters. Discussed will be their reception in national law and the discussion it spurred in chapter 2, their introduction into European law and their relevance in the context of the Banking Union in Chapter 3 and their functioning as undefined object of transnational law in the context of the FSB itself in Chapter 4. In Chapter 5, the Key Attributes will no longer be used as an illustration, but instead the outcomes gained from their previous analysis will be seen as indices to understand the meaning of bi-polarity in transnational law.

¹⁵ This hint to the proliferation of various “lex” in the field of transnational law shall be forgiven. Meant, of course, is that no claim about existence of a distinct legal regime with regard to the resolution of large financial institutions, shall be made here. For an illustration of the use of “lex” in transnational law refer for example to Fischer-Lescano Andreas and Teubner Gunther, „Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law“, in the Michigan Journal of International Law, Vol. 25, 2004, p. 1013.

1. Setting the Scene: Framework, Outcomes and Context of Illustration

The first chapter will present the elements of this thesis. First, by introducing the notion of bi-polarity, the parameters of law and the three contexts of law and transnationalization, the framework is developed. Then, the outcomes that are drawn from the application of the framework to the three contexts are presented, and finally, the context of illustration – the resolution of larger financial institutions – is introduced.

1.1. Framework for the Analysis of Transnationalization and Law

The academic debate assessing the role of law in the context of transnationalization is in need of a framework that allows structuring the different approaches. This thesis provides such a framework.

The non-state/state distinction will be put at the center of this structuring exercise, as it is identified as the core challenge of the field. Transnational law struggles to reconcile the state origin of law with non-state regulatory developments. The framework will distinguish between approaches that cling to the traditional state conception of law and approaches that embrace the non-state trend in law.

The framework consists of rows disentangling the state/non-state tension according to its aspects in the different parameters of law and columns distinguishing between the national, European and transnational legal context in which legal thinking struggles with transnationalization. Central to this classification exercise is the importance of the state/non-state distinction for theories of transnational law.

Attributing significance to distinctions in transnational law is in no way new in transnational legal thinking. It is an attempt to capture the impact of cross border interactions on the role of the state and law. In the following, the centrality of the distinction between what is beyond the state and the state and the ways in which it impacts law as well as the horizontal and vertical categories of the framework will be introduced.

1.1.1. Bi-polarity: the non-state/state distinction in law

The existence, meaning and characteristics of distinctions or on the contrary hybrids are important topics throughout the field of transnational law.¹⁶ This is not surprising, as the object of transnational law is being defined as all law that is neither national law nor international law.¹⁷ The hope is that the changing meaning of distinctions allows insight into the impact of the transformation of the state and the consequences thereof for law. While private/public¹⁸ and global/national¹⁹ are popular distinctions to look at, in the following, the non-state/state distinction will be forwarded as the main or principal distinction that entails a set of sub-distinctions according to which the impact of the non-state/state distinction on law can be disentangled (refer to Chart II).

What is the meaning of the non-state/state distinction for law? I will approach this question by inquiring in what ways the non-state/state distinction orients law.²⁰ These orientations reflect the underlying understanding of the role of law in a democratic society in this thesis, preconditioned by a background and upbringing but at the same time with the potential to capture the debate of transnational law. The six parameters of law that result from disentangling the meaning of the non-state/state distinction accordingly and thereby finding a substitute for it as a means of orientation for law are presented in the following. In each parameter the non-state/state distinction manifests in a non-state/state tension created through transnationalization.

In a first step, I am dividing the non-state/state distinction in three sub-distinctions that all reflect one dimension in which the non-state/state distinction orients law. The first one reflects the fact that we draw conclusions on legality from the non-state/state distinction. This

¹⁶ Micklitz Hans-W., "Rethinking the Public/Private Divide", in Maduro Miguel, Tuori Kaarlo and Sankari Suvi, (eds.), "Transnational European Law and Legal Thinking," Cambridge University Press, Cambridge, 2014. The author approaches the challenges legal thinking faces in transnational law from the perspective of the public/private divide.

¹⁷ In the words of the founding father: "I shall use, instead of 'international law', the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers." Jessup, Philip C., "Transnational law", Yale University Press, New Haven, 1956, p. 1. Furthermore "In effect, the very idea of transnational law is an epitome of legal hybridization"

¹⁸ Some prominent examples are provided by Micklitz Hans-W. and Svetiev Yane, "A Self-Sufficient European Private Law – A Viable Concept?" EUI-ERC Working Paper 1/2012. Reich Norbert, "The Public/private divide in European Law", in Cafaggi Fabrizio and Micklitz Hans-W. (eds.), "The European Private Law after the Common Frame of References", Edward Elgar Publishing, Cheltenham, 2010, p. 56. Azoulai Loic, "Sur un sens de la distinction public/privé dans le droit de l'Union Européenne" in Revue trimestrielle de droit européen, 2010, pp. 842-860. Michaels Ralf and Jansen Nils, "Private Law Beyond the State? Europeanization, Globalization, Privatization", Duke Law School Faculty Scholarship Series, Paper 78, 2007

¹⁹ Zumbansen Peer, "Sustaining Paradox Bounders: Perspectives on Internal Affairs in Domestic and International Law", in the European Journal of International Law, 15, 2004, pp. 197-211. Zumbansen Peer, "Neither Public Nor Private, National Nor International: Transnational Corporate Governance from a Legal Pluralist Perspective", Journal of Law and Society, Vol. 38, Issue 1, pp. 50-75, 2011.

²⁰ The difficulty has been presented by Michaels Ralf, "Globalization and Law: Law Beyond the State" In order to analyze the effects of transnationalization without falling into the trap of methodological nationalism

is the non-law/law distinction. The second reflects the message on the power relationship that is implied by the non-state/state distinction; the private/public distinction and lastly the spatial judgment in the global/national distinction.

Each of these distinctions will be further disentangled into two parameters that again entail a distinction. The non-law/law distinction has a formal dimension. This is the parameter of **legality** in which the non-state/state distinction manifests as procedural/formal distinction. The substantive side of the non-law/law distinction is captured in the parameter of **legitimacy** in which the non-state/state distinction translates as a thin/thick distinction.

The private/public divide provides an understanding of the power relation in law in two ways:²¹ firstly, in its economical dimension it refers to the relationship between the market and society: this is the parameter of **values**. With regard to values, the non-state/state distinction distinguishes between a dependent consideration of social interests from market interests and an independent consideration of social interests from market interests. Secondly, in its political dimension it defines the relationship between the state and its citizens or more generally, that of regulator and regulated: this is the **politics** parameter. In this parameter the non-state/state distinction is reflected in the de-politicization/politicization distinction.

The global/national divide provides orientation in two ways: firstly, following an institutional dimension, there is a distinction between national structures and structures outside of the national: this is the **governance** parameter. In the governance parameter the non-state/state distinction manifests as assimilated following an ideal of independence and dis-integrated in the sense of checks and balances. Secondly, the global/national has an identity dimension, distinguishing between national citizen and global community: this is the **polity** parameter. According to the non-state/state distinction a polity can be either global or national.

The non-state/state distinction hence appears in six parameters of law. Transnationalization causes a non-state/state tension in each of them. These are the parameters of law beyond the state because they allow to understand the meaning of law independently from the non-state or state label attached to it. Of course the choice of these six parameters is not beyond debate.

²¹ This understanding of the private/public divide is inspired by Chapter 5 of Arendt Hannah, “The Human Condition”, University of Chicago Press, Chicago, 1958.

Parameter	non-state/state tension
Legality	Procedural/formal
Legitimacy	Thin/thick
Values	Economic (market dependent)/ Social (market independent)
Politics	De-politicization/Politicization
Governance	Assimilated/dis-integrated
Polity	Global/national

Chart III: Bi-polarity: The non-state/state tension in the different parameters of law

1.1.2. The parameters of a law beyond the state

In the following I will introduce the six ‘parameters’ of law in which the effects of transnationalization – the transcending of the non-state/state distinction – manifests and according to which I will structure the debate of law and transnationalization. The term parameter is borrowed from mathematics where it is used for a constant or a variable that determines the specific form of the function but not its general nature. This speaks to the current undertaking, as we aim at looking at six different variables of law that are affected by transnationalization but do not determine its nature of non-law or law. These parameters are: legality, legitimacy, politics, values, governance and polity.

Each of these parameters is seen to show one aspect of the non-state/state distinction formulated as six different tensions; the tensions between procedural and formal, thin and thick, de-politicization and politicization, market and society, assimilation and dis-integration, global and national. The way this tension is looked at will provide the basis to look at the debate in the national, European and transnational contexts in Chapter 2, 3 and 4 respectively. Chapter 5 will look at the outcomes gained from the analyses of bi-polar approaches in view of the different legal contexts. It will allow classifying the approaches to transnational law according to their strengths and weaknesses, similarities and differences. With regard to the parameters the distinction between law-making parameters (legality, politics and governance) and theoretical backdrop parameters (legitimacy, values and polity) will certainly be the most important one that will contribute better to the understanding of the non-state/state divide for legal theory of transnational law.

1.1.2.1. Legality

The parameter of legality entails the formal side of the non-law/law distinction and reflects the non-state/state tension with the procedural/formal distinction. Arguments on the importance of the flexibility of procedural law and the speed and expertise of technocratic governance in the context of transnationalization are faced with statist positions that insist on the importance of formal law and legal safeguards.

Procedural approaches in general promote the benefits of speed, expertise and flexibility in the face of increasing cross-border interactions. Formal arguments are based on notions like coherence of the legal system and legal certainty. Within this parameter, the transnationalization debate is put in context of the debate of delegation in administrative law and the extent to which the functional development of law should be enhanced or controlled.²² In the context of the European Union, this debate confronts the supporters of functionalism with calls for treaty changes and formalization of law.²³ At the same time, the delegation debate in transnational law opposes procedural and formal approaches on issues such as regulation by private actors,²⁴ globalized state agencies,²⁵ networks of such agencies²⁶ and self-regulation by market participants.²⁷

Procedural law is appreciated by pluralism²⁸ for the accommodation it allows for and by functionalism for its self-driven development.²⁹ Theories of private regulation forward efficiency arguments. Formalist approaches on the other hand, point to the danger of legal uncertainty and promote implementation, legal safeguards and judicial review.³⁰ Institutional constitutionalism forwards charters and institutional structures that allow for the ‘hardening’ of transnational law.³¹ Approaches on the legalization of global governance advance decision-making procedures as similar means of formalizing law. Global administrative law shares the

²² An excellent overview is provided by Taggart in Taggart Michael, “From ‘Parliamentary Power’ to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century” in the *University of Toronto Law Journal*, 55, 2005, pp. 575-628.

²³ Chapter 3.

²⁴ For instance in McBarnet Doreen, Voiculescu Aurora and Campbell Tom, (eds.), “The New Corporate Accountability: Corporate Social Responsibility and the Law”, Cambridge University Press, Cambridge, 2007.

²⁵ Writing about the spheres of influence of state and non-state actors, Sassen observes that some activities do not fit this distinction. She observes a embeddedness of the global “that requires at least a partial lifting of these national encasements and hence signals a necessary participation by the state [in globalization]” according to her: “Key among these are some components of the work of ministries of finance, central banks, and increasingly specialized technical regulatory agencies.” Sassen Saskia, “The Participation of States and Citizens in Global Governance”, in the *Indiana Journal of Global Legal Studies*, Vol. 10 No. 5, Issue 1, 2003, p. 10 and p. 9.

²⁶ Barr illustrates this according to the Basel Committee of Banking Supervision in Barr Michael, “Global Administrative Law: The View from Basel”, in *The European Journal of International Law*, Vol. 17, No. 1, 2006, pp. 15-46.

²⁷ For instance in Cafaggi Fabrizio, “Reframing Self-Regulation in European Private Law”, Kluwer International, London, 2006.

²⁸ Krisch Nico, “Beyond Constitutionalism: The Pluralist Structure of Postnational Law”, Oxford University Press, Oxford, 2010, p. 23

²⁹ For example in Ladeur Karl-Heinz, „The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law“, Osgoode CLPE Research Paper, No. 16/2011.

³⁰ Calliess Graf-Peter and Renner, Moritz, “Between Law and Social Norms: The Evolution of Global Governance”, in *Ratio Juris*, Vol. 22, No. 2, 2009, pp. 260-280.

³¹ Schwöbel elaborates on some examples of institutional constitutionalism in Schwöbel Christine E. J., “Global Constitutionalism in International Legal Perspective”, Martinus Nijhoff Publishers, Leiden, 2011, p. 3. As an example it can be referred to Petersmann Ernst-Ulrich, “Human Rights, Cosmopolitan Democracy and the Law of the World Trade Organization”, in Fletcher Ian, Mistelis Loukas and Cremona Marise (eds.) “Foundations and Perspectives of International Trade Law”, Sweet & Maxwell, London, 2001.

functionalist starting point but develops more ambitious transparency and accountability requirements.³²

The legality parameter covers the question of the formal distinction between law and non-law. The question on the substantive difference between law and non-law is covered by the legitimacy parameter.

1.1.2.2. Legitimacy

The legitimacy parameter refers to the substantive and relational counterpart of the aspect of legality and investigates the extent to which law conveys the impression that it ought to be observed.³³ As the state provides for many elements that sustain this impression, the challenge of transnationalization to legitimacy is how the same belief can be nourished outside of the nation state. The distinction that allows structuring this debate is the thin/thick distinction.

Thin approaches argue that liberal or performance based (output) notions of legitimacy are better suited or more appropriate in the context of increased cross-border interactions. Thick approaches on the other hand, insist on the importance of republican and democratic (input).

Transnationalization leads to a tension between the output legitimacy and input legitimacy, as transnationalization threatens to evade control of the democratic process.³⁴ In European law, ordo-liberal arguments attempt at solving this tension through multilevel approaches.³⁵ Concepts of thin legitimacy have been forwarded under the label of ‘liberal’³⁶, ‘performance-based’³⁷ or ‘authority’³⁸ and aim at conceptualizing legitimacy outside the nation state and in difficult environment for of democracy. To a large extent, they correspond with the procedural approaches of the previous category. Private regulation and private law beyond the

³² Carotti Bruno and Casini Lorenzo, “A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Number (ICANN) and the Governance of the Internet”, in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), “Global Administrative Law: Cases, Materials, Issues”, IRPA and IILJ, Rome and New York, 2008.

³³ This approach is influenced by Scharpf’s functional and relation definition of legitimacy. Scharpf Fritz W., “Legitimacy in the Multilevel European Polity”, MPIfG Working Paper, 09/1, 2009, p. 5.

³⁴ According to Scharpf the legitimacy deficit of the European Union can be understood accordingly. Scharpf, 2009, Scharpf Fritz W., “What have we learned? Problem-solving capacity of the multilevel European polity”, MPIfG working paper, No. 01/4, 2001 and more recently Scharpf Fritz W., “Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis”, MPIfG Discussion Paper, 12/6, 2012.

³⁵ This will be further elaborated in Chapter 3.

³⁶ Scharpf, 2009, p. 6.

³⁷ An interesting summary on performance-based notions of legitimacy is provided by Bartl Marija, “Legitimacy and European Private Law”, EUI Thesis, 2012, pp. 52ff.

³⁸ Roughan Nicole, “Authorities: Conflicts, Cooperation, and Transnational Legal Theory”, Oxford University Press, Oxford, 2013.

state approaches often make performance-based legitimacy arguments.³⁹ Others, in the context of the debate on the declining role of states in transnational contexts,⁴⁰ point to the limits of representative- or participatory mechanism to tackle transnational challenges. Thick approaches emphasize the importance of upholding republican requirements also in the context of transnationalization⁴¹ or to limit the participation of a state in transnationalization to the limits in which democratic legitimacy can be provided.⁴²

1.1.2.3. Politics

The parameter of politics covers the political aspect of the private/public divide and raises the question of the role of politics in law. The non-state/state distinction opposes approaches of de-politicization and politicization, the first supporting the increasing distance between law and politics and the second resisting it.

De-politicized approaches emphasize the potential of private law and the importance of shielding it from public policy invasions.⁴³ In this context beyond the state, de-politicized approaches forward the ordering potential of contracts and the importance of independent technocratic governance.⁴⁴ Such de-politicization is impossible for others theorists. Approaches of politicization either focus on the role of power as an obstacle to de-politicization or they focus on distributive realities and urge for non-law and law to be politicized accordingly. According to authors like Koskenniemi, law is just one more discourse according to which political claims for domination are formulated.⁴⁵ Other authors focus on the rising power of private actors and the political nature of industry self-regulation and the danger of the capture of state institutions by industry actors and state-industry-

³⁹ The shared underlying argument being that legitimation comes through the very fact that transnational law develops where state law falls short. This will be further developed in Chapter 4 with reference to Callies Graf-Peter and Zumbansen Peer, "Rough Consensus and Running Code: A Theory of Transnational Private Law", Hart Publishing, Oxford, 2010 and Krisch, 2010, and others.

⁴⁰ For an overview of the literature on the changing role of the state, refer for example to Sassen, 2003, pp. 8ff.

⁴¹ Schwöbel provides an overview of approaches of normative or analogical constitutionalism in Schwöbel, 2011.

⁴² Amongst others, Kjaer Poul F., Teubner Gunther and Febbrajo Alberto, (eds.) "The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation", Oxford, Hart Publishing, 2011.

⁴³ Cherednychenko Olha, "Fundamental Rights, Contract Law and the Protection of the Weaker Party", Sellier, Munich, 2007.

⁴⁴ Freeman Jody, "The Private Role in Public Governance", in the New York University Law Review, Vol. 75, No. 3, June 2000.

⁴⁵ Koskenniemi Martti and Leino Päivi, "Fragmentation of International Law? Postmodern Anxieties", in the Leiden Journal of International Law, 15, 2002, pp. 553-579.

partnerships.⁴⁶ Faced with this reality of power, some politicizing approaches support the introduction and politicization of underrepresented currents in non-law and law.⁴⁷

The parameter of politics covers the political aspect of the private/public divide. The economic aspect of this divide is entailed in the parameter of values.

1.1.2.4. Values

In the parameter of values, approaches that advocate the dependent consideration of social interests on market interests compete with approaches that conceive social interest independent from market interests.

The dependent consideration of social interests on market interests urges non-interference of law with the market while the state vision of law treats substance independently; opposing objectives are accommodated through balancing/consensus building within the political process.

Approaches that opt for a dependent consideration of social interests on market interests see a market-enabling role for law. According to these approaches, law should focus on market disciplines, as the benefits of a functioning market for society are superior to those of a protection of social interests that potentially harms the market.⁴⁸ According to independent approaches, social and market interests must be considered independently by law and consequently balanced against each other. These approaches urge for consideration of the dependence of the market on society as well as that of society on the market.⁴⁹ From this mutual dependence, an independent consideration of both is needed. Dependent approaches on the other hand, argue that this balancing is not possible in the absence of state structures.

⁴⁶ For example Abbott Kenneth W. and Snidal Duncan, “The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State”, in Mattli Walter and Woods Ngaire, (eds.) “The Politics of Global Regulation”, Princeton University Press, 2009 or also Scherer Andreas Georg and Palazzo Guido, “The New Political Pole of Business in a Globalized World – A Review of a New Perspective on CSR and Its Implications for the Firm, Governance and Democracy”, in Corsten Hans and Roth Stefan, (eds.), “Nachhaltigkeit: Unternehmereisches Handeln in globaler Verantwortung”, Springer Gabler, Wiesbaden, 2012.

⁴⁷ Meidinger for instance writes on efforts to include the protection of indigenous rights, interests of local communities and concerns of biological diversity in the context of forest certification in Meidinger Errol, “The Administrative Law of Global Private-Public Regulation: the Case of Forestry”, in the European Journal of International Law, Vol. 17, No. 1, 2006, pp. 47-87.

⁴⁸ In general terms this argument is for instance made in the context of private regulation, McMillan John and Woodruff Christopher, “Private Order Under Dysfunctional Public Order”, in the Michigan Law Review, Vol. 98, 1999-2000, pp. 2421-2485 and more specifically by Scott Kenneth E. and Taylor John B., “Bankruptcy Not Bailout: A Special Chapter 14”, Hoover Institution Press, Stanford, 2012.

⁴⁹ This mutual dependence is referred to by Polanyi as ‘interdependence’ Polanyi, Karl, “The Great Transformation”, Beacon Press, Boston, 1957. For an example of one of many current applications of the concept refer to Frerichs Sabine, “Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law”, in Joerges Christian and Falke Josef (eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011

This explains and supports the economic embeddedness of transnationalized law.⁵⁰ The protection of social interests such as the protection of the environment through pollution certificates and the like can, according to them, only be provided through the market.⁵¹ Independent approaches on the other hand, argue that the challenges of transnationalization demand an independent protection of social interests.⁵²

1.1.2.5. Governance

The parameter of governance covers the institutional aspect of the national/global sub-distinction of the non-state/state distinction.

For non-state approaches, transnationalization urges assimilated governance structures across national and other distinctions that match the challenges at hand. To statist approaches, this assimilation is either impossible as national interests prevail, or not desirable as dis-integration provides for checks and balances.

Assimilated approaches to governance structures propose a structure that develops according to the challenge of transnationalization. Authors of system theory and functional integration illustrate this approach.⁵³ In the face of challenges of transnationalization - like global climate change, terrorism or migration - governance joins forces and disregards national, sectorial and other delineations that might prevent their collaboration in the development of law. Approaches focusing on dis-integration on the other hand, either forward the dis-integrating force of power such as Koskenniemi⁵⁴ or the importance of maintaining checks and balances within and beyond the state like authors of global governance or global constitutionalism.⁵⁵

The parameter of governance covers the institutional aspect of the national/global distinction. The community⁵⁶ aspect of this distinction is entailed in the polity parameter.

⁵⁰ Sassen, 2003, p. 8.

⁵¹ Meidinger, 2006.

⁵² Schwöbel, 2011, provides an overview of social and normative constitutionalism. Further approaches will be discussed in Chapter 2, 3 and 4.

⁵³ Amongst many others, Fischer-Lescano Andreas and Teubner Gunther, „Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law“, in the Michigan Journal of International Law, Vol. 25, 2004, pp. 999-1046.

⁵⁴ Koskenniemi and Leino, 2005.

⁵⁵ Generally Schwöbel on institutional constitutionalism, more specifically for instance Acharya Viral V. and Richardson Matthew, (eds.), „Restoring Financial Stability“, Wiley & Sons, Hoboken, 2009.

⁵⁶ The term is taken from Walker, who defines it as “‘Community’ refers to the social dimension, the sense of belonging to, identification with, or, if you like, ‘citizenship’ (in its ‘thick’ sociological sense, rather than its ‘thin’ legal sense) of the entity in question on the part of those who are implicated in, or affected by, the decisions of that entity.” in Walker Neil, “The White Paper in Constitutional Context”, part of contributions to

1.1.2.6. Polity

The ‘polity’ parameter of law relates to the social order in reference to which law is developed and the polity aspect of the national/global distinction.

The non-state/state tension is reflected in the debate whether transnationalization itself leads to the development of a polity or polities. The sense of belonging is no longer limited to a local or national understanding but can be based on different ideas.⁵⁷ Examples of supranational polities are for instance functionally defined.⁵⁸ National approaches on the other hand, limit the reference to social order of law to polities that correspond to the national conception of a polity and corresponding, more local sense of belonging.

Supranational polity conceptions can be global in reach or only partially global. They can co-exist with other polities or have priority over others: the community of traders that is imagined to use the so-called *lex mercatoria* is, for instance is an example of a functionally defined polity. On the other hand, in environmental or climate change regulation, an overall polity is referred to that reflects a global common interest.

According to the national conception of the polity, the priority is given to the only real kind of polity, the national one that takes the legitimacy of this priority from a sameness or identity of its people.

Approaches opting for a supranationalized polity point out that the effects of transnationalization cut across the delimitation of national polities and thereby create new forms of polities. For national polity approaches the national polity persists and remains the most important social entity and reference for law. Supranational approaches insist on the need for cooperation in the interests of overarching newly emerging polities, while national polity approaches see harmonization of legal orders as sufficient reaction to transnational challenges.

Legality and legitimacy, politics and values, governance and polity, are the six parameters within which the non-state/state distinction manifests itself in law. In the following the three legal contexts in which these effects are looked at will be introduced.

1.1.3. The different contexts of law and transnationalization

the Jean Monnet Working Paper No.6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, 2001, p. 11.

⁵⁷ Hence basing Walker’s ‘community’ on different ‘thinner’ ideas. Walker, 2001, p. 10.

⁵⁸ For instance in the families of the so-called *lex mercatoria*, *lex sportiva*, *lex digitalis* and so on.

The columns of the framework represent the three legal contexts in which transnationalization affects law. They are the legal contexts of national law, European law and transnational law. National law, for the purpose of this thesis, includes national as well as international law: law that is produced within or with agreement of the nation state. European law is the law produced within the European Union. Transnational law is law that is, according to the general definition, neither national nor international and also not, according to our definition, European.

In each context of law, the debate on transnationalization is split in the six parameters, distinguishing between non-state and state arguments. Chapter 2 will look at the debate on national law and transnationalization opposing non-state and state approaches to legality, legitimacy, politics, values, governance and polity. Chapter 3 and 4 will structure the debate on transnationalization in European law and transnational law in the same way. In the following, all three chapters will be introduced.

1.1.3.1. National Law

Chapter 2 focuses on the debate of transnationalization and national law. The arguments on law and the increase of cross-border interaction will be structured into the bi-polar categories, distinguishing between arguments reflecting non-state trends spurred by transnationalization and state-based notions of law in all parameters of law.

The **parameter of legality** can be assessed as either procedural (non-state) or formal (state). With regard to the aspect of the legality of law, the non-state/state tension manifests itself between procedural and formal approaches. On the procedural end, the debate on transnationalization can be seen as a prolongation of the delegation debate, with authors like Sassen⁵⁹ and Taggart⁶⁰ pointing out the suitability of procedural law and the comparative advantage of the executive that can react faster and in a more flexible manner to the challenge of increased cross-border interactions. On the other hand, formal approaches emphasize the predominance of ‘hard law’ and the power and practical relevance of the judiciary⁶¹ as well as the dangers of an uncontrolled executive branch. The parameter of legality allows us to identify this tension along a non-state/state scale.

⁵⁹ Sassen, 2003.

⁶⁰ Taggart, 2005.

⁶¹ Dyzenhaus David, Hunt Murray and Taggart Michael, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation”, in Oxford University Commonwealth Law Journal, Vol. 1, No. 1, 2001, pp 5-34.

With regard to the **parameter of legitimacy**, the empowerment of the executive and the shift of law making away from the core sources of legitimacy has been accompanied with arguments in favor of thinner conceptions for the legitimacy of national law in the context of transnationalization. Transnationalization can be seen as just an additional layer of complexity that is and has been challenging and over-burdening parliaments for a long time.⁶² However, just as there have always been warnings against the expansion of the executive,⁶³ transnationalization is also seen to call for the strengthening of democratic legitimacy and returning to thicker conceptions of legitimacy of law.⁶⁴

In the **politics parameter**, approaches of de-politicization object to the interference of public policy decisions in private law, while politicization approaches on the other hand argue for the priority of policy goals over private law and judicial activism in transnational emergencies.⁶⁵ In the national law context, transnationalization has added to the debate on the public law private law divide. To de-politicization approaches, public policy should not intervene in contract law. Politicization approaches on the other hand can justify limitations of property rights on public policy grounds.

With regard to the **value parameter**, the increase of cross-border interactions has given momentum to approaches emphasizing the liberal or economic turn of law in the context of transnationalization⁶⁶ that advocate a role of law limited to market imperfections. These approaches can be contrasted with authors that focus on the independent protection of social interests in law in contexts of transnationalization.⁶⁷

In the debate on the **governance structure**, some authors see or support an assimilation of governance structure across sectorial and national boundaries in the face of transnationalization. Others insist that such assimilation is impossible as – especially national

⁶² Levit is arguing for an ‘bottom-up’ approach to international law as ‘who must roll up their sleeves and grapple with the day-to-day technicalities of their trade’ in Levit Janet Koven, “A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments”, *Yale Journal of International Law*, Vol. 30, 2005. Taggart connects the empowerment of the executive in the industrial and post-industrial era with privatization and globalization. Taggart, 2005

⁶³ For example; Lord Hewart of Bury, “The New Despotism”, Ernest Benn, London, 1929, referred to in Taggart, 2005, fn. 4.

⁶⁴ Scharpf, 2009.

⁶⁵ Cheredychenko; “The public/private divide and its role today”, Chapter 2 in Cheredychenko, 2007

⁶⁶ Authors suggesting a (re)turn to the dominance of private law, or pointing out the benefits this would have can be understood like this. Emmenegger, in her genealogy of the changing importance of private law and public law refers to Biedenkopf for the political re-discovery of private law. Emmenegger Susan, “Bankenorganisationsrecht als Koordinationsaufgabe. Grundlinien einer Dogmatik der Verhältnisbestimmung zwischen Aufsichtsrecht und Aktienrecht”, Habilitation, 2004.

⁶⁷ Joerges Christian, “Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralization of Constitutionalisation”, in the *German Law Journal*, Vol. 10, No. 04, 2009, pp. 335-360.

– divisions persist or that such assimilation is undesirable, as it replaces a system of checks and balances that is important also in the context of transnationalization.

Finally, in the **polity parameter**, non-statist approaches observe the formation of alternative – supranational - polities in the face of the imperatives of transnationalization. These polities can be global and all-encompassing or ‘functional’ reflecting the assimilated governance structure that was build along one particular transnational challenge. Statist approaches on the other hand, call for the protection of the national polity in the face of transnationalization.⁶⁸ To them, polities remain defined by sameness and belonging that can only develop at the national level. Supranational polities hence either do not exist or do not have to be given priority to national ones.

Along these lines, Chapter 2 will structure the debate on transnationalization in national law. It will become apparent that the strong opposition of positions emphasizes the importance of courts and other state institutions to find compromises in specific transnational cases. In Chapter 5, the bi-polarity of the debate of law and transnationalization in national law will be seen as symptomatic of the co-existence of organizational principles in contemporary legal thinking. The dependence on state institutions, illustrated by the crucial role of courts in the context of transnationalization, ultimately limits legal thinking to the state.

1.1.3.2. European law

Chapter three will focus on European law as an example of a debate on law and transnationalization. The debate will again be structured into non-state and state arguments across the six parameters of law. The bi-polar categories however, will not be able to capture all developments. In the context of the parameters of legality, politics and governance, European law has developed beyond bi-polarity. On one hand, this observation hints to the special place the study of European law has in the debate on law and transnationalization and will be further analyzed in the fifth Chapter. On the other hand, this observation introduces the distinction between law-making parameters (legality, politics and governance) and theoretical backdrop parameters (legitimacy, values and polity). The difference between these two groups and the take authors take on it will allow to structure the debate on European law and transnationalization.

⁶⁸ Many authors approaching a topic of transnationalization from the perspective of national law, attribute at least implicitly priority to a national polity. As an example is provided by Nobel Peter, “Schweizerisches Finanzmarktrecht und international Standards”, 3. Ausgabe, Stämpfli Verlag, Bern, 2010.

With regard to the **legality parameter** there is a bi-polar debate on European law, where procedural approaches are opposed by formal approaches. The first for instance, support the functional expansion of EU law into more and more domains.⁶⁹ Formal approaches on the other hand, insist that this development be accompanied with treaty adaptations. However, at the same time, by combining the three requirements of proportionality, subsidiarity and legal basis, the legality of European law moved beyond bi-polar categories and allowed for a debate to take place beyond bi-polarity.

On the other hand, in the context of the **parameter of legitimacy**, the debate in the European context remains largely confined to the non-state/state categories. Among the thin approaches, proponents of the ordo-liberal heritage emphasize the role of the Union in securing competition in the growing single market. While they might disagree on the purpose, functionalist approaches portray the Union still as a purposeful entity, justified as long as it fulfills its purpose. From a performance point of view, the democratic deficit is justified either in view of the purpose, or it is to be addressed on the national level. Thick approaches on the other hand take the lack of republican elements at EU level more serious. One can distinguish between approaches that aim at the development and strengthening of representation at EU level and approaches that aim at strengthening the participation across the multilevel system. They aim to do so either by limiting the EU to its Member State given mandate and thereby strengthening national democratic accountability, or, by reaching out in order to include citizens directly in the European law-making.

Within the **parameter of politics**, de-politicization approaches can also be traced back to the ordo-liberal origin and its distrust of politics. Technocratic and privatized law-making are praised for reasons of efficiency and independence from other institutions.⁷⁰ Again private law is forwarded as an apt means of regulation that should be protected by intrusion from public policy.⁷¹ Politicized approaches on the other hand, see a distribution reality that should be accounted for, either through politicization on a Union level, through more input for Member States, or on a citizen level, through the inclusion of citizens in law-making processes and strengthening the role of the European Parliament. In the practice of European

⁶⁹ Bach Maurizio, “Technocratic Regime Building: Bureaucratic Integration in the European Community”, in the *International Journal of Sociology*, Vol. 24, No. 1, Spring 1994, pp. 97-122.

⁷⁰ Bach, 1994, p. 98.

⁷¹ Lualaba Shaelou Stephanie, “Market Governance and European Private Law in the Global Financial Downturn: “And the Story goes on”...”, in Snyder Francis, Sonntag Albrecht and Shen Wei, (eds.), “The “Visible Hand” European and Global Perspectives on Financial Market Regulation and Economic Governance”, Bruylant, Bruxelles, 2012.

law, many instances can be observed where de-politicization and politicization are combined, balanced and merged. The parameter of politics is another example where the debate on European law has moved beyond bi-polar categories, by merging or combining elements of both poles –de-politicization and politicization.

On the **values parameter** of European law, approaches that forward the dependent consideration of social interests on market interests are opposed by authors urging for the independent consideration of social interests from market interests. Dependent approaches refer back to the founding ethos of fostering peace *through* economic integration. The market and integration of it, to them, is still the key for the provision of welfare and the furthering of social interests.⁷² Social interests are hence considered through an economic lens. Independent approaches on the other hand, advocate the independent consideration of social interests, either by taking a supranational position and advocating a social Europe, or by taking a national position and advocating for the immunization of national welfare states from EU law.⁷³

Regarding the **governance parameter** of European law, assimilated approaches advocate centralist models and integrated agencies in order to overcome national differences. On the other hand, dis-integrated approaches urge for the accommodation of pluralism with regard to national distinctions and advocate for the importance of checks and balances at the Union level.⁷⁴ As the analysis in Chapter 3 will show, many governance structures developed that cannot be put in either an assimilated or dis-integrated category, but that merge elements of the two.

The debate on the **polity parameter** of European law is split into approaches that conceive the European polity as a supranational polity distinct from national polities and approaches that project an ideal of a European polity similar to the national one. Amongst the supranational approaches, the European polity has been seen as a community of Member State or it has, for instance, been conceived as a polity of economic rather than political

⁷² Bartl provides a very useful summary of this debate in Bartl, 2012, Chapter 1.3.

⁷³ With regard to this point the analysis in Chapter 3 will forward arguments by authors in Schiek 2013 or by Alexander. Schiek Dagmar, (ed.), “The EU Economic and Social Model in the Global Crisis”, Ashgate Publishing Limited, Farnham, 2013. Alexander Kern, “Bank Resolution Regimes: Balancing Prudential Regulation and Shareholder Rights”, in the Journal of Corporate Law Studies, Vol. 9, Part I, pp. 61-93.

⁷⁴ Joerges Christian, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, LEQS Paper, No. 28/2010, revised in April 2013.

subjects.⁷⁵ National approaches aim at the development of an identity or sameness similar on European level or dismiss the possibility of a European polity altogether. However, the bipolar categories with regard to the parameter of polity can hardly be overcome.

The analysis of the debate on transnationalization in European law supports the intuition that European law takes a special place in legal thinking. While it moves beyond non-state/state distinctions in some parameters it remains trapped by them in others. Applying bi-polar analysis to European law helps distinguishing between such instances. Chapter 5 will look at these differences more closely.

1.1.3.3. Transnational law

In Chapter 4, the transnational law debate will also be structured according to the bi-polar categories of the non-state/state distinction in all six parameters of law. The aim will be to see in what ways the transnational law debate has been able to move beyond non-state/state categories. On the basis of the insights drawn from that exercise, Chapter 5 will forward elements of an approach to transnational law beyond bi-polarity.

However, the development of a framework for the structuring of the transnational law debate is an important aim in itself. The framework in the transnational context will be elaborated on a bit more elaborated as, after all, providing a tool to structure approaches in transnational law is the central aim of this thesis. The bi-polar dichotomy will be transformed into a spectrum according to which the theories of transnational law also will be classified. Micklitz' classification of the transnational field according to the vanishing public/private divide will be taken and extended to include the parameters of the non-state/state tension.⁷⁶

1.1.3.3.1. Bi-polarity and the field of transnational law

The idea of organizing the transnational law debate according to the non-state/state distinction is not new. Examples are for instance the classification of global governance according to legalization by Calliess and Renner⁷⁷, or Micklitz' classification of transnational theories according to the vanishing public/private distinction. The approach in this thesis is based on the latter, yet suggests that the public/private distinction is just one of the aspects to be considered. Disentangling the non-state/state distinction into six different parameters allows

⁷⁵ For example as a community of consumer in Grundmann Stefan, "The Concept of the Private Law Society: After 50 Years of European Business and European Business Law", in the European Review of Private Law, No. 4, 2008, pp. 553-581.

⁷⁶ Micklitz develops this framework in the introduction to a special issue of the . Micklitz Hans-W., "Why a Special Issue on Theories of Transnational Law",

⁷⁷ Calliess and Renner, 2009.

one to distinguish more subtly between the various approaches and thereby to discern more specifically where their potential regarding legal thinking beyond bi-polarity lies.

Micklitz classification of four approaches – constitutional pluralism, global administrative law, private law beyond the state and private regulation – is taken as a starting point. Then the differentiation according to the six aspects will be added to further distinguish between approaches. This will form a framework of two ideals – global constitutionalism and private regulation – between which six spectra allow classifying transnational theories in view of their ability to overcome the non-state/state distinction (Chart VI). In the following, I will introduce Micklitz' framework and the four theoretical strands of transnational law according to him. However, within each one, I will show how introducing the six parameters can help to further distinguish between approaches.

This presentation of the approaches to transnational law remains limited. However, the extent of the debate becomes clear as well as the difficulty to provide a satisfactory structuring grid. Many approaches have different focuses, and a comparison between them is not easy. According to this thesis, part of this confusion is due to the fact that the non-state/state tension affects law in a range of ways and the approaches of transnational law focus on various of these impacts. In order to disentangle the non-state/state tension, the framework here will entail six parameters of law, within each the tension manifests in another facet.

Global constitutionalism and constitutional pluralism

Under the label of global constitutionalism and constitutional pluralism, this thesis will refer to approaches that forward notions of order for the functioning or making of transnational law. In the case of global constitutionalism, this order is over all or universal: in the case of constitutional pluralism it is a dis-order of orders that is thought of.⁷⁸ In this thesis, global constitutionalism will be presented as strongly dependent on a state vision of law, requiring influences from global governance or GAL to accommodate non-state regulatory developments.⁷⁹

⁷⁸ For example in Walker Neil, "Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders", in the *International Journal of Constitutional Law*, Vol. 6, 2008, pp. 373-396.

⁷⁹ In the words of Krisch: "In a nutshell, postnational constitutionalism attempts to provide continuity with the domestic constitutionalist tradition by construing an overarching legal framework that determines the relationship of the different levels of law and the distribution of power among their institutions." Krisch, 2010, p. 23. This thesis follows this argumentation and attributes the currants of constitutionalism to a state like argumentation.

Micklitz sets aside the overall debate on global constitutionalism and constitutional pluralism even though he sees important interconnections with private law theories. For him, global constitutionalism is the dominant public perspective.⁸⁰ Here a similar approach is taken; the idea of order that runs through all theories of constitutionalism is seen as evidencing closeness to the idea of the state or at least “attempts to provide continuity with the domestic constitutionalist tradition.”⁸¹

Beyond this point of commonality, global constitutionalism⁸² is a very varied field. There is a distinction between normative, institutional, social and analogical constitutionalism, and there is also constitutional pluralism.⁸³ Constitutional pluralism will be put in the same category, distinguished just by the degree of order and hence publicness or state attachment as global constitutional pluralism applies constitutional ideas on the regime or system level.⁸⁴

In such a vast field, categorizing approaches according to the six parameters is useful. In normative constitutionalism, approaches that forward a notion of world law⁸⁵ and approaches of fundamental norms as ideas⁸⁶ might be interesting with regards to different parameters. While the first focuses more on legitimacy and legality, the latter is more interesting with regard to the role of values and politics in law.

Institutional constitutionalism entails such different approaches as Petersmann’s stands of the WTO⁸⁷ and Peters’ global governance perspective on participation of citizens in international (or transnational) law-making.⁸⁸ Distinguishing them according to the parameters could be useful as they surely differ in their stands on governance and politicization. Both currents in institutional constitutionalism share a lot with global administrative law and blur the theoretical categories in this regard. Alexander, Dhumale and Eatwell provide an illustration

⁸⁰ Micklitz Hans-W., “Pourquoi une édition spéciale relative aux théories du droit transnational?” Introduction, Cahiers à Thème Transnational Law RIDE, 2013, 1-2, 4-7.

⁸¹ Krisch, 2010, p. 23.

⁸² A very wide definition is provided by Schwöbel: “global constitutionalism as a universal system of certain social, political, cultural, economic and legal ideas.” In Schwöbel, p. 2.

⁸³ Schwöbel, 2011, p. 3.

⁸⁴ Walker, 2008.

⁸⁵ Emmerich-Fritsche Angelika, „Paradigmenwechsel vom Völkerrecht zum Weltrecht - ein Beitrag zur Erweiterung des föderalen Mehrebenensystems“, in Härtel, Ines (Hrsg.), „Handbuch des Föderalismus. Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt“, Springer, Berlin 2009.

⁸⁶ Delbrück Jost, “Laws in the Public Interest – Some Observations on the Foundations and Identification of erga omnes Norms in International law” in Götz Volkmar, (ed.), “Liber Amicorum Günther Jaenicke – zum 85. Geburtstag”, Springer, Berlin, 1999.

⁸⁷ Joerges Christian and Petersmann Ernst-Ulrich, (eds.), “Constitutionalism, Multilevel Trade Governance and International Economic Law”, Hart Publishing, Oxford, 2011.

⁸⁸ Peters Anne, “Membership in the Global Constitutional Community”, in Klabbers Jan, Peters Anne and Ulfstein Geir, (eds.) “The Constitutionalization of International Law”, Oxford University Press, Oxford, 2009.

of this overlap of theories with their attempt to devise a global governance structure that can efficiently regulate financial markets while adhering to principles of accountability and efficiency.⁸⁹ Again, the parameters advanced in this thesis can be useful to tease out differences between constitutionalism and global administrative law as they most likely differ in their ambitions regarding legality, politicization and legitimacy.

Analogical constitutionalism in the context of the European Union includes authors like Walker and Kumm.⁹⁰ The first speaks to the parameters of legitimacy, polity, and governance, while the latter provides more insight on the parameter of politics. Arguments of ‘hardening’ transnational law through decision-making bodies mix analogical constitutionalism with transnational private law⁹¹ as well as global administrative law.⁹² Thinking about the parameters of values or politics might help in differentiating these currents better.

Global administrative law (GAL)

The category of GAL considered here entails approaches that draw parallels between national administrative law and transnational law. Placed second on Micklitz’ spectrum, GAL shares the public origin, yet focuses on the old debate of delegation of law-making powers away from the nation state.⁹³ Micklitz naturally focuses on the delegation to private actors, yet in the context of the changing nature of the state through transnationalization public/public or hybrid delegation also remains an interesting topic in the writings of GAL. The field of GAL is growing fast, as it overlaps with a wide range of approaches to global governance that – similar to analogical constitutionalism – engage in a form of ‘analogical administrative law.’⁹⁴ GAL is based on the idea of a (self-) ordering that takes place in administrative law logic.⁹⁵ As such GAL bridges a constitutional perspective to the other end of the spectrum, with authors arguing for the prevalence of administrative principles in private regulation.⁹⁶ This

⁸⁹ Kern Alexander, Dhumale Rahul, Eatwell John, (eds.), „Global Governance of Financial Systems“, Oxford University Press, Oxford, 2006.

⁹⁰ Kumm Mattias, “Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law”, in the German Law Journal, Vol. 07, No. 04, pp. 341-370.

⁹¹ Calies and Zumbasen, 2010.

⁹² Barr Michael, “Global Administrative Law: The View from Basel”, in The European Journal of International Law, Vol. 17, No. 1, 2006, pp. 15-46.

⁹³ Micklitz, 2013, p. 2 of course as the spectrum in his paper is public private Micklitz focuses on the delegation to private actors. However in transnational law there are various kinds of delegation to various kinds of actors that are distant from nation states like standards setting bodies, but also informal meetings of state officials etc.

⁹⁴ Meidinger, 2006.

⁹⁵ Klabbers, Jan, “Law-making and Constitutionalism”, in Klabbers Jan, Peters Anne and Ulfstein Geir, (eds.) “The Constitutionalization of International Law”, Oxford University Press, Oxford, 2009.p.99

⁹⁶ Different examples as discussed in the GAL Casebook, i.e. De Bellis Murizia, “International Accounting Standard Setting and the IASC Foundation” and Carotti Bruno, “Alternative Dispute Resolution: The ICANN’s Uniform Dispute Resolution Policy (UDRP)” in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia

blurring of categories is further enhanced though GAL's strong functionalist perspective that is shared across many approaches to transnational law. Distinguishing the different approaches according to the non-state/state distinction in the six parameters of law can be useful.

GAL is defined as "comprising the mechanisms, principles, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies."⁹⁷ Central in the GAL approach according to Kingsbury et al. is the existence of an accountability deficit that appeared as a consequence of the growing transnational regulatory power.⁹⁸ In contrast to this, Ladeur puts emphasis on the potential of GAL to overcome hierarchical structures through networks. The first hence focus on the parameters of legality and legitimacy, while the latter centres on legality and governance.

The approach of Kingsbury et al. has been applied to a large range of different examples of global governance. According to the GAL approach this resulted in "various transnational systems of regulation or regulatory cooperation that have been established through international treaties and more informal intergovernmental networks of cooperations, shifting many regulatory decisions from the national to the global level."⁹⁹ The parameters are useful to distinguish among them as some focus on governance structures and others on the role of politics. Barr's account on the Basel Committee from a GAL perspective focuses mainly on governance and legitimacy while Meidingers account on forest certification and public-private partnership provides more interesting from a politics and values perspective.¹⁰⁰

Due to the case study chosen in this thesis, GAL will be of central importance in our analysis. However, the categorization into bi-polar non-state/state arguments and especially its limits with regard to the theory of GAL will also be taken as evidence that its traditional preoccupation with delegation between public and private and more generally state and non-state grants an important role to this theory in transnational law.

Marco, Euan MacDonald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

⁹⁷ Kingsbury Benedict, Krisch Nico and Stewart Richard B., "The Emergence of Global Administrative Law", in *Law and Contemporary Problems*, Vol. 68, 2005, p. 17.

⁹⁸ Kingsbury, Krisch and Stewart, 2005, p. 16.

⁹⁹ Kingsbury, Krisch and Stewart, 2005, p. 16.

¹⁰⁰ Barr, 2005 and Meidinger, 2006.

Private law beyond the nation state

Private law beyond the nation state (PLBS) focuses on a range of authors¹⁰¹ that have been focusing on international private law and its ‘public’¹⁰² or regulatory potential. According to Micklitz’s spectrum, private law beyond the state and private regulation are distinguished by the top-down or public-ordering ambition of the former and the bottom-up focus on private ordering of the latter. Again there are important overlaps.

PLBS entails authors that focus on the conflict-solving potential of international private law following the tradition of the “grand codifications of the 19th century and the rise of international private law to organize the linkages between different national private legal orders”¹⁰³ and the endeavor of finding similar linkages between the different regulatory entities that make up the pluralistic transnational space. Wai, for instance forwards the ‘interlegality transnational private law’ as a “decentralized and intermediate form of transnational governance that recognizes and manages the multiplicity of norms generated by plural systems in our contemporary world society.”¹⁰⁴

Looking at the range of coordination between legal orders that approaches of PLBS find private law to provide, we find the topic of codification, as well as combinations of private law and GAL or global governance. For these approaches, a differentiation according to the legality and politics parameters would be interesting.

Muir Watt’s studies the contractualization of transnational law and advocates the improvement of it through the furthering of accountability and transparency in the legal principles of good governance.¹⁰⁵ She thereby makes a connection between private law beyond the state and GAL that could be analyzed through the parameters of legality, politicization and legitimacy. As Micklitz points out, Cafaggi makes a bridge between private regulation and GAL. His effort can be disentangled according to the parameters of legality, politics and governance.

¹⁰¹ For example Muir Watt Horatia, “‘Party Autonomy’ in International Contracts: from the Makings of a Myth to the Requirements of Global Governance”, in the European Review of Contract Law, 3, 2010, pp. 1-34, Christian Joerges, 2009 and Calies and Zumbansen, 2011.

¹⁰² Micklitz, RIDE, p. 2.

¹⁰³ Micklitz in Introduction RIDE English. P. 2 referring to Savigny

¹⁰⁴ Wai Robert, „The Interlegality of Transnational Private Law“, in Law and Contemporary Problems, Vol. 71, 2008, p. 107.

¹⁰⁵ Muir Watt, 2010.

Private regulation

The approaches of private regulation focus on the ordering potential of private law from a bottom-up perspective. Again, this is a very large theoretical strand as it catches all authors that investigate the role and function of private rule-making.

The starting point for most writers is an observation of functional integration. Functional integration has been most famously developed by Teubner in his application of Luhmann's system theory to the context of law. The same 'regime-focus' is shared in writings about so-called *lex-mercatoria*, *lex sportiva* and *lex digitalis*. One important difference between these approaches is the degree of interaction that is seen to exist between regimes. The governance or polity parameters allow one to account for this distinction.

The degree of interaction forwarded by these approaches remains debated in most cases.¹⁰⁶ In system theory some sort of minimal interaction or communication between these systems is suggested but remains vague.¹⁰⁷ Instead of political and legal order, systems are connected through nodes that work through functional integration. The state, politics or law, thereby lost their overall steering capacity.¹⁰⁸ Calliess Zumbasen similarly start with a bottom-up perspective on private law, yet then make links to a whole range of other theoretical categories. For instance the importance of transparency and accountability closely connects them to GAL. The proposal to include the notion of 'affectedness' into the thinking about the legitimacy of transnational law borrows from global governance more generally.¹⁰⁹ The six parameters allow one to classify the various combinations of approaches and to account for subtle non-state/state compromises that are achieved through the combinations.

1.1.3.3.2. A framework for the field of transnational law

Similar to the context of national law and European law, the debate on transnationalization and law in transnational law is structured according to a framework. The non-state/state distinction – bi-polarity – is however changed into a spectrum, in order to allow for a more subtle differentiation of the stances of the different theories on the distinction.

¹⁰⁶ Schiff Berman, Paul, „Global Legal Pluralism“, in the Southern California Law Review, Vol. 80, 2007, p. 1197. According to Berman there are mechanisms for the managing of hybridity. Yet, according to him “this sort of line-drawing question can never be resolved definitely or satisfactorily because there is a root level no way to “solve” problems of hybridity: the debates are ongoing.”, p. 1197.

¹⁰⁷ Lescano and Teubner, 2004, refer to 'Sturktuelle Koppelung'.

¹⁰⁸ Glinski Carola, “Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards”, Nomos Verlagsgesellschaft, Baden-Baden, 2011, p. 79.

¹⁰⁹ Calliess and Zumbasen refer extensively to Held's 'cosmopolitan democracy' and a degree of 'affectedness' by norms. Held David, “Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective”, in Government and Opposition, Vol. 39, Issue 2, 2004, pp. 364-391 in Calliess and Zumbasen, 2010, p. 130.

Spectrum of transnational theories	Legality	Legitimacy	Politics	Values	Governance	Polity
Global constitutionalism	Formal	Thick	Politicized	Independent	Dis-integrated	National
GAL						
Private Law beyond the state						
Private Regulation	Procedural	Thin	De-politicized	Dependent	Assimilated	Supranational

Chart VI: Framework of transnational theories according to their ability to overcome bipolarity in six parameters of law

The framework put forward by this thesis allows a structures of the debate in legal thinking on transnationalization in the context of national, European and transnational law. In the context of transnational law, faithful to the focus of this thesis, the framework is further elaborated, structuring approaches to transnational law according to their stances on the non-state/state tension. It is however hoped that the structuring exercise will also provide some insights for the study of transnational law. The following part will introduce the aim of Chapter 5 to draw some insights form the structuring exercise that prompt the development of an approach to transnational law beyond bi-polarity.

1.2. **Outcomes from the framework: a plea for an approach to transnational law beyond bi-polarity**

The main outcome of the analysis of the framework is that an approach to transnational law beyond bi-polarity should be developed. The persistence of bi-polarity throughout the contexts of law and transnationalization indicates that there are fundamental tensions in legal theory that ultimately limit our understanding of transnational law. This will follow from a range of different outcomes presented according to the chapters of the different contexts of law and transnationalization.

1.2.1. **National law: Bi-polarity and dependence on state institutions**

The outcome of the analysis of national law according to the bi-polar framework will be that legal thinking in national law is dominated by two competing organizational principles and therefore depends on state institutions.¹¹⁰

This argument will be sustained by presenting the analysis of the framework in national law as an illustration of what Kennedy called the ‘legal thinking of the third globalization’ that is characterized by the management between two opposed ideals and the mixed outcomes of this management. The way in which courts are at the same time considered very important but also criticized for conducting judicial activism will illustrate this point. The compromises that are achieved in law-making remain superficial and ultimately leave it to the courts to strike a balance between legal formalism and policy analysis. Bi-polarity indicates hence an underlying tension that makes law dependent on a managerial effort that must be provided by state institutions.

The two organizational principles and the influence of their co-existence on contemporary legal thinking will be explained and illustrated according to the analysis of national law and transnationalization in the six parameters of law. The preference of thin legitimacy, depoliticized law, dependent consideration of social interests, assimilated governance and a supranational polity will be put in the context of the organizational principle of the will theory and the premise that “law should be the coherent working out of the idea of individual freedom so far as compatible with the like freedom of others.” Similarly, arguments for thick legitimacy, politicized law, independent consideration of social interests, dis-integrated governance and a national polity will be attributed to the premise of social interdependence.

Transnationalization will be presented as one further issue in which this tension manifests. The role of courts in each of the six parameters will be used to illustrate that they have a crucial role in managing between the two ideals. As transnational challenges enhance procedural developments of law, courts are called upon to provide legal safeguards. At the same time it is true that in the face of increasingly performance-based notions of legitimacy and technocratic and assimilated governance structures, courts are seen to be the last – or at least one of the last- guardians of national interests. The role of the courts will also indicate a difference between the parameters; in legality, politics and governance bi-polar categories

¹¹⁰ According to Kennedy, who’s understanding is adopted here, an organizational principle is understood as a logic that transcends all legal thinking of its time, a mode of thought “that provided a conceptual vocabulary, organizational schemes, modes of reasoning and characteristics arguments” Kennedy, 2006, p. 22.

seem to blur, the compromises found in law-making remain superficial and the actual finding of compromises is left to the court.

1.2.2. European law: differences between parameters

The impression of a difference between parameters will be confirmed in the analysis of European law. The difference between law-making parameters (legality, politics and governance) and parameters of the theoretical backdrop (legitimacy, values and polity) will be the outcome of the chapter on European law.

Management between the poles can be achieved in the parameters of legality, politics and governance but bi-polarity persists in the parameters of legitimacy, values and polity.

In Chapter 3 this becomes apparent, as certain developments in the legality, politics and governance of European law, do not fit the bi-polar categories. With regard to legality, European law has to combine characteristics that satisfy procedural as well as formal requirements. Similarly, law-making in the European Union creates for closeness to political institutions in some instances and for distance from them in others and lastly, various forms of governance structures that co-exist, combine assimilated structures with dis-integrated structures.

However, European law does not serve as a blueprint for transnational law because in the parameters of legitimacy, values and polity it depends very much on European institutions. In these parameters, the bi-polar tensions persist, and approaches that forward non-state like visions of European law collide with state-like visions. By way of illustration, the debate on the role of the European Court of Justice is examined according to this distinction.

The European Court of Justice is, at the same time, crucial in the development of European law, and it is harshly criticized for engaging in judicial activism.¹¹¹ Should the European Court of Justice give predominance to the four freedoms? Or respect the national welfare systems?¹¹² Or advance social protections by itself?¹¹³ The debate remains bi-polar because as the legality of European law combines legal formalism and policy analysis, it remains to the

¹¹¹ Azoulai, 2010; Grimmel Andreas, "Judicial Interpretation or Judicial Activism? The Legacy of Retentionism in the Studies of the European Court of Justice", in the European Law Journal, Vol. 18, Issue 4, pp. 518-353, 2012.

¹¹² Joerges Christian and Roedel Florian, "'Social Market Economy' as Europe's Social Model?" EUI Working Paper, No. 2004/8, 2004.

¹¹³ Schiek, 2013, p. 14.

judge to ultimately strike the balance between the two.¹¹⁴ This outcome on one hand raises the question about the relationship between the two groups of parameters and on the other hand shows that European law cannot be a blueprint for transnational law.

1.2.3. Transnational law: haunted by another bi-polarity

The same difference between parameters applies to the context of transnational law. While approaches that focus on law-making overcome bi-polarity in these parameters, there are other approaches that take a stance in the parameters of legitimacy, values and polity. However, the outcome of the bi-polar analysis of transnational law will be that while they overcome the non-state/state distinction at first sight, bi-polarity re-appears on a more fundamental level. Ultimately, transnational law cannot overcome bi-polarity and legal thinking remains limited by it.

With reference to examples taken from GAL it becomes clear that transnational law-making can overcome bi-polarity. Differences to European law-making exist; the legality of transnational law does not reach the robustness of the legality of European law. On the other side, the variety of governance structures in transnational law outmeasures the one in European law.

With regard to the parameters of legitimacy, values and polity a theoretical choice has to be made. The questions can be either approached from a top-down or a bottom-up perspective. Elaborating on system theory, the bottom-up perspective will be illustrated. At first the reflexive development of system internal legitimacy and values for a functionally defined polity are explained and finally bi-polarity seems overcome. Within the system the choice of thin legitimacy, dependent consideration of interest and supranational polity seems convincing. However, when considering the external face of the system, its relation to its environment and other systems, the tension reappears. What is the relationship between the thin legitimacy in the system and the thin common normative horizon that all systems share? What is the relationship between the dependent consideration of all interests according to the rationality of the system and the rationality of other systems or values like the protection of the environment? What is the relationship between the functionally defined polity of the system and the global civil society? The analysis of the parameters according to system theory will raise these questions and conclude that the bi-polar tension between non-state and

¹¹⁴ The judge is not only a hero but “must answer the charge that s/he is a usurper, doing ‘politics by other means.’” Kennedy, 2006, p. 71.

state is transformed into a tension between laws internal and external face. Ultimately legal thinking remains limited by bi-polarity.

1.3. **Context of illustration: The FSB Key Attributes of Effective Resolution Regimes for Financial Institutions**

Our framework is illustrated with the Financial Stability Board Key Attributes of Effective Resolution Regimes (Key Attributes, KAs).¹¹⁵ In the flurry of reform spurred by the financial and economic crisis of the late 2000s, the newly transformed Financial Stability Board developed these standards as part of the efforts to end the too big to fail (TBTF) problem associated with systemically important financial institutions.¹¹⁶

The Key Attributes are part of the FSB SIFI framework and aim at addressing the systemic risks and the associated moral hazard problem for institutions that are seen by markets as TBTF.¹¹⁷ The framework that was endorsed by the G20 in November 2011 entails measures for effective resolution regimes and policies, requirements for additional loss absorption capacity to make banks more crisis resistant, more intense and effective supervision, and the strengthening of core market infrastructures.¹¹⁸

In the following, I will provide an introduction into the debate of the Key Attributes according to the framework of this thesis. First, I will present the KAs as a piece of transnational law. Then I will show the tension that the non-state/state distinction causes in the six parameters of law, and finally, I will provide an introduction into the developments it caused in the three contexts of national, European and transnational law. Before starting this analysis, I will provide an overview of the so-called KAs:

The Key Attributes of Effective Resolution Regimes for Financial Institutions, lie out the characteristics that a resolution regime for financial institutions should have according to the FSB. A resolution regime is an alternative to a bankruptcy procedure and aims at ‘resolving’ or liquidating a failing institution in an ‘ordered’ way so that the financial market does not

¹¹⁵ FSB Recommendations, “Key Attributes of Effective Resolution Regimes for Financial Institutions” October 2011 endorsed at the G-20 Summit in Cannes, November 2011. For an introduction to the Key Attributes and the FSB refer to Huepkes, 2013.

¹¹⁶ For an introduction into the subject Gerdes, 2013 or Scott, Shultz and Taylor, 2009 and opcit in fn. 5.

¹¹⁷ FSB Progress Report of the FSB to the G-20, “Progress and Next Steps Towards Ending “Too-Big-To-Fail” (TBTF), 2 September 2013, p. 7. (FSB, TBTF Progress report, 2013.)

¹¹⁸ Group of 20, London Declaration, 2009

suffer disruptions. The FSB puts forward twelve such Key Attributes. In the following they are listed and their content summarized in one simplified sentence:

Nr.	Title	Shorthand
1	<i>Scope of the resolution regime</i>	<i>(KA 1, Scope),</i>
2	<i>Resolution authority</i>	<i>(KA 2, Resolution authority)</i>
3	<i>Resolution Powers</i>	<i>(KA 3, Resolution powers)</i>
4	<i>Set-off, netting, collateralization, segregation of clients' assets</i>	<i>(KA 4, Set-off rights)</i>
5	<i>Safeguards</i>	<i>(KA 5, Safeguards)</i>
6	<i>Funding of firms in resolution</i>	<i>(KA 6, Funding)</i>
7	<i>Legal framework conditions for cross-border cooperation</i>	<i>(KA 7, LFCRC)</i>
8	<i>Crisis Management Groups</i>	<i>(KA 8, CMG)</i>
9	<i>Institution-specific cross-border cooperation agreements</i>	<i>(KA 9, COAGs)</i>
10	<i>Resolvability assessments</i>	<i>(KA 10 Resolvability assessments)</i>
11	<i>Recovery and resolution planning</i>	<i>(KA 11, RRP)</i>
12	<i>Access to information and information sharing</i>	<i>(KA 12, access to information)</i>

Chart VII: Overview of the Key Attributes

KA 1: Scope of the resolution regime (KA 1, Scope),

Lists all the institutions that should fall within the scope of the resolution regime.

KA 2: Resolution authority (KA 2, Resolution authority),

Lists amongst others its statutory objectives and functions, the extent of its authority and its independence.

KA 3: Resolution Powers, (KA 3, Resolution powers)

Enumerates the various powers the authority should have throughout the resolution process and the different measures it should be able to carry out in this process.

KA 4: Set-off, netting, collateralization, segregation of clients' assets, (KA 4, Set-off rights)

Stipulates that, in order to gain the necessary time to organize the resolution, the legal framework should, with the adequate safeguards, be able to suspend statutory or contractual set-off rights or other measures that entail automatic early termination rights.¹¹⁹

KA 5: Safeguards, (KA 5, Safeguards)

Stipulates that the hierarchy of claims, the principle of “no creditors worse off” and legal safeguards for creditors and other legal remedies should remain in place and not be harmed.

KA 6: Funding of firms in resolution, (KA 6, Funding)

Holds that funding should be planned and available so that the resolution authority is not constrained to rely on public ownership or bail-out funds.

KA 7: Legal framework conditions for cross-border cooperation (KA 7, LFCRC)

Holds that the legal framework should empower and encourage the resolution authority to cooperate with foreign authorities. National laws and regulations should not discriminate against creditors on the basis of their nationality.

KA 8: Crisis Management Groups (CMG)

Forwards that home and key host authorities of all global SIFIs (G-SIFIS) should form and maintain CMGs in order to coordinate and facilitate the management of a potential resolution.

KA 9: Institution-specific cross-border cooperation agreements (COAGs)

Demands that for all G-SIFIS an institution-specific cooperation agreement between the home and relevant host authorities should be in place and formulates the content of such an agreement.

KA 10: Resolvability assessments,

Holds that such assessments should be in place to evaluate the feasibility of resolution strategies and facilitate the predication of impacts on the overall economy.

KA 11: Recovery and resolution planning (RRP)

Demands that an ongoing process for recovery and resolution planning is put in place in all jurisdictions. At least all G-SIFIS are required to develop such plans in place.

KA 12: Access to information and information sharing.

Forwards that no legal, regulatory or policy impediments should exist that hinder the exchange of information.

¹¹⁹ Mengle „The importance of Close-Out Netting“, ISDA Research Note, available on the website of the International Swaps and Derivatives Association (ISDA) at <http://www.isda.org/researchnotes/pdf/Netting-ISDAResearchNotes-1-2010.pdf> (accessed last on 19.10.2014)

In order to facilitate the reading quotations from the KAs will be formatted in italic and put apart from the text.

1.3.1. The KAs as a piece of transnational law

Looking at the KAs provides an example of the nature of a transnational challenge, the regulatory development it spurs and the challenge it causes to law.

The resolution of large financial institutions¹²⁰ is an incidence of transnationalization in two interconnected ways; firstly, large financial institutions do often have a cross-border component in either their corporate form, clientele or at least activity; secondly their size – acquired through this cross-border activity – out-measures that of states. This double challenge, as well as the resolution of large financial firms in general has attracted much writing since the financial crisis of the late 2000's where under the catch phrase of 'too big to fail'¹²¹ the need to prevent moral hazard and the resolution of financial institutions became a reform priority.¹²²

As the piece of transnational law that was developed in reply to this challenge, the KAs exemplify the unclear legal status of transnational law and the various impacts it has on national and European law, as well as the interactions between the three that helped its development.

In the crisis of the late 2000s, national jurisdictions faced with struggling financial institutions mostly disregarded the bankruptcy regimes they had in place and reacted to the crisis with emergency measures and legislation. Later these measures led to the development of resolution authorities, the strengthening of powers of supervisory agencies, or alternative arrangements with the same aim. These developments in national jurisdiction were paralleled

¹²⁰ "SIFIs are institutions of such size, market importance and interconnectedness that their distress or failure would cause significant dislocation in the financial system and adverse economic consequences. FSB, TBTF Progress report, 2013, p. 2.

¹²¹ Goldstein Morris and Veron Nicolas, "Too big to fail: The transatlantic debate", Bruegel Working Paper, 03, 2011. Huepkes Eva H. G., "Complicity in Complexity: What to Do About the 'Too-Big-To-Fail' Problem", Butterworths Journal of International Banking and Financial Law, Vol. 24 , No. 9 , pp. 515-518, 2009

¹²² An overview of helpful literature is provided in fn. 5.

by efforts of groups of states to concert the reforms.¹²³ Firstly, because in the face of the globalized market in financial services there is an interest in harmonization and secondly the practical challenge of resolving a financial institution that operates in different jurisdictions demands a degree of cooperation.¹²⁴

These efforts, driven by the G20 and led by the FSB, were finally formalized in the Key Attributes. They match the definition of transnational law, as they are neither national nor international law. Instead they have been formulated as recommendations and are now, after the endorsement by the G20, referred to as international standards.¹²⁵ The legal value of these standards remains unclear; however, they led to further reforms in national law.¹²⁶

1.3.2. Resolution of large financial institutions: non-state/state tensions in all parameters of law

The aim of the Key Attributes is to enable the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claim in liquidation.¹²⁷ At the same time, they entail measures that aim at the establishment of institution-specific cross-border colleges in order to enable the resolution of global SIFIs and measures to facilitate the cooperation and exchange of information between jurisdictions.

Dealing with the failure of large financial institutions has challenged law in all of its six parameters. In the following, I will shortly provide an overview of the challenge and the tensions they created within each parameter of law.

What form of law is better fit to deal with the challenge of struggling financial institution? Should the emphasis be on flexibility or on legal certainty?¹²⁸ The **legality** of formal law is challenged, as its lack of flexibility and speed does seem unfit for the tackling of financial

¹²³ For an introduction on the subject refer for instance to the background Chapter of the FSB, Peer Review Report, p. 14.

¹²⁴ Attinger, 2011, p. 7.

¹²⁵ Riles 2013, p. 77.

¹²⁶ See Chapter 2.

¹²⁷ FSB Recommendations, “Key Attributes of Effective Resolution Regimes for Financial Institutions” October 2011 endorsed at the G-20 Summit in Cannes, November 2011, Preamble, p. 3. (FSB, Key Attributes, 2011)

¹²⁸ On this question as well as the ones on values: Vives Xavier, “Competition and Stability in Banking: A New World for Competition Policy?” in Financial Supervision in an Uncertain World, ESI Annual Conference Report, Eijffinger Sylvester and Koedijk Kees (eds.), CEPR, 2010.

resolutions.¹²⁹ On the other hand, legal uncertainty in national orders fueled through procedural approaches makes cross-border resolutions even harder.¹³⁰ Large administrative powers, untested enforceability of netting and collateral rights, and policy decision in depositor and creditor protection hinder planning of cross-border resolutions. The Key Attributes display a mix of both, procedural and formal approaches, by promoting flexibility for best enabling resolution agencies while at the same time providing for legal safeguards, promoting learning and feedback to accommodate national differences and closely monitor implementation.

The confusion is equally large with regard to the parameter of **legitimacy**; by holding consultations on a regional as well as global level, while at the same time insisting on a very exclusive membership, the stances of the Key attributes with regard to legitimacy are not clear.¹³¹ How is its legitimacy to be understood? What is the legitimacy of law under transnationalization? How is the common good that should be served evaluated? What is the understanding of the common good that should be served? Policies developed with liberal notions of legitimacy in mind clash when their outcomes are evaluated to republican legitimacy standards. But how should the resulting legitimacy deficit be addressed? Should the focus be on accountability, or on participation?

With regard to the **values** and relationship of the market and society the central importance attributed to taxpayer protection seems to indicate the will to protect society from the market. On the other hand, most measures in the KAs do not in fact intervene very restrictively into the market but aim to enable market discipline through transparency. What should be the relationship between market and social interests? Should we intervene more in the markets?¹³² Ending bailouts is justified with a double aim. What is the relationship between protecting taxpayers and safeguarding market discipline (limiting moral hazard)? Conceptions considering social interests as dependent on market interests clash with conceptions that consider social interests independently from market interests.

¹²⁹ Jackson Thomas H., “Chapter 11F: A Proposal for the Use of Bankruptcy to Resolve Financial Institutions”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.

¹³⁰ Attinger on courts, 2013, p. 25.

¹³¹ Kroener William F. III, “Expanding FDIC-Style Resolution Authority”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.

¹³² Lavelle Kathryn C., “Implementing the Volker Rule in National and International Politics”, in Porter Tony, (ed.), “Transnational Financial Regulation after the Crisis”, Routledge, New York, 2014

The role of law with regard to **politics** proposed in the KAs, their strong reliance on delegation seems to indicate a de-politicization approach, but overriding public policy consideration give the opposite impression. What should be the relationship between law and politics in transnationalization? Should law be politicized in order to achieve policy goals, or should functional or technocratic approaches be fostered?

The challenge of transnationalization crosses sectorial and national borders. Information sharing and cooperation is needed to manage resolution. Should therefore **governance structures** be assimilated or will that only aggravate the national particularities?¹³³ The formation of regulatory colleges and strong independent agencies seems to indicate assimilative tendencies in the KAs. On the other hand, reliance on courts and tolerance towards sectorial differentiation suggest dis-integration.

Finally with regard to **polity**, the reference to global systemic risk and the global economy allude to a polity beyond the state. At the same time, the majority of the measures of the KAs are aimed at the improvement of national resolution agencies and the harmonization of their practices. The challenge of transnationalization implies that the countries bearing the risk of failure might not be the countries of incorporation.¹³⁴ Does that mean that law should protect the national polity through ring-fencing and preferential treatment of home depositors and creditors?¹³⁵ Or does it mean that it should allude to a polity beyond the national that shares the common interest to tackle financial institutions?

The resolution of large financial institutions as a challenge of transnationalization causes tension in all aspects of law. It is hence a good choice for the illustration of the debate on law and transnationalization. Even more so, as shown in the next part, it has led to developments and hence debate in all three contexts of law looked at in this thesis.

1.3.3. The Key Attributes in the three contexts of transnationalization and law

¹³³ Alexander Kern, "Reforming European Financial Supervision: Adapting EU Institutions to Market Structures", Academy of European Law, Trier, 11 June 2011. Eisenbeis Robert A. and Kaufman George G., "Cross-Border Banking: Challenges for Deposit Insurance and Financial Stability in the European Union", Working Paper Federal Reserve Bank of Atlanta, October 2006.

¹³⁴ Attinger, p. 17.

¹³⁵ The last crisis has shown that there is a strong tendency to protecting funds of home banks Cross-border Bank Resolution Group, "Report and Recommendations of the Cross-border Bank Resolution Group", Bank of International Settlements, March 2010, on ring-fencing in particular and a comment on the last crisis refer to Attinger, p. 16 on countermeasures more specifically: Alford Duncan, "International Financial Reforms: Capital Standards, Resolution Regimes and Supervisory Colleges, and their Effect on Emerging Markets", ADBI Working Paper Series, No. 402, 2013.

The Key Attributes led to developments in all three contexts of law. In national law they spurred reforms in FSB member states.¹³⁶ On a European level, the Resolution and Restructuring Directive (BRRD) incorporated not only the KAs into European law but mark an important step in the development of the banking union. Lastly, of course, the KAs are a development in transnational law, according to the rules and procedures of the FSB and endorsed by the G20.

Thereby, the KAs offer an illustration not only of regulation developed in the face of a transnational challenge, but also of the impact of this regulation in different contexts of law as well as the debate it spurs in them.

The KAs entail a series of recommendations that are aimed at the improvement of national resolution authorities. In Chapter 2 of this thesis, these recommendations, their reception in **national jurisdictions** and the debate around them will be structured according to the framework that is developed here. This analysis will largely be based on the 2013 Thematic Peer Review Report. This report provides illustrations for difficulties faced in specific countries as well as trends regarding the implementation of the different KAs, priorities given to them, and the like. The reception of these KAs will be looked at with regard to all six parameters of law. It will become apparent that within each parameter transnationalization leads to a tension that reflects the non-law/law tension of the bi-polar approach.

The role of **European law** as a potential pioneer for transnational law defines how this thesis will be looking at the Key Attributes and European law in this thesis. The Bank Resolution and Restructuring Directive¹³⁷ (BRRD) introduced the Key Attributes into European law. This network of national resolution authorities has been complemented by a Single Supervisory Mechanism and - in the Euro zone - a Single Resolution Mechanism. The BRRD is part of a larger effort to strengthen the financial framework of the single market. Key in the strengthening of the framework is the ‘single rulebook’ for all banks in Europe. It is made up by the implementation of Basel III in the EU legal Framework¹³⁸ for stronger prudential

¹³⁶ FSB Peer Review Report, “Thematic Review on Resolution Regimes”, 11 April 2013. (FSB, Peer Review Report, 2013.)

¹³⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173, 12.6.2014, p. 190–348, (EU, BRRD, 2014.)

¹³⁸ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending

requirements, the new Directive on Deposit Guarantee Schemes¹³⁹ and the Bank Recovery and Resolution Directive as an attempt to strengthen and harmonize the tools for dealing with the bank crisis across the EU. The pillars of the banking union are the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). While both regimes now co-exist they provide competing visions of the future of European law in financial market regulation.¹⁴⁰ Chapter 3 will classify the debate on the resolution of large financial institutions in European law according to the bi-polar categories. The ways in which European law overcomes the non-state/state tension and the limits thereof will become apparent. Thereby, the framework will provide a better understanding of the particular place European law has in the study of transnational law.

The functioning of the FSB itself as well as the KAs that aim at transnational cooperation will be used to illustrate the framework in the context of **transnational law**. The focus will be on the rules on the functioning of the FSB (its legal form and its mechanism of enforcement), and the measures aimed at global systemically important financial institutions (GSIFIs) that develop regulatory fora beyond the state level. With regard to the functioning of the FSB, its Charter¹⁴¹ as well as its thematic peer review mechanism will be looked at more closely.¹⁴² The peer reviews are part of the FSB Framework on Strengthening Adherence to International Standards¹⁴³ alongside with leadership by example and the adherence toolbox and are part of the responsibilities of the Standing Committee on Standards Implementation (SCSI). Chapter 4 will structure the debate on these KAs as well as on the functioning of the FSB. The analysis will unveil the instances where transnational law provides avenues to an approach beyond the non-state/state distinction and where it remains limited by it.

Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, OJ L 176, 27.6.2013, p. 338–436. (EU, Capital Requirement Directive IV, 2013.)

¹³⁹ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes Text with EEA relevance, OJ L 173, 12.6.2014, p. 149–178. (EU, Directive on deposit guarantee schemes, 2014.)

¹⁴⁰ Veron, 2013.

¹⁴¹ Charter of the Financial Stability Board, endorsed by the Heads of State and Government of the Group of Twenty, Los Cabos Summit, 19 June 2012. (FSB, Charter, 2012)

¹⁴² FSB, Standing Committee on Standards Implementation, “Handbook for FSB Peer Reviews”, 7. January 2014.

¹⁴³ FSB, Framework for Strengthening Adherence to International Standards, 9. January 2010.

2. The Bi-polar Debate on National Law and Transnationalization

This Chapter will examine the debate that has been inspired by transnationalization in national law and will structure that debate according to the non-state/state distinction and its sub-distinctions in the six parameters of law; legality, legitimacy, politics, values, governance and polity. This bi-polar analysis provides an insight into how non-state/state tension persists in legal thinking about national law and transnationalization. Bi-polar arguments do not solve this non-state/state tension; in fact they sustain that tension and the final compromise in most cases is left to the courts or the political institutions of the nation state.

By way of illustration, this Chapter will refer to the Financial Stability Board's (FSB) Key Attributes of Effective Resolution Authorities (Key Attributes) that are being transferred into national law. The focus is on the implementation of FSB standards in national jurisdictions and the debate that this spurs. Considerable tension may be observed as the developments caused by transnationalization have given momentum to non-state arguments and the criticism of state institutions and state characteristics of law while on the other hand, law remains closely attached to the state, and arguments of a state-based vision of law persist. The actual resolution regimes that develop in the nation state can be seen as compromises developed under and within this tension.

The KAs aimed at national implementation are:

<i>Nr.</i>	<i>Title</i>	<i>Shorthand</i>
<i>1</i>	<i>Scope of the resolution regime</i>	<i>(KA 1, Scope),</i>
<i>2</i>	<i>Resolution authority</i>	<i>(KA 2, Resolution authority)</i>
<i>3</i>	<i>Resolution Powers</i>	<i>(KA 3, Resolution powers)</i>
<i>4</i>	<i>Set-off, netting, collateralization, segregation of clients' assets,</i>	<i>(KA 4, Set-off rights)</i>
<i>5</i>	<i>Safeguards,</i>	<i>(KA 5, Safeguards)</i>
<i>6</i>	<i>Funding of firms in resolution</i>	<i>(KA 6, Funding)</i>
<i>7</i>	<i>Legal framework conditions for cross-border cooperation</i>	<i>(KA 7, LFCRC)</i>
<i>12</i>	<i>Access to information and information sharing</i>	<i>(KA 12, access to information)</i>

Chart VII: Overview of the Key Attributes relevant in the context of national law

These are all KAs with the exception of KA8 (Crisis Management Groups) and KA9 (Institution-specific cross-border cooperation agreements). These two along with the transnational law applications of KA10 (Resolvability assessments) and 11 (Access to information) will be looked at in Chapter 4.

The focus in this Chapter is hence the debate as to how national jurisdictions deal or should deal with the challenge caused when large financial institutions get into difficulty and risk failure. It will be argued that in all parameters of law, the question with regard to the non-state/state distinction is not ultimately resolved. Instead, bipolar arguments sustain the non-state/state tension and the role of courts illustrates a dependence on a management effort by state institutions.

2.1. **Bi-polar approaches to the legality of law**

Bi-polarity in legal thinking about the legality of law in transnationalization entails arguments of procedural law on one hand and arguments on formal law on the other.

Many see the complexity and speed of transnationalization as favoring procedural approaches.¹⁴⁴ On the other hand, others point to the high stakes and uncertainty caused by transnationalization as a reason to heighten or at least adhere strictly to formal requirements of law-making in these contexts.¹⁴⁵ Procedural approaches emphasize the importance of speed and expertise in the context of dealing with financial institutions and the added benefit of flexibility in cross border resolutions. The formalist approach on the other hand, focuses on the role of legal certainty and legal safeguards. On one hand they are pointing to the formalization of emergency measures on the other hand to the judicial limits to cross-border cooperation throughout national jurisdictions.

In the context of resolution regimes this is partly reflected by the debate on bankruptcy law framework versus resolution authorities for the resolution of financial institutions. The FSB approach is based on the latter but tries to accommodate formalistic demands through judicial safeguards and clear mandates for resolution authorities.

¹⁴⁴ Taggart, 2005, p. 613.

¹⁴⁵ Attinger Barbara Jeanne, "Crisis Management and Bank Resolution: Quo Vadis, Europe?", Legal Working Paper Series, No. 13, European Central Bank, 2011, p. 16.

2.1.1. Procedural legality approaches

Procedural approaches are forwarded on basically three grounds; firstly, speed and flexibility are suitable for complex regulatory challenges, secondly, they allow for the consideration of public policy goals and finally, they are more likely to facilitate cross border interactions.

The debate on the legality of measures to deal with large financial institutions illustrate this point, as FSB type resolution authorities are seen to be superior to the formalist bankruptcy framework solutions.

Speed and flexibility are forwarded as advantages of procedural approaches in the face of the complexity of transnationalization. Sassen, for instance, argues that globalization emphasized the comparative advantage that the executive can have over the other branches of the state.¹⁴⁶ The underlying factors that led to this empowerment have been discussed in general administrative law.¹⁴⁷ Procedural approaches are seen to be faster than judicial ones.¹⁴⁸ This is especially important in the context of resolutions of financial firms but also in the context of transnationalization in general. It is agreed that prompt action in banking resolution is crucial to limit the cost of that resolution.¹⁴⁹ “In bank resolution, time is of essence. Resolution need to be triggered earlier than under corporate insolvency law, before balance sheet insolvency of the bank.”¹⁵⁰ This is reflected by the KAs:

“The resolution regime should provide for timely and early entry into resolution before a firm is balance- sheet insolvent and before all equity has been fully wiped out.”¹⁵¹

By comparison, bankruptcy proceedings are portrayed as being slow. “The most important advantage on bank resolutions [over bankruptcy law] is the speed, and resulting preservation of value, due to earlier intervention and the absence of an automatic stay. In bankruptcy, by comparison, there is an automatic stay of uncertain but possibly considerable duration while a

¹⁴⁶ Sassen, 2003, p. 9.

¹⁴⁷ Ladeur, 2011, p. 21.

¹⁴⁸ Taggert, 2005, p. 605.

¹⁴⁹ Ingves Stefan and Hoelscher David S., “The Resolution of Systemic Banking System Crises: the Way Forward”, in Systemic financial Crises: resolving large bank insolvencies, Singapore, World Scientific, 2005, p. 163. Also according to Shultz, “To what degree do problems arise from slowness of application? If quicker resolution would be helpful, can some greater degree of automaticity or presumption be built into these processes? ... And the proceedings take place within an understood rule of law.” Shultz George P., “Making Failure Tolerable”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009, p. 7.

¹⁵⁰ Attinger, 2011, p. 9.,

¹⁵¹ FSB, Key Attributes, 2011, KA 3.1, p. 7.

plan is developed by creditors and submitted for judicial approval.”¹⁵² Bank resolution models on the other hand can put in place solutions, even temporary ones, more quickly.¹⁵³ While of course the bankruptcy vs. resolution authority debate is a question that persists independently of the context of transnationalization, the importance of speed and expertise are emphasized in the cross-border setting, because of the added complexity of cross-border interactions. The magnitude of the stakes is increased and the reaction of the market can be more intense. It also connects to the next section on cooperation, as judicial formalism is seen to hinder cooperation in cross-border resolutions.¹⁵⁴

The other widely praised advantage of procedural approaches relates to the possibility of using them to better consider public policy goals. It is generally suggested that the executive, through its day-to-day exposure to the practical problems involved in the application of law, has more expertise.¹⁵⁵ In the context of resolution authorities, “There is a form of expert decision-making involved, by experienced financial agency personnel, rather than an Article III judge, in determining the nature of resolution.”¹⁵⁶ Limitations in the legal system have been seen as a key reason for sub-optimal results in bank restructuring. While most claims regard the lack of powers of executive agencies that will be further discussed, the ‘insufficient knowledge of judges on banking matters’ is named as well:¹⁵⁷ “even the best-intentioned bankruptcy process is assumed to lack sufficient expertise to deal with the complexities of a SIFI [systemically important financial institution] and its intersection with the broader financial market.”¹⁵⁸

Finally, the flexibility of procedural tools (like standards)¹⁵⁹ or actors (like executive agencies¹⁶⁰ or private standard setters¹⁶¹) is said to be beneficial in cross-border settings.

¹⁵² Kroener William F. III, “Expanding FDIC-Style Resolution Authority”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009, p. 181-182.

¹⁵³ Kroener, 2009, p. 182.

¹⁵⁴ Attinger, 2011, p. 7.

¹⁵⁵ Taggert, 2005, p. 611.

¹⁵⁶ Kroener 2009, p. 182.

¹⁵⁷ Ingves and Hoelscher, 2005, p. 162.

¹⁵⁸ Jackson Thomas H., “Chapter 11F: A Proposal for the Use of Bankruptcy to Resolve Financial Institutions”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009, p. 218 Also in the testimony of David Moss: “Although American bankruptcy law has served us extremely well over the past 100-plus years, it was never designed to handle the failure of a large, systemically significant financial institution, particularly at a moment of severe financial turmoil.” Jackson, 2009, p. 244.

¹⁵⁹ For an excellent account on standards, Schepel Harm, “The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets”, Hart, Oxford, 2005.

¹⁶⁰ Sassen, 2003.

Formal supervisory crisis management tools appear to be limited when a financial institution needs to be stabilized rapidly and the continuity of business needs to be ensured in more than one jurisdiction. They can on the contrary “undermine market confidence or may trigger termination and close-out netting events in financial contracts, with counterproductive effects.”¹⁶² Judicial safeguards are thought to hamper cross-border resolutions. The FSB KA on judicial safeguards insists very much on the importance of limiting these safeguards:

KA 5.4 “the legislation establishing resolution regimes should not provide for judicial actions that could constrain the implementation of, or result in a reversal of, measures taken by resolution authorities acting within their legal powers and in good faith.”

KA 5.5 “In order to preserve market confidence, jurisdictions should provide for flexibility to allow temporary exemptions from disclosure requirements or a postponement of disclosures required by the firm, for example, under market reporting, takeover provisions and listing rules, where the disclosure by the firm could affect the successful implementation of resolution measures.”¹⁶³

Procedural arguments are hence on the forefront in questions of transnationalization. However, and especially in the context of national law, the state context and its arguments persist also with regard to the legality of law.

2.1.2. Formal legality approaches

Formalist approaches focus on the importance of legal certainty and legal safeguards. The emphasis is on the role of courts, widespread formalization of procedural developments, and legal safeguards to administrative action.¹⁶⁴ On one hand, general arguments in favor of legal certainty and legal safeguards are forwarded. On the other hand, the peer review report is seen as an illustration of the importance that national jurisdiction give to legal safeguards in general and on cross-border context in particular.

The cornerstones of arguments in favor of formalist approaches to law in the face of transnationalization reflect those of the general discussion about administrative law to a

¹⁶¹ Cafaggi Fabrizio, “New Foundations of Transnational Private Regulation”, in the *Journal of Law and Society*, Vol. 23, No. 1, 2011, pp. 20-49.

¹⁶² Cross-border Bank Resolution Group, “Report and Recommendations of the Cross-border Bank Resolution Group”, Bank of International Settlements, March 2010. p. 11. (CRBR Group, 2010.)

¹⁶³ FSB, Key Attributes, 2011, KA 5.5.

¹⁶⁴ Dyzenhaus David, Hunt Murray and Taggart Michael, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation”, in *Oxford University Commonwealth Law Journal*, Vol. 1, No. 1, 2001, pp 5-34.

certain extent.¹⁶⁵ Legal certainty and legal safeguards are seen as being essential for the smooth functioning of financial markets and for counterbalancing the dangers of politicization that come with the procedural approach.¹⁶⁶ Furthermore, the application of procedural approaches in cross-border resolution is limited, as national courts are seen as being inclined to act in the national interest.

Examples of legal formalism are widely found, especially as the mainly procedural emergency measures have been followed by legal reforms in most national jurisdictions.¹⁶⁷ Switzerland is even said to have developed a coherent legal regime for the resolution of financial institutions.¹⁶⁸

It is further felt that the flexibility that comes with procedural approaches calls for safeguards. According to Attinger, an intervention like saving a financial institution is difficult because it is difficult to justify why: (i) creditors should be deprived of (part of) their claims; and (ii) shareholders should accept an interference in their rights.¹⁶⁹ For some this means that no interference should take place at all.¹⁷⁰ Other formalist approaches emphasize the role of courts in these instances. According to FSB KA 5:

“The resolution authority should have the capacity to exercise the resolution powers with the necessary speed and flexibility, subject to constitutionally protected legal remedies and due process.”¹⁷¹

The majority of cases provide for a right of judicial review either under general administrative law or as an explicit right under the resolution regime.¹⁷²

Lastly, the peer review report illustrates that procedural tendencies are seriously limited with regard to the cross-border aspect of resolutions. On one hand, the powers of administrative agencies in general remain limited in these contexts; on the other hand, the powers of courts are more accentuated. The thematic peer review brought to light that only a few jurisdictions encourage their resolution authorities to cooperate with foreign authorities seriously and only some have explicit powers to do so.¹⁷³ Most FSB jurisdictions report that the powers they

¹⁶⁵ Taggart, 2005.

¹⁶⁶ Jackson, 2009, p. 246.

¹⁶⁷ FSB, Peer Review Report, “Thematic Review on Resolution Regimes”, 11 April 2013. (FSB, Peer Review Report, 2013.)

¹⁶⁸ FSB, Peer Review Report, 2013 p. 45

¹⁶⁹ Attinger, 2011, p. 9.

¹⁷⁰ For example Jackson, 2009.

¹⁷¹ FSB, Key Attributes, 2011, KA 5.4.

¹⁷² FSB, Peer Review Report, 2013, p. 28.

¹⁷³ FSB, Peer Review Report, 2013, p. 10.

have over branches of foreign banks are not special resolution powers but stem from the domestic insolvency framework.¹⁷⁴ It is hence the courts that have more power in this regard. They also have more power as, while about a third of the FSB jurisdictions are said to have a mechanism for the giving of legal effect to the decisions of foreign authorities, they depend in most cases on application to the court.¹⁷⁵

Formalist approaches can also point to the national interest as a limit to the cooperation that can be expected to be achieved through procedural law. According to the report of the Cross-border Bank Resolution Group that evaluated the cases of Fortism Dexia, Kaupthing and Lehman Brothers, the “crisis has illustrated that it is national interests that are most likely to drive decisions.”¹⁷⁶ There are eight jurisdictions of the FSB that have provision for differential treatment of certain claims – mostly deposits – according to the location of their claim or the jurisdiction where the claim is payable under their insolvency or resolution regime.¹⁷⁷

Attempts to reform this situation and to open the national legal frameworks for cooperation in cross-border resolutions have not been very successful so far. According to the FSB peer review, KA 7 on the development of national legal frameworks for cross-border cooperation, has been the least well-developed in member states.¹⁷⁸ This supports the bi-polar approach of law to transnationalization that reserves procedural development within law to the legal framework.

The debate about the form in which the law should address the failure of large financial institutions illustrates that the non-state/state tension persist in this context. Procedural and formal arguments co-exist and the outcome will depend on the courts or on political decisions.

2.2. **Bi-polar approaches to the legitimacy of law**

Bi-polarity – competing non-state and state arguments- in legal thinking about the legitimacy of law and transnationalization opposes arguments of thin and thick conceptions of legitimacy.

¹⁷⁴ FSB, Peer Review Report, 2013, p. 29.

¹⁷⁵ FSB, Peer Review Report, 2013, p. 30.

¹⁷⁶ CRBR Group, 2010, p. 16.

¹⁷⁷ The countries are Australia, Indonesia, Japan, Korea, Singapore, Switzerland, Turkey and the US. FSB, Peer Review Report, 2013, p. 30.

¹⁷⁸ FSB, Peer Review Report, 2013, pp. 29-31.

Transnationalization has given momentum to thin conceptions of legitimacy. Following the functionalist approach to legality, performance and efficiency-based arguments have come to the forefront. Such ‘output’ oriented arguments are made for instance in the case of independent agencies or self-regulation. Other thin approaches point to the limits of thick ‘input’ oriented conceptions, arguing that democratic procedures – electorates or parliaments – are not able to decide on complex issues of transnationalization. Approaches in favor of thick conceptions of legitimacy on the other hand argue that in the face of transnationalization, democratic structures are even more important and must be strengthened through enhanced participation.

The FSB KAs on resolution powers and legal safeguards seem to illustrate a thin approach as they promote very wide-ranging powers and rather limited legal safeguards. On the other hand, in the wake of the crisis the legitimacy of financial market regulation in general has been questioned and higher democratic accountability was demanded.

2.2.1. Thin legitimacy approaches

Transnationalization has enhanced reference to thin conceptions of legitimacy. Thin, liberal¹⁷⁹ or performance based¹⁸⁰ notions of legitimacy resonate with the delegation and privatization that has been witnessed in administrative law in general.¹⁸¹ The focus on the protection of individual freedom makes them suitable for thinking about legitimacy beyond the state and fits into the parallelism of neo-liberalism and liberal theory (thin approaches to legitimacy) developing together.¹⁸² In the context of resolution authorities, the independence of agencies and their powers are illustrations for thin conceptions of legitimacy.

The ability of these agencies to solve problems has been seen as justifying their actions.¹⁸³ The increasing distance from the legislator and its representative function has been seen as positive for a more neutral focus on substance instead of politics.¹⁸⁴ Approaches discussing the comparative advantage of national banks and supervisory agencies refer to such

¹⁷⁹ According to Scharpf, the liberal discourse focuses on the freedom that a governing entity has to provide in order to allow individual participants to achieve their goals. The republican discourse on the other hand focuses on the common good and its definition by participatory government. Scharpf, 2009, pp., 3-13.

¹⁸⁰ In the words of Bartl: “This corresponds to the utilitarian justification of political authority and is concerned with outcomes of a polity, rendering the legitimacy dependent on providing material (or other kinds of) welfare.” Bartl, 2012, p. 53.

¹⁸¹ Taggart, 2005.

¹⁸² Kennedy, 2006, p. 64.

¹⁸³ A practical example is provided by the FSB by linking agency powers to independence and efficiency. FSB, Peer Review Report, 2013, p. 23.

¹⁸⁴ Bach, 1994.

abilities.¹⁸⁵ In the following paragraphs I will first elaborate on instances of private actor involvement and then more specifically on the independence of resolution authorities as presented by the FSB KAs.

Performance-oriented notions of legitimacy are forwarded, for instance, in the context of private actor involvement. For example, private actor involvement was widely discussed in the context of the use of industry-developed risk calibration methods for the calculation of capital reserves.¹⁸⁶ Arguments of expertise are crucial in this context. However, arguments of efficiency are also frequently made, especially in the context of self-regulation. Self-regulation in the financial market has a long history¹⁸⁷ and is still very important in many domains like securities markets, rating agencies and stock exchanges. Efficiency of self-regulation is also often forwarded against the inefficiency of government institutions. “Self-regulation’s relative efficiency increases with uncertainty over institutional implementation, populism, and political polarization.”¹⁸⁸

In the context of the resolution of SIFIs the KAs illustrate a thin approach, as the wide-ranging powers in KA 3 (Resolution powers) are not matched by legal safeguards or increased representation or participation. The resolution powers include the removal and replacement of senior management, the operation and resolving of the firm, the transfer or sale of assets, the carrying out of bail-ins and many others (in total twelve individual points). The exercise of these resolution powers is subject to several principles and safeguards; however, there should not be room for judicial decisions that reverse actions taking by the resolution authorities within these large legal powers and in good faith.¹⁸⁹

Other thin approaches focus on the inability of thicker, input-oriented conceptions to ‘produce results.’ One example that has been picked up from this perspective is the Icelandic “No” to the bail-out referendum. It did not change the reality of the debt the country was facing due to the collapse of its financial sector. “The three Icelandic banks that expanded their operations to the UK and continental Europe, particularly the Netherlands, gambled with derivatives using the depositors’ money. On becoming bankrupt they left behind them on the shoulders of

¹⁸⁵ Kroener, 2009.

¹⁸⁶ For a critique of Basel II refer to Hellwig Martin, “Capital Regulation after the Crisis: Business as Usual?”, preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2010/31, July 2010.

¹⁸⁷ Flohr provides an overview in Chapter 4 of her recent book in Flohr Annegret, “Self-regulation and legalization: making global rules for banks and corporations” Palgrave Macmillan, Basingstoke, 2014.

¹⁸⁸ Grajzl Peter and Murrell Peter, “Allocating Lawmaking Powers: Self-Regulation vs. Government Regulation”, in the Journal of Comparative Economics, 23:3, 2007, p. 520.

¹⁸⁹ FSB, Key Attributes, 2011, KA 5.5.

all stakeholders, a heavy legacy - and the Icelandic people were asked to supply hefty amounts of money to pay for the damage. The case was put for a public decision to referendums in Iceland: it was rejected but still came back in modified forms.”¹⁹⁰

Thin approaches embrace efficiency and performance that seem more suitable for the context of transnationalization. Thick approaches on the other hand, see that suitability as being the very reason why participation of all parties involved or the citizens at large, should be enhanced.

2.2.2. Thick legitimacy approaches

Thick approaches are based on an understanding of the common good that is determined by democratic mechanisms.¹⁹¹ These approaches focus on issues like representation and participation.

As the economic crisis struck, an extreme return to republican discourses could be observed. This is seen as not only mirroring the increased demand of legitimation in the face of the strain to which citizens were exposed but also the predominance of thicker notions of legitimacy in law.¹⁹²

The outcry on the illegitimacy of bailouts was not only focused on actual legal powers but on the unfairness of taxpayer burdening without involvement. Thicker conceptions of legitimacy focus on the more participatory ways in order to determine what the common good is. The outrage caused by the bailouts was the result of the perception that it was illegitimate to make taxpayers pay without their involvement in the decision-making that would lead to deciding how to deal with the debt. Thick approaches support referenda in these cases or may urge more generally to put the liberalization of financial markets under more popular control. In the context of the protests that accompanied the bail-outs, questions on the popular involvement in liberalization were asked. It was felt that populations should have a say about how their national financial sectors are meant to operate and more generally how their states participate in globalization.¹⁹³ It has even been suggested that the moment of crisis posed a

¹⁹⁰ Chorafas Dimitris N., “Basel III, the Devil and Global Banking”, Palgrave MacMillan, Hampshire, 2012, p. 124.

¹⁹¹ Scharpf, 2009, p. 5.

¹⁹² Scharpf, 2009, p. 9.

¹⁹³ For example Gapper John, “A better Way to occupy Wall Street”, Financial Times, New York, November 16, 2011

constitutional moment, questioning the conception of the welfare state and its relation to global economy.¹⁹⁴

In the wake of the massive bailouts that governments around the globe provided for their financial institutions, the legal frameworks were perceived illegitimate not only because they failed to provide smooth resolutions, but especially because they implied the burdening of taxpayers thereby harming the common good.

The tension between thin and thick conceptions of legitimacy is important in the debate about the legitimacy of national law in transnationalization and no obvious compromise follows from these arguments.

2.3. Bi-polar approaches to politics and law

With regard to the role of politics in law, bi-polarity in legal thinking confronts arguments about de-politicization with arguments of politicization.

Approaches of de-politicization are for instance provided by the advocates of contract law and the immunity it should enjoy in resolution proceedings. On the other hand, approaches of politicization are propose interference with contracts on public policy reasons, as in the context of stays, closeout netting,¹⁹⁵ and early termination rights.

The continental debate about the distinction between private law and public law is providing interesting insights into the tensions between de-politicization and politicization. The distinction between the two bodies of law is increasingly questioned and a growing complementarity is acknowledged.¹⁹⁶

2.3.1. De-politicization approaches

¹⁹⁴ Kjaer Poul F., Teubner Gunther and Febbrajo Alberto, (eds.) “The Financial Crisis in Constitutional Perspective; The Dark Side of Functional Differentiation”, Oxford, Hart Publishing, 2011, Introduction.

¹⁹⁵ According to Attinger who is referring to Mengle: close out netting is a “process involving termination of obligations under a contract with a defaulting party and subsequent combining of positive and negative replacements values into a single net payable or receivable” it is seen as the “primary means of mitigating credit risk associated with over-the-counter derivatives and necessary because it enables derivatives participants to protect against market changes following the default of a company” Attinger, 2011, p. 12 referring to „The importance of Close-Out Netting“, ISDA Research Note, available on the website of the International Swaps and Derivatives Association (ISDA) at <http://www.isda.org/researchnotes/pdf/Netting-ISDAResearchNotes-1-2010.pdf> (accessed last on 19.10.2014), pp. 1-2.

¹⁹⁶ Cherednychenko, 2007, p. 50.

De-politicization idealizes distance from the political institutions of the state as being conducive to the unimpaired rule of expertise and limiting market distortions. This distance can be achieved through delegation to more remote administrative bodies or through privatization.¹⁹⁷ Such approaches can also focus on the importance of private law and support the contention that it should be shielded from public policy limitations. If private law is limited, judicial review is essential but has to be free from judicial activism.

Trends of the de-politicization of law have focused on the ability of private law to substitute public law in the context of transnationalization with private ordering¹⁹⁸ and on limits to the interference of public law.

In the context of resolution authorities, de-politicization is apparent in the scope and independence of resolution authorities, as it has been discussed in the thin approach to legitimacy. Furthermore, in the context of contract law, de-politicization approaches warn of the danger of resolution regimes to interfere with contract law.¹⁹⁹ This interference is not only market-distorting; it also makes the system dependent on judicial review. Bankruptcy law is to be preferred, as it provides for the respect of contracts.

However, within resolution proceedings at least set-off and netting rights should not be overturned by public policy decisions. On the contrary, stays should not be allowed.²⁰⁰ If there are stays, resolution regimes should respect the creditor hierarchy and principles like “no creditors worse off”²⁰¹ as they will increase the role of judicial review.

The potential of private law and especially contract law to act as a neutral, efficient and market friendly regulatory option has been widely discussed.²⁰² Together with arguments on technocratic governance it forms the most important component of de-politicization approaches.

2.3.2. Politicization approaches

¹⁹⁷ Taggart, 2005.

¹⁹⁸ Caruso Daniela, “Private Law and State-Making in the Age of Globalization”, in the *Journal of International Law and Politics*, 1, 3, 2006.

¹⁹⁹ Scott Kenneth E. and Taylor John B., “Bankruptcy Not Bailout: A Special Chapter 14”, Hoover Institution Press, Stanford, 2012.

²⁰⁰ Duffie Darrell, “A Contractual Approach to Restructuring Financial Institutions”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.

²⁰¹ FSB, Key Attributes, 2011, KA 5.1.

²⁰² For example Emmenegger, 2004 and Lualhe Shaelou 2012.

Politicizing approaches focus on instances when the law is put in the service of politics. On the one hand, the emphasis is put on the limits of de-politicization in the face of power and on the other hand, law is seen as a tool that should help the less powerful. In the context of resolution authorities, politicization approaches are more favorable to the overriding of contracts for public policy reasons.

As pointed out previously, bankruptcy law can be seen as being of limited use in the context of failing financial institutions because it focuses on the parties before the court, and not systemic worries or public policy concerns.²⁰³ Resolution regimes have therefore been largely portrayed as attempts to balance sensible regulation and shareholder rights.²⁰⁴ This reflects the debate on the “rise of the state and the decline of private law”, suggesting that in the pursuit of public policy, private law is less powerful.²⁰⁵

“Given the manifest public interest in the case of bank failure in preserving stability and avoiding contagion, a special resolution for banks is needed to allow the public authorities to intervene to protect this public interest.”²⁰⁶ According to KA 4 (set-off rights), this intervention also targets private law. The legal framework of set-off rights, contractual netting and collateralization should for instance not hamper effective implementation of resolution regimes.²⁰⁷ Resolution powers should also not be seen as a trigger for statutory or contractual set-off rights. Instead the possibility of a stay, although limited, should exist.²⁰⁸

The rationale is that bank resolution interferes with the property rights of the shareholder and the contractual rights of creditors. Hence, national law provides compensation or judicial redress for creditors and shareholders.²⁰⁹ “Resolution powers should be exercised in a way that respects the hierarchy of claims while providing flexibility to depart from the general principle of equal (*pari passu*) treatment of creditors of the same class, with transparency as to the reasons for such departures, if necessary to contain the potential systemic impact of a firm’s failure or to maximise the value for the benefit of all creditors as a whole.”²¹⁰

²⁰³ Statement of Ben Bernanke, U.S. House of Representatives, Committee on Financial Services, October 1, 2009, in Jackson, 2009, p. 218.

²⁰⁴ Alexander Kern, “Bank Resolution Regimes: Balancing Prudential Regulation and Shareholder Rights”, in the Journal of Corporate Law Studies, Vol. 9, Part I, 2009, pp. 61-93.

²⁰⁵ For a very good summary of the debate refer to Michales and Jansen, 2007

²⁰⁶ Attinger, 2011, p 8.

²⁰⁷ FSB, Key Attributes, 2011, KA 4.1.

²⁰⁸ FSB, Key Attributes, 2011, KA 4.3.

²⁰⁹ Attinger, 2011, p. 9.

²¹⁰ FSB, Key Attributes, 2011, p. 11.

Provisions like the no worse off principle “make clear that the SRR takes account of the legitimate interests of the transferors and their shareholders and respects their property rights, but at the same time leaves no room for a bail-out.”²¹¹ According to Attinger, this is a good example of how to “strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights.”²¹²

According to the FSB, “The majority of jurisdictions provide a right to such judicial review, either under general administrative law or as an explicit right under the resolution regime and in most cases, remedies other than monetary compensations are available. In such cases, the legal framework needs to strike an appropriate balance between protected legal remedies on the one hand and the certainty of resolution and the effectiveness of the measures taken on the other.”²¹³

However, as illustrated by Scott, in writing on the development of insurance funds that would prevent the use of public funds for bailouts, one has to remain cautious, as there is always the possibility for a bail-out for political motives. According to Scott: “The best that can be done is to try to design a resolution process that makes it somewhat less justifiable economically and less attractive politically.”²¹⁴ The public interest in a viable financial system justifies a special regime. The consequential politicization stretched quite far into the legal regime. According to the FSC peer review, *all* of its jurisdictions report having created specific powers to restructure and/or wind up banks that are distinct from ordinary insolvency that often – like in the case of the UK – restrict judicial review in the interest of the public interest and allow overriding of private interests.²¹⁵

Bi-polar legal thinking does not solve the tension of de-politicization and politicization in the context of resolution authorities. The public law/private law debate provides avenues to think about ways to overcome the tension. Yet, much remains to be done as Cherednychenko concludes: “The real question is not whether or not one should make a distinction between

²¹¹ Attinger, 2011, p. 25.

²¹² Attinger with reference to the European Court of Human Rights, *Jahn and Others v. Germany*, para. 93, in Attinger, p. 25, fn, 95.

²¹³ FSB, Peer Review Report, p. 28.

²¹⁴ Scott Kenneth E., “Evaluating Failure Resolution Plans”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009, p. 258.

²¹⁵ FSB, Peer Review Report, p. 23.

public and private law, but what should be the right balance between them in a certain period of time.”²¹⁶ Transnationalization has certainly not made this question any easier to answer.

2.4. Bi-polar approaches to the consideration of social and market interest in law

With regard to the relationship of social and market interests in law, bi-polar thinking in law opposes arguments on a dependent relationship and an independent relationship of social and market interests.

Approaches that view social interests dependent on market interests urge for an enabling role of law for the market. The advocates of bankruptcy or competition law for the prevention of future bailouts or the proponents of incentive based approaches like corporate governance provide examples for such approaches. FSB KAs entail such approaches, as the establishment of resolvability plans and resolvability assessments is based on the hope of increasing transparency and market discipline. On the other hand, approaches considering social and market interests independently are preoccupied with the protection of interests from the market and advocate a role for law to limit the market. Examples of such approaches suggest limitations to financial activities such as the Volker rule, size caps for institutions or even their nationalization. Also the installation of a resolution authority could be seen as an example of an independent approach depending on how far the goal of taxpayer protection limits market activity.

2.4.1. Dependent considerations of social and market interests approaches

Faithful to the thin conception of legitimacy that we discussed earlier, approaches that consider social interests as dependent on market interests are based on the contention that law must enable and not distort the market in order to keep operating costs low.²¹⁷ With regard to the failure of large financial institution, the concept of a resolution procedure disagrees with

²¹⁶ Cherednychenko, 2007, p. 50.

²¹⁷ In the words of Posner ‘Is it plausible to suppose that people are rational only or mainly when they are transacting in markets, and not when they are engaged in other activities of life, such as marriage and litigation an crime and discrimination and concealment of personal information? Or that only the inhabitants of modern Western (or Westernized) societies are rational? If rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behavior, then the conceptual apparatus constructed by generations of economists to explain market behavior can be used to explain nonmarket behavior as well’, Posner Richard “ The economics of justice”, Harvard University Press, Cambridge, 1983, pp. 1-2. A very interesting analysis is provided by Lennig in Lennig Martin, “From Justice to Efficiency: On a Shift in the Normative Focus of Economics”, Doctoral Thesis, Technische Universität Darmstadt, 2012.p. 39.

this approach; this further distortion of the market will only lead to more moral hazard in the system. Moral hazard, fueled by flat deposit insurance and the presence of social cost of failure, leads to excessive risk-taking.²¹⁸ Such subsidies allow banks to grow to an extent where they become too big to fail, which is conducive to more moral hazard as it constitutes an implicit guarantee.²¹⁹ One can distinguish between approaches aimed at the fostering of market discipline and approaches aimed at inducing the right behavior in market participants via incentives.

Approaches that aim at strengthening market discipline focus on overcoming market failures like imperfect information or distortions through imperfect competition.²²⁰ According to these approaches, the bailouts were a catastrophe. “All this [measures of bailouts]²²¹ represents a tremendous distortion in terms of moral hazard, long term effects in market structure, protection of inefficient incumbents, and creation of an uneven playing field (among different institutions and different countries). For example, assisted institutions which have proven to be TBTF end up with lower cost of capital than other (not only in the short term but also in the long-term because of the implicit guarantee they obtain). Ex-ante this fosters incentive to take excessive risk.”²²²

Instead, market discipline should be restored by reintroducing competition, abolishing implicit and explicit subsidies and fostering transparency. In the context of large financial institutions and the prevention of bailouts, the revival²²³ of competition law, limits to state ownership²²⁴ and the strengthening of bankruptcy law have been advocated as approaches which follow this logic. “The public aid programs distorted competition and created an

²¹⁸ Vives Xavier, “Competition and Stability in Banking: A New World for Competition Policy?” in *Financial Supervision in an Uncertain World*, ESI Annual Conference Report, Eijffinger Sylvester and Koedijk Kees (eds.), CEPR, 2010, p. 9

²¹⁹ Vives, 2010, p. 9.

²²⁰ Schwarcz Steven L., “Regulating Shadow Banking”, in the *Review of Banking & Financial Law*, 31, 2011-2012, pp. 631.

²²¹ In the previous sentence Vives lists asset purchases and guarantee schemes (including extensions for deposit insurance, and guarantees in the interbank market and in mutual funds) capital injections, nationalization and forced merges. Vives, 2010. p. 17.

²²² Vives, 2010. p. 17.

²²³ For an overview of the history of banking and competition law consult Vives in p. 2 and 3. Also in footnote he summarizes: “In the US, banking became subject to competition law in the 1960, when its antitrust exemption was abolished. In the EU, the Commission intervened since the 1980s against national protectionism, merges, price agreements, abuse of dominance, and state aid. Vives, 2010, p. 2.

²²⁴ According to Vives “State ownership is distortionary: government is on both sides of the regulatory relationship; political objectives/and incentives rule: if not disciplined by competition it induces less competitiveness of the banking system, inefficiency, and less financial stability with higher risk exposure and more bank losses, it eliminates the market for corporate control; creates an uneven playing field (with implicit and explicit guarantees); and ends up inducing less competition and lower financial development.” Vives, 2010, p. 17.

uneven playing field in the cost of capital. Merges have created weak competitive environment and increased concentration within and across countries, and across business lines”²²⁵ With regard to bankruptcy law it is said that if we seek to end Bailouts, their failure needs to be a strong possibility and the consequences of failure need to fall on the parties who were contracted, ex ante, to bear the risks of such failure according to a predictable set of rules.²²⁶

Public disclosure should be used to provide information and secure market functioning.²²⁷ Certain authors present the proposal of wind-down plans according to this logic.²²⁸ Also the proposals in KA 10 regarding the resolvability assessments can be understood as a measure to increase information and transparency in the market. According to KA 11.2 every jurisdiction should require that robust and credible recovery and resolution plans are in place also requiring input by the senior management.²²⁹

Lastly, dependent approaches focus on incentives that can be created to induce desirable behavior. The underlying contention is that individuals can respond to laws in an economic way.²³⁰ The best way for law to operate – the lowest operating costs – are hence to induce the right behavior by getting the incentives right. The law must thus “organize incentive structures such that these rational individuals, out of their own self-interest, do what the government wishes.”²³¹ In the context of financial market regulation, incentives are widely discussed²³² and it has been suggested that corporate governance reforms are essential to prevent a repeat of the financial crisis.²³³ With regard to large financial institutions, conflicts of interest and the role of ownership and shareholders have attracted a lot of attention.²³⁴

²²⁵ Vives 2010, p. 2

²²⁶ Guynn Randall D., “Are Bailouts Inevitable?”, in the Yale Journal on Regulation, Vol. 29, 2012, pp. 121.

²²⁷ Jackson, 2009, p. 220.

²²⁸ Herring Richard J., “Wind-down Plans as an Alternative to Bailouts: The Cross-Border Challenges”, in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.

²²⁹ FSB, Key Attributes, 2011, KA 11.2 and KA11.4.

²³⁰ Posner, 1983.

²³¹ Mayes David G. and Wood Geoffrey, (eds.), “Reforming the Governance of the Financial Sector”, Routledge, New York, 2013, p. 166.

²³² For an overview Galloway Tina M., Lee Winson B. and Roden Dianne M., “Banks’ changing Incentives and Opportunities for Risk Taking” in Journal of Banking & Finance, Vol. 21, Issue 4, 1997, pp. 509-527.

²³³ Muller Peter O. and Citlau Ryan D., “The Uncertain Role of Banks’ Corporate Governance is Systemic Risk Regulation”, in Birkmose Hanne S., Neville Mette and Sorensen Karsten Engsig, (eds.), “The European Financial Market in Transition”, Wouters Kluwer, London, 2012. Kirkpatrick Grant, “The Corporate Governance Lessons from the Financial Crisis”, in Financial Market Trends, 2009, pp. 1-30.

²³⁴ For example Poullsen Thomas and Strand Therese, “The Owners and the Power: An Insight into Shareholder Actions”, in Birkmose Hanne S., Neville Mette and Sorensen Karsten Engsig, (eds.), “The European Financial Market in Transition”, Wouters Kluwer, London, 2012. Or in the words of Schwarcz: “Secondary manager, such

All of these approaches have in common the final aim of enabling the market. This final aim is justified, as the distortion of the market caused by the protection of social interests would be more harmful than it would be helpful. Social interests are hence dependent on market interests.

2.4.2. Independent consideration of social and market interests approaches

Independent approaches on the other hand adopt a logic of protection of public policy goals and consider social and market interests independently.

The logic of protection is apparent with regard to consumer protection or – regarding the failure of financial institution more importantly – ‘taxpayer’ protection. The aim of protecting the taxpayer has justified the conception of resolution authorities that intervene with the functioning of the market. The logic is hence one of protection from the market rather than one of enabling the market. This protection then also calls for more stringent legal limitations to the market.

Kennedy has formalized the effort of putting law at the service of the protection of social interests as the second globalization of legal thinking. It was driven by discontent with the individualism idealized by legal thinking from 1850 to 1914. Individualism had “ignored interdependence, and endorsed particular legal rules that permitted antisocial behavior of many kinds.”²³⁵ The social crisis caused by the market forces “derived from the failure of coherently individualist laws to respond to the coherently social needs of modern conditions of interdependence.”²³⁶ To counter this and give law its proper place, it had to be rethought as a purposeful activity and a regulatory mechanism.²³⁷

The stabilization of financial markets through capital insurance and the installation of a public lender of last resort function as an illustration of Kennedy’s rise of the social. The risk inherent to maturity transformation at the heart of financial intermediation led to runs and crises throughout history. In the wake of the Great Depression, the free market was regarded as being unable to either protect depositors or to maintain the stability of the banking

as investor analysis and investment-bank vice presidents, are almost always paid under short-term compensations schemes, misleading their interests with the long-term interests of the firm.” Schwarcz, 2011-2012, p. 635.

²³⁵ Kennedy, 2006, p. 38.

²³⁶ Kennedy, 2006, p. 38.

²³⁷ Kennedy, 2006, p. 20.

system.²³⁸ Law was put forward as a means of change with the creation of deposit insurance and lender of last resort. It was felt that: “this bill rests upon the theory that banking which is unsafe for the depositors ought to be prohibited by law. Banking is not the individual right of a citizen and when we charter an institution to engage in banking to receive the deposits of the public, it is the duty of the government to see that deposits of the public are protected.”²³⁹

The creation of resolution authorities is a similar instance. In the aftermath of the crisis of 2007/08, it was felt yet again that the market could not provide for stability. Instead, resolution regimes were developed that would allow resolving financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions.²⁴⁰

Again, the debate comparing resolution authorities against bankruptcy law is illustrative: “The bankruptcy code does not sufficiently protect the public’s strong interests in ensuring the orderly resolution of a nonbank financial firm whose failure would pose substantial risks to the financial system and to the economy.”²⁴¹ This argument follows from the reasoning that in the context of the Great Depression led to the regulation of banks more generally. The essential role that banks play in the economy (e.g. provision of credit, deposit taking and operation of payment systems) as well as the devastating consequences of a banking crisis, are seen to justify the support of banks. In the same vein the failure of such banks is of public concern.²⁴² “In bank resolutions, there is an explicit focus on spillover systemic effects. This is a significant advantage where the principle purpose of the operation is to protect against systemic external effects not explicitly taken into account in bankruptcy proceedings.”²⁴³

However, the rationale of protection of policy interests seems to imply a limitation of the market. Independent approaches have forwarded such proposals as the Volker rule that is – at least in theory- aimed at reintroducing the separation between depository banks and

²³⁸ Khoury Srakis Joseph, “U.S Banking and its Regulation in the Political Context”, University Press of America, Lanham, 1997, p. 28

²³⁹ N.Y. Times, June 25, 1933, p. 3 quoted in Alper Carl E., “Banking Act of 1933”, St John’s Law Review, 8, 1933-1934, p. 193.

²⁴⁰ FSB, Key Attributes, 2011, p. 1.

²⁴¹ Jackson, 2009, p. 243.

²⁴² Attinger, 2011, p. 7.

²⁴³ Vives, 2010, p. 17.

institutions, which are more conducive to more speculative business.²⁴⁴ Other proposals are, for instance, the limitation of activities of banks or the development of caps to their size.

The FSB KAs do not propose such *intrusive* measures. In the U.S., the Volker rule found its way into law however, with a diluted protective or market limiting effect. In general, market-limiting measures remain rare.²⁴⁵

The tension between dependent and independent consideration of market and social interests in national law is accentuated in the context of transnationalization. As illustrated by the example of resolution regimes, they are instituted as a protection of social interests, yet they aim at minimizing market intrusion.

2.5. Bi-polar approaches to governance structures in law

The bi-polar debate on the governance structure of law in transnationalization opposes arguments on assimilated and dis-integrated governance structures. Assimilated approaches promote proposals to overcome sectorial and national boundaries in the face of transnational challenges. Approaches emphasizing dis-integrated governance structures focus on the public policy rationale of sectorialization and the importance of checks and balances between resolution authorities, national banks and courts.

Assimilating approaches are illustrated by the FSB efforts to establish a level playing field and extend supervision to other systemically important firms. Dis-integrating approaches on the other hand are apparent in national jurisdictions where sectorial differentiation persists and overarching systemic risk institutions remain neglected.

2.5.1. Assimilated governance approaches

In the context of resolution authorities, transnationalization has led to the questioning of the disintegration of governance.²⁴⁶ The fact that regulation follows sectorial and national

²⁴⁴ Volcker Paul, “Financial Reforms to End Government Bailouts as We Know Them”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.

²⁴⁵ Lavelle Kathryn C., “Implementing the Volker Rule in National and International Politics”, in Porter Tony, (ed.), “Transnational Financial Regulation after the Crisis”, Routledge, New York, 2014.

²⁴⁶ Summe for example holds that “Upon insolvency, each of these component entities is potentially subject to its own insolvency regime, depending on its organizational form and sphere of activities. For example, the bankruptcy of Lehman Brothers, involving nearly one hundred entities operating globally, resulted in many of the larger business being handled either under Chapter 11 of the U.S. Bankruptcy Code (in the case of Lehman

delimitations hindered taking into account the complexity of certain corporate structures. It is also seen to have led to regulatory competition that fueled the risk-taking and was essential in the growth of the shadow banking system. The division of powers between administrative agencies and courts is seen as prolonging a process that depends very much on speed. Therefore a more assimilated governance structure is supported. In the context of the KAs, this approach is apparent with regards to the scope of resolution regimes that suggest overcoming sectorial disintegration and cross-border arrangements that target disintegration across borders.

Pre-crisis legal frameworks around the globe treated many institutions involved in financial markets differently. This made intervening in their failure very difficult. The case of Lehman Brothers has been forwarded as an illustration thereof.²⁴⁷ However, the problem with disintegration of governance according to sectors has been taken up by the FSB that recommends to develop similar standards for financial holding companies, systemic banks and systemic non-financial institutions. KA 1 defines the scope as:

“Any financial institution that could be systemically significant or critical if it fails should be subject to a resolution regime that has the attributes set out in this document [...] it should extend to: (i) holding companies of a firm; (ii) non-regulated operational entities within a financial group or conglomerate that are significant to the business of the group or conglomerate; and (iii) branches of foreign firms.”²⁴⁸

Assimilated approaches also put forward arguments for a limitation on the number of actors involved in resolution. The expertise and speed needed in the context of complex situations has been forwarded as a reason to limit judicial review.²⁴⁹ Furthermore the FSB supports limiting the number of agencies involved or at least strengthening cooperation among them. Indeed, nearly all jurisdictions with multiple agencies involved “report having some form of

Brothers Holdings Ins., the parent holding company, Lehman Brothers Special Financing, Inc. the Delaware corporation that held much of the derivatives portfolio, and several other entities) or under Chapter 7 (in the case of Lehman Brothers Inc., the broker-dealer (investment bank)). Lehman Brothers also maintained insurance subsidiaries that were subject to unique insolvency laws. There were also bankrupt proceedings initiated in a variety of jurisdictions outside of the United States, including Australia, Japan, and the United Kingdom. Some Lehman Brothers entities did not file for bankruptcy, however.” And suggests that “Many point to this fragmented approach as being partly responsible for the chaos that ensued from the Lehman Brothers bankruptcy.” Summe Kimberly Anne, “Lessons Learned from the Lehman Bankruptcy”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009, p. 73.

²⁴⁷ Summe, 2009, p. 65.

²⁴⁸ FSB, Key Attributes, 2011, KA.

²⁴⁹ Attinger, 2011, p. 7.

coordination arrangements in place between the authorities.”²⁵⁰ While the adequacy of these arrangements have not been analyzed by the peer review, worries were voiced with regard to the absence of ‘lead authorities’ to “coordinate the resolution of domestic entities of the same group.”²⁵¹

In the aftermath of the crisis, agencies, bureaus and councils with a focus on ‘financial stability’ have been created. They provide an example for attempts to overcome disintegration in the face of transnationalization. Some are limited to a supervisory or observatory role from the outset; others have more powers, but their impact still has to be tested in practice.

In these points, the KAs reflect how transnationalization can be seen as urging a more assimilated governance structure of law that accords better to the magnitude of the transnational challenge.

2.5.2. Dis-integrated governance approaches

Dis-integrated approaches see benefits in the existences of a range of bodies involved in governance or point out limits of assimilation. Among the benefits are again the observance of public policy goals, the importance of checks and balances and the respect of national particularities that at the same time is also the most prominent limit that is forwarded to assimilation.

According to dis-integration approaches, different sectors are treated differently depending on their importance to the public interest. The extent of regulation reflects the extent to which public policy considerations are made in the sector in question. According to the FSB peer review, all jurisdictions report that they have specific powers to restructure or resolve banks that are distinct from corporate insolvency law. While eight jurisdictions limit these powers to banks that are systemically important, it is true that resolution powers are most developed with regard to the banking sector. They are almost entirely exempt from bankruptcy codes. Powers with regard to insurance firms are the second best developed. These regimes are different, institutionally as they often involve a different authority, and conceptually as they typically rely upon a combination of ordinary insolvency law supplemented by powers for supervisory authorities. In most FSB jurisdictions, specific restructuring and wind up powers are limited to cases of financial holding companies (FHC) that are regulated as banking or

²⁵⁰ FSB, Peer Review, 2013, p. 21.

²⁵¹ FSB, Peer Review, 2013, p. 21. These countries are Argentina, Brazil, Canada, Hong Kong, Indonesia, Mexico, Russia, South Africa, and Turkey.

insurance groups. Only eight resolution authorities have the ability to use powers for FHC that are not themselves a bank or another regulated institution.²⁵² Only seven jurisdictions have direct powers in relation to non-regulated operations entities within a financial group. In the sector of securities or investment firms, resolution regimes are much less developed. Only thirteen jurisdictions have some specific powers for the resolution of such firms in place²⁵³ and many of them refer to an authority that does only have some sector-specific powers for restructuring or winding up but does not have administrative resolution powers as are in place for banks.

The notion of checks and balances in the context of the large financial institutions stretches beyond judicial review. In fact, the task in dealing with large financial institutions in most cases involves more than one entity. Furthermore, there are significant differences amongst countries regarding the division of labour and power between these agencies.²⁵⁴ “Many jurisdictions confer the primary responsibility and powers for the resolution of banks on supervisory authorities with different degrees of functional separation.”²⁵⁵ The involvement of different agencies helps to keep them in check.²⁵⁶

This point already hints to national particularities as limits to assimilation. With regard to resolution regimes, these limits are very important. The peer review report concludes that the KAs aiming at cross border cooperation show the lowest implementation in national legal orders. In many jurisdictions resolution agencies are not given powers to engage with foreign agencies but depend on court decisions to do so. From a dis-integration approach, this judicial review is desirable as it provides for the protection of national interests.²⁵⁷

Transnationalization fuels efforts to assimilate governance structures, yet national jurisdictions remain reluctant. Again even if structures are being assimilated, this only

²⁵² FSB, Peer Review, 2013, p. 19.

²⁵³ It is even less in the context of FMI “Only eight jurisdictions report having sector-specific powers in place for restructuring and /or winding up all or some classes of FMI. Three of those jurisdictions note that, where certain FMIs (such as CCPs) are authorized as banks, they are currently within the scope of that jurisdiction’s bank resolution regime. Work is ongoing by CPSS and IOSCO to clarify how the KAs should be applied to FMIs, so as to provide a basis for jurisdictions to design and implement resolution regimes for this sector.” This of course will further disintegration of course. Peer review, p. 19.

²⁵⁴ FSB, Peer Review, 2013, p. 20.

²⁵⁵ FSB, Peer Review, 2013, p. 20.

²⁵⁶ Attinger on the UK, in Attinger, 2011, p. 17.

²⁵⁷ Attinger, 2011, p. 17.

enhances the role of courts as judicial review is essentially seen as guarding the national interests.

2.6. **Bi-polar approaches to the polity of national law**

Finally, regarding the polity parameter of law, bipolarity in legal thinking opposes arguments on a national polity to arguments on a supranational polity for law.

Supranational approaches, for instance, forwarding a notion of global systemic risk, pointing to the inability of states to tackle the failures of large financial institutions and the limits of harmonization in achieving the cooperation needed in this context. The polity that is at stake is hence different from the national one. It is not based on an idea of sameness or identity, but on common global interests. In view of protecting global common interests, harmonization is not enough; a more cooperative solution must be found. Proponents of the national polity, on the other hand, point to the national consequences of transnationalization. As law is to serve the national interests, harmonization is the most that should and can be achieved in the national interest.

2.6.1. **Supranational polity approaches**

Supranational approaches focus on the challenges of transnationalization that stretch beyond national borders. These are seen to be of a magnitude that cannot be addressed by single states but ask for a common approach. The harmonization of law, in order to avoid regulatory arbitrage, is not enough, as there is a common – supranational – interest emerging that demands steps toward cooperation.

The regulation of large financial institutions has been forwarded as a transnational challenge that demands cooperation across national borders. It is commonly agreed that the financial crisis that started in 2007 turned from national subprime mortgage-backed securities in the United States into a financial and economic crisis with impacts around the globe.²⁵⁸ With financial risk with the potential to cause harm far beyond national borders, calls for the consideration of systemic risk effects in other jurisdictions have been voiced. The rationale is that in the face of a risk that stretches beyond borders, there is a common interest in finding solutions that widen the national definition of interests.

²⁵⁸ Hellwig, *Systemic Risk in the Financial Sector – the analysis of the subprime mortgage financial crisis*, p. 129.

Harmonization is aimed at limiting regulatory arbitrage and, in the case of resolution of large financial institutions, it is hoped to facilitate cross-border cooperation “by having comparable approaches in place, as well-known solutions are far easier to accept than unfamiliar approaches. Therefore, close convergence and (ideally) the harmonization of resolution tools and powers would increase the effectiveness of cross-border resolution.”²⁵⁹ However, according to supranational approaches, harmonization is not enough. Much more needs to be done in order to improve the cross border supervision of large financial institutions. “Effective pre-crisis planning requires home and host regulators to share information and agree on resolution plans.”²⁶⁰ Therefore, more cooperative approaches have been suggested. KA 8 on Crisis Management Groups (CMGs) and KA 9 on Institution-specific cross-border cooperation agreements are suggestions in this direction. Certain large institutions are seen as creating a special supranational challenge that justifies cooperation among all of the states involved. However, these cross border agreements develop only slowly and “where such agreements do exist, they often are non-binding and lack detail on crisis roles, responsibilities, and information sharing methods.”²⁶¹

Supranational approaches to the polity on national law act as a bridge to Chapter 4 and transnational law. Also, bi-polar arguments are being made that oppose national and supranational interests as defining a polity of law in the face of transnationalization.

2.6.2. National polity approaches

While transnationalization has spurred arguments for a supranational polity, the reference to a national polity for national law persists. The resistance in national jurisdictions to any measure of cross-border cooperation beyond harmonization can be seen as an illustration of this persistence. Furthermore, national approaches point to the national bias of judicial and administrative action that is accentuated in times of crisis. According to national approaches, this will not be overcome, as the effects of transnationalization are ultimately felt at the national level.

²⁵⁹ Attinger, 2011, p. 16. Also the CBRG observes in paragraph 69 that ‘greater convergence in national laws, by promoting a common understanding, more predictability, and reliable frameworks for responsive actions, will likely improve cooperation. In particular, it should help to reduce the precipitous and perhaps unnecessary actions that could exacerbate a crisis.’ CBRG, 2010, p. 20.

²⁶⁰ Barr Michael, “The Financial Crisis and the Path of Reform”, in the Yale Journal on Regulation, 29, 2012, p. 117.

²⁶¹ Barr, 2012, p. 117.

While the crisis was followed by enormous legal reforms, they rarely stretch beyond harmonization. According to national approaches the findings of the FSB peer review report on the limited developments of cross-border arrangements is not a coincidence but a natural consequence of the national polity of law.

For this national polity of law, harmonization is also sufficient, as in the face of transnationalization, only the establishment of a level playing field but not actual cooperation is sought for. National approaches find confirmation in the peer review report. The legal formalization of bi-lateral or multilateral cooperation frameworks remains notoriously low. No single jurisdiction of the FSB framework has formulated comprehensive obligations for domestic authorities to avoid taking resolution actions that may have an adverse effect on the financial stability of other jurisdictions.²⁶²

Only a few jurisdictions encourage their resolution authorities to cooperate with foreign authorities seriously and only some have explicit powers to do so. Most jurisdictions neither require nor prohibit cooperation with foreign resolution authorities. Also, while most jurisdictions report to have some powers over branches of foreign banks, they are not special resolution powers but stem from the domestic insolvency framework.²⁶³ Only the Swiss national resolution authority has the power to recognize and make effective under local law the transfer of local assets and liabilities of a foreign bank by the home country resolution authority.²⁶⁴

National approaches suggest that the national bias will dominate judicial and administrative action.²⁶⁵ The report of the BCBS Cross-border Bank Resolution Group on the crisis seems to sustain this point; “the Fortis case illustrates the tension between the cross-border nature of a group and the domestic focus of national frameworks and responsibilities for crisis management. This led to a solution along national lines, which did not involve intervention through statutory resolution mechanisms”²⁶⁶

Transnationalization causes a tension between a supranational and a national conception of the polity of law. The bi-polarity of legal arguments does not provide avenues to overcome it.

²⁶² FSB, Peer Review Report, 2013, p. 30

²⁶³ FSB, Peer Review Report, 2013, p. 29.

²⁶⁴ FSB, Peer Review Report, 2013, p. 30

²⁶⁵ Chorafas Dimitris N., 2012, p. 124.

²⁶⁶ CBRG, 2010, p. 11.

2.7. Conclusion: Persisting non-state/state tension and the importance of courts

The present Chapter argued that legal thinking in national law struggles with the non-state/state tension that transnationalization causes in law. The tensions that follow from the non-state/state tensions persist, are sustained by bi-polar arguments and ultimately depend on a management effort by state institutions to be solved. The debate on the implementation of the FSB illustrates this bi-polarity, as the standards themselves, as well as their reception in jurisdictions, cause bi-polar debate and require national courts to find compromises between the non-state and state arguments.

Transnationalization gives momentum to non-state tendencies in law. It fosters procedural legality, resonates with thin legitimacy, is more suited to de-politicization, favors market interests and therefore the dependent consideration of social interests, calls for assimilated governance structures and is seen to create a supranational polity. At the same time, these developments also provoke an affirmation of the state and state tendencies of law that call for the safeguards of formal law, thick legitimacy, politicization, the independent consideration of social interests, dis-integrated governance structures and a national understanding of the polity.

The FSB KAs, as an example of transnational law, are a mix²⁶⁷ of these two visions of law, the non-state and the state vision. Within this mix and its implementation into national law, courts and state institutions play an important role. Juridical safeguards are crucial to limit the procedural development of law. The performance-based legitimacy of the resolution authority is held in check by democratic institutions. The technocratic governance and importance of contract law is exposed to the constant possibility of public policy interventions and judicial activism. Assimilated governance structures are limited by courts that are acting in the national interests or policy decisions to treat sectors differently according to public interest considerations. Finally, cooperation agreements developed with a view to a supranational polity are limited by the laws and courts of the national polity.

²⁶⁷ Or 'hybrid', refer to: Micklitz Hans-W., "Rethinking the Public/Private Divide", in Maduro Miguel, Tuori Kaarlo and Sankari Suvi, (eds.), "Transnational European Law and Legal Thinking," Cambridge University Press, Cambridge, 2014. The author approaches the challenges legal thinking faces in transnational law from the perspective of the public/private divide.

Throughout the parameters of law, the debate on transnationalization and law remains bi-polar and the tension between non-state and state cannot be overcome. Courts and other state institutions are crucial in finding compromises between the two.

3. The Bi-polar Debate on European Law and Transnationalization

This third Chapter looks at the non-state/state tension in the debates on European law. Again, the six parameters of law are treated individually. Within each of these six parameters, arguments are divided into bi-polar categories.

The focus is on how academics conceive European law in the context of transnationalization. Is it a different development from state law (non-state) or should it to be considered in the same way as state law (state)? Bi-polarity opposes the proponents of a statist vision of European law with the ones that support or observe a non-statist conception. There are ample examples of bi-polar thinking in European Law; however, important differences between the parameters can be observed.

With regard to the parameters of legality, politics and governance, European law developed compromises that can overcome bi-polarity. Non-state and state elements have been merged or combined into middle-ways that develop a functioning of their own. The legality of European law integrates procedural as well as formal requirements. A variety of measures aimed at achieving 'better law-making' opens the door to the politicization and de-politicization of the technocratic governance of the EU in many ways and the governance structures that have developed within European law-making that allow for a combination of assimilated as well as dis-integrated governance structures.

On the other hand, with regard to the parameters of legitimacy, values and polity, bi-polarity cannot be overcome. Visions of a thin legitimacy of European law collide with thick conceptions of that legitimacy. Arguments of a dependent consideration of social interest are opposed by arguments for an independent consideration and the protection of social interest. Concepts of a different, specific European polity are faced with authors that insist on a state-like polity for European law.

Throughout all six parameters the debate is strongly influenced by the development of European law from the European Coal and Steel Community to European Union and now the banking union and the different views of this development. For the analysis here, the debates

on the influence of German Ordo-liberalism²⁶⁸ and the remains of it today,²⁶⁹ the development of the economic constitution, the ‘regulatory state’-debate²⁷⁰ and the arguments about social regulation²⁷¹ or a social constitution of Europe and its relationship to the economic constitution are particularly relevant.²⁷² While there is overlap between the different arguments, the parameters and the bi-polar categories provide a useful structuring tool.

By way of illustration, this Chapter considers the European response to the challenge of the failure of large financial institutions after the crisis of the late 2000’s. The tension between a non-state vision and a state vision as the answer to the challenges faced, is apparent in the tension between the decentralized effort of harmonizing and strengthening the resolution regimes in Member States and the parallel centralized development of a common banking union for the Member States of the Monetary Union. The FSB Key Attributes found their way into European law through the Bank Recovery and Resolution Directive (BRRD).²⁷³ Its aim was to improve and harmonize the national resolution regimes²⁷⁴ – a non-statist vision of European law, focused on the coordination of Member States.

The banking union, on the other hand is more ambitious and proposes a centralized regime for the Monetary Union,²⁷⁵ which represents a statist vision of European law. The pillars of the banking union are the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) made up by two texts, one on the functioning of the Single Resolution Mechanism and an intergovernmental agreement for the Single Resolution Fund.

²⁶⁸ Müller-Armack Alfred, “Wirtschaftslenkung und Marktwirtschaft”, Verlag für Wirtschaft und Sozialpolitik, Hamburg, 1947. Mestmäcker Ernst-Joachim, „Macht-Recht-Wirtschaftsverfassung“, in Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, 137, 1973, pp. 97-111.

²⁶⁹ Joerges puts his argument for a Conflicts of Law approach to Europe’s constitutions into the context of the origins of German ordo-liberalism, in Joerges, 2013.

²⁷⁰ Majone Giandomenico, (ed.), “Regulating Europe”, Oxon, Routledge, 1996.

²⁷¹ Joerges Christian and Vos Ellen, (eds.), “EU Committees: Social Regulation, Law and Politics”, Hart Publishing, Antwerpen, 1999.

²⁷² Schiek Dagmar, (ed.), “The EU Economic and Social Model in the Global Crisis”, Ashgate Publishing Limited, Farnham, 2013. Joerges Christian and Roedl Florian, ““Social Market Economy” as Europe’s Social Model?” EUI Working Paper, No. 2004/8, 2004.

²⁷³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173, 12.6.2014, p. 190–348

²⁷⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, OJ L 176, 27.6.2013, p. 338–436.

²⁷⁵ Commission Memo, “A comprehensive EU response to the financial crisis: substantial progress towards a strong financial framework for Europe and a banking union for the Eurozone”, Memo/14/244, Brussels, 28 March 2014. (Commission Memo, March 2014)

While the regimes now co-exist, they provide competing visions of the way forward for European law in financial market regulation. The moves toward a banking union were justified by saying that “bank supervision and resolution need to be exercised by the same level of authority and be backed by adequate funding arrangements.”²⁷⁶

The following sections will structure this debate and illustrate that important differences within parameters exist. With regard to legality, politics and governance, the bi-polarity – competing state and non-state visions – could be overcome. The different possible compromises are also apparent in the context of financial market regulation. However, in the parameters of legitimacy, values and polity, bi-polar arguments could not yet be overcome and the debate for a new vision of European law persists. Non-state approaches portray the SRM as an extension of the BRRD following a functionalist logic. Statist approaches, on the other hand, emphasize the banking union as a new level of integration that demands or projects higher - state like – standards of law.

3.1. Bi-polar approaches to the legality of European law

Bi-polarity exists in the debate on the legality of European law. However, as the legality of European law integrates two procedural conditions - proportionality and subsidiarity – with the condition of a formal legal basis, it also offers an approach to compromising the non-state/state tension.

The bi-polar debate on the legality of European law is marked by procedural approaches that complain about the loss of potential for accommodation through formalization²⁷⁷ and formal approaches that focus on the legal basis of European law.²⁷⁸

The legality of European law however, provides a compromise as proportionality and subsidiarity requirements encourage the consideration of developments while the legal basis requirements provides limits thereto. It offers a way of thinking of a compromise between

²⁷⁶ Commission Memo, March 2014, p. 8.

²⁷⁷ Traditionally flexibility is hailed in fields like environmental law, for instance refer to: Hey Christian, Jacob Klaus, Volkery Axel, “Better Regulation by New Governance Hybrids? Governance Models and the Reform of European Chemicals Policy,” working paper series, 2006, available at SSRN: <http://ssrn.com/abstract=926980>, in financial market regulation similar argument are made for example in Alford Duncan, “The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?”, in the Annual Review of Banking & Financial Law, Vol. 25, No. 1, 2006, pp. 389-435.

²⁷⁸ Attinger, p. 12, or for a more general example Alexander Kern, “Bank Resolution and Recovery in the EU: Enhancing Banking Union”, European Law Academy Forum, 14, 2013, pp. 81-93, For an example of a deliberation of the form which financial regulation should take: Duffie Darrell, “How Should We Regulate Derivatives Markets?”, The PEW, Financial Reform Project, Briefing Paper 5, 2009.

non-state and state arguments, as it takes two procedural characteristics into consideration (proportionality and subsidiarity) as well as a formal one.

In the following, I will demonstrate this argument in the context of SRM. While the SRM is accepted as a crucial element of the European banking union, its legal basis is seen as one of the most contentious issues concerning the establishment of the SRM.²⁷⁹

3.1.1. Procedural legality approaches

Of course, arguments are made that European law is becoming too formalized, thus undercutting the flexibility and hence the accommodation that it provides.²⁸⁰ However, the legality of European law at least allows for consideration of procedural development with its procedural requirements of proportionality and subsidiarity.

According to the principle of subsidiarity, the actions of the Union outside its exclusive responsibility are limited to actions that cannot be sufficiently achieved by Member States.²⁸¹ Action should take place at the level best suited, ranging from local, to regional to central and finally to Union level.²⁸² This allows the consideration of procedural developments for the legality of European law as long as they are with regard to issues that could not be addressed by Member States.

According to the Commission: “Only action at the European level can ensure that failing banks are resolved with minimal spill-over effects and in a consistent manner pursuant to a single set of rules.”²⁸³ Furthermore, “Substantial differences between resolution decisions

²⁷⁹ Zavvos and Kaltsouni, forthcoming, 2015, p. 8.

²⁸⁰ For an example on the “fast-track” procedure refer to: Reh Christine, Heritier Adrienne, Koop Chritel, Bressanelli Edoardo, “The Informal Politics of Legislation: Explaining Secluded Decision-Making in the European Union”, APSA Annual Meeting Paper, 2010.

²⁸¹ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, Art. 5.3. (TEU) In the days of Maastricht, described as “a mechanism for reconceptualizing power-sharing” and “the word that can save Maastricht”, Cass, Deborah, Z., “The Word that saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community”, in the *Common Market Law Review*, 29, 1992, p. 1107, to concept still agitates the academic debate. In way of illustration it can be referred to Davies Gareth, “subsidiarity: The wrong Idea, in the wrong Place, at the wrong Time”. In the *Common Market Review*, 43, 2006, pp. 63-84 and Fabbrini Federico and Granat Katarzyna, ““Yellow Card, but no Foul”: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike”, in the *Common Market Law Review*, 50, 2013, pp. 115-144.

²⁸² On the allocation of powers, Lenaerts Koen and Guterrez-Fons Jose A., “The Constitutional Allocation of Powers and General Principles of EU Law”, in *Common Market Law Review*, 47, 2010, pp. 1629-1669.

²⁸³ Commission, COM (2013) 520 final, 2013/0253 (COD), Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, Brussels, 10.7.2013, p.7. (Commission Proposal, June 2013)

taken at the national level, and subject to local specificities and funding constraints, may undermine the stability and integrity of the internal market.”²⁸⁴

The Commission concludes that therefore it is “appropriate that the Union should propose the necessary legislative action to establish such resolution arrangements for banks supervised by the SSM. A regulation is the appropriate legal instrument to avoid discrepancies in national transposition and to ensure a unified institutional mechanism and level playing field for all banks in the participating Member States.”²⁸⁵

The principle of proportionality²⁸⁶ is used for the review of community measures as well as the review of national measures.²⁸⁷ It has been held that the use of the proportionality test by the ECJ largely reflects the integration variable.²⁸⁸ At the same time, it provides for an allocation of powers and allowing to fill normative gaps.²⁸⁹ As an element of the legality test of European law, it cannot be fit into the bi-polar categories of procedural and formal legality. Rather it builds a bridge between the two. According to the Commission the creation of the SRM fulfills the principle. “The recent crisis highlighted the need for swift and decisive action backed by European level funding arrangements to avoid nationally conducted bank resolution from having disproportionate impacts on the real economy, and in order to curb uncertainty and prevent bank runs and contagion within the internal market [...] The added legal certainty, properly aligns incentives in the Banking Union context, and economic benefits of central and uniform resolution action entail that the proposal complies with the principle of proportionality.”²⁹⁰

Subsidiarity and proportionality are hence means that allow procedural developments to be taken into consideration. They therefore allow the integration of procedural arguments into the legality of European law. However, of course bi-polar procedural arguments persist,

²⁸⁴ Commission Proposal, June 2013, p.7.

²⁸⁵ Commission Proposal, June 2013, p.7.

²⁸⁶ TEU, Art. 5.

²⁸⁷ Tridimas Takis, „The General Principles of EU Law“, 2nd ed., University of Oxford, Oxford, 2006, Chapter 3 and 4.

²⁸⁸ Sauter Wolf, “Proportionality in EU Law: A Balancing Act?”, TILEC Discussion Paper, No. 2013-003, 2013, p. 1.

²⁸⁹ Lenaerts and Guterrez-Fonds, 2010, p. 1929. Also Harbo holds that “The essence of the proportionality principle is that it makes it possible to combine a liberal rights-based constitutional rationality with a strong commitment to a welfare state”, Harbo Tor-Inge, “The Function of the Proportionality Principle in EU Law”, in *European Law Journal*, Vol. 16, No. 2, 2010, pp. 158-185. This suggests that the principle even bridges bi-polarity in the value parameter.

²⁹⁰ Commission Proposal, June 2013, p.7.

insofar as the formalization that takes place can be seen as impeding the accommodation of pluralism.

3.1.2. Formal legality approaches

While calls for a treaty reform prove that bi-polarity persists, the third criteria for the legality of European law – the legal basis – integrates a functionalism perspective into formalist arguments.

According to the Commission, the legal basis for the SRM is Article 114 TFEU, which allows the adoption of measures for the approximation of national provisions aiming at the establishment and functioning of the internal market.²⁹¹ According to Germany 114 TFEU provides only a very thin legal basis for the establishment of the mechanism at risk of challenges in front of courts.²⁹²

According to the Commission, the SRM is a measure needed to achieve approximation of national provisions. The resolution and restructuring directive is not sufficient according to the Commission, “Whilst the Directive brings a high level of harmonization, it still allows flexibility to Member States which means that a certain fragmentation in the internal market could remain.”²⁹³ Furthermore, the Commission has argued that the SRM has also for object the establishment and functioning of the internal market and therefore fulfils the second requirement of Article 114 TFEU. After all it is its goal to enhance the stability in the financial markets of the whole Union.²⁹⁴

It will remain to be seen if legal challenges will be raised and how they will be solved. However, with regard to the question at hand here it can be said that Art 114 TFEU is a good illustration of a blurring of the procedural formal distinction in the legality of European law. The formal requirement of a legal basis opens the door to a functional argument and the EU legislator has been given a wide discretion as regards the harmonization technique most

²⁹¹ Commission Proposal, June 2013, p.7.

²⁹² Schäuble Wolfgang, „Banking union must be built on firm foundations“, Financial Times, May 12, 2013, available at: <http://www.ft.com/cms/s/0/8bdaf6e8-b89f-11e2-869f-00144feabdc0.html#axzz3Md8hUPbh> last accessed on the 22.12.2014.

²⁹³ Commission Proposal, June 2013, p.6.

²⁹⁴ In the recital this goal is repeated at different instances, in way of illustration, “The establishment of the SRM will ensure a neutral approach in dealing with failing banks and therefore increase stability of the banks of the participating Member States and prevent the spill-over of crises into non- participating Member States and will thus facilitate the functioning of the internal market as a whole”, Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 3, Recital (12). (SRM Regulation)

appropriate for achieving a desired result.²⁹⁵ Hence the establishment of an agency might well be confirmed as such a legitimate measure.

The formalist element of a legal basis hence takes a functionalist turn, as it calls for the attaching of the new measure to an existing legal basis. Of course, the bi-polar debate persists. The ‘robustness’ of the proposed legal basis spurs it anew. For some commentators, a change in the European treaties is needed “that will establish the robust legal basis needed for a sustainable banking union.”²⁹⁶ This treaty change is urged because firstly, while supervision is explicitly referred to in the treaties, resolution authorities are not. Moreover, according to Vernon, resolution regimes are closely related to insolvency, which is a national competence under the current treaties.²⁹⁷

Notwithstanding it remains true that with its three requirements, the debate on the legality of European law has moved beyond the non-state/state tensions.

3.2. Bi-polar approaches to the legitimacy of European law

With regard to the legitimacy of European law, bipolarity cannot be overcome. Non-state visions of European law that accept and support its thin legitimacy are opposed by statist approaches that envisage a thick legitimacy for European law. For both approaches, rapprochement is limited to multilevel arguments that reflect the idea of limiting the development of European law to thick legitimation provided at the national level.

Thin approaches portray the SRM as a mere continuation of the BRRD and rely on a functional argumentation and a performance argumentation²⁹⁸ by pointing to the inability at national level to take up transnational challenges. The reference to thick approaches is limited to a multilevel approach that suggests that functional development on the European level is paralleled by the provision of thick legitimacy on the national level.²⁹⁹

²⁹⁵ An introduction in relevant case law is provided in Zavvos and Kaltsouni, forthcoming 2015, p. 11.

²⁹⁶ Veron Nicolas, “A Realistic Bridge Towards European Banking Union”, Bruegel Policy Contribution, Issue 20013/09, June 2013, p. 2. And of course, in way of illustration of the German position, Schäuble, 2013.

²⁹⁷ Veron, 2013, p. 5.

²⁹⁸ Draghi himself makes largely functional arguments in way of justifying the development of the banking union. Draghi, 2011, p. 24.

²⁹⁹ Joerges for instance argues that the welfare decisions of national courts must be respected at national level. Joerges Christian, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, LEQS Paper, No. 28/2010, revised in April 2013, p. 22.

Thick approaches on the other hand, apply a state law-like legitimacy standard to European law. Thick approaches are to a large extent aspirational and provide prescriptions for the strengthening of democratic institutions on the European level.³⁰⁰ For instance, the role of the European parliament is looked upon as a potential mechanism to provide such legitimacy. To thick approaches, the banking union is a further step for the European Union towards statehood. The multilevel component comes in, when the development thick legitimacy is tied back to national legitimation, for instance by authors that demand a treaty adaptation for the development of the banking union.³⁰¹

The debate on the legitimacy of European law has developed very far. However, their arguments tend to include a multilevel approach that allows for a division of labour regarding the provision of legitimacy. These approaches hence do not allow the tension between non-state and state to be overcome but actually accommodate it through multilevel arrangements. To illustrate this point, the approaches of Schapf³⁰² and Walker³⁰³ will be examined.

3.2.1. Thin legitimacy approaches

Thin approaches to the legitimacy of European law emphasize its functional development and put forward notions of performance legitimacy. References to thick legitimacy are limited to multilevel arguments that suggest that the functional development on the European level is accompanied with the provision of thick legitimacy on the national level.

Originally, the legitimacy of the EU was based on its goal to foster peace between its members.³⁰⁴ Even as this goal was enlarged, the EU has been defined through the limited purposes and goals it was aimed at pursuing that also limited the legitimacy requirements it

³⁰⁰ A call for a thickening is voiced in Schieck,

³⁰¹ Veron, 2013.

³⁰² Scharpf Fritz W., “Legitimacy in the Multilevel European Polity”, MPIfG Working Paper, 09/1, 2009 and Scharpf Fritz W., “Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis”, MPIfG Discussion Paper, 12/6, 2012.

³⁰³ Walker Neil, “The White Paper in Constitutional Context”, part of contributions to the Jean Monnet Working Paper No.6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, 2001.

³⁰⁴ In way of illustration some quotes of the Schuman Declaration can be recalled: “The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations” and later „ Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity “, Schuman Declaration, 9.05.1950, available at: http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm, accessed last on 16.12.2014.

was meant to meet. This is the functional approach to the European Union and it has always been an important part of the debate on the legitimacy of the European Union.³⁰⁵

Other thin conceptions of legitimacy that focus on performance refer to the inability of the national level to regulate in the face of transnational challenges. For instance, it is said that national parliaments are not able to address complex issues in the transnational context. They enhance the legitimacy of European law drawing “legitimation of European law by its potential to compensate structural democracy failures of nation states.”³⁰⁶ The failure at national level is not only a democratic one. In the context of financial market regulation, the ability of states is generally doubted. The European level is seen as more apt to provide for solutions with regard to large financial institutions.

The initial ordo-liberal authors conceived of a division of labor between the European level and the national level and charged the latter with the responsibility of providing democratic legitimacy.³⁰⁷ Democratic contestation should be able to take place at the nation state level and thereby legitimize the developments on the European level. This argumentation remains timely, as for instance Scharpf criticizes the development of the banking union because it undermines a similar division of labour in the provision of legitimacy that he calls ‘legitimacy intermediation’. According to him, the limits on states responsibilities in monetary policies undercut their ability to provide for their share of the overall legitimation.³⁰⁸ The thin notion of legitimacy for the Union is hence linked to a limitation of activities according to a division of labour between the levels. In this way, regarding the division of labour, the ordo-liberal heritage remains relevant.³⁰⁹

Walker forwards an approach that disaggregates legitimacy, in terms of the characteristics of the political entity to which it refers. He distinguishes between performance, regime and

³⁰⁵ It can be defined according to Walkers ‘performance legitimacy’ or the utilitarian approach to the legitimacy of the European Union. Walker, 2001, 8.

³⁰⁶ Joerges Christian and Neyer Juergen, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Committology” in *European Law Journal*, 3, 1997, p. 293.

³⁰⁷ For a description how this division of labour enabled and limited the Community at the same time refer to Mestmäcker Ernst-Joachim, „Macht-Recht-Wirtschaftsverfassung“, in *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 137, 1973, pp. 97-111.

³⁰⁸ Scharpf, 2012, p. 21.

³⁰⁹ Joerges, 2013. To summarize this essay of his in very crude terms, he spans a bow from the origins of German ordo-liberalism and the spill-over of ordo-liberalism into the founding project of the European Communities and the realization of many of its ideals in the European project. However, then through the expansion of the responsibilities of the Union through the development of social regulation, the ordo-liberal division of labour was undermined and was finally meant to become obsolete through the constitutional treaty. However, since the rejection of the constitutional treaty the future is in limbo and Joerges argues for a re-introduction of the division of labour through the national and the European Court of Justice.

polity legitimacy.³¹⁰ This allows him to provide an interesting analysis of the performance and regime legitimacy of the European Union, yet it also illustrates that the EU ‘fails’ to produce polity legitimacy. While the performance is well discussed through the functional approaches, regime legitimacy is interesting as it covers a political organization, representative quality of the governing institutions and so on. This understanding bridges to the governance parameter and allows a deep analysis of the governance structures of the Union. However, with regard to legitimacy, it is polity legitimacy that would qualify for a thick notion of legitimacy. According to Walker, polity legitimacy means “the fundamental acceptance of the entity in question as a legitimate political community” that at the same time also inspires a “sufficient sense of identity and we feeling.”³¹¹

3.2.2. Thick legitimacy approaches

Polity legitimacy according to Walker, reflects a statist approach to the legitimacy of European law because it implies republican structures for the representation of this polity. Most approaches that forward thick legitimacy approaches to European law retain an aspirational or advocacy component as they urge for the development of thick legitimacy.³¹² The focus is on ways that democratic institutions can be strengthened, for instance through the role of the European Parliament. The multilevel component comes in when, in search of this thick legitimacy, the vision turns to the national level.

Since early on in the development of the European Union, high expectations on European law have been held.³¹³ Such ambitious visions are still put forward.³¹⁴ The SRM can be viewed as a self-standing European level body that will be in charge of resolving the systemically important banks within the Monetary Union providing a “steady-state banking policy framework.”³¹⁵ However this view also heightens the legitimacy standard for this entity: “consolidation of authority at the European level implied by banking union cannot be sustainable without a parallel enhancement of the empowerment of European citizens in

³¹⁰ Walker, 2001, p.8.

³¹¹ Walker Neil, “Europe’s constitutional momentum and the search for polity legitimacy, I.CON, Vol. 3, No. 2&3, 2005, p. 211.

³¹² Schiek for instance calls for the application of ‘hard’ European law in social contexts, in Schiek, 2013, p. 12.

³¹³ For example „Community Law is more than that [a law of inter-state co-operation]; it is a law of solidarity and integration“, Pescatore Pierre, “International Law and Community Law – a Comparative Analysis”, Collection des Conférences Européennes, Nancy, 1968.

³¹⁴ Numhauser-Henning Ann and Rönning Mia, „Normative Patterns and Legal Developments in the Social Dimension of the EU“, Hart Publishin, Oxford, 2013.

³¹⁵ Veron, 2013, p. 1.

European institutions through adequate channels of representation and accountability, or political union.”³¹⁶

The authors that aim at addressing the lack of republican elements beyond the nation state³¹⁷ are on the one hand looking both at institutions like the European Parliament and at law-making itself and at initiatives that aim at increasing the participation of citizens more directly.

With regard to the parliament an increasing role has been observed. However, on a more fundamental level it is also debated whether the European Parliament has a representative function and, if so what it represents and what its relationship with national constituency is. Weiler for instance points out that the increased powers of the European Parliament would not bring about the desired goal of democratization, as the shift in decision-making is not accepted by the constituency.³¹⁸ “Under the impact of Europeanization and globalization, contemporary societies experience an ever stronger schism between decision-makers and those who are impacted upon by decision-making. This schism poses a democracy problem for anybody defending the idea that the citizens of democratic polities should be able to interpret them as in the last instance...”³¹⁹ Other arguments focus on the initiatives that aimed at increasing participation in law-making. In its White Paper on governance the Commission for instance proposes a reform of law-making aiming at the increased involvement of the citizens. On the one hand the openness of European institutions was increased through transparency and information while at the same time citizens themselves were more directly involved in law-making.³²⁰ Thick approaches support the development of such procedures also in the domain of financial market regulation. From a thick perspective on legitimacy many authors dismiss the development of the SRM or the banking union as illegitimate.³²¹

³¹⁶ Veron, 2013, p. 7. For another approach that focuses on the European citizens role in the debate on a ‘thick’ legitimacy: Azoulai Loic, “La citoyenneté européenne, un statu d’intégration sociale”, *Mélanges Jean Paul Jaque, Chemins d’Europe*, Dalloz, 2010.

³¹⁷ For example Scharpf, “the Union appears as the extreme case of a polity conforming to liberal principles but which, at the same time, lacks practically all republican credentials.” Scharpf, 2012, p. 13

³¹⁸ Weiler Joseph H.H. “The Constitution of Europe”, Cambridge University Press, Cambridge, 1999, p. 92.

³¹⁹ Joerges Christian, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, LEQS Paper, No. 28/2010, revised in April 2013, p. 22.

³²⁰ An excellent account on micro level legitimacy and its potential and limits in the EU can be found in Bartl, 2012, pp. 71.

³²¹ Arestis Philip, Fontana Guisepe and Sawyer Malcom, “The Dysfunctional Nature of the Economic and Monetary Union” and Zahn Rebecca, „EU Internal and External Social Policy in Time of Global Crisis“, both in Schiek, 2013. Zuleeg Fabian and Martens Hans, 2009, „Beyond the current crisis: How should Europe deal with the government deficits and public debt in future“ in Secchi Carlo and Villafranca Antonio, (eds.), „Liberalism

If this thick legitimacy cannot be generated on the European level, then the focus is turned to the national level. Here again a multilevel aspect is introduced. With regard to the banking union, some authors suggest that the legitimacy of the banking union will ultimately depend on a change to the European treaties. According to Vernon it is “doubtful that the banking union agenda can be entirely delivered [...] outside the EU framework. This is because of the need for resolution, insolvency and fiscal policy to be subject to adequate judicial review and political scrutiny.”³²² The current treaties do not explicitly provide for a European resolution authority. From his analysis, Vernon concludes that changes to the European Treaties appear to be an “inescapable step on the path towards permanent banking union, and are likely to require the ordinary revision procedure with all its implications for negotiation and ratification.”³²³

Hence it is also true of the thick approaches that a turn to the multilevel argument: there is an idea that there should be accordance between the legitimacy provided by the national level and the developments on the European level. However the bipolar tension between a non-state and a statist vision for European law cannot be overcome.

3.3. Bi-polar approaches to politics and European law

With regard to the relationship between politics and European Law, bi-polar approaches can be split into those focusing on de-politicization and those focusing on politicization. However, law-making in the European Union integrates elements of de-politicization and politicization and thereby moves the debate beyond bi-polarity. This is especially true with regard to the participation of European and national institutions in law-making but less so with regard to civil society participation.

De-politicized approaches emphasize the independence of technocratic and expert governance and aim at increasing the insulation between law-making and the political process.³²⁴ Politicized approaches either disbelieve that such a separation can work, or they suspect that it

in Crisis? European Economic Governance in a Time of Crisis“, Edward Elgar, Cheltenham, 2009 and Scharpf, 2013.

³²² Veron, 2013, p. 7.

³²³ Veron, 2013, p. 7.

³²⁴ The argument is forwarded famously and enthusiastically by Bach in Bach Maurizio, “Technocratic Regime Building: Bureaucratic Integration in the European Community”, in the International Journal of Sociology, Vol. 24, No. 1, Spring 1994, pp. 97-122.

hides political power plays.³²⁵ Politicized approaches focus on distributive realities and politicization in favor of underrepresented issues.³²⁶

In the context of the SRM issues at the center of the politics debate regard the working arrangements between the ECB, the Commission and the Council, the composition of the Single Resolution Board and the distributive impact of the resolution mechanism. De-politicized approaches emphasize the limited role of the Council with regard to the resolution plan, the independence of the Single Resolution Board from the Commission and the remoteness of the executive session of the Single Resolution Board from its plenary session and the bureaucratic functions of the national representatives in the board. Politicized approaches on the other hand emphasize the distributive implication of the mandate of the SRM, the politicized choice of having a board instead of a body that is part of the Commission, the national representatives and the political nature of the public interest requirement on which a Commission objection triggers Council involvement.

Overall, the composition of the SRM and its board show a move beyond bipolarity as both, de-politicized and politicized elements are combined. However, while there is indeed a mix of de-politicization and politicization with regard to national and European institutions, the politicization of institutions from citizens remains limited.

3.3.1. De-politicization approaches

De-politicized approaches can be seen to follow from the ordo-liberal and functional arguments that hail the neutrality and efficiency of technocratic governance to overcome political tension within and between Member States.³²⁷

De-politicized approaches suggest that the ordo-liberal origin of the European Communities is still decisive for the relationship between EU law and politics. On the one hand, the State has to constrain private power through competition; on the other hand it is prevented from further interference in the economy.³²⁸ On top of that, the politicization that occurs at the national level can be avoided at the European level. The neutrality of the technocratic decision-making

³²⁵ Koskenniemi Martti and Leino Päivi, „Fragmentation of International Law? Postmodern Anxieties“, in the *Leiden Journal of International Law*, 15, 2002, pp. 553-579.

³²⁶ Schiek Dagmar, (ed.), „The EU Economic and Social Model in the Global Crisis“, Ashgate Publishing Limited, Farnham, 2013.

³²⁷ For example “the normative primacy of the bureaucracy” in Bach, 1994, p. 99.

³²⁸ Majone Giandomenico, (ed.), “Regulating Europe”, Oxon, Routledge, 1996

is also seen to be more efficient.³²⁹ De-politicized approaches can hence also accommodate neo-classical arguments, where the distance to politics is not increased through a technocratization but rather a privatization.³³⁰

The functionalist approaches find examples in the working of the SRM. With regard to its technocratic staff it says for instance “If a bank fails, the SRM with clear decision-making rules for cross-border bank and highly experienced staff will be much more effective in carrying out resolutions than the existing patchwork of national resolution authorities.”³³¹ It has also been suggested that with regard to ‘fields which are characterized by complex technical features’, the establishment of an agency and its independence will be considered justified.³³² Furthermore, de-politicized approaches can emphasize the ‘delegation’ that happens within the mechanism. For example, the Commission’s proposal forwards a distinction between the executive and the plenary session of the board.

“In its plenary session, the Board would take all decision of a general nature. In its executive session, the Board takes decision in respect of individual entities or banking groups. Such decisions range from resolution planning, early intervention powers to decision on resolution schemes [...] In its executive session, the board comprises the Executive Director, the Deputy Executive Director and representatives appointed by the Commission and the ECB [...] Depending on the banks or groups to be resolved in each case, when meeting in its executive session, the Board will also convene in addition [...] members appointed by the relevant national resolution authorities.”³³³

The example of the SRM also demonstrates that in the European context de-politicization can take place by avoiding political tensions between Member States as well as in one particular Member State. According to its press release from the 30th of March 2014, it was important to the parliament that firstly, it was the ECB (instead of the Council or the Commission) that was empowered to trigger a resolution procedure and secondly that the involvement of the Council would be limited also with regard to the approval of the resolution procedure.³³⁴ This de-politicization is interesting insofar as it aims at the limitation of interstate politics and inter-institutional politics.

³²⁹ Esty Daniel C., “Good Governance at the Supranational Scale, Globalizing Administrative Law”, in the Yale Law Journal, Vol. 115, No. 7, May 2006, pp. 1517.

³³⁰ Taggart explains the nexus between de-politicization, neo-classical ideologies and privatization in the national context, Taggart, 2005.

³³¹ Commission Memo, April, 2014, p. 2.

³³² For an analysis of the ECJ case law from this perspective refer to, Zavvos and Kaltsoumi, forthcoming 2015, p. 11.

³³³ Commission Proposal, June 2013, p. 12.

³³⁴ Parliament press release, “Parliament negotiator rescue seriously damaged bank resolution system”, Committee on Economic and Monetary Affairs, 20.03.2014.

3.3.2. Politicization approaches

Politicized approaches emphasize the impossibility or undesirability of neutrality of law in the face of policy issues. The focus is on instances of closeness between politics and law-making, such as instance the participation of different actors in the mechanism, its integration of national bureaucrats instead of ‘neutral’ Commission bureaucrats and the implication of the mechanism for the public interests. On top of that, politicized approaches object to the multi-level approach that justifies de-polarization on European level through the ‘natural’ politicization on the national level.

The SMR hence entails instances of inter institutional as well as interstate politicization. However, politicization by civil society remains limited.

The turn away from classic legal theory that Kennedy termed the turn to the ‘social’ has also had effects on the European Union level.³³⁵ The widening of the goals of the Union beyond pure market integration can be understood as a part of this development. The EU is increasingly urged to acknowledge the distributive realities and the impact on the welfare systems of the Member State.

The normative implication of functional rationality has been neglected.³³⁶ Other authors doubt the potential of de-politicization altogether as they argue that “It would be entirely unrealistic to envisage bank resolution regimes, the aim of which is to maintain trust and to preserve financial system stability, as purely mechanic, rules-based processes.”³³⁷

With regard to the SRM, the question of politicization is very apparent as the entity is located outside the Commission. According to an early proposal from the European Commission the Commission gave an important role to itself.³³⁸ The limited role of the Commission can be seen as an incidence of politicization. Instead of relaying solely on ‘neutral’ Commission bureaucrats, the board relies on national and ECB bureaucrats as well.

This decision was not obvious. Other proposals that envisaged putting the Commission in charge of resolution have done so on grounds of technocratic neutrality and expertise³³⁹

³³⁵ Kennedy, 2006.

³³⁶ Bartl, 2012, p. 69.

³³⁷ Veron, 2013, p. 11.

³³⁸ Veron, 2013, p. 14.

³³⁹ Veron for instance has argued: ““A key factor is the control of state aid by the European Commission in the context of such restructuring. Through state aid control, the Commission’s Directorate-General for Competition Policy (DG COMP) has become a prominent player in determining bank-restructuring strategies throughout the

However, the current structure opted for the involvement of more actors within the EU institutions and more importantly also included national ‘representatives.’ The SMR hence illustrates the potential for politicization in European law-making, at least across institutions and the European and national level. However, it remains limited with regard to civil society.

In other areas of European law, the politicization towards citizens is more developed. Amongst the most obvious of these initiatives is of course the enlarging role of the European Parliament. However, the Commission also reached out to include the ones it was governing. In its White Paper on governance the Commission characterizes its reform as a wide-ranging democratic process aimed at the increased involvement of the citizens. On the one hand the European institutions were meant to be more open and attach more importance to transparency and communication in their decision-making, on the other hand, citizens must be more systemically involved in law-making.³⁴⁰ The ‘Open Method of Coordination’ is also forwarded as a measure that allows for more politicization and inverse top-down approach an allow for feedback from Member States and even citizens.³⁴¹ This political element was meant to lead to more direct participation. The limited extent of these developments in the context of financial market regulation reflects arguments with regard to the lack of independent consideration of social interests in European Union law-making.

3.4. Bi-polar approaches to values in European Law

In the debate on the values of European law, dependent and independent considerations of social and market interests also compete. As no compromise between the two has been formalized, both argumentations refer to multilevel arguments.

While economic integration and the development of a common market has been joined by other priorities that guide the EU, the relationship between these goals remains up for debate. The debate is split into bi-polar categories of non-state approaches that prioritize the economic values of the EU as a means to also further its social goals, and more ambitious,

EU, and has developed a unique operational capability in this area. The continued need to ensure consistency of competition policy enforcement suggests that DG COMP’s financial crisis task force will play an important and possibly central role in any European framework for the restructuring of problem banks in the 2014 transition. DG COMP’s competition policy mandate makes it an awkward agent for system-wide bank restructuring, but it may have to assume leadership - as it has already done to a significant extent in the case of Spain - only because it has more of the required experience than any other player, and for lack of a better alternative.” In Veron, 2013, p. 15.

³⁴⁰ A detailed account on the White Paper on Governance can be found in Bartl, 2012, p. 71.

³⁴¹ Trubek David M. and Trubek Louise G., “Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination”, in the European Law Journal, Vol. 11, No. 3, May 2005, pp. 350.

statist approaches that push for a consideration of social interests beyond or independently of market interest. The debate on the European Court of Justice is particularly illustrative of this bi-polarity. While some authors portray the court as expanding European law through the interpretation of the fundamental freedoms³⁴² others urge for a stronger consideration for the protection of social interests of the court.³⁴³ Again a compromise has not been crystallized but multilevel approaches have been forwarded, such as the call for the Court to respect and act only within the limits provided for by national welfare systems.³⁴⁴ While in the context of the Single Resolution Mechanism not much can yet be said about the role of the ECJ, the bipolar framework could be useful to structure the debate about the Court in other contexts.

The debate on the Single Resolution Mechanism can be split accordingly. Dependent approaches emphasize the importance of the SRM for the working of the single market and portray the private contributions to the single resolution fund as an internalization of risk into the market that benefits social interests as a consequence. Independent approaches on the other hand, see limits in this internalization of risk and instead demand an independent furthering of social interest either through the protection of different social interests or by embedding the banking union in a larger political union that includes the protection social interests, such as pensions, housing and tax.

3.4.1. Dependent consideration of social and market interests approaches

Echoing the functional and utilitarian justifications that we have discussed in the context of the thin legitimacy approaches, the dependent consideration of social interests on market interests is deeply ingrained in European law. The principles and values of the European Union have, since its beginning, been enlarged. Yet conceptions that consider social values dependent from economic values persist. With regards to the protection of social interests, dependent approaches often refer to the multilevel approach of the traditional ordo-liberal division of labour between national and European level.

From a dependent perspective, the SRM is presented as being essential for the working of the internal market. The fact that deposit insurance is still largely national can be seen as part of the division of labor that counted on nation states to provide for the protection of social interests.

³⁴² Kennedy, 2006, p. 69.

³⁴³ Schiek, 2013, p. 11.

³⁴⁴ Joerges, 2009 and 2010, Azolai, 2010.

While the goal of economic prosperity has been joined by many others the predominance of economic values has maintained itself and dependent approaches still find ample evidence to sustain their view. The importance given to competitiveness as a goal of the Union can be seen as an illustration of this. According to Joerges, it is still true today that “an institutionalization of economic efficiency is widely perceived today, either affirmatively or critically, as Europe’s core agenda.”³⁴⁵ The new social values that have been introduced are said to have changed little about the predominance of economic goals.³⁴⁶ For instance, it is argued that consumer protection has been “completely taken over by the pervasive performance narratives of international markets, economic efficiency and competition.”³⁴⁷ On the contrary, consumer law is aimed at the removal of market failures instead of consumer protection.³⁴⁸

The field of financial market regulation offers itself very well to a dependent view of social and market interests. The development of the SRM is foremost justified though its constituent contribution to the Banking Union:

“swift progress towards a Banking Union is indispensable to ensure financial stability and growth in the Euro Area and in the whole internal market.”³⁴⁹ It is said that “By overcoming the financial fragmentation currently hampering economic activity, it [the SRM] will help ensure fair competition for and remove obstacles to the free exercise of fundamental freedoms not only in the participating Member States but in the whole internal market.”³⁵⁰ [The mechanism will] “complement the Single Supervisory Mechanism (SSM) and [] ensure that – not withstanding stronger supervision - if a bank subject to the SSM faced serious difficulties, its resolution could be managed efficiently with minimal costs to taxpayers and the real economy.” [The improvement of market functioning will in turn] “strengthen confidence and stability in the financial markets and help restore lending to the economy” [and thereby benefit the real economy and social interest].³⁵¹

³⁴⁵ Joerges, 2010, p. 17.

³⁴⁶ Bartl, 2012, p. 68.

³⁴⁷ Risse Thomas, “Neo-Functionalism, European Identity, and the Puzzles of European Integration”, in the *Journal of European Public Policy*, 12:2, 2005, pp. 291-309.

³⁴⁸ Grundmann, 2008, p. 557. Bartl, 2012, p. 67.

³⁴⁹ Commission Proposal, June 2013, p. 2.

³⁵⁰ Commission Proposal, June 2013, p. 3.

³⁵¹ Commission Statement, “European Parliament and Council back Commission’s proposal for a Single Resolution Mechanisms: a major step towards competing the banking union”, Statement/14/77, Brussels, 20 March, 2014.

Hence, while the benefits of taxpayer protection are acknowledged, the argumentation on the benefit to the market functioning and its impact on the real economy thereby enhancing social interests indirectly can be and is sustained as well.

Again, a multilevel approach exists also in the context of the values of European law; the predominance of economic interests at Union level can be justified with the securing of social interests in the national context.

Some authors observe the same division of labour to the present day. Member State reluctance to surrender control in certain areas, as well as the factual difficulty and political impossibility of replacing the variety of European welfare state models and traditions by a European model are therefore forwarded as reasons for social policy remaining in the competence of Member States.³⁵²

With or without a reference to the protection of social interest at national level, dependent approaches to the values of European law prioritize market interests and only dependently consider social interests.

3.4.2. Independent consideration of social and market interest approaches

Independent approaches urge for a consideration of social interests in their own right. In European law, these approaches have argued that the increasing inclusion of social values has not yet found due consideration. Often formulated as a criticism to functionalism, these approaches demand a de-marketization of European Union law. If this de-marketization is deemed impossible, multilevel arguments are made, urging for the protection of social interests on the national level.

Such approaches see the inclusion of more and more social objectives into the treaties as reason to defend these aims in their own right.³⁵³ According to such approaches, the development of a banking union is just one part of a wider political union that must encompass economic as well as social components such as housing and tax.³⁵⁴

³⁵² Joerges, 2010, p. 16.

³⁵³ Trubek and Trubek, 2003, p 352, discuss two models of a Social Europe.

³⁵⁴ Veron, 2013.

From early on, the Treaties stated that the Common Market should achieve the progressive improvement of living and working conditions.³⁵⁵ Subsequent Treaty reforms added more elements like social policy, consumer policy, health policy and educational policy among the policies pursued by the EC.³⁵⁶ On these bases a debate has started on the question of a ‘social’ model of the European Union and the relationship thereof to the ‘economic’ model. Tracing the tension between social and market interests within the European Union to its very beginning,³⁵⁷ independent approaches aim at solving this tension by putting both interests in a relationship that will prevent their asymmetrical advancement³⁵⁸ through legislation, adjudication or governance.³⁵⁹

In the context of the resolution of financial institutions, the independent perspective suggests that resolution is not sufficient to prevent the exposure of public funds and that a banking union is only one aspect of a larger political union that must also necessarily include common tax, housing and other policies.

The Single Resolution Mechanism is meant to complement the Single Supervisory Mechanism and will ensure that “if a bank subject to the SSM faces serious difficulties, its resolution can be managed efficiently with minimal costs to taxpayers and the real economy.”³⁶⁰ However, approaches arguing for an independent consideration of social interests see potential contradictions between the interests of taxpayers and real economy. In the last crisis, the taxpayer interest had to cede for the sake of financial stability that was seen as crucial for the real economy. Therefore, resolution of financial institutions is seen as insufficient, and stricter limitations to the growth of financial institutions like caps or limitations of activities are demanded.

At the same time, it has been held that the “banking union cannot be separated from parallel and significant progress towards fiscal union, economic union, and political union.”³⁶¹ From his analysis of the crisis of the late 2000s Vernon argues that “a sustainable banking union may entail further policy integration in other areas than banking policy defined in a narrow

³⁵⁵ Then Article 2 EEC, in Schiek, 2013, p. 7.

³⁵⁶ Then Article 3 EC in Schiek p. 7.

³⁵⁷ “Tensions between, on the one hand, values underlying internal market law and the competitiveness agenda of the Lisbon strategy and, on the other hand, the normative frame of ‘social Europe’ and the agenda of social inclusion constitute unresolved enigmas, stemming from the original Treaties.” Schiek, 2013, p. 1

³⁵⁸ Scharpf, 2002 and 2010.

³⁵⁹ Schiek, 2013.

³⁶⁰ Commission Statement, “Finalizing the Banking Union: European Parliament backs Commission’s proposals (Single Resolution Mechanism, Bank Recovery and Resolution Directive, and Deposit Guarantee Schemes Directive)”, Statement/14/119, Brussels, 15 April 2014, p. 2.

³⁶¹ Veron, 2013, p. 7.

sense, including housing policy and various aspects of tax policy.”³⁶² Schiek and others go even further, demanding the inclusion of social goals to the same extent as economic goals in general.³⁶³ In the context of the SRM, there was general worry that the common currency was an imbalanced commitment to market interests that threatened to overrule social values; it was feared that the “European social model would be ‘sacrificed on the altar of the common currency’.”³⁶⁴ Along this logic it has for instance been suggested, that in order to protect old age incomes from further crises, a European pension fund should be created.³⁶⁵ Furthermore, it has been criticized that a Euro-wide approach to the social effects of the crisis is lacking.³⁶⁶ The post-crisis interventions have also been interpreted as a call for a new social pact.³⁶⁷ The EU has been and still can be shown as a transnational market with limited claims to transnational social solidarity.³⁶⁸ As a last resort, also to the independent approaches, remains the multilevel approach. From their perspective, what is important is the safeguarding and securing of the national welfare system from European law.³⁶⁹

3.5. Bi-polar approaches to the governance structure of European Law

With regard to the governance structure the bi-polar debate on EU law is split into approaches to emphasize assimilated governance structures and approaches the focus on dis-integrated governance structures. With its structure of being a clearly European institution which is nevertheless located outside of the Commission the SRM can be seen as an attempt to overcome the tensions between assimilation and dis-integration.

In the context of the SMR, assimilated approaches can put forward that the mechanism is ‘strong’ or independent giving a limited role for the Commission and the Council and instead

³⁶² Veron, 2013, p. 7.

³⁶³ For example, Arestis Philip, Fontana Guiseppa and Sawyer Malcom, “The Dysfunctional Nature of the Economic and Monetary Union”, in Schiek Dagmar, (ed.), “The EU Economic and Social Model in the Global Crisis”, Ashgate Publishing Limited, Farnham, 2013.

³⁶⁴ Schiek, 2013, p. 12.

³⁶⁵ Zuleeg Fabian and Martens Hans, 2009, „Beyond the current crisis: How should Europe deal with the government deficits and public debt in future“ in Secchi Carlo and Villafranca Antonio, (eds.), „Liberalism in Crisis? European Economic Governance in a Time of Crisis“, Edward Elgar, Cheltenham, 2009, p. 150.

³⁶⁶ Zahn Rebecca, „EU Internal and External Social Policy in Time of Global Crisis“, in Schiek Dagmar, (ed.), “The EU Economic and Social Model in the Global Crisis”, Ashgate Publishing Limited, Farnham, 2013, p. 178.

³⁶⁷ “Some of the changes constitute a degree of political union, although the expression is a slippery one and it is evident that features such as democratic oversight have yet to be convincingly integrated” in Begg Iain, “Are better defined rules enough? An assessment of the post-crisis reform of the governance of the EMU”, in European Review of Labour and Research, 19 (1), 2013, p. 52.

³⁶⁸ Joerges, 2010, p. 95.

³⁶⁹ Zahn, 2013, p. 181. Joerges, 2010, p. 28.

allow the working together on national representatives. Furthermore the mutualization of funds and the explicitly inclusive approach of the banking union can be interpreted as mechanisms that lead to assimilation across national borders. On the other hand, dis-integrated approaches will point to the cumbersome inclusion of a wide range of institutional actors and the potential frictions this can entail. With regard to national frictions, dis-integrated approaches can point to the need of an interstate agreement for the resolution fund and the neglected role of national courts. Lastly, for dis-integrated approaches, the SRM is really only a bank mechanism and so far there is no indication of how sectorial borders will be overcome.

The structure of the SRM hence constitutes a combination of assimilated and dis-integrated elements and allows the debate to overcome bi-polar categories.

3.5.1. Assimilated governance approaches

Assimilated approaches point to the institutional functioning of the mechanism including actors across national and institutional divisions. More importantly, the mutualization of funds and the inclusive approach of the banking union can be forwarded as examples of assimilation across national borders.

According to assimilated approaches, law-making must take place in assimilated fora that are able to take up the transnational challenge together in a unified manner.³⁷⁰

The SRM can be looked at from this point of view because it puts representatives of national jurisdictions and members of the Commission and the ECB together to take up the common challenge of bank resolution. The governance structure is set out so that “decision-making must ensure European decision, but involving MS, recognizing significance of bank resolution for national economies.”³⁷¹ This mix is reflected in the composition of the board.

‘The board would consist of an executive director, four full-time appointed members and the representatives of the national resolution authorities of all the participating countries. [...] Most draft resolution decisions would be prepared in the executive session, composed of the executive director and the appointed members, with the representatives

³⁷⁰ Functional integration, further explained by Glinski as “Entstehung einer Vielzahl differenzierter sektoraler Rechtsregime” in Glinski Carola, “Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards”, Nomos Verlagsgesellschaft, Baden-Baden, 2011, p. 79.

³⁷¹ Commission Proposal, June 2013, p. 8.

of member states concerned by a particular resolution decision involved in a first stage.”³⁷²

However, it falls short of an institution that would actually function within the Commission, where bureaucrats act outside the national interest. This will be taken up by the dis-integrated approaches.

Assimilated approaches can however point to the mutualization of funds as a ‘mechanism’ to overcome national objection and a slow integration of funds towards truly common burden sharing. “This agreement, in line with terms of reference also approved today, would include arrangements for the transfer of national contributions to the fund and their progressive mutualization over a 10-year transitional phase.”³⁷³

Lastly, the approach of the banking union and therefore also membership of the SRM is inclusive. The SRM is said to allow for a centralized “application of EU-wide rules for banks in the euro area (and any non-euro Member States that would want to join.)”³⁷⁴ In the words of the European Commission:

“Swift progress towards a Banking Union, comprising single centralized mechanisms for the supervision and restructuring of banks, in indispensable to ensure financial stability and growth in the euro area [...] building on the strong regulatory framework common to the 28 members of the Single Market (single rulebook), the European Commission has therefore taken an inclusive approach and proposed a roadmap for the Banking Union with different steps, potentially open to all Member States...”³⁷⁵

The SSM and the SRM are both open to all non-euro area Member States. “Member States outside the euro zone which join the Single Supervisory Mechanism will also join the Single Resolution Mechanism.”³⁷⁶ Furthermore, with regard to the external dimension, it can be argued that a unified and centralized approach within the EU will facilitate the interactions in cross-border resolutions with banks outside the EU.

While being located outside the Commission, mutualization and the inclusive approach provide an overview of the SMR from an assimilated approach.

³⁷² Council Press Release, “Council agrees general approach on Single Resolution Mechanism”, 17602/13 (OR. en), PRESSE 564, Brussels, 18 December 2013, p. 2. (Council Press Release, 2013)

³⁷³ Council Press Release, 2013, p. 1.

³⁷⁴ Commission Memo, April 2014, p. 2.

³⁷⁵ Commission Memo, March 2014, p. 7.

³⁷⁶ Commission Memo, March 2014, p. 8.

3.5.2. Dis-integrated governance approaches

For dis-integrated approaches, assimilation is either impossible or undesirable. Dis-integration provides for a state-like system of checks and balances.

Dis-integrated approaches will look at the institutional framework and point out the flexibility it affords nation states and the different European actors that are involved. With regard to the overcoming of sectorial boundaries the SRM remains altogether limited. Dis-integrated approaches are appreciative of the fact that the SRM is situated outside of the Commission and of the role that is given to national representatives. Also, dis-integrated approaches will emphasize that the mutualization of funds is conditional on an interstate agreement.

The practical working of the SRM can be viewed as being a very dis-integrated process that involves many different actors and provides for checks and balances. The decision to resolve a bank is triggered by the ECB that is the supervising body. If the ECB does not trigger it, the Board of the mechanism itself is able to do so. The Board will then adopt a resolution scheme specifying the tool and any use of the fund. Before adoption by the board, the Commission will assess the scheme regarding its compliance with state aid rules and resolution objectives. If the Commission significantly changes the amount requested from the fund or contests the public interest in the resolution, its decision will be submitted for approval or rejection by the Council. Where the Council or the Commission object to the resolution scheme, the Board will have to make amendments. Finally, national resolution authorities will then implement the resolution scheme, in accordance with national law including relevant provisions transposing the Bank Recovery and Resolution Directive.³⁷⁷ This reception by national resolution authorities entails further potential for dis-integration, as the role of national courts has not yet been tested.

Dis-integrated approaches can furthermore point to the need of intergovernmental agreement to establish the Single Resolution Fund. If an authorization is required by national rules, “such authorization shall be applied for” and “the national judicial authority shall control that the decision of the Board is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection.”³⁷⁸ Also the ties to the national parliaments are regulated; “national Parliaments of the participating Member States, through their own procedures, may request the Board to reply in writing to any

³⁷⁷ Commission Statement, March 2014, p. 2.

³⁷⁸ Commission Proposal, June 2013, Art. 35.

observations or questions submitted by them to the Board in respect of the functions of the Board under this Regulation.”³⁷⁹

Regarding the inclusive approach and its potential assimilating force, dis-integrated approaches can point to the various categories of EU Member States that will develop between Euro Zone, banking union and Member States that are not part of any of them. Lastly, the external dimension of the SRM can also be looked at from a perspective of dis-integration; while it aims at a coherent implementation of the FSB Key Attributes, it also does not specifically regulate the cross-border resolutions with non-EU states.

The bi-polar categories are not suitable to analyzing the governance structure of the SMR. Assimilated and dis-integrated structures are mixed. European Union law-making in this regard, thus moves beyond bi-polarity.

3.6. Bi-polar approaches to the polity of European Law

The bi-polar debate on the polity of European Law opposes approaches that conceive of a European polity as a different, new, supranational kind of polity, to approaches that imagine a European polity similar to the national one. Authors that limit European citizenship to a purely economic perspective or that attach only symbolic meaning to European citizenship provide examples of supranational approaches. National polity approaches on the other hand, focus more on political rights of citizens or refer to notions like identity and sense of belonging.³⁸⁰

The different starting points of these approaches seem irreconcilable. While for supranational approaches, the European polity remains different, national polity approaches can, for instance, suggest that the creation of wealth leads to a loyalty that provides a basis for a polity like the national one.

With regard to the SRM, emphasis on depositors and creditors illustrates partial, supranational notions of polities. The reference to ‘taxpayers,’ on the other hand, is more ambitious and can be attributed to a national polity approach.

3.6.1. Supranational polity approaches

³⁷⁹ Commission Proposal, June 2013, Art. 42.

³⁸⁰ Walker, 2001.

In the context of European law, different supranational polity approaches can be observed. On the one hand, there are approaches that focus on an economic form of polity and on the other hand, authors refer to an inter-state polity, where the Member States are seen as the main objects. Both examples conceive of polities differently from national ones.

References to depositors or large banks as the addressees of financial market regulation, reflect an economic and hence partial definition of polity. This reflects arguments that have been made about the economic nature of citizenship in the European Union.³⁸¹ The principles of the SRM as proposed by the Commission reflect this economic perspective as they entail, for example, the prohibition of any discrimination against banks, their depositors, creditors or shareholders on grounds of nationality or their place of business. The focus is hence put on the economic aspects of these actors. This reflects the same division of labour that can be traced back to the ordo-liberal origin and that has been observed in the parameters of legitimacy, values and politics. The underlying rationale is that this limitation of the polity on its economic aspects is justified because the other - political- aspects are satisfied on the national level.

The idea of polity can also be different with regard to what is considered as members of said polity. Intergovernmental approaches consider the European polity as made up by states. In the context of the SRM, approaches that emphasize the importance of interstate agreements for the resolution fund take such an inter-governmental stance.

Supranational approaches, either by focusing on a partial understanding of the polity or by taking an intergovernmental approach, hence forward different – supranational – understandings of polity. The SRM provides evidence for both.

3.6.2. National polity approaches

National polity approaches forward a national polity ideal also for the European level. They either suggest ways in which the European polity may develop towards this ideal, or, if this is deemed impossible, dismiss the possibility of a European polity altogether or take a multilevel approach according to which the national polity prevails over the European one until it lives up to the standards of a national polity.

National polity approaches to functionalism argue that the benefits of the EU will lead to the development of a loyalty towards it that will pose the basis of a polity that entails a notion of

³⁸¹ Risse, 2005. Grundmann, 2008, p. 557.

sameness or identity like the national one. The wealth that the EU generates is seen as crucial for the development of this loyalty towards the Union;³⁸² however other elements are also forwarded as contributing to the development of a common identity. Authors insisting on a sense of belonging have forwarded ‘culturalist’ ideals for the European Polity.³⁸³ The most significant one of them is the establishment of a European citizenship, which goes beyond the limited reach of economics and also encompasses a political dimension to this citizenship.³⁸⁴ It was a symbolic counterpart to the increase of participation. The fostering of a direct link between the EU and its citizens is important for national polity approaches.

The importance that the SRM gives to taxpayers and the way in which it addresses them directly – even if the taxation is done by Member States – evidences just such an ambitious approach. ‘Taxpayers’ is a much more inclusive term than depositors or consumers and thereby goes beyond the partial – supranational – notion of polity. At the same time, the reference to taxpayers is also revealing in the sense that taxes are not unified in the European Union or the banking union.

The SRM hence refers to national as well as supranational notions of polities. However, it also illustrates the tensions between the two, as it remains unclear how those – national and supranational – polities relate to each other and which should be given preference in European law.

3.7. Conclusion: Differences between Parameters

The tension between non-state and state arguments runs through all the parameters. This is also true of the debate on European law. However, here a difference between the parameters can be observed. In legality, politics and governance the practice of European law developed in a way that mixes the approaches and the debate moves beyond bi-polar categories. In the context of legitimacy, values and polity, no such developments can be observed and the debate remains bi-polar. In the parameter of values in particular, the crucial role of the European Court of Justice is apparent.

³⁸² Haas Ernst, B., “International Integration: the European and the Universal Process”, in *International Organization*, Vol. 15, Issue 03, 1961, pp. 366-392.

³⁸³ For a recent example referring to a culturalist vision refer to Semmelmann Constanze, “How to Reconcile the Functional-Rationalist and the Culturalist Perspective in the Euro Area Crisis: The Road Towards Multiple Identities of EU Citizens”, in the *Oxford Yearbook of European Law*, 2014.

³⁸⁴ Azoulai Loic, “La citoyenneté européenne, un statu d’intégration sociale”, *Mélanges Jean Paul Jaque*, *Chemins d’Europe*, Dalloz, 2010.

This illustrates the special place many authors attribute to European law in the field of transnational law. The framework suggests looking at this ‘specialty’ from the standpoint of the non-state/state tensions. The different parameters allow a distinction to be made between the ways in which European law did move beyond the non-state/state tension and the ways in which it did not. In the parameter of values, this section also considered the potential to use the framework for the analysis of the debate on the role of the European Court of Justice.

The analysis of the arguments on European law have shown that in questions of legality, politics and governance the debate has moved beyond bi-polar categories. The practice of European law has led to compromises that overcome the non-state/state tension. However, in questions of legitimacy, values and polity, the bipolar categories hold and the non-state/state tension persists.

The next Chapter will examine whether any evidence exists as to the difference between parameters in transnational law. If such evidence does exist, it might provide an insight for a future approach to transnational law and the lessons that European law teaches about transnational law and overcoming the non-state/state tension of transnationalization.

4. The Bi-polar Debate on Transnational Law and Transnationalization

The following Chapter will focus on bi-polarity in legal thinking on transnational law. The arguments and approaches will be structured according to non-state/state categories in all six parameters of law in order to [analyze in which](#) instances the thinking about transnational law has overcome the non-state/state tension.

Private regulation and global constitutionalism will form the endpoints of the non-state/state spectrum. The actual example of transnational law – the regulation of the resolution of large financial institution – is looked at from the perspective of Global Administrative Law ([GAL](#)). GAL is given a predominant place here in order because it helps elaborate on the example of the FSB. Especially, in the law-making parameters it will form different kinds of compromises between private regulation and global constitutionalism. In spite of this focus on GAL, the framework [serves](#) to [evaluate](#) and classify [a range](#) of transnational theories. In Chapter 5 the outcomes from the analysis here will be brought together to this end.

Similarly to the Chapter on European law, a difference between parameters will become clear as parameters of legality, politics and governance provide for more instances beyond bi-polarity than the parameters of legitimacy, values and polity.

The framework will be illustrated according to the example of the debate on the Key Attributes of Effective Resolution Regimes for Financial Institutions. Faithful to the transnational law perspective, the focus will be on the rules on the functioning of the FSB (its legal form and its mechanism of enforcement), and the measures aimed at global systemically important financial institutions (GSIFIs) that develop regulatory fora beyond the state level. The Charter of the FSB³⁸⁵ as well as its thematic peer review mechanism will be looked at more closely.³⁸⁶ The peer reviews are part of the FSB Framework on Strengthening Adherence to International Standards³⁸⁷ alongside leadership by example and the adherence toolbox. [They](#) are part of the responsibilities of the Standing Committee on Standards Implementation (SCSI).

³⁸⁵ FSB, Charter of the Financial Stability Board, endorsed by the Heads of State and Government of the Group of Twenty, Los Cabos Summit, 19 June 2012.

³⁸⁶ FSB, Standing Committee on Standards Implementation, “Handbook for FSB Peer Reviews”, 7. January 2014.

³⁸⁷ FSB, Framework for Strengthening Adherence to International Standards, 9. January 2010.

With regard to the KAs that aim at tackling resolution beyond the state level, the focus will be on:

8	<i>Crisis Management Groups</i>	<i>(KA 8, CMG)</i>
9	<i>Institution-specific cross-border cooperation agreements</i>	<i>(KA 9, COAGs)</i>
10	<i>Resolvability assessments</i>	<i>(KA 10 Resolvability assessments)</i>
11	<i>Recovery and resolution planning</i>	<i>(KA 11, RRP)</i>

4.1. **Bi-polar approaches to the legality of transnational law**

With regard to the parameter of legality, procedural approaches focus on the suitability of the functional and or informal ways of the development of transnational law for the complex context of transnationalization. Formal approaches on the other hand, emphasize the importance of the ‘hardening’ of these developments. Procedural approaches are very common across all theories of transnational law. However, private regulation with its focus on efficiency, flexibility and accommodation, can be attributed to the procedural pole, while global constitutionalism emphasizes the importance of legal certainty and the legalization or hardening of soft law. GAL can be positioned on the spectrum between the two as it has the potential to offer compromises between the two and thereby overcome bipolarity. It merges a procedural ‘observation’ with a formal ambition of improving the procedural development of transnational law through administrative principles.

With regard to the FSB Key Attributes, procedural approaches emphasize the flexibility that standards, peer review and colleges provide and the importance of maintaining it by limiting the formalization or hardening of these structures. On the other hand, formalist approaches urge the ‘hardening’ of the standards and the FSB ‘regime’. GAL succeeds in integrating these competing pressures and [thus](#) [overcomes](#) bi-polarity. With the example of peer review, it will be illustrated how GAL can combine the two and therefore overcome the non-state/state tension with regard to the legality of transnational law.

4.1.1. **Procedural legality approaches**

Procedural approaches are predominant in transnational law. Not only is procedural law-making seen to be better fit to the pluralistic transnational environment, private regulation

also sees it as more efficient. Approaches of standardization³⁸⁸ and functional integration³⁸⁹ strongly rely on procedural arguments. GAL takes a procedural reality as its starting point as it ‘observes’ the development of administrative law in self-regulating entities.³⁹⁰

The development of self-regulation and the importance thereof in many fields has been one of the main drivers of the transnational law debate in general.³⁹¹ In the field of financial market regulation the example of stock exchanges has been widely debated as a successful example of private regulation.³⁹² However, in the current context, the debate focuses much less on private regulation because of the crisis and the specific example of resolution authorities. The regulation of the resolution of banks is a priori a decision against the self-regulation of the sector. However, the take of private regulation on pluralism is reflected in the debate about resolution authorities. The arguments can be split between ones which focus on the descriptive force of pluralism, according to which pluralism provides an account of transnational law that is factually true (or truer, when developed against arguments of global constitutionalism)³⁹³ and one which focus on accommodation and flexibility in transnational law. In the context of the FSB standards both flow into the working of GAL.

From a procedural perspective the FSB standards and peer-reviews are celebrated for allowing for deliberation, flexibility and feedback. With regard to the FSB’s mandate the emphasis is put coordination above all else. The main function of peer review is to “provide feedback from peers on the implementation and effectiveness of standard and policies”³⁹⁴. Learning, encouragement and cooperation are at the center.³⁹⁵

The development of firm-specific cross-border regulatory entities provides another example for the cooperation focus as it is said that “Such arrangements enhance preparedness for a crisis and facilitate the management of any such crisis and, if necessary, the orderly resolution

³⁸⁸ A very interesting account on standards in transnational contexts is provided by Schepel Harm, “The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets”, Hart, Oxford, 2005.

³⁸⁹ For an introduction Glinski, 2011, p. 79 In way of illustration Fischer-Lescano and Teubner, 2004.

³⁹⁰ Ladeur, 2011, p. 2.

³⁹¹ For an overview of the self-regulatory developments Zumbansen Peer, “The Next ‘Great Transformation’ of Markets and States in the Transnational Space: Global Assemblages of Corporate Governance & Financial Market Regulation”, CLPE Research Paper, 09/2009, Vol. 05, No. 02, 2009, p. 18.

³⁹² Pagliari Stefano, “Who Governs Finance?” in Snyder Francis, Sonntag Albrecht and Shen Wei, (eds.), “The ‘Visible Hand’: European and Global Perspectives on Financial Market Regulation and Economic Governance”, Edition Bruylant, Bruxelles, 2012, p. 47. and also Levit Janet Koven, “A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments”, Yale Journal of International Law, Vol. 30, 2005.

³⁹³ Krisch, 2009, p. 2.

³⁹⁴ FSB Framework for Strengthening Adherence to International Standards, 9. January 2010, p.1.

³⁹⁵ Riles, 2013, p. 95.

of the firm.”³⁹⁶ As they bring together “supervisory authorities, central banks, resolution authorities, finance ministries and the public authorities responsible for guarantee schemes of jurisdictions that are home or host to entities of the group that are material to its resolution, and should cooperate closely with authorities in other jurisdictions where firms have a systemic presence,”³⁹⁷ cooperation is strengthened while still providing for flexibility. “CMGs have been focusing more recently on developing a clearly articulated resolution strategy for their respective G-SIFIs. These strategies outline, at a high level, the strategic approach to resolution that is likely to be adopted should the need arise, but they do not prescribe the precise course of action [...], given the need to consider the circumstances existing at the time of a resolution.”³⁹⁸

The implementation of the KAs is treated as a priority under the FSB Coordination Framework for Implementation Monitoring (CFIM). The monitoring and reporting process it entails can also be looked at from a procedural perspective. “The objective of the peer review is to evaluate FSB member justifications’ existing resolution regimes and any planned changes to those regimes using the Key Attributes as a benchmark.”³⁹⁹ The process is seen as open-ended, fueled by continuous feedback.⁴⁰⁰

Procedural approaches resonate with the self-generative function of administrative law within and outside of the state stipulated by GAL.⁴⁰¹ According to Ladeur, the ‘experimental search process of the administration’ that is instrumental in the development of general administrative law exists beyond administrations and drives the development of GAL.⁴⁰² Standards and peer review can be seen as attempts to improve self-administration through administrative principles like transparency and accountability. However, as in the general approach of GAL, the ideal of more established procedures and ‘carefully crafted administrative mechanisms that are sensitive to the institutional and normative context’⁴⁰³ ultimately leads to friction with the pluralistic environment that GAL itself takes as its starting point. Not only will there be “losses to efficiency, more difficulty in reaching consensus, and

³⁹⁶ FSB Progress Report, “Resolution of Systemically Important Financial Institutions”, November 2012, p. 14.

³⁹⁷ Huepkes Eva, “Resolving systemically important financial institutions (SIFIs): The Financial Stability Board key attributes of effective resolution regimes”, in LaBrosse John Raymond, Olivares-Caminal and Singh Dalvinder, (eds.), “Financial Crisis Containment and Government Guarantees”, Edward Elgar, Northampton, 2013, p. 47.

³⁹⁸ FSB, Progress Report, 2012, p. 14.

³⁹⁹ FSB Peer Review Report, 2013, p. 16.

⁴⁰⁰ Riles, 2013, p. 99.

⁴⁰¹ Ladeur, 2011, p. 1.

⁴⁰² Ladeur, 2011, p. 2.

⁴⁰³ Barr and Miller, 2006, p.46.

other costs”⁴⁰⁴ but there is also strong bias toward formalization. This unease between its pluralistic starting point and its formalistic outcome puts GAL at the limits of bi-polar analysis.

4.1.2. Formal legality approaches

Formalist approaches portray transnational law as a transitory phenomenon. They are preoccupied with legal certainty and the hardening of transnational law. I will distinguish here between global constitutionalism that has a more ambitious or ‘holistic’ view of transnational law or global law and approaches of legalization or hardening that are focusing on instances where transnational law resembles state law that also influence GAL.

Global constitutionalism has evolved beyond a vision of global law⁴⁰⁵ that resembles state law. Yet it is suggested that the variety of different approaches still share a state inspired ideal of legal order. With regard to the Key attributes, such an ideal is the most apparent in the ‘legalization’ of the FSB recommendations themselves. The original FSB ‘recommendations’ have transformed, at least verbally into ‘international standards.’ Riles points out that while these standards do not have legal quality “in practice, these standards seem to shade into a regime that takes on more and more of the trappings of traditional international legal rules and norms.”⁴⁰⁶ The key attributes for instance turned into the “international standards for resolution mechanism.”⁴⁰⁷ While this may seem a merely rhetorical change, it has also been endorsed as such at the G20 Summit in Cannes. In its ‘consultative document’ on recovery and resolution planning of November 2012, the Key Attributes are referred to as “Key Attributes Requirements” and it is further specified that “At the Cannes Summit in November 2011, the G20 Leaders endorsed the Key Attributes of Effective Resolution Regimes for Financial Institutions (‘the Key Attributes’) as the international standard for resolution regimes, following a public consultation process.”⁴⁰⁸

However, other more subtle approaches of legalization or formalization have been developed. Calliess and Renner for instance suggest a ‘functional’ approach that evaluates transnational law in regard to its potential to fulfill the function of law. If this function is the regulation of

⁴⁰⁴ Barr and Miller, 2006, p.46.

⁴⁰⁵ Forwarded for example in Emmerich-Fritsche, 2009.

⁴⁰⁶ Riles, 2013, p. 77.

⁴⁰⁷ Riles, 2013, p. 77.

⁴⁰⁸ FSB Consultative Document, “Recovery and Resolution Planning: Making the Key Attributes Requirements Operational”, November 2012, p. 3.

behavior, there will be a strong focus on enforcement.⁴⁰⁹ Indeed, such arguments have been made in context of the FSB, where for instance Riles ‘warns’ about a sliding of the learning function of peer reviews into supervision.⁴¹⁰ Riles analyzes the actual review questionnaire on risk governance in this vein concluding that: “The questionnaire acknowledges that there is no clear international standard regard proper procedures for risk governance and that the purpose of the review is to evolve toward consensus concerning a standard. This, it would seem to be a neutral vehicle for deliberation and consultation. However, the specific questions posed to regulators presuppose an answer as to what the international standard for risk governance should be.”⁴¹¹

Instead of asking what institutions a jurisdiction envisages, the questionnaire introduces for example “the concept of a “risk committee” as “a specialized Board committee responsible for advising the Board on the firm’s overall current and future risk appetite and strategy, and for overseeing senior management’s implementation of that strategy” – clearly suggesting one very specific institutional form of risk management from among all possible forms.⁴¹²

Implementation is often referred to in the charter of the FSB. Formalist approaches can emphasize such instances as the function of the SCSI to “ensure comprehensive and rigorous implementation monitoring of international financial standards.”⁴¹³ It is said that “Resolvability assessments should help identify any remaining barriers to resolution, and should inform the development and further improvement of the resolution plan.” The FSB is developing more specific guidelines and more detailed guidance to ensure adequate and consistent reporting on the implementation of all G-SIFI resolution requirements across institutions,⁴¹⁴ potentially leaving less and less flexibility.

Formalist approaches further emphasize that the general nature of the “resolution strategies” for CMGs are to be seen as transitory, as they “should give the necessary direction to the next stage of work in the CMGs, which should aim to develop detailed operational resolution plans to implement the strategies and to finalize COAGs.”⁴¹⁵ These Institution-specific cross-border

⁴⁰⁹ For example Benvenisti Eyal and Downs George W., “National Courts and Transnational Private Regulation” and other contribution in Cafaggi Fabrizio, (ed.), “Enforcement of Transnational Regulation”, Edward Elgar, Cheltenham, 2012.

⁴¹⁰ She ‘warns’ because she sees the danger of the process loosing its learning inducing function. Riles, 2013, p. 97.

⁴¹¹ Riles, 2013, p. 95.

⁴¹² Riles, 2013, p. 95.

⁴¹³ FSB Charter, 2012, Art. 16 (1).

⁴¹⁴ FSB, Progress Report, 2012, p. 15.

⁴¹⁵ FSB, Progress Report, 2012, p. 14

cooperation agreements can be seen, from a formalist point of view, as the actual goal on ‘ultimate’ stage of the CMG.

It has been seen that GAL is open to procedural and formal approaches to the legality of transnational law. This openness offers an avenue to overcome the bipolarity in legal thinking about transnational law.

4.2. **Bi-polar approaches to the legitimacy on transnational law**

Thin and thick understandings of the legitimacy of transnational law coexist in contemporary legal thinking. Thin approaches like private regulation focus on instances of performance-based legitimacy and thick approaches like global constitutionalism focus on the issues of representation and participation.

According to thin approaches, the independence of the FSB and the hardening of its standards can be justified on the basis of their performance. Legitimacy deficits, according to thin approaches, should be addressed through increased accountability and transparency. Thick approaches on the other hand focus on the membership of the FSB and participatory elements like the consultations that the FSB is conducting and the regional consultative groups⁴¹⁶ and their potential to enhance participation. However, because of the factual absence of republican elements in transnational law, thick approaches either remain hypothetical or end up rejecting the legitimacy of transnational law altogether.

Both thin and thick approaches tend to extend beyond the parameter of legitimacy either by developing legitimizing procedures with regard to the legality of law as GAL does or by referring to the parameter of governance structure to achieve participation. Applying the bi-polar framework and the limits of the parameters, the debate on the legitimacy of transnational law – as distinct from European law – remains limited.

4.2.1. **Thin legitimacy approaches**

The emphasis across the field on the functional nature of transnational law also affects the debate about its legitimacy. Thin approaches are predominant and an undertone of performance-based legitimacy runs deep in the field because a comparative advantage to state

⁴¹⁶ FSB Charter, 2012, Art. 20.

law is assumed.⁴¹⁷ Clearer performance-based arguments are made in private regulation and more general global legal pluralism with references to efficacy and expertise. Beyond these performance-based approaches, other references to ‘thin’ legitimacy are made by approaches that forward ideals that should provide a ‘thin normative horizon’.⁴¹⁸

The undertone of a presupposed legitimacy of transnational law is illustrated by the position that [its development has exhibited a proven](#) comparative advantage to state law. This undertone is dominant in what is referred to as the descriptive force of global legal pluralism and manifests [itself](#) in the parameter of legitimacy as a bias to performance-based notions of legitimacy.⁴¹⁹

Closely related to this is the argument that thicker, input-oriented conceptions of legitimacy do not work in transnational law. One example that has informed this perspective is the Icelandic “No” to the bail-out referendum. It did not change the ‘reality’ of the debt the country [was](#) facing due to the collapse of its financial sector.⁴²⁰

Beyond the comparative advantage argument, performance-based notions of legitimacy can for instance focus on expertise and efficiency as legitimizing elements. Such arguments are made in private regulation but also in general global legal pluralism. Efficiency arguments make a link to the symbiotic co-evolution of liberal legitimacy discourse with classical, neo-classical and institutional economics.⁴²¹ Efficiency arguments were for instance important in the risk calibration according to Basel II. The reliance on private expertise and industry calculation methods was welcomed as an efficiency gain. In the context of the FSB initiatives for the resolution of large financial institutions, they focus on the legitimacy of the board itself, the importance of its independence from the G20, the value of its technocratic, information-based approach and its benefits in comparison of the IMF.

Approaches focusing on performance-based legitimacy point out the extensive and far reaching achievements of the FSB and the limits of other institutions on [the](#) national and supranational level. The FSB has for instance been referred to as “an experimental, purposeful, and energetic institution that deploys the most innovative international financial

⁴¹⁷ Krisch, 2009, p. 42.

⁴¹⁸ Lescano and Teubner, 2004, p. 1033.

⁴¹⁹ For instance Krisch, 2009, p. 42 and Wai 2008, p. 108.

⁴²⁰ Chorafas, 2012, p. 124.

⁴²¹ Kennedy, 2006, p. 22.

regulatory methodology today.”⁴²² According to thin approaches, this has led to an acceptance or presupposition of its legitimacy.

The legitimacy of technocratic governance, as supported by authors like Bach, combines a performance-based approach with the notion that expertise is neutral.⁴²³ In the context of the FSB, this approach is illustrated by authors who support its independence and portray its function as that of ‘the bureaucratic arm’ of the G20.⁴²⁴ The same logic of delegation is apparent throughout the FSB and its structure of plenary session, steering committees and several more remote standing committees and consultative groups. Similar arguments could also be applied to the CMG.

4.2.2. Thick legitimacy approaches

Thick approaches to the legitimacy of transnational law either reject the idea of transnational law altogether or they acknowledge the limits of the legitimacy of transnational law but aim at its enhancement through the fostering of republican elements.⁴²⁵ These approaches are focused on issues of participation and representation. The transnational law debate here entails references to global constitutionalism, but more commonly constitutional pluralism and global governance with a democratic focus.⁴²⁶

The new leadership role of the G20 is a topic that has attracted a lot of attention from authors interested in the legitimacy of transnational law. The widening of membership and the meaning thereof has been looked at from the perspective of legitimacy. The structure it developed with the FSB and other actors of economic governance have been looked at with ‘constitutional’ ideas in mind.⁴²⁷ However, criticism remains substantial. Global governance approaches that focus on representation point to the importance of the affected population as a part of the decision-making.⁴²⁸ The enlarged membership of the G20 and the new FSB does

⁴²² Riles, 2013, p. 67.

⁴²³ Bach, 1994, p. 98.

⁴²⁴ Wouters Jan and Geraets Dylan, “The G20 and Informal International Lawmaking”, Leuven Centre for Global Governance Studies, Working Paper No. 86, March 2012.p. 7

⁴²⁵ Republican elements in order to define the common good that thick approaches define by democratic deliberation. This understanding follows Scharpf for example in Scharpf, 2009.

⁴²⁶ For example in Peters Anne, “Membership in the Global Constitutional Community”, in Klabbers Jan, Peters Anne and Ulfstein Geir, (eds.) “The Constitutionalization of International Law”, Oxford University Press, Oxford, 2009.

⁴²⁷ Wouters Jan and Odermatt Jed, “Comparing the ‘Four Pillars’ of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank and WTO”, Leuven Centre for Global Governance Studies, Working Paper No. 128, December 2013, p. 2.

⁴²⁸ With a reference to David Held Calliess and Zumbansen urge for including the “affected” into the development of transnational private law. Calliess Galf-Peter and Zumbansen Peer, “Rough Consensus and Running Code: A Theory of Transnational Private Law”, Hart Publishing, Oxford, 2010, p. 132.

not change [the fact that](#) they remain exclusive institutions.⁴²⁹ Some emerging economies including possible relocation jurisdictions for GSIFIS are not [involved](#). With regard to the FSB, it has for instance been argued that “At the individual committees in which important policies are often debated and drafted, the representation of North Atlantic regulators on FSB and Basel committees is still unduly large in relation to these economies’ market share.”⁴³⁰

Furthermore, even if they would represent the entire state community equally, this would not guarantee that world citizens would be represented. Sassen, for instance, sees a detachment of de-nationalization of certain state agencies and inquires into the effect this distancing has on representation.⁴³¹

Ultimately, thick approaches remain limited to the fostering of participation and representation in transnational law-making, which makes the parameter of legitimacy dependent on other parameters like legality and governance.

4.3. **Bi-polar approaches to politics in transnational law**

The bi-polar debate on the role of politics in transnational law can be structured in approaches of de-politicization that aim [to](#) limit the effects of politics in transnational law and approaches of politicization that propose transnational law [as a means to realize](#) public policy [objectives](#).

[Along with other approaches that advocate the neutrality of technocratic governance](#), private regulation and standardization seem the most prone to de-politicization. A different approach is taken by global constitutional pluralism [advocates](#), who recommend politicization in order to develop a system of checks and balances. [In](#) the context of the parameter of legality, [GAL](#) provides an interesting insight, as its starting point is shared with private regulation and de-politicization, yet politicization can be part of the transparency and accountability improving measures [for which](#) GAL strives.

In the context of the FSB initiative on the resolution of large financial institution, de-politicized approaches appreciate the FSB and private actor involvement for reasons of neutrality. They also portray the governance by the FSB as ‘governance by information’.⁴³² Approaches urging for politicization point out that de-politicized approaches disregard

⁴²⁹ Riles, 2013, p. 91.

⁴³⁰ Riles, 2013, p. 92.

⁴³¹ Sassen, 2003, p. 7.

⁴³² Riles, 2013, p. 79.

distributive realities and suggest ways of politicizing non-law.⁴³³ They emphasize the limits of de-politicization in the face of private or national power and attempt to find ways for transnational law to either organize counterweights to these powers or [to find alternative ways of limiting them](#). However, with regard to the FSB, these attempts remain limited in practice.

4.3.1. De-politicization approaches

Approaches on de-politicized transnational law insist on a link between expertise and neutrality. The rationale is that by focusing on substance, political tensions can be overcome.⁴³⁴ Such arguments are quite common in private regulation and standardization. However, even if only implicitly, de-politicization seems also to be predominate in GAL.

The debate on privatization and transnationalization of law beyond the state, illustrates the actor-focused part of this argument. Certain authors hail self-regulatory undertakings beyond the state as an alternative to [a situation of](#) political deadlock in international law.⁴³⁵ In the absence of political state interests, they are meant, together with expert bureaucrats or not, to focus solely on issues of substance. [Although not an](#) example of a private initiative, the FSB itself is [often put forward](#) as an example of this, as it is seen as the technocratic arm of policy creation and implementation of the G20.⁴³⁶

Furthermore, authors forward benefits of de-politicized tools of transnational law such as technical standards and the benefits of private institutions developing them so as their expertise can unfold in between the public and the private sphere.⁴³⁷ In this context, information-based forms of regulation have been forwarded as methods to de-politicize transnational law.⁴³⁸ The FSB provides an example of information-based governance by the information it makes available on its webpage and the rankings in which it presents. This is also true in the context of its efforts on GSIFI resolution. The publication of the GSIFI list is such an instance. The list is made public on a yearly basis and allows identifying institutions that deserve special attention.

Moreover, with regard to resolvability assessments, a similar logic as with peer review is envisaged. “Implementation of all G-SIFI resolution requirements, including resolution strategy, planning, resolvability assessments and COAGs, will be reviewed through

⁴³³ Riles, 2013, p. 86.

⁴³⁴ Bach, 1994, p. 99.

⁴³⁵ Abott and Snidal, 2008, p. 14

⁴³⁶ Riles, 2013, p. 66.

⁴³⁷ Schepel, 2005, p. 3

⁴³⁸ Riles, 2013, p. 65.

resolvability assessments conducted by the resolution authorities and CMGs as well as through a resolvability assessment process for G-SIFIs that the FSB expects to launch in 2013.⁴³⁹ This can also be viewed as an instance of government by information, as the reports of self-evaluation though the reporting system should induce a constant process of improvement through learning and comparing with peers. Feedback is forwarded as a neutral vehicle of learning and adapting. It gives a central role of ideas, expertise and communities of experts in producing international law.⁴⁴⁰

4.3.2. Politicization approaches

Arguments for the politicization of transnationalization on the other hand focus on distributive realities and policy goals that transnational law should actively aim to achieve. It is either suggested that de-politicization is impossible and simply conceals existing power dynamics or that because of its distributional effects transnational law should actively defend policy goals. Approaches that forward such arguments can come from social constitutionalism and promote notions such as the international community as a global constitutional order or a global civil society. Others representing normative constitutionalism are focusing more on normative values, such as justice or the like.⁴⁴¹

Parts of the politicization approaches center on the argument that the de-politicization is a diversion of distributive realty and should be inverted for this reason.⁴⁴² The limits of this neutrality have also been voiced as a reason for the improvement of GAL. Indicators of standards for example have been found to never be entirely innocent.⁴⁴³

The examples of the questions in the peer review surveys make this point; they can be suggestive and entail certain judgments about possible options. Form her examination of peer review questionnaires, Riles suggests that there is a danger of ‘learning sliding into surveillance’.⁴⁴⁴ She points out that the questions are highly suggestive. “The specific questions posed to regulators presuppose what the international standard for risk governance should be.”⁴⁴⁵

⁴³⁹ FSB report 2012. P. 16.

⁴⁴⁰ Riles, 2013, p. 87.

⁴⁴¹ For an overview on social and normative constitutionalism consult Schwöbel, 2011, p. 3.

⁴⁴² For example Meidinger Errol, “The Administrative Law of Global Private-Public Regulation: the Case of Forestry”, in the European Journal of International Law, Vol. 17, No. 1, 2006, pp. 47-87 more generally Koskenniemi and Leino, 2002.

⁴⁴³ Davis, Kingsbury, and Merry, 2011, p. 4

⁴⁴⁴ Riles 2013, p. 95

⁴⁴⁵ Riles 2013, p. 95.

Kreide observes at the transnational level that “Politics withdraws from the public sphere and becomes an issue for commissions, think tanks, lobbying groups, and NGOs, which are not transparent and make far-ranging decisions behind closed doors. The protection of the private interests of citizens still belongs to a liberal understanding of politics, whereas international politics increasingly moves away from this and become private as well.”⁴⁴⁶ De-politicization is seen as an exclusion of the public sphere from transnational law-making. This is problematic as it is the citizens that ultimately have to bear the undesired consequences of this decision-making process. According to Kreide, politics has lost its anchor in the national society and now serves the global economy instead.⁴⁴⁷

In order to address these power issues a re-politicization or ‘re-embedding’ is suggested.⁴⁴⁸ For the FSB this could be important in the context of the crisis management groups. Measures could be conceived that prevent the de-nationalization of the state agencies of home or host jurisdictions. Again, accountability measures according to GAL could provide a way forward, for the re-politicization of crisis management groups.

4.4. **Bi-polar approaches to the values of transnational law**

With regard to the values of transnational law, dependent and independent considerations of market and social interests compete in legal thinking. Dependent approaches consider social interests as [contingent](#) on market interest. Independent approaches look at both, market and social interests [separately](#) from each other.

Dependent approaches focus on market imperfections and suggest ways in which transnational law, private regulation or private law beyond the state in particular, can support the market functioning. Independent approaches, are preoccupied with social policy goals and suggest ways in which transnational law can protect these goals from the market, either by forwarding ideals of justice [as](#) in normative constitutionalism or by advocating the

⁴⁴⁶ Kreide Regina, “Re-embedding the Market through Law? The Ambivalence of Juridification in the International Context”, in Joerges Christian and Falke Josef (eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011, p. 47.

⁴⁴⁷ Kreide, 2011, p. 47.

⁴⁴⁸ Different takes on ‘embedding’ and ‘reembedding’ in the transnational context are brought together in Joerges Christian and Falke Josef (eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011.

independence of social and market interests, as in approaches of transnational law inspired by sociology and law.⁴⁴⁹

In the context of the FSB initiatives on the resolution of large financial institutions, the FSB approach of ‘preparedness’ illustrates a dependent approach. On the other hand, proposals for a global Volker rule⁴⁵⁰ or a global resolution authority follow independent approaches.

4.4.1. Dependent consideration of social and market interests approaches

Approaches considering social interests as dependent on market interests share a focus on markets and ways in which transnational law can enhance their functioning through market discipline and incentives. Chapter 2, the FSB ‘preparedness’ focus for national resolution authorities was forwarded as an example of a dependent approach. In the context of transnational law, the FSB also relies on ‘preparedness’ and the dependent consideration of social interests on market interests. From this perspective recovery and resolution plans are seen to enhance transparency and thereby increase market discipline.

‘Preparedness’ is also [considered in relation](#) to G-SIFIs and transnational law the preferred option of FSB. Preparedness means the organization and preparation of structures that will allow cooperation between jurisdictions in case a large financial institution faces difficulties. It resonates with the ‘problem-solving’ approach of performance-based notions of legitimacy. While the formation of resolution authorities seems to be a market intrusive approach, their impact is limited to being prepared.

Furthermore, the strong emphasize on information sharing and transparency aims at coming to terms with market imperfection.⁴⁵¹ This has been discussed in the context of GAL but also applies to other approaches of global governance.⁴⁵² Recovery plans are for instance intended to include “(i) credible options to cope with a range of scenarios including both idiosyncratic and market wide stress; (ii) scenarios that address capital shortfalls and liquidity pressures;

⁴⁴⁹ Frerichs Sabine, “Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law”, in Joerges Christian and Falke Josef (eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011.

⁴⁵⁰ The difficulties thereof are discussed Lavelle Kathryn C., “Implementing the Volker Rule in national and international politics”, in Porter Tony, (ed.), “Transnational Financial Regulation after the Crisis”, Routledge, New York, 2014.

⁴⁵¹ Schwarcz Steven L., “Controlling Financial Chaos: The Power and Limits of Law”, in the Wisconsin Law Review, 2012, pp. 815-840

⁴⁵² Riles, 2013, p. 97.

and (iii) processes to ensure timely implementation of recovery options in a range of stress situations.”⁴⁵³

Other than in preparing market participants, the dependent approach is also apparent in the notion of ‘protection’ that is forwarded with regard to resolution plans. Within the preparedness approach of the FSB to GSIFIs, evidence of independent approach is limited to the notion that resolution plans should help identify “(v) actions to protect insured depositors and insurance policy holder and ensure the rapid return of segregated client assets.” The protection of social interests is hence limited to the interests of depositors and insurance holders.

The dependent approach is also apparent in the choice of ‘preparedness’ over other options that are seen to be harmful to the market and therefore also undesirable from a social perspective.

4.4.2. Independent consideration of social and market interests approaches

The approach of independent consideration of social and market interests in transnational law focuses [on](#) the role of transnational law in protecting social interests from the market. The aim can be the protection of national social interests – such as the prevention of taxpayer bailouts- or the protection of global social interests. Approaches suggest [either the imposition of limits on](#) the market or the shielding of social interest from it. Many global governance approaches forward ideals that should be protected in transnational law. Approaches of law and sociology on the other hand, base their reasoning for the protection of social interest on the notion of interdependence.⁴⁵⁴

Global governance approaches that were focused on justice or similar ideals found plenty of examples in the G20 declarations. The aim of the G20 in London was “To launch a framework that lays out the policies and the way we act together to generate strong, sustainable and balanced global growth.”⁴⁵⁵ This spirit that is also applied to the domain of financial regulation more specifically: “We will take action to build a stronger, more globally consistent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens.”⁴⁵⁶

⁴⁵³ FSB, Key Attributes 2013, 11, 11.5.

⁴⁵⁴ Frerich, 2011, p. 67.

⁴⁵⁵ G 20, London Declaration, 2009.

⁴⁵⁶ G 20, London Declaration, 2009.

In the context of the FSB, the idea of resolvability entails protection of taxpayers.⁴⁵⁷ However, according to the independent approach this is limited as for instance RRP's 'should make no assumption that taxpayers' funds can be relied on to resolve a firm.' To the dependent approach this is not enough. From the notion of interdependence the idea of a mutual dependence of the functioning of the market and a flourishing of society is derived.⁴⁵⁸

With regard to the protection of national social interests, proposals have been forwarded to include market-limiting measures in the development of the international standards on large financial regulation. There have been such proposals with regard to the Volcker rule.⁴⁵⁹ Also product limitations have been discussed in the context of transnational law. This option has not only been discussed in academia, but "even some prominent market participants such as former Citigroup CEO John Reed and former Citigroup Chairman and CEO Sanford Weill, have questioned whether the increasingly large size of financial conglomerates contributes to wider economic welfare to a degree that is proportionate to the externalities they impose on the global economy."⁴⁶⁰

Approaches calling for the protection of global social interests have been limited to coupling global financial stability to goals like development and equality. Other approaches, originating from the contexts of sociology and law, emphasize the interdependence of social and market goals and urge interdependent consideration. The markets are seen as dependent on the protection of social interest, as otherwise their destructive force undermines the creation of wealth as well as their own functioning.

4.5. Bi-polar approaches to the governance of transnational law

Bi-polar thinking about the governance structure of transnational law opposes assimilated to dis-integrated visions. Assimilation approaches emphasize the importance of unifying

⁴⁵⁷ The resolution plan should facilitate the effective use of the resolution authority's powers with the aim of making feasible the resolution of any firm without severe systemic disruption and without exposing taxpayers to loss while protecting systemically important functions. FSB, Key Attributes 2013, Annex I, I.9.

⁴⁵⁸ This connection is made by many critical legal perspectives for two interesting yet different examples consult for instance Schapiro Mario G. and Coutinho Diogo R., "Political Economy and Economic Law in Brazil: From Import Substitution to the Challenges of the New State Activism", and Stone Katherine VW., "Globalisation and the Middle Class", both in De Burca Grainne, Kilpatrick Claire and Scott Joanne, (eds.), "Critical Legal Perspective on Global Governance", Hart Publishing, Oxford, 2014.

⁴⁵⁹ Volcker Paul, "Financial Reforms to End Government Bailouts as We Know Them", in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009, p. 16.

⁴⁶⁰ Riles, 2013, p. 70.

governance structures across sectorial or national borders according to the challenge of transnationalization at hand. Dis-integrated approaches imagine a global system of checks and balances like certain approaches of analogical constitutionalism. Alternatively, when focusing on single regulatory entities, they emphasize the dis-integration within them often arguing in favor of the persistence of the national transnational divide. Both categories of approaches, assimilated and dis-integrated forward arguments about network structures that seem to not fit the bi-polar categories.

The so-called crisis management groups (CMG or colleges), and the increased collaboration along corporate lines that they aim to achieve can be seen as an illustration of the assimilated approaches that focus on regulatory regimes. The vision of a global system is reflected in the context of resolution authorities by approaches that forward ideas of a global centralized resolution authority as part of a global system of governance. Approaches for which the governance of transnational law remains dis-integrated, insist on the importance of the inter-state agreements on which CMGs depend and the importance of national judicial systems in resolutions of large financial firms.

Network structures, according to GAL, could allow both, for instance through the communication between courts and CMGs.

4.5.1. Assimilated governance approaches

Approaches focusing on assimilated governance structure in transnational law are based on the idea that in the absence of state borders, transnational law should be developed or develops according to the transnational challenge at hand.⁴⁶¹ This is the idea of functional integration and leads to the developments of ‘regimes’⁴⁶² or ‘systems.’⁴⁶³

The challenge of large global institutions that are at risk of failure has been perceived as crossing sectorial and national [boundaries](#). Assimilated approaches show these entities as disregarding national – potentially also sectorial – limitations, thereby asking for host and home state coordination and possibly [the](#) institutionalization of this coordination. Finally, it is hoped to overcome sectorial boundaries more easily than on the national level.

⁴⁶¹ For example in Kern Alexander, Dhumale Rahul, Eatwell John, (eds.), „Global Governance of Financial Systems“, Oxford University Press, Oxford, 2006.

⁴⁶² Abott und Snidal, 2009.

⁴⁶³ Most obviously of course Teubner, 2003 and 2011.

The approaches that theorize at the regime level see a ‘functional integration’ that forms ‘silos’⁴⁶⁴ spanning across national and transnational levels. Functional integration is important in private regulation⁴⁶⁵ and standardization but also more general global legal pluralism⁴⁶⁶ and system theory.⁴⁶⁷ Crisis Management Groups (CMG) can arguably be seen as an example of functional integration along corporate lines. However, when looking at the ways in which CMGs are linked to other institutions the distinction between assimilation and dis-integration becomes less clear. They are at the same time cross-border and open for inputs by other members of the FSB. CMGs have now been put together for all qualified G-SIFIs, producing protocols for information sharing in time of crisis and building relationships between regulators. They hence combines a realistic – problem focused – approach with a social approach implying that “personal relationships are as significant a source of regulatory stability and strength as, for example, sanctions against governments for failure to share information.”⁴⁶⁸ Again, GAL accounts s for the assimilated governance structure while not disregarding their interconnection.

4.5.2. Dis-integrated governance approaches

Approaches of dis-integrated governance portray assimilation either as undesirable or impossible. Assimilation is undesirable for approaches that value a system of checks and balances like global constitutionalism and it is impossible for pluralists because of the political reality that makes governance structures reflect power structures, or the persistence of national vetoes on transnational law.

Approaches that view assimilation as undesirable put forward an ideal of a global system of checks and balances. Global financial market supervision has been portrayed as one global system.⁴⁶⁹ The FSB might be used as one institution in such a project. It includes 24 member jurisdictions plus the Bank of International Settlements, the World Bank, the International Monetary Fund, the Organization for Economic Cooperation and Development (OECD) the

⁴⁶⁴ I have learned to use this term in a seminar on transnational law by Hans Micklitz and Dennis Patterson at the European University Institute in Florence in the fall of 2012.

⁴⁶⁵ Examples of such function ‘regimes’ are for instance provided by Bernstein Lisa, “Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry”, in the *Journal of Legal Studies*, Vol. 31, No. 1, 1992, pp. 115-175, Gulbrandsen Lars, H., “Private and Public Governance Interactions: State Influences in Forest and Fisheries Certification Programs”, Draft Paper for Workshop on Transnational Business Governance Interactions, EUI, May, 2011. McMillan John and Woodruff Christopher, “Private Order Under Dysfunctional Public Order”, in the *Michigan Law Review*, Vol. 98, 1999-2000, pp. 2421-2485 and many others.

⁴⁶⁶ Krisch 2009 and 2010.

⁴⁶⁷ For an overview on System Theory: Glinski, 2011, p. 79.

⁴⁶⁸ Riles, 2013, p.80.

⁴⁶⁹ Alexander, Dhumale and Eatwell, 2006.

Basel Committee on Banking Supervision (BCBS), the Committee on the Global Financial System the International Accounting Standards Board (IASB), the International Association of Insurance Supervisors (IAIS), the International Organization of Securities Commissions (IOSCO) and the committee on payment and settlements systems.

Approaches focusing on power see disintegration as a condition that cannot be overcome.⁴⁷⁰ Dis-integration through power can follow national borders as suggested by authors emphasizing the persistent importance of nation states. It can also reflect private power either in respect to state power or in respect to other private power. With regard to resolution authorities, legal analysis has mainly focused on the role of national courts. While the FSB Attributes aim to overcome judicial conflict, their success in this area is so far limited.⁴⁷¹

The Attributes prescribe that home and host states must address the legal and operational impediments to cross-border implementation of resolution actions. Furthermore, both have to make commitments that specify legal and operational procedures for implementing resolution strategies in a cross-border context. These include for example:

“(i) Procedural requirements and conditions for (a) recognition of the transfer to a bridge or third party purchaser of assets and liabilities relating to branches of the failed firm in the host jurisdiction; (b) recognition of the transfer to a bridge or third party purchaser of assets or shares of majority or wholly owned subsidiaries in the host jurisdiction; and (c) execution of a bail-in within resolution;

(ii) Identification of types of financial contracts and assets that cannot be transferred with legal certainty (for example, contracts governed by the law of a jurisdiction where the firm does not have a physical presence) and implications for the successful application of the resolution tool;”⁴⁷²

If taken seriously, these commitments narrow the possibilities for legal redress in national law and the resolution regimes for national SIFIs. Such limits are justified according to the Key Attributes as “the effectiveness of institution-specific cooperation agreements hinges on the home and host authorities having the necessary resolution powers in relation to the firms’ operation, including the branch operation of a foreign firm.”⁴⁷³ However, progress in these fields has been limited and as dis-integration approaches suggest, remains unlikely. In the

⁴⁷⁰ Koskonnimeei and Leino, 2002, p. 554.

⁴⁷¹ FSB, Peer Review Report, 2013, p. 29.

⁴⁷² FSB, Key Attributes, KA 7.2.

⁴⁷³ FSB, Key Attributes, Annex I, p. 20.

moment of resolution, it is likely that national interests within each state will prevail and influence the course of action.⁴⁷⁴

With regard to this national bias of courts, it has been suggested that an awareness or understanding for the common difficulties can be developed through the fostering of interactions amongst courts. Tuori for instance suggests that the common practice of transnational law will provide ways of overcoming conflict.⁴⁷⁵ Slaughter has developed a theory on networks among courts within which attitudes other than the national can be developed to common problems.⁴⁷⁶ Ladeur's approach combines the self-administering tendency of GAL with network structures. According to him the evolution of national and transnational administrative law allows for a heterarchical form of accountability and legitimation,⁴⁷⁷ potentially allowing for the combination of assimilated and dis-integrated governance structures.

4.6. **Bi-polar approaches to the polity of transnational law**

Non-state and state arguments oppose supranational and national conceptions of the polity of transnational law. Supranational approaches propose a form of [polity](#) for transnational law that is different from the national one. Often, the polity is functionally defined either a global polity developing in the face of a global challenge or a partial one in view of a specific challenge. National approaches forward a national conception based on sameness or identity and on these grounds support the fostering of these elements on the supranational level, rejecting the possibility of a supranational polity altogether or insisting on the priority [of](#) the national polity.

In the context of the FSB, supranational approaches point to the global interest of [the](#) financial stability of the global financial market. The coordination needed between supranational standard setters as well as the dealing with systemically important financial firms that are global are forwarded as issues that concern a polity bigger than the national one. This polity can either be [partially](#) developed according to functional integration or it can be general responding to a global interest in financial stability. Nationalist approaches either reject the idea of polity for transnational law and transnational law beyond inter-governmentalism or

⁴⁷⁴ Attinger, 2011, p. 16.

⁴⁷⁵ Tuori Kaarlo, "Towards a Theory of Transnational Law", Conference Draft Paper, Helsinki, 26.08.2010.

⁴⁷⁶ Slaughter, 2005.

⁴⁷⁷ Ladeur, 2011, p. 1.

they insist on the priority of national legal orders over transnational law in the name of the national polity.

4.6.1. Supranational polity approaches

For supranational approaches transnational law develops as a reaction to the demands of a polity beyond the state. This polity can be partial, as in the context of functional integration - private regulation or more general legal pluralism – or it can be all-encompassing. The FSB's objectives are defined according to a functional but global polity. When considering the declarations of its 'mother' institution the G20, even the idea of a general global civil society to be served is apparent.

The objectives of the FSB are defined as “in the interest of global financial stability.”⁴⁷⁸ This global financial stability is widely accepted as for instance it is said that: the systemic impact assessment aim at determine the likely impact of a firm's failure and resolution on global and national financial systems and *real economies*.⁴⁷⁹ Authors disagree on the polity of regimes that develop according to functional integration. Private regulation approaches seem to disregard polities largely because participation in the regime is voluntary but binding. Approaches of private law beyond the state have been more ambitions or worried about polities. Calies and Zumbansen for instance turn to Held and integrate an idea of affectedness into their approach. Teubner has formulated the impact of functional integration on the larger public and its partial disregard for it as the dark side of functional integration.

With regard to the FSB, the crisis led to a very wide formulation regarding a possible polity for the FSB. At the London Summit the G20 declared for instance: “a crisis which has deepened since we last met, which affects the lives of women, men, and children in every country, and which all countries must join together to resolve. A global crisis requires a global solution.” In the context of the FSB, the definition of “GSIFI” supports a similar large approach: “institutions of such size, market importance, and global interconnectedness that their distress or failure would cause significant dislocation in the global financial system and adverse economic consequences across a range of countries.”⁴⁸⁰

The FSB has also been criticized in the name of supranational polities. The demonstrations spurred by the financial crisis and the high level response to it have been forwarded as

⁴⁷⁸ FSB, Charter 2012, Art. 1.

⁴⁷⁹ FSB, Key Attributes 2011, Annex II, p. 28.

⁴⁸⁰ FSB Progress Report of the FSB to the G-20, “Progress and Next Steps Towards Ending “Too-Big-To-Fail” (TBTF), 2 September 2013. p. 8.

evidence for an emerging global civil society that demands participation in transnational law-making. At the same time, these demonstrations can also be seen as addressing a national law-maker.

4.6.2. National polity approaches

National approaches insist on a polity for transnational law that is based on a polity similar to the national one. This is for instance the case in the ambitious approaches to global constitutionalism that forward an idea of world law.⁴⁸¹ Other national approaches reject the idea of a supranational polity altogether or at least support the primacy of the national polity for law-making.⁴⁸² The effects of transnational law-making are felt nationally and the social fabric on which a polity is build is limited to the national context. Cross-border initiatives are only a marginal part of the general effort of the national polity to take up transnational challenges and [are](#) mainly targeted against regulatory arbitrage.⁴⁸³

National approaches [emphasize](#) the role of the FSB in improving the national resolution authorities. With only up to 3 KAs aimed at cross-border resolutions, these approaches have strong arguments. Regarding the FSB mandate further evidence can be found as it is said that the FSB will “promote member jurisdictions” implementation of greed commitments, standards and policy recommendations through monitoring of implementation, peer review and disclosure”⁴⁸⁴

Cross-border components of resolution regimes can indeed be portrayed as secondary: The SIFI Framework sets out recommendations for improving the authorities’ ability to resolve such institutions in an orderly manner, without exposing tax-payers to loss, while maintaining continuity of their vital economic functions. This may require changes to resolution regimes and tools at national levels, and legislative changes to enable resolution authorities to coordinate in cross-border resolutions.⁴⁸⁵

In the same vein criticisms to the FSB [are also](#) voiced by groups that advocate a closure of the national regulatory system in the face of transnationalization.

⁴⁸¹ Emmerich-Fritsche, 2009.

⁴⁸² Chapter 2 of this thesis is presenting these approaches.

⁴⁸³ Attinger, 2011, p. 15.

⁴⁸⁴ FSB, Charter 2012, Art. 2 (1) (j)

⁴⁸⁵ FSB G20 Progress Report, p. 7.

4.7. **Conclusion: Mixed Approaches to Legality, Politics and Governance but persisting bi-polarity in the other parameters**

With regard to transnational law the framework has facilitated [a](#) distinction between approaches that follow the non-state/state distinction and approaches that in some instances succeed in overcoming it. GAL appears to be one of these approaches as it [mixes](#) elements [and manages to](#) find compromises between private regulation and global constitutionalism. Similar to the debate in European law, overcoming bi-polarity seems easier in parameters of legality, politics and governance than in legitimacy, values and polity.

Global administrative law, as one of the mixed approaches is [a](#) more promising [means](#) to overcome non-state/state tensions. Its procedural starting point in combination with the ambition to improve law-making through administrative principles leads to a compromise between procedural and formal legality. Similarly, it supports technocratic governance as well as [allowing](#) for participation, thereby providing for a possible compromise between depoliticization and politicization. Finally, through network structures, GAL [combines](#) assimilated and dis-integrated governance structures. Yet GAL does not provide any satisfactory answers to questions of legitimacy, values and polity. The analysis has shown that GAL again attempts to produce compromises, yet in these parameters they remain mere ‘piecemeal improvements.’ On the other hand, the approach to transnational law at the end of the spectrum -global constitutionalism and private regulation- reproduced [the non-state/state tension in each](#) parameter of law.

On this basis Chapter 5 will [outline](#) a way of structuring the transnational law approaches according to bi-polarity: approaches that focus on law-making can overcome bi-polarity in legality, politics and governance. Approaches that provide answers on the legitimacy, values and polity of transnational law re-produce bi-polarity.

5. Conclusions from the framework: a plea for an approach to transnational law beyond bi-polarity

This concluding Chapter will put one interpretation of the bi-polar analysis of law and transnationalization forward and develop its own starting point to think about transnational law. The outcome from the analysis is that transnational law remains ultimately limited by bi-polarity. Hence, I will conclude with a plea for an approach to transnational law beyond bi-polarity.

The call to overcome bi-polarity is based on the analysis in this thesis so far. While the distinction is to a certain extent artificial, I will present the different insights according to Chapter 2, 3 and 4, differentiation between the legal contexts of law and transnationalization. From Chapter 2 and the analysis in national law I will draw evidence for the predominance of bi-polarity in legal thinking and link it to the importance of state institutions in law. Bi-polarity in legal thinking will be portrayed as a consequence or symptom of the co-existence of organizational ideals in legal thinking, inherited according to Kennedy, from two past globalizations of legal thought. This co-existence of organizational principles makes law dependent on a managerial effort that is provided by state institutions, such as the courts. With the analysis of the first Chapter, bi-polarity therefore becomes an index of the dependence of law on the state and hence allows us to formulate the challenge of transnational law as overcoming bi-polarity.

By suggesting that there is a difference between the six parameters of law, European law will be presented as taking up an intermediate position between national law and transnational law. In the parameters of legality, politics and governance, a management between the organizational principles can be achieved and bi-polarity can be overcome in European law-making. On the other hand, in the parameters of legitimacy, values and polity, the limitations of European law as a model for transnational law become apparent, as bi-polarity cannot be overcome and the management between organizational principles depends on European institutions like the European Court of Justice.

Finally, in the context of transnational law this distinction between management through law-making and persisting co-existence between organization principles, allows one to distinguish between the approaches of transnational law. Approaches like GAL focus on law-making and hence the parameters of legality, politics and governance. They overcome bi-polarity and

reach beyond the state. However, this focus on law making limits them regarding the parameters of legitimacy, values and polity. There they ultimately lean again towards the creation of state-like institutions such as conflict resolution mechanisms and such as proposals of the legalization of global governance.

On the other hand, approaches that legitimacy, values and polities beyond the state, forward proposals of a law beyond the state, yet remain as such also always attackable. System theory forwards a position on legitimacy, by suggesting that in a world of functionally integrated systems, the common understanding of legitimacy will be limited to a normative horizon, thereby forwarding a thin notion of legitimacy for transnational law. Similarly, private regulation takes a stance with regard to the values of transnational law; the values are market dependent visions of social interests. Finally, global constitutionalism takes a stance with regard to the polity of transnational law.

However the ‘stances’ these approaches take are not definite. The choice between a bottom-up or top-down perspective that they make haunts them and the bi-polar tension re-appears. Global constitutionalism cannot accommodate the pluralism that exists beyond the state. System theory risks to betraying its own premises when attempting to conceptualize the relationship of the system to its environment, and private regulation struggles to account for cooperation that is not guided by interests. In the part on transnational law, this argument will be sustained with reference to system theory. Ultimately, the contention of this thesis is that transnational law has to address bi-polarity. Arguing on either side just reinforces the tension and makes law ultimately dependent on an external management effort by institutions.

5.1. National law: Bi-polarity and dependence on state institutions

Bi-polar arguments compete in almost all parameters of national law. I am presenting this persistence of bi-polar arguments as a symptom of what Kennedy in his “Three Globalizations of Legal Thought” termed ‘the co-existence of organizational principles’.⁴⁸⁶ The difficulty that became apparent in the parameter of values hence has deeper consequences as the co-existence of organizational principles means that legal thinking is dominated by two competing rationales that once. While each in its time provided guidance to legal thinking,

⁴⁸⁶ The following argumentation is inspired by Kennedy Duncan, “Three Globalizations of Law and Legal Thought: 1850-2000”, in Trubek David M. and Santos Alvaro, (eds.), “The New Law and Economic Development”, Cambridge University Press, 2006.

through their co-existence law is made dependent on state institutions. This state-dependence of legal thinking through co-existing organizational provides an important insight for the study of transnational law. Yet before discussing these insights, attention must be given to the role of courts that exemplifies this dependence. In the following, I will revisit the competing bi-polar arguments and the importance of courts in finding compromises that follows from this competition in all six parameters of law.

The important role of courts will provide the basis for the analysis of European law; that there is a difference between parameters and that in legality, politics and governance bi-polarity can be overcome, while in legitimacy, values and polity it persists. The discussion of the insights from the Chapter on European law and transnationalization will hence suggest that the compromises that law-making finds between the competing poles can remain superficial, and leaves it to the courts to strike a balance between the organizational principles. This gives judges a lot of power and hence also an exposure to the criticism of judicial activism.

5.1.1. Bi-polarity in legal thinking: the co-existence of organizational principles and transnational law

In the following I will suggest that the quite large suitability of the bi-polar framework for national and European law comes from the fact that two organizational principles co-exist in contemporary law. Kennedy demonstrates that the history of legal thought has left behind two competing normative ideals that depend on a managerial effort by the state. This has important consequences also for law in the context of transnationalization as in the absence of the state, dichotomic analysis is at risk of reproducing the competition of normative ideals. I will therefore revisit his argument and extend it to the transnational context.

Current legal thinking does not provide a final normative stand in view of the relationship between non-state trend of transnationalization and the state origin of law and instead lawmaking engages in a managing exercise that resembles “a confrontation at the level of legislation or case law between CLT and the social.”⁴⁸⁷ Financial market supervision, as an institution inherited from the times of the rise of the social can be seen as an illustration of this struggle for a pragmatic managerial effort.

The first globalization of legal thought was dominated by the formation and dissemination of CLT. Kennedy summarizes the organizational principle of this epoch as ‘the will theory’. An

⁴⁸⁷ Kennedy, 2006, p. 63.

organizational principle is understood as a logic that transcends all legal thinking of its time, a mode of thought with a conceptual vocabulary, organizational schemes, modes of reasoning and characteristics arguments.⁴⁸⁸ Kennedy does not distinguish the organizational principles by their take on a sphere beyond the state. However, attributing the approaches that embrace the non-state tendency to the will theory is justified. The “will theory” is fundamentally based on the notion that government should protect the rights of legal persons in a way to permit them realizing their own wills, restricted only by the attempt and right of others to do the same.⁴⁸⁹ This logic can surely be extended to the engagement in activities beyond the state. The individualism that provided the normative ideal of CLT, suggests embracing the non-state tendency of transnationalization and securing it as a further area in which individuals can realize their will. It is no longer protection from the state that is needed, as in the national context but the conquest of an additional space should be left to individuals so that they can realize their free will. In this sense the neoclassical rationale that is for instance apparent in private regulation can be traced back to this dichotomy.

The legal thinking of this third globalization was a counteraction, yet it could not break as fundamentally with its predecessor as the social could. It had to reconcile the call for cutting back the social for the sake of economic growth. Yet, at the same time elements inherited by the social persisted⁴⁹⁰ and with it also the need to engage with an extended range of issues and interests. Similarly, with regard to the external component, the institutions of the social are in conflict with the neoliberal support for liberalization around the globe. With regard to transnationalization, it therefore makes sense to attribute the insistence of state-like law to the era of the social. Transnationalization bears the risk of dis-embedding the social and the resistance to that implies clinging to state-like law.⁴⁹¹ The purposeful role for law goes together with high participatory standards of thick legitimacy, the independent consideration of social interests and potentially the overall need to protect national social institutions from interference. While the will theory supports the procedural legality of law in order to allow for the flexibility needed in the complex and fast evolving cross-border setting, formal legality is

⁴⁸⁸ Kennedy, 2006, p. 22.

⁴⁸⁹ Kennedy, 2006, p. 26.

⁴⁹⁰ This persistence is on one hand explained by the strong institutional component. Yet, of course ‘rights based’ legal discourse provides another important explanation. For a short overview: Kennedy, 2006, pp. 65-70.

⁴⁹¹ The terminology is taken from Polanyi Karl, “The Great Transformation”, Beacon Press, Boston, 1957. For an examples of its application to transnational law look at the various contributions in Joerges Christian and Falke Josef (eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011.

attributed to the social because it allows protecting (welfare) state institutions from these developments.

Interpretations of the financial and economic crisis of the late 2000's as a consequence of the crowding out of the social institution of deposit insurance and regulation of the financial sector by neo-classical liberalization and the shadow banking system can be seen as an illustration of the difficulties of the role of law in this managerial effort. With regard to the example of the failure of large financial institutions, the will theory would suggest leaving these institutions to themselves and their failure to bankruptcy law. The FSB approach of a resolution regime contradicts this logic and on the contrary, it gives law a purposeful role of providing for a failure that is -hopefully- less painful for society. The institution of resolution regimes can be seen as an institution of the social era, instituted as a counter reaction to the cruelty of individualism. Then while not instituted at the time, they are a consequence of the deposit insurance that was introduced after the crisis of the 1930s.⁴⁹² They are therefore part of the effort to give law its right place, as a purposive activity and regulatory mechanism⁴⁹³ and an example of the strong institutional component⁴⁹⁴ of the social.

The difficulties of handling the failure of large financial institutions can hence be put in the context of contemporary legal thinking that struggles to maintain the institutions form the social despite increasing market pressures.⁴⁹⁵ The competition of non-state and state arguments – the bi-polarity of the debate in national law – can therefore be understood in the larger context of co-existing organizational principles in contemporary legal thinking.

In the following, this struggle of contemporary legal thinking will be illustrated by revisiting the competing arguments on national law and transnationalization in the six parameters of law. It will become apparent that while compromises are found in most parameters they remain superficial and ultimately depend on a managerial effort. The importance of the courts, will support this argument. As compromises in law-making and political process remain contestable, it is left to the judges to strike a balance between co-existing organizational

⁴⁹² Alper Carl E., "Banking Act of 1933", in the *St John's Law Review*, 8, 1933-1934, pp. 193-196.

⁴⁹³ Kennedy, 2006, p. 20.

⁴⁹⁴ "There was no single endpoint toward which national regimes of positive law converged, and if, as I will suggest in a moment, we take the year 1968 as a rough marker for the demise of the social as a dominant legal consciousness, we would have to say that it had triumphed institutionally but in as many forms as there were sovereigns." Kennedy, 2006, p. 59.

⁴⁹⁵ Kennedy, 2006, p. 22.

principles. No wonder hence that they are referred to as the ‘heroes’⁴⁹⁶ of contemporary legal theory.

5.1.2. Management through state institutions: the example of courts

With regard to national law, one insight from the framework is that while there is a strong tension between both poles of bi-polar analysis in almost all parameters of law, there is also an impressive ability to deal with these tensions. In the context of academic writing, the large discussion on the public-law/private-law distinction can be seen as evidence of this ability. On a practical level, courts do have an important role in allowing law to overcome or ‘administer’ the tension that transnationalization caused throughout the parameters of law. In the following, the analysis of national law and transnationalization will be examined to find examples of such court practice.

The debate on whether to resolve large financial firms through bankruptcy law or a specific resolution process illustrates this point. As the FSB peer review report illustrates, in most countries the practical process consists of a compromise between the two that heavily relies on courts. In the following, I will look again at the different parameters of law and show how courts are important in their regard.

Legality: Bi-polar analysis of the legality of national law in the face of transnationalization has shown the struggle of legalization and codification to keep up with procedural developments as well as the limits of formal law to cope with the speed and dynamics of cross-border interaction. At the same time, law-making is surprisingly capable of finding compromises in moments of conflicts between non/state and state tensions. The peer review report has for instance shown that most resolution regimes combine elements of bankruptcy law with the possibility for public interest intervention by state institutions.⁴⁹⁷ Nevertheless, the importance that is attributed to courts suggests that these compromises in law-making might be superficial. This will be further discussed in the context of European law. However, it can at least be said that in the context of national law and transnationalization courts play an

⁴⁹⁶ The terminology here is taken from Kennedy, yet a clarification and differentiation from Dworkin’s „Judge Hercules“ might be in place. While Kennedy’s terminology is similar to Dworkin’s (Kennedy refers to judges as heroes of contemporary legal thinking) the two are different in the sense that Kennedy suggests that judges are important in way of finding a compromise – that can be political – as legal thinking lacks an organizational principles and instead manages the remains of classical legal thinking and law as a purposeful endeavor in the service of society. Dworkin on the other hand, proposes the judge Hercules as the one to find ‘the right answer’

⁴⁹⁷ FSB, Peer Review Report, p. 27.

important role for the legality of law, be it only in finding the right balance between formal law and procedural law that is developed in the heat of transnational emergencies.

Legitimacy: In the parameter of legitimacy, the analysis of national law and transnationalization has shown that there is a tension between output legitimacy and input legitimacy. On one hand, the ability of parliaments or, in the of direct democracy, also the people, to grapple with, understand, and ultimately solve issues of transnationalization in a good way is in doubt. On the other hand, the profound impact that transnationalization can have on people's lives demands heightened participatory standards. As these tensions are hard to solve, courts are crucial for the safeguarding of individual rights that might risk being sacrificed in the interests of the common good. At the same time, courts might also be one of to the fora where those hurt by transnationalization can seek reparations. The analysis of resolution regimes has provided illustrations of these questions of legitimacy. On one hand they are set up in the interests of the republican common good.⁴⁹⁸ On the other hand, political processes can at all times interfere with set up bankruptcy proceedings in the name of the common good.⁴⁹⁹ Courts have in any case played an important role on one hand for the safeguarding of individual rights but also to hear claims of the injured ones.⁵⁰⁰

Politics: With regard to politics, the bi-polar analysis showed how efforts of de-politicization through technocratic governance, privatization and strong independent agencies exists in an environment where legal reform or emergency measures remain at all times possible and of course highly political. The clash between the worry of conserving the neutrality of law and the will to make law responsible for it in the face of its distributional impact is to a large part taken up by the continental public-law/private-law debate. While approaches opting for an abolition of the distinction are forwarded,⁵⁰¹ a majority of authors opts for a middle way suggesting that, even if the distinction has lost its descriptive accuracy, it can be sustained if the conceptual framework allows for a certain mutual openness.⁵⁰² The association between

⁴⁹⁸ Whytock Christopher A., "Domestic Courts and Global Governance", in the *Tulane Law Review*, Vol. 84, 2009, pp. 67-123.

⁴⁹⁹ Jackson Thomas H., "Chapter 11F: A Proposal for the Use of Bankruptcy to Resolve Financial Institutions", in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009.

⁵⁰⁰ Fussnote zum Thema Anklagen an Grossbanken

⁵⁰¹ The distinction does not exist in the same way in common law. For an introduction to this debate Michaels Ralf, „Of Islands and the Ocean: The Two Rationalities of European Private Law“, in Brownsword Roger, Micklitz Hans-W., Niglia Leone, Weatherill Stephen, (eds.), "The Foundations of European Private Law", Bloomsbury Publishing, Oxford, 2011.

⁵⁰² In her thesis for instance, Emmebegger demands mutual openness between banking supervision law and securities law in Emmenegger Susan, "Bankenorganisationsrecht als Koordinationsaufgabe. Grundlinien einer Dogmatik der Verhältnisbestimmung zwischen Aufsichtsrecht und Aktienrecht", Habilitation, 2004, available at:

state, public interest, and private actor and private interest remains at least on the theoretical level intact but depends largely on a management capacity of the state legitimized through the political process. Hoffmann-Riem forwards a functional approach, according to which the interplay of private law and public law can be understood as orders of mutual assistance (Gegenseitige Auffangordnungen).⁵⁰³ The typology of this assistance ranges from normative, institutional to judicial mechanisms. While subject to a lot of controversy, courts are given an important role in finding a working together between private law and public law.

Values: Bi-polar analysis has also shown how transnationalization emphasises the tensions between the values in national law. Enabling of markets as well as the protection of the society from them are advocated with regard to cross-border interactions. While the role of the European Court is being discussed a lot,⁵⁰⁴ other authors such as Wai, claim that the national court remains the most effective and legitimate forum of dispute settlement.⁵⁰⁵ This forum of contestation is urgently required as “contestation is needed to address governance gaps in this world where many problems are globalised but political and legal forums remain primarily situated in the nation-state, where national governments tend to be parochial in their regulatory focus, and where international institutions such as the WTO are only weakly empowered to address the full range of cross-border problems that arise in a global society.”⁵⁰⁶ This implies that their judiciary carries an important role in safeguarding these values in the application of the law.

Governance: The bi-polar analysis demonstrated that with regards to governance structure, transnationalization has led to efforts of creating assimilated governance structures that reach across sectorial and national boundaries and that are able to respond to the challenge that does not respect either boundary. The formation of crisis management colleges is just one example that has been touched upon. At the same time, it became clear that for a number of reasons that range from path dependency, worries about checks and balances and of course nationalism, dis-integration of governance in national law is bound to persist. The potential

http://www.ibr.unibe.ch/content/e8911/e9031/e9154/e9155/e9741/Emmenegger_Habil.pdf. In more general terms Cherednychenko supports the distinction in Cherednychenko Olha, “Fundamental Rights, Contract Law and the Protection of the Weaker Party”, Sellier, Munich, 2007.

⁵⁰³ Hoffmann-Riem Wolfgang und Schmidt-Assmann Eberhard, (Hrsg.) „Öffentliches Rechts und Privat Recht als gegenseitige Auffangordnungen“, Baden-Baden, 1996.

⁵⁰⁴ Micklitz Hans-W. and Reich Norbert, “The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)”, in the Common Market Law Review, 51. 2014, pp. 771-808. Dougan Michael, “Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship”, in Micklitz Hans-W. and De Witte Bruno (eds.), “The European Courts of Justice and the Autonomy of the Member State”, Intersentia, Cambridge, 2012.

⁵⁰⁵ Wai, 2008, p. 120.

⁵⁰⁶ Wai, 2008, p. 120.

of courts to function as a link between that can act in the national context with the transnational in mind that applies in the context of values is important also in the context of governance structure. Between disintegrated and assimilated governance structure networks of courts seem a promising alternative.

Polity: With regard to polity, different approaches have been forward regarding which polity shall prevail. Are there interests of a supranational polity to be followed? Or do the citizens that are strongly involved in the conduct of transnational business form a constituency that should be paid tribute in the context of national law and transnationalization? In the context of resolution authorities: how important are banks and what is their relationship to the ‘taxpayers’? These and other questions are troubling for the polity aspect of national law. Yet, as the analysis showed in Chapter 2, often these questions are not addressed in the law and it is left to courts to strike a balance. According to Attinger the crisis of the late 2000s has shown that courts often act as guardians of the interests of the national polity.⁵⁰⁷ At other times they are called upon to find the right balance between the interests of a transnational and a national polity.

Throughout the parameters of law, legal thinking in national law remains very bi-polar. At the same time, state institutions like courts are important to provide for a compromise between the non-state and state actors. This importance of courts suggests that law-making only superficially addresses the non-state/state tension and leaves the ultimate decision to courts. Transnationalization can hence be seen as an enhancement of the trend that can be observed with the co-existence of organizational principles.

5.1.3. National law: The limits of overcoming the co-existence of organizational principles in law-making and the importance of state institutions

With the analysis of national law and transnationalization I am suggesting that there is an important link between the co-existence of organizational ideals and the role state institutions like courts play in the context of transnationalization. This thought provides a bridge to the discussion of European Law. There, this link becomes even clearer; the criticism the European Court of Justice faces when applying this law suggests that the accommodation has remained superficial.

⁵⁰⁷ Attinger, 2011. P. 15

The co-existence of organizational principles, inherited from two previous globalizations of legal thinking, forces law to find a compromise. Transnationalization can be seen as an additional layer of this challenge. The organizational principles of both classical legal thinking and the social-legal aspects, entail an implication for transnationalization. Individualism can be seen to be supportive or encouraging of the non-state tendency, while the social implies a protection from this tendency and hence an inclination to the state.

Understanding transnationalization along the lines of competing organizational principles also explains the importance of courts in this context. They yet again have to strike the usual balance when organizational principles need to be administered. The incorporation of FSB Attributes into national law combines procedural and formal law-making, de-politicization as well as politicization and dis-integrated and integrated governance structure. However, ultimately a tension remains. The importance of courts and other state institutions is at the same time indicative of this tension, as it is a consequence thereof. Because the co-existence is not to be overcome, ultimately a balance needs to be struck. Striking this balance cannot be done by law itself but depends on an external decision-making that remains debatable. It is along these lines that the discussion about the role of courts in contemporary legal thinking can be explained. In the co-existence of organizational principles, their decisions ultimately strike the balance between organizational principles always at risk of blurring the line between judicial decision taking and judicial activism.

Transnationalization accentuates this difficulty; because of its complexity and speed it challenges the established role of state institutions and heightens the pressure on the legitimacy standards for this exercise. The importance of state institutions in the context of co-existing organizational principles becomes illustrative of the dependence of the law on state institutions. On a more general level, it illustrates the dependence of law on institutions and contexts for its legitimacy. This argument will be pursued in the next part on European law.

Similarly to the national context, law-making in the EU can quite well accommodate the co-existence of organizational principles. However, with regard to the other parameters, the legitimacy challenges are more accentuated. This is so, because in the European context, the dependence on institutions for accommodation is more precarious, as the European institutions themselves are less established and more vulnerable to doubts regarding their

decision. In the next part I will show how the debate on European law and transnationalization can be structured accordingly

5.2. **European law: differences between parameters**

With regard to Chapter 3 on European law, the insight is that there is a difference between parameters. While within certain parameters compromises between both poles are found, within others the debate remains bi-polar. With reference to Kennedy, I will distinguish between the parameters of legality, politics and governance that are evidencing the praxis of contemporary law-making, and legitimacy, values and polity as the theoretical backdrop that is still unsettled by the co-existence of organizational principles. In law making, bi-polarity can be overcome, yet questions of legitimacy, values and polity remain unresolved and the coexistence of organizational principles cannot be overcome.

First, the examples discussed in Chapter 3 in the parameters of legality, politics and governance will be looked at as illustrations of contemporary law-making according to Kennedy resulting from the mixture of neoformalism and policy analysis. The parameters of legality, politics and governance will illustrate the actual practice of the law of the third globalization that results from the “un-synthesized coexistence of transformed elements of CLT with transformed elements of the social.”⁵⁰⁸ The way in which the difference between organizational principles can be overcome in law-making and the self-organizational forces it hints to, will link with the discussion on Global Administrative Law and global governance in transnational law in Chapter 5.3.

Next, I will show that in the parameters of legitimacy, values and polity, the debate on European law remains still largely bipolar. These parameters reflect the theoretical backdrop of law-making that is still dominated by the co-existence of two organizational principles. As the look at Scharpf and Walkers’ approaches has suggested, a rapprochement between the poles is dependent on combinations between the national and the European level. As in the national context, the compromises between the two poles in the parameters of legitimacy, values and polity, ultimately depend on institutions; bi-polar argumentation persists and is only silenced by European political-solutions.

Ultimately, European law does not provide a blueprint for transnational law. Instead, as bi-polarity can be overcome in law-making but persists in the theoretical backdrop, the difference between parameters allows us to classify approaches to European law in four

⁵⁰⁸ Kennedy, 2006, p. 63.

categories; authors of the first category focus on law-making.⁵⁰⁹ Two and three forward non-state and state visions⁵¹⁰ of the parameters of legitimacy, values and polity and four opts for a multilevel approach.⁵¹¹

5.2.1. Legality, politics and governance: accommodation between organizational ideals in law-making

With regard to these three parameters the analysis in Chapter 3 shows that the making of European law moved beyond the bi-polar distinctions. The legality of European law combines formal as well as procedural elements. European law-making allows for de-politicization as well as politicization and its governance has the potential to integrate dis-integrated as well as assimilated governance structures.

Kennedy tries to make sense of contemporary law-making. He observes an unlikely mix between neoformalism and policy analysis that combines a mode of deduction within a system of positive law with the balancing of conflicting considerations.⁵¹²

In the following the three first parameters in European law will be looked at more closely and the developments across bi-polar categories will be interpreted as the ability within law-making to overcome the non-state/state tension by itself.

With its combination of three elements, the **legality** of European law merges procedural and formal characteristics and thereby allows for a compromise between the non-state/state tensions in this parameter of law. The elements to determine the legality of European law are a legal basis, proportionality and subsidiarity. From the outset it seems that the requirement a legal basis provides for the neoformalism while proportionality and subsidiarity are tests that come from policy analysis. Yet at the same time, the two are even more intertwined. For instance with regard to the requirement of a legal basis, the analysis in Chapter 3 has shown that even within this requirement policy analysis is relevant. Article 114 TFEU provides a justification on grounds of an approximation effect and the objective of furthering market integration. Thereby including procedural elements in the analysis of the formal requirements. The potential centralization the SRM achieves and the enhancing of the harmonization by the

⁵⁰⁹ Haas, 1961. Risse, 2005.

⁵¹⁰ Traditionally and in general, Pescatore, 1968, in legality this would be Harbo, 2010, from a values perspective the different authors in Schiek, 2013, in governance Numhauser-Henning and Roennmar, 2013, Veron, 2013.

⁵¹¹ Of course the reality is complicated by the fact that there is an important overlap of the non-state arguments and the multilevel arguments. For instance Joerges, 2013. Multilevel approaches are also a 'second-best' option for other authors, for instance Zahn, 2013 or Scharpf, 2013.

⁵¹² Kennedy, p. 63

BRRD are therefore looked at in the context of the legal basis exam.⁵¹³ Yet also with regard to the ‘procedural’ or policy analysis requirements a blurring occurs. The requirement of proportionality, from the outset a procedural requirement, puts a limit onto the consideration of functional developments, by putting them into the context of competing individual rights.⁵¹⁴ The balancing or weighing of one against the other accommodates between conflicting values and therefore also organizational principles. The functional development is hence put in context of the general framework of European Law.⁵¹⁵ While proportionality has acquired a very important place in law-making in general and also explicitly in the context of the European Union, it is suggested that the practical relevance of the subsidiarity principle never met the expectation of politicians and theorists.⁵¹⁶ However, it does add another condition as action is only justified at the Union level if it is better suited than at the national or local level. This condition hence mirrors the considerations made under the legal basis requirement. The legality of European law combines a managerial effort of proportionality and subsidiarity with the formalistic reference to a legal basis, thereby combining formal and procedural characteristics of legality.

The analysis in Chapter 3 has shown that regarding to **politics** European law-making combines politicization and de-politicization. According to Kennedy, contemporary law-making strives to combine a pragmatic approach - apparent in in the economic image of a pragmatically regulated market⁵¹⁷ – with the needs of the civil society. The European Union, on the one hand aimed at the development of an internal market, yet at the same time confronted with demands of a civil society, can be looked at as an illustration of Kennedy’s analysis. The variety of ways in which European law-making allows for de-politicization as well as politicization can be seen as an effort to satisfy the needs of a pragmatically regulated market as well as the ones of its civil society. The efforts to strengthen the independence of the European Central Bank have provided an example of de-politicization, as they limited the power of the Council. At the same time, they constitute a politicization as they involved national representatives instead of Commission bureaucrats. The example of the SRM is

⁵¹³ Zavvos and Kaltsouni, forthcoming 2015, p. 12.

⁵¹⁴ Attinger provides for an analysis of resolution form an individual rights point of view, Attinger, 2011. For a more general yet very current take on the proportionality principle refer to Reich Norbert, “How Proportionate is the Proportioianlity Principle? Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ”, in Micklitz Hans-W. and De Witte Bruno (eds.), “The European Courts of Justice and the Autonomy of the Member State”, Intersentia, Cabridge, 2012.

⁵¹⁵ Harbo, 2010, p. 158.

⁵¹⁶ In general Tridimas, 2006, for a current take on subsidiarty refer to Fabbrini and Granat, 2013, on the limits of subsidiarity refer to Davies, 2006 on proportionality refer to Lenaerts and Guterrez-Fonds 2010, Harbo, 2010.

⁵¹⁷ Kennedy, 2006, p. 21.

limited, as European law-making in other domains provides for more politicization options for the civil society. In the field of financial market regulation, these remain limited so far. However, in general, while debatable, European law-making has been opened up to civil society participation.⁵¹⁸ At the same time, bureaucratic governance has been expanded and improved as well.⁵¹⁹

Regarding the **governance structure** of European law making has a potential to integrate assimilated as well as disintegrated governance structures. The Lamfalussy procedure, developing the context of the Financial Service Action Plan, can be viewed as an illustration.⁵²⁰ It has been presented as an attempt to improve and adapt the legislative process in the EU to the fast moving, global capital markets, a multilevel legislative structure was introduced that at the same time increased the level of specialization within committees and spread out responsibility amongst them.⁵²¹ The functional assimilation has been combined with a disintegration across levels, thereby establishing fora for the exchange between Member State and the formation of (technocratic) consensus, while at the same time maintaining a system of checks and balances.⁵²² Supervision of banks long remained exempt from these efforts.⁵²³ Yet the structure of the new single resolution mechanism also combines assimilated and disintegrated governance structures, as it assimilates national representatives in its boards while at the same time, it involves different European bodies in the decision making. The executive session of the Single Resolution Board is composed by a chair and four independent full-time member.⁵²⁴ Additionally, representatives of home states, and where applicable host states, participate in concrete cases and even authorities of non-participating Member States shall be invited.⁵²⁵ At the same time, when a bank is actually placed under resolution, the ultimate appreciation of whether the resolution action is in the public interests falls to the Commission and then even to the Council.⁵²⁶

⁵¹⁸ And this trend should be furthered, Trubek and Trubek, 2005, Schiek, 2013.

⁵¹⁹ For a summary, Chapter 1 in Joerges Christian and Vos Ellen, (eds.) "EU Committees: Social Regulation, Law and Politics", Hart Publishing, Antwerpen, 1999.

⁵²⁰ Alford Duncan, "The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Ban-European Regulation?", in the Annual Review of Banking & Financial Law, Vol. 25, No. 1, 2006, pp. 389-435.

⁵²¹ Alford, 2006, p. 396.

⁵²² While they are not writing in the context of financial market regulation this ideal view of the Lamfalussy Process reflects Trubek and Trubek's view of committology, Trubek and Trubek, 2005.

⁵²³ Alford, 2006, p. 396, explaining that under the Treaty, the ECB would be allowed to take over prudential supervision of banks only after unanimous approval of Member States and the assent of the European Parliament.

⁵²⁴ Art. 53, 1 SRM Regulation

⁵²⁵ Art. 53, 1 and 3 SRM Regulation

⁵²⁶ Gandrud Christopher and Hallerberg Mark, "Who decides? Resolving failed banks in a European framework", Bruegel Policy contribution, Issue 2013/16, 29.11.2013. p.8.

In the parameters of legality, politics and governance, European law moved beyond the bi-polar discussion. In various ways, the opposing poles of the non-state/state tension have been integrated and combined within law-making. However, in the parameters of legitimacy, values and polity, similar combinations have not been developed. Instead the law-making parameters are charged to stretch towards providing solutions also for the parameters of legitimacy, values and polity. Harbo for instance suggests that with the proportionality principle allows to combine the “liberal rights-based constitutional rationality with a strong commitment to a welfare state.”⁵²⁷ Yet, such stretching is not enough to address the questions of the parameters of legitimacy, values and polity.

The next part will summarize how in these parameters the debate remains bi-polar. Then, in conclusion on this part about European law, I will forward that because of this mismatch between a compromise in law-making but a persisting disaccord with regard to legitimacy, values and polity, European law cannot serve as a blueprint for transnational law. Instead, it reiterates the difficulty faced in national law, yet due to the weaker institutional legitimization, the tension between organizational principles appears more dramatically. However, the difference between parameters provides a way of structuring the European law debate.

5.2.2. Legitimacy, values and polity: Coexisting organizational ideals in European law and importance of European institutions

With regard to the parameters of legitimacy, values and polity, the bi-polar analysis of European law is very similar to the one in national law. The debate does not extend beyond bi-polar categories. On a theoretical level, the only rapprochement between the poles is achieved through multilevel arguments, for instance Scharpf’s legitimacy intermediation.⁵²⁸ Otherwise a part of the non-state/state tension is bound to remain, as seen with Walker’s notion of polity legitimacy that ultimately depends on the definition of the European polity somewhere between non-state and state.⁵²⁹ On a practical level, institutions, in this case the European Court of Justice, are therefore important as they ultimately decide between co-existing organizational principles. The analysis of Kennedy still applies; also in European law, the remains of classical legal thinking are competing with the social. The struggle of the

⁵²⁷ Harbo, 2013, p. 158.

⁵²⁸ Scharpf, 2009.

⁵²⁹ Walker, 2001.

national courts in striking a balance between the formalistic application of law and giving law a purposeful social policy interpretation applies to the European Court of Justice as well. The Court is of course, first and foremost operating in a vertical tension, the one between the European level and the national level. Yet, as the extent of the competences of the EU is bound to a market integrating logic, the tension between Union and member state at least partly reproduces the tension between the organizational principles inherited from the area of classical legal thinking and the social. Multilevel arguments can attempt to take on this tension, and thereby constitute one of the categories of European legal thinking that I will forward in conclusion.

The debate on the legitimacy of European law is split into thin approaches and thick approaches; combinations of the two are limited to multilevel arguments. The same is true in the parameters of values and polity. There are either state-like visions of European law forwarded or non-state visions. Compromises combine the two levels, and thereby do not in fact overcome the non-state/state distinction.

With regard to **legitimacy**, Scharpf and Walker, are two of the leading authors that will be discussed here. On a very simplified level it can be said that they are either relying on ideas of a division of labour between the European level and the Member State level (Scharpf and Walker) or at the end of the day remain stuck with the non-state/state tension (Walker). Scharpf forwards the idea of a legitimacy intermediation in a multilevel European polity. According to him, the lack of republican legitimacy on European level has to be made up for at the national level. Legitimacy intermediation works through a two-step compliance between the Member State level and a European level. If these legitimating relationships are cut or undermined, the legitimacy of the Union is at peril.⁵³⁰ From the perspective of Scharpf, the SRM is problematic – it does not entail the necessary elements for republican legitimacy, yet at the same time it undercuts the provision of legitimacy at the national level because it ties the hands of national institutions to provide for financial market supervision or resolution of financial institutions.

Walker, on the other hand, disaggregates legitimacy according to the characteristics of the political entity in question. He distinguishes between performance legitimacy, regime

⁵³⁰ Scharpf, 2012, p. 1.

legitimacy⁵³¹ and polity legitimacy. His approach is multilevel in the sense that he attributes performance and regime legitimacy to the European Union, yet it faces more difficulty with regard to the polity legitimacy. He holds that it will depend on the definition of the European Polity itself. In these ‘deep waters’ he observes that it is “far easier and far less controversial to conceive of the EU in terms of what it is not rather than what it is.”⁵³² The non-state/state tension is hence just shifted from the parameter of legitimacy to the one of polity. For the polity - similarly suffering from the impossibility to overcome the non-state/state tension – Walker disaggregates the idea of a ‘political community’. He proposes for ‘political’ a measure of autonomous political authority and for ‘community’ a social dimension, sense of “belonging to” and “identification with.”⁵³³ The polity remains a matter of degree not able to quiet “skeptical questions, most forcefully put by state constitutionalists in legal discourse and by liberal integovernmentalists in international relations,”⁵³⁴ hence not overcoming the non-state/state tension.

The tension with regard to **polities** is illustrated in the context of the SRM. On one hand the BRRD is directed at the national resolution regimes, hence implying a national notion of polity. On the other hand, the BRRD as well as the SRM are steps towards a banking union that should benefit the taxpayers in Europe. However, as there is not tax Union, there is no such thing like a polity of taxpayers. Such a polity would depend on the strengthening of a political union.⁵³⁵

It is beyond doubt that Scharpf and Walker’s approaches are very important. It is probable that the legitimacy of European law, as well as transnational law ultimately, has to rely on a division of labour with the national level or that it cannot be conceived of differently from on a spectrum.⁵³⁶ However, for the legal thinking on legitimacy, multilevel approaches do not solve the tension between non-state and state, much like courts that manage or administrate it.

This becomes very clear in the parameter of **values**. In the context of the general principles of European law but also according to its own principles, the SRM shall respect individual

⁵³¹ According to Walker this refers to the “overall institutional framework through which the entity in question is constituted and regulated.” Walker, 2001, p. 9.

⁵³² Walker, 2001, p. 10.

⁵³³ Walker, 2001, p. 11.

⁵³⁴ Walker, 2001, p. 11.

⁵³⁵ Schiek’s introduction in Schiek, 2013.

⁵³⁶ After all, spectra are what is suggested in this thesis as well.

rights⁵³⁷ and with reference to taxpayers,⁵³⁸ public funds,⁵³⁹ depositors,⁵⁴⁰ social interests. However, as discussed in the context of legality, the justification of the SRM itself is based on its contribution to market integration. This tension persists and it will ultimately be left to the ECJ to strike a balance.⁵⁴¹ While for the SRM not yet⁵⁴² relevant, the debate on judicial activism of the European Court of justice illustrates that these difficulties are tied to the co-existence of organizational ideals.⁵⁴³ The interpretations of European law by the Court are at the same time crucial in the making of European law and harshly criticized. What is the role of the Court? Should the Court give predominance to the freedoms? Or protect the national welfare systems?⁵⁴⁴ Or advance social protections by itself?⁵⁴⁵ The debate remains bipolar because it is left to the judge to ultimately strike the balance between the two. Similarly to national law, the “hero figure of the third globalization is unmistakably the judge who brings either policy analysis or neoformalism to bear.”⁵⁴⁶ According to Kennedy, the European Court of Justice is neoformalist in its interpretation of the freedoms of movement while operating in a system of pre-established social institutions.⁵⁴⁷ Therefore, the judge is not only a hero but “must answer the charge that s/he is a usurper, doing “politics by other means.””⁵⁴⁸ Similarly to the national context, the challenge to which judges are exposed illustrates the limits of the compromise that is found in law-making. While the processes overcome bi-polarity, the compromises they reach are not beyond doubt. Their application is difficult and often requires an additional balance to be struck. Arguments about too much or not enough judicial activism by judges, evidence doubts with regards to the balance that is struck. Like in the national context, the verdict of the Court regarding the balance will depend on the institution or its context to convey additional legitimacy on it. The European Court of Justice faces from some authors the criticism not to do enough for the protection of social interests and from other it

⁵³⁷ Recital 62 refers to the proportionality principle with regards to infringements of property rights, Recital 78 refers to the ‘no creditor worse off’ principle as does Art. 20, SRM Regulation.

⁵³⁸ Recital 62, SRM Regulation.

⁵³⁹ Art. 14 (2) (c), SRM Regulation.

⁵⁴⁰ For instance Art. 14 (2) (d) and Art. 79, SRM Regulation.

⁵⁴¹ Zuleeg Fabian and Martens Hans, 2009, „Beyond the current crisis: How should Europe deal with the government deficits and public debt in future“ in Secchi Carlo and Villafranca Antonio, (eds.), „Liberalism in Crisis? European Economic Governance in a Time of Crisis“, Edward Elgar, Cheltenham, 2009.

⁵⁴² Attinger provides an illustration of the questions that could arise from the SRM. Attinger 2011 and Schäuble warns that the RSM will provoke legal challenges, Schäuble, 2013.

⁵⁴³ In general Grimmel investigates the difference between judicial interpretation and judicial activism in the context of the ECJ, Grimmel 2012, Harbo, 2013, shows the power the proportionality principle can have in the development of European law. Sauter asks the question regarding the place of balancing in the practice of the Court, Sauter, 2013.

⁵⁴⁴ Joerges and Roedel, 2004.

⁵⁴⁵ Schiek, 2013, p. 14. Trubek and Trubek, 2005.

⁵⁴⁶ Kennedy, 2006, p. 65.

⁵⁴⁷ Kennedy, 2006, p. 69.

⁵⁴⁸ Kennedy, 2006, p. 71.

faces the criticism that it limits economic freedom and stretches its competences through rulings that protect social interests. Ultimately, the Court remains vulnerable to both criticisms, and the debate reflects the co-existence of organizational principles.

Structuring the debate on European law and transnationalization into bi-polar categories shows that there is a difference between parameters. In legality, politics and governance, European law-making has led to compromises and developments that overcome the non-state/state tension. In the parameters of legitimacy, values and polity, the tension persists and the outcomes depend on European institutions. In the next part, I will argue that because of this mismatch between law-making and its theoretical backdrop, European Law cannot serve as a blueprint for transnational law.

5.2.3. European law: No blueprint for Transnational Law

According to this thesis, European law is not a blueprint for transnational law. It is rather an illustration of the tension between the developments that are possible in the context of law-making and the persistence of bi-polarity in the context of the theoretical backdrop of law-making. In the context of co-existing organizational principles, law on the national as well as on the European level depends ultimately on the legitimacy that is conveyed on it through other institutions. The bi-polar analysis of European law hence did not provide a model for transnational law but instead a way of structuring the debate on European law according to the meaning that is attributed to the difference between law-making beyond bi-polarity and persisting co-existing organizational principles. Four approaches can be distinguished; the two reproduce bi-polarity as they take either state or non-state stances towards the European Union. The latter two overcome bi-polarity either by focusing on law-making only or by introducing multilevel arguments.

The first category entails the approaches that support the overcoming of bi-polarity also with regard to the theoretical backdrop. To these approaches, Europe should⁵⁴⁹ progress in a state-like fashion; aiming at thick legitimacy, developing a court that is also a social court and becoming a political Union.⁵⁵⁰ They forward a statist ideal for the European Union. These are the approaches that have forwarded in Chapter 3, the importance of the independent consideration of social interests and the development of a European polity that will be based on identity similar to what currently exists at the national level. It is an evolving approach that

⁵⁴⁹ Or is assumed to do so, Haas, 1961.

⁵⁵⁰ Contributions by Zahn, Schiek and others demand for such development, Schiek 2013.

believe in the development of state-like entities. It can for instance build on the vision of a Union that provides for welfare that creates a loyalty, and an ultimately a sense of belonging. The current imbalance or tension is just a sign of the institutional context that has not yet developed far enough. For such approaches, the Single Resolution Mechanism is just a development in this direction and will have to be accompanied by a unified tax-system, a pension model and ultimately a political union. It might not be legitimate at the moment, yet it is a transitory and necessary phase in the development towards the state of the European Union or at least a more integrated version of it that can provide for compromises between organizational ideals.

The second category of approaches takes the difficulties to overcome the bi-polarity of coexisting organizational principles on the theoretical level as an indication for the impossibility of the European model. The accommodation that is achieved in law-making is superficial and illegitimate; law-making processes have sidelined legitimacy, values and polity questions. The difference between parameters illustrates this mismatch and urges for a return to the national level. Instead of developing a state-like Union, the Union should be dismantled and reduced to a solely international treaty that aims at reducing transaction costs and remains within the confines where compromises between coexisting organizational principles can be provided through national institutions. These approaches cling to the importance of the inter-state agreement for the Single Resolution Mechanism and foresee that ultimately the mechanism is bound to failure due to national interests.⁵⁵¹ Member states will oppose the gradual mutualization of funds, or they will at least continue to privilege the financial institutions that they regard as their national champions.⁵⁵²

Finally the authors in the third and fourth category of approaches to European law can be presented together. To them the difference between parameters is meaning full and either suggest focusing on law-making only or on accommodation by turning to multilevel solutions.⁵⁵³ The accommodation that happens in law-making on the European level has to be accompanied by provision of legitimacy regarding the persisting co-existence of organizational ideals. Therefore, a close link to the national level and strong national

⁵⁵¹ Veron, 2013, Cross-border Bank Resolution Group, “Report and Recommendations of the Cross-border Bank Resolution Group”, Bank of International Settlements, March 2010 strongly supports this view.

⁵⁵² Attinger, p. 12.

⁵⁵³ The crisis of the late 2000s has been forwarded by many as an illustration of this dysfunction and a call for returning to a multilevel structure, for instance in Arestis Philip, Fontana Guiseppe and Sawyer Malcom, “The Dysfunctional Nature of the Economic and Monetary Union”, in Schiek Dagmar, (ed.), “The EU Economic and Social Model in the Global Crisis”, Ashgate Publishing Limited, Farnham, 2013, Joerges, 2010, Scharpf 2012.

institutions are required to provide accommodation with regard to legitimacy, values and polity.⁵⁵⁴ This recalls the original ordo-liberal model of the EU and urges for a strict functional definition of the competences of the EU.⁵⁵⁵ Or it remains a puzzle that cannot yet be solved.⁵⁵⁶ In the context of the SRM it is the arguments that distinguish between the legitimacy of the single supervisory mechanism and the one of the SRM on grounds that the latter undermines the provision of legitimacy on national level.⁵⁵⁷

⁵⁵⁴ Eisenbeis Robert A. and Kaufman George G., “Cross-Border Banking: Challenges for Deposit Insurance and Financial Stability in the European Union”, Working Paper Federal Reserve Bank of Atlanta, October, 2006.

⁵⁵⁵ Joerges, 2009 and 2013.

⁵⁵⁶ Risse, 2005.

⁵⁵⁷ Scharpf, 2012, p. 1.

5.3. **Overcoming bi-polarity in law-making or choosing sides? Bi-polarity and the limits of transnational law**

In this final part, the insights to be drawn are the most debatable. After all, the question regarding the meaning of the non-state/state distinction for the study of transnational law cannot easily be solved. It is for this reason that the main contribution of this thesis is an analytical framework. Nevertheless also a theoretical argument shall be made and developed in the following. Namely, it is suggested that transnational law can address bi-polarity either by focusing on law-making *only*, or transnational law theories can forward theoretical stands with regard to legitimacy, values and polity of transnational law, yet bi-polarity will reappear in the tension between the system and its environment or the global constitution and pluralism.

The focus on law-making will be illustrated with the example of GAL. Through law-making GAL finds compromises beyond the non-state/state distinction in transnational law. Naturally, its compromises are less established than in European law-making, but parallels can nevertheless be drawn. However, at the same time, GAL is also limited to law-making and therefore to legitimization through *better* law-making. It cannot forward answers to legitimacy, values or polity by itself.

On the other hand, system theory will be forwarded as an example of the latter option of transnational law theories. System theory forwards notions of legitimacy, values and polity of transnational law. They develop from below and according to a reflexive rationality, shared by a functionally defined entity, thereby overcoming bi-polarity within the social system that develops. However, the analysis will show that while system theory addresses bi-polarity within the systems, a tension remains regarding the relation of the system to its environment. While the non-state/state tension is translated into to an environment/system tension, bi-polarity ultimately limits the analysis of transnational law.

The move beyond bi-polarity within the parameters of legality, politics and governance illustrates the potential of what I call here ‘mixed’ theories of transnational law. On the spectrum of transnational theories, these are placed between global constitutionalism and private regulation or system theory. The analysis in Chapter 4 illustrates the potential of global administrative law in overcoming bipolar categories. However, this potential remains

limited to the law-making parameters and cannot propose notions of legitimacy, values and polity beyond procedural improvement.

With regard to the theoretical backdrop – legitimacy, values and polity – system theory suggests answers. The legitimacy of a system is reflexive and provided from below. The values are defined by the rationality of the system and its polity is functionally defined like the entire system. However, in each parameter system theory also proposes a solution regarding the external face of the system, the relations with its environment. While the system is entirely independent its constitutionalization depends on the observation of other reflexive processes in other systems.⁵⁵⁸ As will be shown, this external face reintroduces bi-polar tensions.

Finally, according to this thesis bi-polarity remains a limit for transnational legal theory. Ultimately part of the challenge that courts face at the national level when faced with questions of transnationalization, and that European institutions face at the European level, and that transnational law itself cannot entirely address, have a commonality in bi-polarity. Ultimately, transnational law puts a reminder to legal theory in general that it simply has not yet addressed the question regarding the relation of its inner face to its outer face.

Spectrum of transnational theories	Legality	Legitimacy	Politics	Values	Governance	Polity
Ideal Global constitutionalism	Formal	Thick	Politicized	Independent	Dis-integrated	National
GAL	Transnational legality (ex. Regulation by information)	?	Re-politicization (ex. Feedback)	?	Integration (ex. Networks)	?
Ideal Private Regulation/ System Theory	Procedural	Thin	De-politicized	Dependent	Assimilated	Supranational

⁵⁵⁸ Constitutionalization is understood according to Teubner recently in Kjaer Poul F., Teubner Gunther and Febrajo Alberto, (eds.) “The Financial Crisis in Constitutional Perspective; The Dark Side of Functional Differentiation”, Oxford, Hart Publishing, 2011 and Teubner Gunther, and Korth Peter, “Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society”, in Young Margaret, (ed.), “Regime Interaction in International Law: Facing Fragmentation, Oxford University Press, 2010, and Fischer-Lescano Andreas and Teubner Gunther, „Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law“, in the Michigan Journal of International Law, Vol. 25, 2004, pp. 999-1046.

Chart V: Law-making theories of transnational law and theoretical backdrop theories of transnational law, the examples of GAL and System Theory

5.3.1. GAL: Overcoming bi-polarity in law-making

In the parameters of legality, politics and governance, GAL provides successful examples of overcoming bipolarity. The different ways in which GAL accommodates between the non-state and state poles, are instances of managing co-existing organizational principle within law making. With regard to the parameter of legality the focus is on regulation by information for the parameter of politics on peer review and for governance on networks.

On the basis of this observation, the categorization of transnational theories with a focus on law-making can be portrayed according to Chart V as overcoming bi-polarity in the parameters of legality, politics and governance. However, a differentiation from the analysis of European Law is in place. The way European legality not only overcame bi-polarity but transformed into a legality that has institutional and large political backing, is not copied in the transnational context. There is a similarity in how procedural elements can be supplemented with formal elements, yet the degree of legality is not the same. With regard to politicization the difference is not as clear-cut. While de-politicization is quite accentuated in transnational law – in addition to the technocratization, the privatization might further increase the distance from regulator to constituency - it can very well be that this privatization also allows for politicization.⁵⁵⁹ With regard to governance on the contrary the blurring of assimilated and disintegrated governance structure has progressed more strongly in the transnational context than in the European context. There exists an enormous variety of governance structure in transnational law.

These arguments will in the following be sustained with reference to the resolution of global financial institution from the point of view of GAL. Regulation by information will be forwarded as an illustration of procedural law-making that is complemented by formal elements, therefore showing potential to overcome bi-polarity.

5.3.1.1. Transnational legality: GAL and regulation by information

⁵⁵⁹ Freeman Jody, “The Private Role in Public Governance”, in the New York University Law Review, Vol. 75, No. 3, June 2000, Grajzl Peter and Murrell Peter, “Allocating Lawmaking Powers: Self-Regulation vs. Government Regulation”, in the Journal of Comparative Economics, 23:3, 2007, pp. 251-276.
Smith Timothy M., “Emerging Private Governance in the Global Green Technology Policy Regime”, Draft Paper for Workshop on Transnational Business Governance Interactions, EUI, May, 2011.

The production of records in transnational law has been looked at as one of the methods of legalization of transnational law. It has been argued, for instance that the publication of the rulings and justifications of alternative dispute resolution mechanism is crucial in the understanding of the difference between law and social norms.⁵⁶⁰ In the following, the information requirements of the FSB will be forwarded in a similar line of argument, suggesting that the information requirement opens the door to the introduction of formal elements into the procedural legality of FSB law-making.

GAL – through regulation by information – has therefore the potential to overcome the transnational tension between non-state and state tendencies in transnational law with regard to the parameter of legality. The formulation is chosen with prudence because of course the degree of legality and overcoming bi-polarity is a different, lesser one, than in the context of European law.

On a more general level, GAL challenges bipolarity in the parameter of legality, because it unites a procedural starting point with ambition to improve the legitimacy of transnational law. In the words of Ladeur: “Administrative law as a product of administrative experimentation ...and its judicialisation.”⁵⁶¹ This idea links back to the functionalist arguments on administrative law according to which it is “characterized by the enabling processes to cope with fundamental uncertainty and the dynamic of the self-transformation of society and to generate forms on binding them in order to allow for co-operation, co-ordination, and learning.”⁵⁶² In Chapter 4, we saw that the Basel Committee of Banking Supervision readily lends itself to an analysis of GAL. The FSB, as seen in Chapter 4, can be analyzed accordingly. From the point of view of legality, regulation of information provides an especially interesting example.

Regulation by information allows us to add formal requirements to the development of procedural law. “Regulation by information deploys certain standards of “indicators” to publicly rank or comparatively evaluate countries’ performance with respect to a predetermined global standard.”⁵⁶³ An example for such regulation by the FSB is the FSB scoreboard. This list is available on the FSB’s website and ranks countries and regulators according to their compliance with FSB’s standards. While from a governance perspective it

⁵⁶⁰ Calliess and Renner, 2009.

⁵⁶¹ Ladeur, 2011, p. 24

⁵⁶² Ladeur, 2011, p. 24.

⁵⁶³ Riles, 2013, p. 85

is argued that the majority of prominent indicators in global governance appear to operate in even more diffuse ways, by influencing profession, public and political opinion in new directions.⁵⁶⁴ Other indicators provide bases for awarding benefits and penalties. Regulation through information hence allows not only for the development of best practices but also documents this development and its result. In this way, regulation by information offers a way toward bridging between the procedural and the formal quality of transnational law.

A wide range of examples of GAL that bring the procedural nature of transitional law closer to formal requirements has been studied. The disclosure of information⁵⁶⁵, a duty to provide reasons⁵⁶⁶, principles like reasonableness and proportionality⁵⁶⁷ and alternative dispute resolution⁵⁶⁸ are just some examples.

5.3.1.2. *Re-politicization in transnational law: GAL and peer review*

While of course lending itself very well at a de-politicization approach, the importance of technocratic or private law-making in transnational law is seen at the same time as offering possibilities of politicization of transnational law. These arguments focus on the potential of technocratic or private law-making to enhance or at least allow or participation from the affected constituencies. In the context of the FSB, the peer review procedure can be looked at from this point of view. The peer review process is a technocratic one. However, the feedback it entails opens the door to politicization through the reporting of not only technical difficulties but also feedback on the reception of regulation and its implication for the public. GAL therefore offers a way of thinking about overcoming the tension between a de-politicized technocratic transnational law making and the politicization thereof.

Governance by information does not only allow for the sanctioning of transnational law, it also offers the possibility to install feedback mechanisms. Peer review is often forwarded as a

⁵⁶⁴ Davis Kevin, Kingsburry Benedict and Merry Sally Engle, "Indicators as a Technology of Global Governance", NYU Law and Economics Research Paper, No. 10-13, 2010, p. 20.

⁵⁶⁵ De Bellis, Maurizia, "The Disclosure of Information: Anti-Dumping Duties and the WTO System" in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

⁵⁶⁶ De Bellis Maurizia, "A Duty to Provide Reasons: Definitive Safeguards on Imports of Certain Steel Products", in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

⁵⁶⁷ Macchia Marco, "Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations", in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

⁵⁶⁸ Calliess and Zumbansen, 2010 and also Carotti, Bruno, "Alternative Dispute Resolution: The ICANN's Uniform Dispute Resolution Policy (UDRP)" in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

superior mechanism of accountability to electoral accountability because of its ability to develop with the regulation process and allow feedback about it, hence constantly evolving with it.

It is argued that peer review provides for better popular accountability than the traditional formal “principal-agent” model of democratic accountability (in which elected “agents” are accountable through elections to the public as a “principle”) because the deliberative process entailed in peer review – what they term ‘dynamic accountability’ – allows for a more substantive and meaningful form of accountability than electoral accountability. Peer Review imposes the obligation to justify the exercise of discretion on implementing ‘agents’. As the actors at all levels learn from and correct each other, the hierarchical distinction between principals and agents is undermined and a form of dynamic accountability develops.⁵⁶⁹ Peer review thereby, opens accountability to possibilities that may have been overlooked by the principal.

The consultations that the FSB holds in view of its standard setting initiatives could be expanded through the levels. This last point relates to the structural part of the argument supporting GAL and the potential of networks to offer a middle way between assimilated and dis-integrated governance.

The dynamic and two-way functioning of peer review, as well as its controlling function, should be equally feedback mechanism should and could be enlarged for including feedback on the impact on citizens⁵⁷⁰ as well.

Pushing the mechanism of peer review and the feedback it allows for one step further, the range of actors involved at all levels could also be expanded to include actors that will secure more democratic accountability towards the national level or groups affected by the regulation. As found by Mattli and Woods: “Regulatory institutions that supply participatory mechanisms that are fair, transparent, accessible, and open [...] are more likely to produce common interests regulation.”⁵⁷¹ Sassen for instance suggests that as states are to an extent enablers of globalization, they do also have leverage to shape it. This is to a large extent a structural argument and will be further developed in the next part, but it has also implications

⁵⁶⁹ Sabel Charles H. and Simon William, “Epilogue: Accountability without Sovereignty”, in de Burca Grannie and Scott, (eds.), “Law and New Governance in the EU and the US”, Hart Publishing, Oxford, 2006, p. 400.

⁵⁷⁰ Sassen, 2003.

⁵⁷¹ Mattli Walter and Woods Ngaire, “In Whose Benefit? Explaining Regulatory Change in Global Politics” in Mattli Walter and Woods Ngaire, (eds.), “The Politics of Global Regulation”, Princeton University Press, Princeton, 2009. p. 5.

for the relationship between transnational law and politics. The feedback that is allowed for through peer review seems to offer a possibility to include such representative elements into the regulatory process.

5.3.1.3. *Integrated governance in transnational law: GAL and networks*

Governance structure has attracted a lot of writing in transnational law. The variety of examples of governance in transnational law also provides many examples of how assimilated and disintegrated governance structures can be combined and therefore how bipolarity can be overcome. Here the focus will be on the example of networks. With reference to the FSB and the regulation of the failure of global financial institutions, the integration of national authorities in crisis management colleges and their interaction among them and with national authorities can be seen as networks and hence a combination between assimilated and dis-integrated governance.

The original concept of a breaking down of the state – the disaggregated state⁵⁷²- into its agents that then form networks with their counterparts throughout the world is often attributed to Slaughter.⁵⁷³ She formulated this idea in terms of ‘judicial globalisation.’⁵⁷⁴ For her, this concept describes the growing interaction between national regional and international courts leading to the “gradual construction of a global legal system.”⁵⁷⁵ In her model, transnational law is seen as a driver for the development of this system, as judges are looking increasingly towards each other, being in need of guidance for the application of new ‘international’⁵⁷⁶ rules to national subjects and litigants.⁵⁷⁷ The co-operation between financial supervision agencies in the context of the BCBS can be analysed according to a similar network logic, accommodating between the dis-integrated national governance and the assimilated global ones. National supervision agencies would hence be part of the national dis-integrated system but at the same time link it to the assimilated global governance structure.

Slaughter’s arguments have been taken up by a number of authors in their attempts to theorise a transnational legal order.⁵⁷⁸ She describes an empowerment that takes place in the networks. In the face of legal complexity that stems from new transnational constellations, national

⁵⁷² Slaughter, 2005, p. 12

⁵⁷³ Ladeur Karl-Heinz, Viellechner Lars, “Die transnationale Expansion staatlicher Grundrechte”, in Archiv des Völkerrechts, Bd. 46, 2008, p. 65.

⁵⁷⁴ Slaughter, 2005, p. 66.

⁵⁷⁵ Slaughter, 2005, p. 66.

⁵⁷⁶ It should be possible to include also transnational law into this argument. For example Slaughter Chapter II.

⁵⁷⁷ Slaughter, 2005, p. 68

⁵⁷⁸ For example Teubner and Ladeur.

judges are empowered through the contacts with other courts.⁵⁷⁹ This increase in knowhow might make a crucial difference in a world where uncertainty causes a fundamental problem. Furthermore, Wai sees the possibility that networking between judges can lead to an advancing of broader policy debates in the global context.⁵⁸⁰ “High-profile litigation cases concerning foreign business conduct related to environmental or human rights, (...) can help to raise general issues about corporate social responsibility in a global context.”⁵⁸¹ This falls short of constituting an order in itself, yet nevertheless bears the potential to extend the limitations to private regulatory autonomy in the transnational space. All in all, the logic of networks and the collaboration of national organs across countries, seem to suggest a middle way.

Ladour links the emergence of networks closely to the rise of a new mode of production and organization that is supported by the importance of information as the principal resource of production. He sees the development of heterarchical self-organization in order to process information. Technological knowledge is therefore no longer concentrated in stable expert communities, but is instead distributed in overlapping project-oriented ‘epistemic communities’ which combine general and specific knowledge production.⁵⁸² According to his understanding of networks, they would allow not only a vertical accommodation between different governance structures but allow heterarchical interaction across the board.

Networks seem to have a similar potential to serve as a channel to introduce the concerns of the national polity and thereby bridge between the national and the supranational polity. Sassen for example suggests a wider view on the concept of citizenship as she asks “to what extent citizenship, even though highly formalized, might actually be less finished as an institution than its formal representation indicated.”⁵⁸³ However, her concern is not the de-territorializing of the institution, like many post national approaches would suggest, but instead its potential to allow for a link for citizens in national and transnational politics through the partial reshaping of their political subjectivity.⁵⁸⁴ Instead of changing the entire state-based concept, the aim is to enlarge it to include a global aspect.

⁵⁷⁹ Slaughter, 2005, p. 213.

⁵⁸⁰ Wai, 2008, p. 118.

⁵⁸¹ Wai, 2008, p. 118.

⁵⁸² Ladour, 2011, p. 19.

⁵⁸³ Sassen, 2003, p. 6.

⁵⁸⁴ Sassen, 2003, p. 24.

Networks can be conceived to have this potential, as network nodes can be located on all kinds of levels. The heterarchical structure as described by Ladeur and the variety of different nodes it can include should be able to include additional nodes that reflect such citizen participation.

If we take the illustration here and look at the institutions of the FSB, the colleagues that unite regulators across states along the lines of corporate structures, other network nodes that also include national or citizens interests could be included as well. This would allow for integration in the transnational law-making market interests, transnational process and national protection of social interests.

So, while the legality, politics and governance of transnational law is different from the one of European law, it is similar in the way it offers methods of overcoming bi-polarity. However, GAL does not focus on questions of legitimacy, values or polity. The extent to which GAL inquires into questions of legitimacy, is in 'improving' law-making procedure to make them more legitimate, yet here it is always limited to the procedural perspective. It is in this way that the distinction between law-making parameters and parameters of the theoretical backdrop can be used to distinguish between approaches of transnational law. The next part will look at a theory that takes a more accentuated stands on legitimacy, values and politics on the system level but that fails to overcome bi-polarity in the context of the system and its environment.

5.3.2. System Theory: overcoming bi-polarity at the system level

With regard to the parameters of legitimacy values and polity the same blurring of bi-polar categories cannot be observed. On the contrary, in Chapter 4, it was shown that the debate in these parameters reproduces the non-state/state tension caused by transnationalization. Non-state visions of these concepts collide with state visions and at the end of the day are dismissed as non-law.

When an accommodation between poles is not possible in the contexts of legitimacy, values and polity, in contrast to law-making, transnational law is left with two options. Either a top-down approach or a bottom-up one is chosen. Yet by presenting this choice, transnational

legal theory is at danger of facing just another, similar bi-polar tension than the one between state and non-state. Chart 4⁵⁸⁵ illustrates this point.

In the following, by way of illustration, these three parameters will be approached from the perspective of system theory, hence a bottom-up perspective is chosen.⁵⁸⁶ With functional integration, system theory takes an alternative starting point to the national delineation on which national and international law are based.⁵⁸⁷ Yet at the same time it differs from global constitutionalism as it takes fragmentation as a starting point and insurmountable condition of transnational law. According to system theory, transnational law develops in transnational communities “or autonomous fragments of society, such as, the globalized economy, science, technology, the mass media, medicine, education and transportation, are developing an enormous demand for regulating norms which cannot however, be satisfied by national or international institutions.”⁵⁸⁸ These fragments make themselves directly use of law and create their own private legal regime.⁵⁸⁹

In all three parameters, system theory provides a self-reflexive answer, where the functionally defined autarchic system produces its own rationality that provides and defines its legitimacy, values and polity with reference to itself, hence forwarding thin, dependent and supranational notions of legitimacy, values and polity.

However, in all three parameters, the question regarding the external face of the system – its relation to other systems or its environment- proves more difficult. This is where I will suggest that even when taking ‘sides’ and forwarding a notion of legitimacy, values and polity for transnational law, the tension remains. This time the tension is between the system and its environment.

Again, reference will be made to the example of resolution of global financial institutions. The application of system theory on financial regulation is not counterintuitive. From the analysis of the previous chapters, we saw that the consideration of national boundaries is not always appropriate to look at the regulation of financial markets and the resolution of global

⁵⁸⁵ p. 151.

⁵⁸⁶ With regard to ‘bottom-up’ approaches it should be referred to Bernstein who conducted a fascinating study on the New York Diamond trade that was groundbreaking for the theorizing of private regimes based on contracts. Bernstein Lisa, “Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry”, in the *Journal of Legal Studies*, Vol. 31, No. 1, 1992, pp. 115-175.

⁵⁸⁷ Fischer-Lescano and Teubner, 2004, p. 1011. The radical fragmentation, not along territorial, but along social sectorial lines, is at heart of the Teubner’s application of Niklas Luhmans’ system theory to transnational law.

⁵⁸⁸ Fischer-Lescano and Teubner, 2004, p. 1010.

⁵⁸⁹ Autonomous ‘Private Legal Regimes’ are introduced under D. Fischer-Lescano and Teubner, 2004, pp. 1009 ff.

financial institutions. For instance the crisis management colleges that were developed according to FSB recommendations can be looked at very well from a functional integration point of view. Also the relations of the FSB to the IOSCO and IAIS, the private global accounting standardization bodies, as well as national supervisors and national banks, lend themselves well to a functional integration perspective. However, the specific example of the FSBs approach to resolution authorities is a bit harder to apply to system theory. The lack of formal private participation from the industry as well as civil society and more generally the top down approach of the FSB, hinders a convincing application. I will therefore refer not only to FSB examples, but more generally global financial market regulation.

In particular, illustrations will be taken from Teubners article of 2010 on the financial and economic crisis of the late 2000s. In this article, he applies a system theory perspective to global financial economy. For Teubner the crisis provided an example where the autopoietic self-reproduction of a social system reverts into a communicative compulsion to repetition and growth, bringing self-destructive consequences in its wake. The independent system is hence not entirely independent, as it, left to the wrong dynamics, can develop a self-destructive growth. Needed is a constitutionalization of the system from within, in the shadow of politics and according to two ideals; the preservation of the system itself and of its environment.⁵⁹⁰ Teubner for instance forwards that the national banks should act as constitutional courts of the economic constitutions providing for intense reflections on the social consequences while guarding the economic constitution.⁵⁹¹ The tension between dependent and independent consideration of interests in the values of transnational law is hence not overcome.

While the application of GAL has been developed throughout the thesis and especially Chapter 4, the take on system theory will be less detailed. However the next part shall demonstrate that even approaches that elaborate on questions of legitimacy, values and polity of transnational law from a non-state perspective, face difficulties in staying away from the non-state/state tension.

5.3.2.1. Transnational legitimacy: self-reflexive legitimacy or a thin common philosophical horizon?

Functional integration, as a starting point of system theory, provides at least two ways to look at legitimacy; the legitimacy within the functional system and its external face, the legitimacy

⁵⁹⁰ Teubner, 2010, p. 30.

⁵⁹¹ Teubner, 2010, p. 32-33.

of the system in function to other systems. Teubner's take on system theory provides answers to both. Yet while the first provides a clear non-state vision of thin legitimacy, the latter alludes to the idea of a 'common philosophical horizon', which is hard to classify between thin and thick legitimacy.

The global legal landscape is made up of a variety of functionally integrated public, private or hybrid instances of regulation that are said to make autonomous law with a claim to global validity,⁵⁹² reflecting the fundamental multidimensional fragmentation of global society itself.⁵⁹³ Regarding legitimacy within the system, system theory suggests that it is produced by the system itself. The autopoietic⁵⁹⁴ system is self-sufficient and legitimacy is produced from 'below'.⁵⁹⁵ "Through their own operative closure, global functional systems create a sphere for themselves in which they are free to intensify their own rationality."⁵⁹⁶ They produce not only substantive rules in their area of functional integration, but they also produce their own procedural rules on law-making, law-recognition and legal sanctions. This is how Teubner describes reflexive norm-building within the system. Self-referencing as it is, it hence also produces its own legitimacy.

However, following the logic of functional differentiation, law itself developed globally as a unitary social system. This unity is no longer structure-based as it was meant to be in international law with the nation state as its structure but it is to be understood as allowing for a link between the different systems. The legitimacy question with regard to this external face of the system is more complex. Teubner introduces a constitutional perspective by arguing, that to transform the reflexive norm-building in a system into a constitutional norm-building, the systems have to link their "legal reflexive processes with reflexive processes of other societal spheres."⁵⁹⁷ The ability of developing thorough reflexive social processes has to be combined with an ability to observe the processes in other systems. This relates to what I have referred to as the external face of legitimacy; beyond the system, there is another constitutional requirement of consideration of other system that norm-making has to fulfill. However, this consideration is a very limited one. In the words of Teubner, the external face

⁵⁹² Fischer-Lescano and Teubner, 2004, p. 1011.

⁵⁹³ Fischer-Lescano and Teubner, 2004, p. 1004.

⁵⁹⁴ Teubner Gubther, "Law as an Autopoietic System", Oxford, Blackwell, 1993.

⁵⁹⁵ In order to illustrate this 'from below' at a later state Fischer-Lescano and Teubner hold: "if the private governance regimes educe form contractual relations between private global players, where is the legal source of a mandatory law which would need to be created and enforced against the wishes of the parties to the contract?", Fischer-Lescano and Teubner, 2004, p. 1032.

⁵⁹⁶ Fischer-Lescano and Teubner, 2004, p. 1006.

⁵⁹⁷ Fischer-Lescano and Teubner, 2004, p. 1016.

of the systems law is limited to a “simple normative compatibility” instead of “hierarchical unity” and can be achieved through a “strengthened mutual observation between network nodes.”⁵⁹⁸

Nevertheless, it becomes clear that the legitimacy of transnational law is a thin one: self-reflexive and limited to the simple normative compatibility with legitimacies of other systems. With regard to their external face, systems hence can subordinate themselves to a, “necessarily abstract, seeming common philosophical horizon, to which they orient their own rule-making”⁵⁹⁹ achieving a thin legitimacy of its law in the external face. The relationship between the internal legitimacy from below and this horizon is not clear. This tension between internal and external becomes even more apparent in the parameter of values.

5.3.2.2. Values in transnational law: internal system rationality or external pressures to self-limitation?

The take of system theory on the values of transnational law indicates its difficulty to avoid bi-polarity. Then while on the level of the system, the all-encompassing rationality of the system implies a dependent consideration of interests, this is not so clear when looking at the relation of the system to other systems or its environment. When rationalities of systems collide, Teubner suggests an approach of mutual observation that moves towards a compatibility. When rationalities endanger themselves, he opts for a ‘externally compelled self-limitation of the systems.’⁶⁰⁰ Both of these proposals complicate the take of system theory on the values of transnational law dramatically and reintroduce the tension between dependent and independent considerations of interests and hence non-state and state understanding of law.

The take of system theory on the considerations of interests is very straightforward; all interests are considered dependently from the rationality of the system. In the words of Fischer-Lescano and Teubner, systems develop their “own rationality without regard to other social systems, or indeed, regard to their national or human environment.”⁶⁰¹ Applied on the

⁵⁹⁸ Fischer-Lescano and Teubner, 2004, p. 1016. This quote is particularly interesting as it indicates the blurring of the six parameters if this thesis in system theory. The reference to self-reflexive law-making and network nodes indicates the strong law-making component of system-theory and its closeness to the “importance of networks”- argument made in the previous part. The network logic is characterized by combining two conflicting demands with one another. On the one hand one finds in the works the autonomous and decentralized reflections of network nodes, which seek compatibility with their human and natural environments. On the other, in networks linkages exist between these decentralized reflections in the sense that nodes observe each other closely, p. 2033.

⁵⁹⁹ Fischer-Lescano and Teubner, 2004, p. 1018

⁶⁰⁰ Teubner, 2010, p. 9.

⁶⁰¹ Fischer-Lescano and Teubner, 2004, p. 1006.

global financial economy, this would mean that the market-supporting approach that was apparent in bankruptcy solutions to failing financial institutions is appropriate.

However, Teubner introduces limitations to this simple logic. On one hand, there is the difficulty of colliding rationalities of different systems. How are we to decide when the legal regimes of two different social systems and hence rationalities collide?⁶⁰² On the other hand there is the danger of self-referencing and re-production of a system turning into a compulsion to growth that can be self-destructing.⁶⁰³ To Teubner, the financial and economic crisis was an instance of such destructive growth, which he compares to an addiction on the social system level.⁶⁰⁴ With regard to both scenarios, Teubner turns to what he calls constitutional norm-building. Like in the parameter of legitimacy, in the external face, systems have to link their legal reflexive process with reflexive processes of other social spheres. Through these linkages they can work towards a limited compatibility with other systems rationalities and thereby over time avoid conflict. With regard to the danger of self-destruction, the opening of reflexive norm-building to such observations will allow systems to be receptive to inputs towards self-limitation.⁶⁰⁵

What does this imply for the values of transnational law according to system theory? It is hard to say. Teubner introduces a binary meta-code to introduce truly constitutional structures. This binary code of constitutional/unconstitutional is ranked above the legal code legal/illegal and allows for the consideration of both the rationality in law and the other social system in question. For the example of the global financial economy he stipulates “The meta-code requires that it be ranked above the legal as well as the economic binary code [...] the meta-code generates different meanings according in each case to whether it is attempting to control the economic code-operations or the legal operations. On its economic side, it serves the reflection of the societal function of the payment options and searched for forms of economic activity that are environmentally viable. On its legal side, it institutes the separation of simple law from superior constitutional law, and judges legal acts according to whether

⁶⁰² For just a glimpse of all the possible conflicts that could be thought of: “Standard contracts within the *lex mercatoria* reflecting the economic rationality of global markets collide with WHO norms that derive from fundamental principles of the health system. The *lex constructionis*, the worldwide professional code of construction engineers, collides with international environmental law.” Fischer-Lescano and Teubner, 2004, p. 1013.

⁶⁰³ And there is the danger of collisions with the global system, yet for reasons of space this option will not be regarded here. For more details on it Teubner, 2010, p. 10.

⁶⁰⁴ Teubner, 2010, pp. 1-2.

⁶⁰⁵ Teubner, 2010. In this article he illustrates this argument in the context of the financial crisis.

they correspond to constitutional values and principles.”⁶⁰⁶ The reflexive functioning of social systems is hence not to be intervened with *except* in certain cases. According to Teubner, “defense against the three possibilities of collision is central – self-destruction of the system, environmental damage in the widest sense (endangering the integrity of the social, human and natural environments), threats to world society”⁶⁰⁷

Yet the decision of what will be served on which instance does not seem obvious. This ambiguity exposes system theory again to the tension between dependent and independent consideration of interests and put an important qualification on its non-state approach.

5.3.2.3. *Transnational polity: the functional polity or a global civil society?*

With regard to the polity parameter, the same mechanic can be observed. While the polity at the system level is without doubt of a non-state nature, because it is functionally defined, a second notion of polity is referred to in the environment of the system, yet again challenging the non-state stances of system theory and exposing it to non-state/state tension in transnational law.

Functional polities cut across the various layers “that bind sub-, supra-, or transnational communities.”⁶⁰⁸ They hence unite the participants in the social system under the rationality of this system. This polity is a non-state polity because it is not defined by citizenship or representation. “‘Polity’ in this context should not be understood in the narrow sense of institutionalized politics; it refers as well to non-political configurations of civil society, in the economy, in science, education, health, art or sports, in all those social sites where constitutionalizing takes place.”⁶⁰⁹ Brought together by the rationality of the system in question, it is forming a non-state polity. By analogy, the non-political configurations of civil society in the social site of financial market regulation must be including all sorts of market participants on the supply side but also on the demand side, regulators at all levels, market infrastructures such as stock exchanges and many more. Yet again, what about the ‘public’? Which public? In this sense the financial regulation example provides an illustration of a functional polity as well as of the difficulty of its delineation.

However, again the understanding of polity in system theory is complicated by the relation of the system to its environment. Teubner refers to a brother civil society that is external to the

⁶⁰⁶ Teubner, 2010, pp. 25-26.

⁶⁰⁷ Teubner, 2010, p. 9.

⁶⁰⁸ Schiff Berman Paul, The Globalization of Jurisdiction, 151 University of Pennsylvania Law Review. 311, 371 2002, p. 235.

⁶⁰⁹ Teubner, 2010, p. 9.

system and charged with the constitutional task of applying “massive pressure in the function system that internal self-limitations are configured and become truly effective”⁶¹⁰

The relation of the civil society to the system is not clear it can be included or also explained as ‘civil society’ countervailing powers from other contexts, media, public discussions, spontaneous protests, intellectuals, social movements, NGOs or trade unions”⁶¹¹

System theory illustrates hence a bottom-up approach to the legitimacy, values and polity of transnational law. However, in each parameter a tension between this bottom-up approach and a top-down vision becomes apparent.

5.3.3. Transnational law and bi-polarity: law-making, bottom up or top down?

From applying the bi-polarity framework on the debate on transnational law it appears that only in law-making, bi-polarity can be overcome. In the other three parameters a choice between a bottom-up or a top-down approach has to be made. However, by taking this choice the tension reappears on another level. Three categories of approaches to transnational law can hence be distinguished. The approaches that focus on law-making, bottom-up approaches and top-down approaches to transnational law.

The example of GAL illustrated that transnational law provides for very interesting examples in the parameters of legality, politics and governance. In legality, the law-making is not as established as in the European context, yet with regard to the role of politics and especially governance, developments in the transnational context might even have outgrown the variety in the European law-making. Yet, law-making approaches remain limited to procedural perspectives on legitimacy, values and polity.⁶¹² System theory was used as an illustration of a bottom-up approach. The insights gained can be generalized in the sense that most bottom-up approaches face difficulties to theorize beyond functional integration. Legitimacy that is founded on contractual relationships and consent always bears the potential of tension with other such contracts.⁶¹³ On the other hand, top-down approaches face difficulties addressing

⁶¹⁰ Teubner, 2010, p. 10.

⁶¹¹ Teubner, 2010, p. 10.

⁶¹² This is without doubt a large category in the field of transnational law. We find a variety of case studies such as, Gulbrandsen, 2011, Barr, 2006 as well as contributions to the WTO, ICANN and other in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, 2008.

⁶¹³ For example Muir Watt, 2010, Cafaggi 2011, Cafaggi and Miller 2013, Teubner 2010 but also Callies and Zumbansen, 2010 and Amstutz Mark, “Globalising Speenhamland: On the Transnational Metamorphosis of Corporate Social Responsibility”, in Joerges Christian and Falke Josef (Eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011.

the plurality in or the fragmentation⁶¹⁴ of the global legal order.⁶¹⁵ This applies to theories of normative constitutionalism,⁶¹⁶ global law⁶¹⁷ and institutional constitutionalism⁶¹⁸ as well as institutional approaches to global governance⁶¹⁹ the like. Top-down approaches struggle with the lack of unity at the global level. To address this struggle such approaches have to stretch towards global governance approaches. In the same way system theory faces difficulties regarding to the environment of the system, top-down approaches face difficulties to account for the pluralities of systems and their distinctness within.

This leaves us with the choice to either limit our theoretical inquiry to law-making or to remain ultimately limited by tensions that cannot be overcome. Less limits to regulatory creativity and more possibility for private actor involvement make the transnational context unique laboratory for the development of regulatory phenomena. However, as appeared in the previous analysis, this creativity is seriously limited. Even if the tension between non-state and state is overcome it reemerges in other forms opposing bottom-up and top-down or system and environment.

⁶¹⁴ For an example of the debate on the fragmentation of international law refer to Koskenniemi and Leino, 2002.

⁶¹⁵ For a criticism to global constitutionalism look at Kirsch, 2009, for an overview of various approaches refer to Schwöbel, 2011, for examples, Peters, 2009, Wouters and Odermatt, 2013, Petersmann, 2001

⁶¹⁶ Delbrück, 1999.

⁶¹⁷ Emmerich-Fritsche, 2009.

⁶¹⁸ Petersmann, 2001.

⁶¹⁹ Wouters and Odermatt, 2013, Wouters and Geraets, 2012.

6. Thesis summary: Law Beyond Bi-polarity?

Structuring the debate on transnationalization and law according to the non-state/state distinction has shown that the theory of transnational law remains limited by this distinction. The tension between the non-state regulatory developments and the state origin of law transcends the entire field and remains unsolved. Yet, it also allows for a useful structuring of debate of transnationalization and law.

The disentangling of the non-state state distinction into six parameters has allowed to see how transnationalization affects law differently in parameters of law-making then in parameters that depend on the theoretical backdrop.

In national law this difference could be put in the context of co-existing organizational principles. From the structuring exercise it appeared that the missing orientation due to the co-existence of organizational principles explains the contradiction between superficial norm compromises in law-making and the difficulty of the application of this law through the courts that is emphasized in the transnational context.

In European law the difference between law-making and theoretical orientation was confirmed. In legality, politics and governance the law-making of the EU has blurred bi-polar categories. However, the bi-polarity persisted in the context of legitimacy, values and polity. This allowed to structure the approaches to European law into three categories; the ones that reject its legitimacy, the one that insist on furthering its legitimacy and the ones that refer to a form of multilevel approach. The use of these categories was illustrated in the context of the debate on the European Court of Justice.

Also in transnational law, law-making approaches blurred bi-polar categories more easily. Inquiring into the reasons for this ease as well as its consequences will provide interesting avenues for the theory of transnational law. The frequent claim of ‘descriptive’ force of approaches that focus on law-making as well as the repeated reference to transnational law as a ‘methodology’ support this hunch.

On the other hand, another direction for further research was identified by structuring exercise of the debate on legitimacy, values and polity of transnational law. There the tension between bottom-up and top-down approaches provides interesting questions for further research.

The particular debate in transnational law that has been structured according to the framework – the resolution of large financial institutions – has illustrated the importance of the bi-polar tension in practice. National courts struggle to address the non-state/state tensions in all parameters of law. Beyond the state, the example of the KAs has shown that development of law is limited to law-making. The legitimacy, values and polity of the FSB and its KAs remain debated; non-state and state visions of transnational law are opposing each other.

Bi-polarity, defined as the reliance on distinctions that are based on the distinction between non-state and state, has proven to be a useful tool to structure the debate. Yet at the same time it is also an inspiring and even haunting way of looking at the field of transnationalization and law; forcing legal theory to question the relation between system and environment, non-state and state and finally non-law and law itself.

7. Bibliography

Books and Chapters

Abbott Kenneth W. and Snidal Duncan, “The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State”, in Mattli Walter and Woods Ngaire, (eds.) “The Politics of Global Regulation”, Princeton University Press, 2009.

Acharya Viral V., Cooley Thomas F., Richardson Matthew P. and Walter Ingo, (eds.), „Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance“, Wiley & Sons, Hoboken, 2011.

Acharya Viral V. and Richardson Matthew, (eds.), “Restoring Financial Stability”, Wiley & Sons, Hoboken, 2009.

Alexander Kern, Dhumale Rahul, Eatwell John, (eds.), „Global Governance of Financial Systems“, Oxford University Press, Oxford, 2006.

Alper Carl E., “Banking Act of 1933”, in the St John’s Law Review, 8, 1933-1934, pp. 193-196.

Alston Philip, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, in P. Alston, (ed.), “Non-State Actors and Human Rights”, Oxford University Press, Oxford, 2005.

Amstutz Mark, “Globalising Speenhamland: On the Transnational Metamorphosis of Corporate Social Responsibility”, in Joerges Christian and Falke Josef (Eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011.

Amstutz Mark und Karavas Vaias, “Weltrecht: Ein Derridasches Monster”, in “Soziologische Jurisprudenz, Festschrift für Gunther Teubner”, De Gruyter, 2009.

Arendt Hannah, “The Human Condition”, University of Chicago Press, Chicago, 1958.

Arestis Philip, Fontana Guisepppe and Sawyer Malcom, “The Dysfunctional Nature of the Economic and Monetary Union”, in Schiek Dagmar, (ed.), “The EU Economic and Social Model in the Global Crisis”, Ashgate Publishing Limited, Farnham, 2013.

Arestis Philip, Sobreira Rogério and Oreiro José Luis, “The Financial Crisis: Origins and Implications”, Palgrave Macmillan, New York, 2011.

Arner Douglas W., “Financial Stability, Economic Growth, and the Role of Law”, Cambridge University Press, Cambridge, 2007.

Balling Morten, Lierman Frank and Mullineux Andy, “Technology and Finance, Challenges for financial markets, business strategies and policy markers”, Routledge, New York, 2003.

Barth James R., Caprio Gerard Jr., and Levine Ross, “Guardians of Finance: Making Regulation Work for us.”, MIT Press, Cambridge, 2012.

Bartl Marija, “Legitimacy and European Private Law”, EUI Thesis, 2012.

Bekker Pieter H. F., Dolzer Rudolf and Waibel Michael, eds., "Making Transnational Law Work in the Global Economy", Cambridge University Press, Cambridge, 2010.

Benvenuti Eyal and Downs George W., "National Courts and Transnational Private Regulation", Cafaggi Fabrizio, "Enforcement of Transnational Regulation", Edward Elgar, Cheltenham, 2012.

Berger Klaus Peter, (ed.), "The Practice of Transnational Law", Kluwer Law International, London, 2001.

Berkowitz Roger and Toay Taun N., (eds.), "The Intellectual Origins of the Global Financial Crisis", Fordham University Press, New York, 2012.

Birkmose Hanne S., Neville Mette and Sorensen Karsten Engsig, (eds.), "The European Financial Market in Transition", Wolters Kluwer, London, 2012.

Bitner Richard, "Confession of a Subprime Lender", Wiley, Hoboken, New Jersey, 2008.

Böfinger Peter, "Ist der Markt noch zu retten? Warum wir jetzt einen starken Staat brauchen", Ullstein, Berlin, 2010.

Brownsword Roger, Micklitz Hans-W., Niglia Leone, Weatherill Stephen, (eds.), "The Foundations of European Private Law", Bloomsbury Publishing, Oxford, 2011.

Brüggenmeier Gert and Colombi Ciacchi Aurelia, "Fundamental Rights and Private Law in the European Union", Vol. 1, Cambridge University Press, Cambridge, 2010

Buckley Adrian, "Financial Crisis, Causes, context and Consequences", Prentice Hall, Financial Times, Pearson, 2011.

Büthe Tim and Mattli Walter, "The New Global Rules: The Privatization of Regulation in the World Economy", Princeton University Press, Princeton, 2011.

Cafaggi Fabrizio and Miller Geoffrey P., "The Governance and Regulation of International Finance", Edward Elgar, Northampton, 2013.

Cafaggi Fabrizio and Muir Watt Haratia, "The Regulatory Function of European Private Law", Edward Elgar, Cheltenham, 2009.

Cafaggi Fabrizio, "Reframing Self-Regulation in European Private Law", Kluwer International, London, 2006.

Callies Galf-Peter and Zumbansen Peer, "Rough Consensus and Running Code: A Theory of Transnational Private Law", Hart Publishing, Oxford, 2010.

Cannata Francesco and Quagliariello Mario, (eds.) "Basel III and Beyond", Risk Books, London, 2011.

Carotti Bruno and Casini Lorenzo, "A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Number (ICANN) and the Governance of the Internet", in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

Carotti, Bruno, “Alternative Dispute Resolution: The ICANN’s Uniform Dispute Resolution Policy (UDRP)” in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDonald and Savino Mario, (eds.), “Global Administrative Law: Cases, Materials, Issues”, IRPA and IILJ, Rome and New York, 2008.

Cherednychenko Olha, “Fundamental Rights, Contract Law and the Protection of the Weaker Party”, Sellier, Munich, 2007.

Chomsky Noam, “The Legitimacy of the Financial System and State Capitalism” in Dobos, Ned, Barry Christian and Pogge Thomas, (eds.), “Global Financial Crisis: The Ethical Issues”, Palgrave Macmillan, 2011.

Chorafas Dimitris N., “Basel III, the Devil and Global Banking”, Palgrave MacMillan, Hampshire, 2012.

Clapham Andrew, “Human Rights Obligations of Non-State Actors”, Oxford University Press, Oxford, 2006.

Collignon Stefan, “The Moral Economy of Money and the Future of European Capitalism”, in Leila Simona Talani, (ed.), “The Global Crash, Towards a New global Financial Regime?” Palgrave MacMillan, 2010.

Couch Jim F., Foster Mark D., Malone Keith and Black David L., “Political and Not Economic Concerns Motivated Bank Bailout Legislation”, in Gerdes Louise I., (ed.), “Are Government Bailouts Effective?”, Greenhaven Press, Detroit, 2013.

Davies Howard and Green David, “Global Financial Regulation: The Essential Guide”, Polity Press, Malden, 2009.

De Bellis, Maurizia, “The Disclosure of Information: Anti-Dumping Duties and the WTO System” in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDonald and Savino Mario, (eds.), “Global Administrative Law: Cases, Materials, Issues”, IRPA and IILJ, Rome and New York, 2008.

De Bellis Maurizia, “A Duty to Provide Reasons: Definitive Safeguards on Imports of Certain Steel Products”, in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDonald and Savino Mario, (eds.), “Global Administrative Law: Cases, Materials, Issues”, IRPA and IILJ, Rome and New York, 2008.

De Burca Grainne, Kilpatrick Claire and Scott Joanne, (eds.), “Critical Legal Perspective on Global Governance”, Hart Publishing, Oxford, 2014.

Delbrück Jost, “Laws in the Public Interest – Some Observations on the Foundations and Identification of *erga omnes* Norms in International law” in Götz Volkmar, (ed.), “Liber Amicorum Günther Jaenicke – zum 85. Geburtstag”, Springer, Berlin, 1999.

Dougan Michael, “Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship”, in Micklitz Hans-W. and De Witte Bruno (eds.), “The European Courts of Justice and the Autonomy of the Member State”, Intersentia, Cambridge, 2012.

Downs Anthony, “The Niagara of Capital: How global capital has transformed housing and real estate markets”, The Urban Land Institute, Washington DC, 2007.

- Duffie Darrell, "How Big Banks Fail", Princeton University Press, Princeton, 2011.
- Duffie Darrell, "A Contractual Approach to Restructuring Financial Institutions", in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009.
- Dyzenhaus David, Hunt Murray and Taggart Michael, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation", in Oxford University Commonwealth Law Journal, Vol. 1, No. 1, 2001, pp 5-34.
- Emmenegger Susan, "Bankenorganisationsrecht als Koordinationsaufgabe. Grundlinien einer Dogmatik der Verhältnisbestimmung zwischen Aufsichtsrecht und Aktienrecht", Habilitation, 2004, available at: http://www.ibr.unibe.ch/content/e8911/e9031/e9154/e9155/e9741/Emmenegger_Habil.pdf.
- Emmerich-Fritsche Angelika, „Paradigmenwechsel vom Völkerrecht zum Weltrecht - ein Beitrag zur Erweiterung des föderalen Mehrebenensystems“, in Härtel, Ines (Hrsg.), „Handbuch des Föderalismus. Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt“, Springer, Berlin 2009.
- Engel Kathleen C., McCoy Patricia A., "The Subprime Virus", Oxford University Press, New York, 2011.
- Evanoff Douglas D., and Kaufman George G., (eds.) "Systemic Financial Crises; Resolving Large Bank Insolvencies", World Scientific Publishing, Hackensack, 2005.
- Flohr Annegret, "Self-regulation and legalization: making global rules for banks and corporations" Palgrave Macmillan, Basingstoke, 2014.
- Frank Thomas, "Repealing Commercial and Investment Banking Separation Led to the Bailout", in Gerdes Louise I., (ed.), "Are Government Bailouts Effective?", Greenhaven Press, Detroit, 2013.
- Frank Thomas, "One Market Under God: Extreme Capitalism, Market Populism, and the End of Economic Democracy", Random House, New York, 1965.
- Frerichs Sabine, "Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law", in Joerges Christian and Falke Josef (eds.): "Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets", Hart Publishing, Oxford, 2011.
- Friedmann Wolfgang, Henkin Louis and Lissitzyn Oliver, eds. „Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup“, Columbia University Press, New York, 1972.
- Goodhart Charles A.E., "Powers and scope of the macro-prudential authority", Chapter 3 in LaBrosse John Raymond, Olivares-Caminal and Singh Dalvinder, (eds.), "Financial Crisis Containment and Government Guarantees", Edward Elgar, Northampton, 2013.
- Glinski Carola, "Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards", Nomos Verlagsgesellschaft, Baden-Baden, 2011.
- Griffith-Jones Stephanie, Ocampo José Antonio, and Stieglitz Joseph E., "Time for a Visible Hand", Oxford University Press, Oxford, 2010.

Günther Klaus, "(Zivil-) Recht: Kann das Zivilrecht im Zuge der Globalisierung das öffentliche Recht ersetzen?" in Joerges Christian and Teubner Gunther (eds.), „Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie“, Nomos Verlagsgesellschaft, Baden-Baden, 2003.

Heritier Adrienne, "The European Polity, Deadlock and Development", in Joerges Christian and Vos Ellen, (eds.) "EU Committees: Social Regulation, Law and Politics", Hart Publishing, Antwerpen, 1999.

Herring Richard J., "Wind-down Plans as an Alternative to Bailouts: The Cross-Border Challenges", in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009.

Hoffmann-Riem Wolfgang und Schmidt-Assmann Eberhard, (Hrsg.) „Öffentliches Rechts und Privat Recht als gegenseitige Auffangordnungen“, Baden-Baden, 1996.

Howse Robert, "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'" in Joerges Christian and Petersmann Ulrich, eds., "Constitutionalism, Multilevel Trade Governance and Social Regulation", Hart Publishing, Portland, 2006.

Huepkes Eva, "Resolving systemically important financial institutions (SIFIs): The Financial Stability Board key attributes of effective resolution regimes", in LaBrosse John Raymond, Olivares-Caminal and Singh Dalvinder, (eds.), "Financial Crisis Containment and Government Guarantees", Edward Elgar, Northampton, 2013.

Jackson Thomas H., "Chapter 11F: A Proposal for the Use of Bankruptcy to Resolve Financial Institutions", in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009.

Jackson Vicki C., "Constitutional Engagement in a Transnational Era", Oxford University Press, Oxford, 2010.

Jessup, Philip C., "Transnational law", Yale University Press, New Haven, 1956.

Joerges Christian and Falke Josef, (eds.), "Karl Polanyi, globalization and the Potential of Law in Transnational Markets", Hart Publishing, Oxford, 2011.

Joerges Christian and Petersmann Ernst-Ulrich, (eds.), "Constitutionalism, Multilevel Trade Governance and International Economic Law", Hart Publishing, Oxford, 2011.

Joerges Christian, and Schmid Christoph, „Towards Proceduralization of Private Law in the European Multi-Level System“, in Hartkamp Arthur, S., Hesselink Martijn, W., Hondius Ewoud, H., Mak Chantal and du Perron Edgar, (eds.), „Towards a European Civil Code“, 4th revised and expanded Edition, Kluwer International Law, The Netherlands, 2011.

Joerges Christian and Vos Ellen, (eds.), "EU Committees: Social Regulation, Law and Politics", Hart Publishing, Antwerpen, 1999.

Johnston Douglas M., "World Constitutionalism in the Theory of International Law", in St. John Macdonald Ronald and Johnston Douglas M., (eds.), "Towards World Constitutionalism", Martinus Nijhoff Publishers, 2005.

- Kennedy Duncan, "Three Globalizations of Law and Legal Thought: 1850-2000", in Trubek David M. and Santos Alvaro, (eds.), "The New Law and Economic Development", Cambridge University Press, 2006.
- Kilgus Sabine, „Effektivität von Regulierung im Finanzmarktrecht“, DIKE Verlag AG, Zürich, 2007.
- Kjaer Poul F., Teubner Gunther and Febbrajo Alberto, (eds.) "The Financial Crisis in Constitutional Perspective; The Dark Side of Functional Differentiation", Oxford, Hart Publishing, 2011.
- Klabbers, Jan, "Setting the Scene", in Klabbers Jan, Peters Anne and Ulfstein Geir, (eds.) "The Constitutionalization of International Law", Oxford University Press, Oxford, 2009.
- Klabbers, Jan, "Law-making and Constitutionalism", in Klabbers Jan, Peters Anne and Ulfstein Geir, (eds.) "The Constitutionalization of International Law", Oxford University Press, Oxford, 2009.
- Kreide Regina, "Re-embedding the Market through Law? The Ambivalence of Juridification in the International Context", in Joerges Christian and Falke Josef (eds.): "Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets", Hart Publishing, Oxford, 2011.
- Krisch Nico, "Beyond Constitutionalism: The Pluralist Structure of Postnational Law", Oxford University Press, Oxford, 2010.
- Kroener William F. III, "Expanding FDIC-Style Resolution Authority", in Scott Kenneth E., Shultz George P. and Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009.
- LaBrosse John Raymond, Olivares-Caminal Rodrigo, and Singh Dalvinder, (eds.), "Financial Crisis Containment and Government Guarantees", Edward Elgar, Northampton, 2013.
- Larouche Pierre and Cserne Peter, (eds.), "National Legal Systems and Globalization: New Role, Continuing Relevance", Springer, Berlin, 2013.
- Laulhe Shaelou Stephanie, "Market Governance and European Private Law in the Global Financial Downturn: "And the Story goes on"...", in Snyder Francis, Sonntag Albrecht and Shen Wei, (eds.), "The "Visible Hand" European and Global Perspectives on Financial Market Regulation and Economic Governance", Bruylant, Bruxelles, 2012.
- Lavelle Kathryn C., "Implementing the Volker Rule in National and International Politics", in Porter Tony, (ed.), "Transnational Financial Regulation after the Crisis", Routledge, New York, 2014.
- Lennig Martin, "From Justice to Efficiency: On a Shift in the Normative Focus of Economics", Doctoral Thesis, Technische Universität Darmstadt, 2012.
- Levit Janet Koven, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments", Yale Journal of International Law, Vol. 30, 2005.
- Likosky Michael, ed., "Transnational Legal Processes: Globalisation and Power Disparities", Cromwell Press, Wilts, 2002.

Macchia Marco, "Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations", in Cassese Sabino, Carotti Bruno, Casini Lorenzo, Macchia Marco, Euan MacDONald and Savino Mario, (eds.), "Global Administrative Law: Cases, Materials, Issues", IRPA and IILJ, Rome and New York, 2008.

Mason David L., "From Buildings and Loans to Bail-Outs: A History of the American Saving and Loan Industry, 1831-1995", Cambridge University Press, Cambridge, 2004.

Mattli Walter and Woods Ngaire, "In Whose Benefit? Explaining Regulatory Change in Global Politics" in Mattli Walter and Woods Ngaire, (eds.), "The Politics of Global Regulation", Princeton University Press, Princeton, 2009.

Mayes David G. and Wood Geoffrey, (eds.), "Reforming the Governance of the Financial Sector", Routledge, New York, 2013.

McBarnet Doreen, Voiculescu Aurora and Campbell Tom, (eds.), "The New Corporate Accountability: Corporate Social Responsibility and the Law", Cambridge University Press, Cambridge, 2007.

Micklitz Hans-W., "Rethinking the Public/Private Divide", in Maduro Miguel, Tuori Kaarlo and Sankari Suvi, (eds.), "Transnational European Law and Legal Thinking", Cambridge University Press, Cambridge, 2014.

Moosa Imad A., "The Myth of Too Big to Fail", Palgrave Macmillan, New York, 2010.

Müller-Armack Alfred, "Wirtschaftslenkung und Marktwirtschaft", Verlag für Wirtschaft und Sozialpolitik, Hamburg, 1947.

Muller Peter O. and Citlau Ryan D., "The Uncertain Role of Banks' Corporate Governance in Systemic Risk Regulation", in Birkmose Hanne S., Neville Mette and Sorensen Karsten Engsig, (eds.), "The European Financial Market in Transition", Wouters Kluwer, London, 2012.

Nobel Peter, "Schweizerisches Finanzmarktrecht und international Standards", 3. Ausgabe, Stämpfli Verlag, Bern, 2010.

Numhauser-Henning Ann and Rönningmar Mia, "Normative Patterns and Legal Developments in the Social Dimension of the EU", Hart Publishing, Oxford, 2013.

Pagliari Stefano, "Who Governs Finance?" in Snyder Francis, Sonntag Albrecht and Shen Wei, (eds.), "The 'Visible Hand': European and Global Perspectives on Financial Market Regulation and Economic Governance", Edition Bruylant, Bruxelles, 2012.

Patterson Dennis and Afilalo Ari, "The New Global Trading Order: The Evolving State and the Future of Trade", Cambridge University Press, Cambridge, 2008.

Peters Anne, "Membership in the Global Constitutional Community", in Klabbers Jan, Peters Anne and Ulfstein Geir, (eds.) "The Constitutionalization of International Law", Oxford University Press, Oxford, 2009.

Petersmann Ernst-Ulrich, "Human Rights, Cosmopolitan Democracy and the Law of the World Trade Organization", in Fletcher Ian, Mistelis Loukas and Cremona Marise (eds.) "Foundations and Perspectives of International Trade Law", Sweet & Maxwell, London, 2001.

Polanyi, Karl, "The Great Transformation", Beacon Press, Boston, 1957.

Posner, R. A., "The economics of justice", Harvard University Press, Cambridge, 1983.

Reich Norbert, "How Proportionate is the Proportionality Principle? Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ", in Micklitz Hans-W. and De Witte Bruno (eds.), "The European Courts of Justice and the Autonomy of the Member State", Intersentia, Cambridge, 2012.

Reich Norbert, "The Public/private divide in European Law", in Cafaggi Fabrizio and Micklitz Hans-W. (eds.), "The European Private Law after the Common Frame of References", Edward Elgar Publishing, Cheltenham, 2010.

Reinisch August, "The Changing International Legal Framework of Dealing with Non-State Actors", in Non-State Actors and Human Rights, edited by P. Alston, Oxford University Press, Oxford, 2005.

Renner Moritz, "The Dialectics of Transnational Economic Constitutionalism", in Joerges Christian and Falke Josef (eds.): "Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets", Hart Publishing, Oxford, 2011.

Roderich Macdonald, "Genesis of the Financial Crisis", Palgrave Macmillan, 2012.

Roughan Nicole, "Authorities: Conflicts, Cooperation, and Transnational Legal Theory", Oxford University Press, Oxford, 2013.

Sabel Charles H. and Simon William, "Epilogue: Accountability without Sovereignty", in de Burca Grannie and Scott, (eds.), "Law and New Governance in the EU and the US", Hart Publishing, Oxford, 2006.

Sassen Saskia, "Territory, Authority, Rights: From Medieval to Global Assemblages", Princeton University Press, Oxford, 2006.

Schapiro Mario G. and Coutinho Diogo R., "Political Economy and Economic Law in Brazil: From Import Substitution to the Challenges of the New State Activism", in De Burca Grainne, Kilpatrick Claire and Scott Joanne, (eds.), "Critical Legal Perspective on Global Governance", Hart Publishing, Oxford, 2014.

Schepel Harm, "The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets", Hart, Oxford, 2005.

Scherer Andreas Georg and Palazzo Guido, "The New Political Pole of Business in a Globalized World – A Review of a New Perspective on CSR and Its Implications for the Firm, Governance and Democracy", in Corsten Hans and Roth Stefan, (eds.), "Nachhaltigkeit: Unternehmerisches Handeln in globaler Verantwortung", Springer Gabler, Wiesbaden, 2012.

Schiek Dagmar, (ed.), "The EU Economic and Social Model in the Global Crisis", Ashgate Publishing Limited, Farnham, 2013.

Schnurman Mitchell, "The Big Bank Model Must Change to Avoid Future Bailouts", in Gerdes Louise I., (ed.), "Are Government Bailouts Effective?", Greenhaven Press, Detroit, 2013

Schwöbel Christine E. J., "Global Constitutionalism in International Legal Perspective", Martinus Nijhoff Publishers, Leiden, 2011.

- Scott Kenneth E. and Taylor John B., “Bankruptcy Not Bailout: A Special Chapter 14”, Hoover Institution Press, Stanford, 2012.
- Scott Kenneth E., “Evaluating Failure Resolution Plans”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.
- Scott Hal S., Gelper Anna, “International Finance: Transaction, Policy, and Regulation”, 18th Edition, Foundation Press, New York, 2011.
- Shultz Georg P., “Making Failure Tolerable”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.
- Slater Don, “Public/Private”, in Jenks, Chris, (ed.), “Core Sociological Dichotomies”, Sage Publications, London, 1998.
- Slaughter Anne-Marie, “A New World Order”, Princeton University Press, Princeton, 2005.
- Snijders Henk and Vogenauer Stefan, eds., “Content and Meaning of National Law in the Context of Transnational Law”, Sellier, Munich, 2009.
- Snyder Francis, Sonntag Albrecht and Shen Wei, (eds.), “The ‘Visible Hand’: European and Global Perspectives on Financial Market Regulation and Economic Governance”, Edition Bruylant, Bruxelles, 2012.
- Soderberg Susanne, “The Transnational Regulation of Financial Inclusion: An Historical Materialist Critique of the G20 Principles”, in Porter Tony, (ed.), “Transnational Financial Regulation after the Crisis”, Routledge, New York, 2014.
- Stichweh Rudolf, “Towards a General Theory of Function System Crises”, Kjaer Poul F., Teubner Gunther and Febbrajo Alberto, (eds.) “The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation”, Oxford, Hart Publishing, 2011.
- Stone Katherine VW., “Globalisation and the Middle Class” in De Burca Grainne, Kilpatrick Claire and Scott Joanne, (eds.), “Critical Legal Perspective on Global Governance”, Hart Publishing, Oxford, 2014.
- Summe Kimberly Anne, “Lessons Learned from the Lehman Bankruptcy”, in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), “Ending Government Bailouts as We Know Them”, Hoover Institution Press, Stanford, 2009.
- Taub, Jennifer S., “The Sophisticated Investor and the Global Financial Crisis”, in Hawmley, P., James, Kamath, Shyam J. and Williams, Andrew T., (eds.), “Corporate Governance Failures, The Role of Institutional Investors in the Global Financial Crisis”, University of Pennsylvania Press, Philadelphia, 2011.
- Teubner Gunther, “A Constitutional Moment? The Logics of ‘Hitting the Bottom’” in Kjaer Poul F., Teubner Gunther and Febbrajo Alberto, (eds.), “The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation”, Oxford, Hart Publishing, 2011.
- Teubner Gunther, and Korth Peter, “Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society”, in Young Margaret,

(ed.), "Regime Interaction in International Law: Facing Fragmentation, Oxford University Press, 2010.

Teubner Gubther, "Law as an Autopoietic System", Oxford, Blackwell, 1993.

Tridimas Takis, "The General Principles of EU Law", 2nd ed., Oxford University Press, Oxford, 2006.

Tsagourias Nicholas, (ed.), "Transnational Constitutionalism", Cambridge University Press, Cambridge, 2007.

Viellechner Lars, "The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law", in Joerges Christian and Falke Josef (eds.): "Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets", Hart Publishing, Oxford, 2011.

Vogel Joseph, "Das Gespenst des Kapitals", 4. Auflage, Diaphanes, Zürich, 2010/2011.

Volcker Paul, "Financial Reforms to End Government Bailouts as We Know Them", in Scott Kenneth E., Shultz George P., Taylor John B., (eds.), "Ending Government Bailouts as We Know Them", Hoover Institution Press, Stanford, 2009.

Weiler Joseph H.H. and Wind Marlene, "European Constitutionalism Beyond the State", Cambridge University Press, Cambridge, 2003.

Weiler Joseph H.H. "The Constitution of Europe", Cambridge University Press, Cambridge, 1999.

Wiener Katz, Avery, "Foundation of The Economic Approach to Law", the Foundation Press, New York, 1998.

Williams, Cynthia, A., and Zumbansen, Peer, "Introduction: corporate governance after the 'end of history': investigation the new 'great transformation'", in Williams Cynthia, A., and Zumbansen, Peer, (eds.) "The Embedded Firm: Corporate Governance, Labour, and Finance Capitalism", Cambridge University Press, Cambridge, 2011.

Wright Robert E., "Bailouts: Public Money, Private Profit", Columbia University Press, New York, 2010.

Wymeersch Eddy, Hopt Klaus J. and Ferrarini Guido, (eds.), "Financial Regulation and Supervision: A Post-Crisis Analysis", Oxford University Press, Oxford, 2012.

Zahn Rebecca, "EU Internal and External Social Policy in Time of Global Crisis", in Schiek Dagmar, (ed.), "The EU Economic and Social Model in the Global Crisis", Ashgate Publishing Limited, Farnham, 2013.

Zavvos George S., and Kaltsouni, "The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing", in Haentjens Matthias and Wessels Bob, (eds.), "Research Handbook on Crisis Management in the Banking Sector", Edward Elgar, Cheltenham, forthcoming 2015. Page numbering according to the SRRN Working Paper available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531907, last accessed on 22.12.2014.

Ziebur Gilbert and Haupt Heinz-Gerhard, "Wirtschaft und Gesellschaft in Frankreich seit 1789", Kiepenheuer & Witsch, Guetersloh, 1975.

Zuleeg Fabian and Martens Hans, 2009, „Beyond the current crisis: How should Europe deal with the government deficits and public debt in future“ in Secchi Carlo and Villafranca Antonio, (eds.), „Liberalism in Crisis? European Economic Governance in a Time of Crisis“, Edward Elgar, Cheltenham, 2009.

Zumbansen, Peer, “The next ‘Great Transformation’? The Double Movement in Transnational Corporate Governance and Capital Markets Regulation”, in Joerges Christian and Falke Josef (eds.): “Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets”, Hart Publishing, Oxford, 2011.

Zumbansen Peer, “Transnational Law”, in Smits Jan (ed.), “Encyclopedia of Comparative Law”, Edward Elgar Publishing, 2006, pp. 738-754.

Articles

Alexander Kern, “Bank Resolution and Recovery in the EU: Enhancing Banking Union”, European Law Academy Forum, 14, 2013, pp. 81-93

Alexander Kern, “Reforming European Financial Supervision: adapting EU Institutions to Market Structures”, Academy of European Law, Trier, 11 June 2011.

Alexander Kern, “Bank Resolution Regimes: Balancing Prudential Regulation and Shareholder Rights”, in the Journal of Corporate Law Studies, Vol. 9, Part I, 2009, pp. 61-93.

Alford Duncan, “The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Ban-European Regulation?”, in the Annual Review of Banking & Financial Law, Vol. 25, No. 1, 2006, pp. 389-435.

Arrow, K. J. “The Role of Securities in the Optimal Allocation of Risk-bearing”, in the Review of Economic Studies, Vol. 31, No. 2 (Apr. 1964), pp. 91-96.

Attinger Barbara Jeanne, “Crisis Management and Bank Resolution: Quo Vadis, Europe?”, Legal Working Paper Series, No. 13, European Central Bank, 2011.

Auld Graeme and Green Jessica, F., “Unbundling the Regime Complex”, Draft Paper for Workshop on Transnational Business Governance Interactions, EUI, May, 2011.

Awrey Dan, “Complexity, Innovation and the Regulation of Modern Financial Markets”, in the Harvard Business Law Review, 401, 2011, pp. 236-293.

Azoulay Loic, “Sur un sens de la distinction public/privé dans le droit de l’Union Européenne” in Revue trimestrielle de droit européen, 2010, pp. 842-860.

Azoulay Loic, “La citoyenneté européenne, un statu d’intégration sociale”, Mélanges Jean Paul Jaque, Chemins d’Europe, Dalloz, 2010.

Azoulay Loïc, “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the conditions for its Realization”, in the Common Market Law Review, 45, 2008, pp. 1335-1356.

Bach Maurizio, “Technocratic Regime Building: Bureaucratic Integration in the European Community”, in the International Journal of Sociology, Vol. 24, No. 1, Spring 1994, pp. 97-122.

- Barr Michael, "The Financial Crisis and the Path of Reform", in the *Yale Journal on Regulation*, 29, 2012, pp. 91-120.
- Barr Michael, "Global Administrative Law: The View from Basel", in *The European Journal of International Law*, Vol. 17, No. 1, 2006, pp. 15-46.
- Basedow Jürgen, "The State's Private Law and the Economy - Commercial Law as an Amalgam of Public and Private Rule-Making" in the *American Journal of Comparative Law*, Vol. 56, No. 3, 2008, pp. 703-721.
- Begg Iain, "Are better defined rules enough? An assessment of the post-crisis reform of the governance of the EMU", in *European Review of Labour and Research*, 19 (1), 2013, pp. 49-62.
- Belke Ansgar and Wiedmann Marcel, "Boom or Bubble in the US Real Estate Market?", *Intereconomics*, September/October 2005, pp. 273-284.
- Bernstein Lisa, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", in the *Journal of Legal Studies*, Vol. 31, No. 1, 1992, pp. 115-175.
- Brunnermeier Markus K., "Deciphering the Liquidity and Credit Crunch 2007-2008", in the *Journal of Economic Perspectives*, Vol. 23, No. 1, 2009, pp. 77-100.
- Cafaggi Fabrizio, "New Foundations of Transnational Private Regulation", in the *Journal of Law and Society*, Vol. 23, No. 1, 2011, pp. 20-49.
- Calliess Galf-Peter and Renner, Moritz, "Between Law and Social Norms: The Evolution of Global Governance", in *Ratio Juris*, Vol. 22, No. 2, 2009, pp. 260-280.
- Caruso Daniela, "Private Law and State-Making in the Age of Globalization", in the *Journal of International Law and Politics*, 1, 3, 2006.
- Cass, Deborah, Z., "The Word that saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community", in the *Common Market Law Review*, 29, 1992, pp. 1107-1136.
- Cecchetti Stephen G., "Crisis and Responses: The Federal Reserve in the Early Stages of the Financial Crisis", in the *Journal of Economic Perspective*, Vol. 23, No. 1, 2009, pp. 51-75.
- Chitale Rajendra, "Seven Triggers of the US Financial Crisis", in the *Economic & Political Weekly*, Vol. 43, No. 44, 2008, pp. 20-24.
- Colton Kent W., "Housing Finance in the United State: The Transformation of the U.S. Housing Finance System", Workingpaper W02-5, Joint Center for Housing Studies, Harvard University, July 2002.
- Crotty James and Epstein Gerald, "Regulating the US Financial System to Avoid Another Meltdown", in the *Economic and Political Weekly*, Vol. 44, No. 13, *Global Economic & Financial Crisis*, pp. 87-93
- Davies Gareth, "subsidiarity: The wrong Idea, in the wrong Place, at the wrong Time". In the *Common Market Review*, 43, 2006, pp. 63-84.
- Davis Kevin, Kingsburry Benedict and Merry Sally Engle, "Indicators as a Technology of Global Governance", *NYU Law and Economics Research Paper*, No. 10-13, 2010.

Debabrata Patra Michael, "Should Financial Stability Be Assigned to Public Policy?" in the *Economic and Political Weekly*, Vol. 38, No. 23, 2003, pp. 2271-2275+2277-2283.

De La Torre Augusto and Ize Alain, "Containing Systemic Risk: Paradigm-Based Perspectives on Regulatory Reform", in *Economia*, Vol. 11, No. 1, 2010, pp. 25-64.

Deyoung Robert, Hunter William C. and Udell Gregory F., "The Past, Present, and Probable future for Community Banks", *Journal of Financial Services Research*, 25:2/3, 2004, pp. 85-133.

Draghi Mario, "The future of global financial stability", in the *European View*, 9, 2010, pp. 23-27

Duffie Darrell, "How Should We Regulate Derivatives Markets?", The PEW, Financial Reform Project, Briefing Paper 5, 2009.

Eisenbeis Robert A. and Kaufman George G., "Cross-Border Banking: Challenges for Deposit Insurance and Financial Stability in the European Union", Working Paper Federal Reserve Bank of Atlanta, October, 2006.

Eisenbeis Robert A., Frame W., Wall Larry D., "An Analysis of the Systemic Risk posed by Fannie Mae and Freddie Mac and an Evaluation of the Policy Options for Reducing Those Risks", in the *Journal of Financial Service Research*, 31, 2007, pp. 75-99.

Fabbrini Federico and Granat Katarzyna, "'Yellow Card, but no Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike", in the *Common Market Law Review*, 50, 2013, pp. 115-144.

Fischer-Lescano Andreas and Teubner Gunther, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", in the *Michigan Journal of International Law*, Vol. 25, 2004, pp. 999-1046.

Freeman Jody, "The Private Role in Public Governance", in the *New York University Law Review*, Vol. 75, No. 3, June 2000.

Galloway Tina M., Lee Winson B. and Roden Dianne M., "Banks' changing Incentives and Opportunities for Risk Taking" in *Journal of Banking & Finance*, Vol. 21, Issue 4, 1997, pp. 509-527.

Gandrud Christopher and Hallerberg Mark, "Who decides? Resolving failed banks in a European framework", Bruegel Policy contribution, Issue 2013/16, 29.11.2013. p.8.

Gapper John, "A better Way to occupy Wall Street", *Financial Times*, New York, November 16, 2011.

Gerardi Kristopher, Rosen Harvey S., Willen Paul, "Do households benefit from financial deregulation and innovation? The Case of the Mortgage Market", National Bureau of Economic Research, Working Paper 12967, March 2007.

Gibson Willa E., "Is Hedge Fund Regulation Necessary?", in the *Temple Law Review*, Vol. 73, 2000, pp. 681-716.

Goldstein Morris and Veron Nicolas, "Too big to fail: The transatlantic debate", Bruegel Working Paper, 03, 2011.

- Gordon Jeffery and Muller Christopher, “Confronting Financial Crisis: Dodd-Frank’s Dangers and the Case for a Systemic Emergency Insurance Fund”, in the *Yale Journal on Regulation*, Vol. 28, 2011, pp. 151-211.
- Gorton Gary, Metrick Andrew, Shleifer Andrei and Tarullo Daniel K., “Regulating the Shadow Banking System”, in *Brookings Papers on Economic Activity*, Fall 2010, pp. 261-312.
- Gotham Kevin F., “Creating Liquidity out of Spatial Fixity: The Secondary Circuit of Capital and the Subprime Mortgage Crisis”, *International Journal of Urban and Regional Research*, Vol. 33.2, June 2009, pp. 335-371.
- Grajzl Peter and Murrell Peter, “Allocating Lawmaking Powers: Self-Regulation vs. Government Regulation”, in the *Journal of Comparative Economics*, 23:3, 2007, pp. 251-276.
- Granovetter Mark, “Economic Action and Social Structure: The Problem of Embeddedness”, in the *American Journal of Sociology*, Vol. 91, No. 3, Nov. 1985, pp. 481-510.
- Green Richard K. and Wachter Susan M., “The Housing Finance Revolution”, Paper Prepared for the 31st Economic Policy Symposium: Housing, Finance & Monetary Policy, Jackson Hole, Wyoming, Federal Reserve Bank of Kansas City, August 31, 2007.
- Grimmel Andreas, “Judicial Interpretation or Judicial Activism? The Legacy of Retentionism in the Studies of the European Court of Justice”, in the *European Law Journal*, Vol. 18, Issue 4, pp. 518-553, 2012.
- Grundmann Stefan, “The Concept of the Private Law Society: After 50 Years of European Business and European Business Law”, in the *European Review of Private Law*, No. 4, 2008, pp. 553-581.
- Gulbrandsen Lars, H., “Private and Public Governance Interactions: State Influences in Forest and Fisheries Certification Programs”, Draft Paper for Workshop on Transnational Business Governance Interactions, EUI, May, 2011.
- Guynn Randall D., “Are Bailouts Inevitable?”, in the *Yale Journal on Regulation*, Vol. 29, 2012, pp. 121-154.
- Haas Ernst, B., “International Integration: the European and the Universal Process”, in *International Organization*, Vol. 15, Issue 03, 1961, pp. 366-392.
- Harbo Tor-Inge, “The Function of the Proportionality Principle in EU Law”, in the *European Law Journal*, Vol. 16, No. 2, 2010, pp. 158-185.
- Held David, “Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective”, in *Government and Opposition*, Vol. 39, Issue 2, 2004, pp. 364-391.
- Hellwig Martin, “Capital Regulation after the Crisis: Business as Usual?”, preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2010/31, July 2010.
- Hellwig Martin, “Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis”, in *The Economist*, 157, No. 2, 2009, pp. 129-207
- Henkel Christoph and Kaal Wulf A., “Contingent Capital in European Union Bank Restructuring”, *Legal Studies Research Paper*, No. 2013-02, Mississippi College School of Law, 2012.

Hey Christian, Jacob Klaus, Volker Axel, "Better Regulation by New Governance Hybrids? Governance Models and the Reform of European Chemicals Policy", working paper series, 2006, available at SSRN: <http://ssrn.com/abstract=926980>.

Huepkes Eva H. G., "Complicity in Complexity: What to Do About the 'Too-Big-To-Fail' Problem", *Butterworths Journal of International Banking and Financial Law*, Vol. 24 , No. 9 , pp. 515-518, 2009

Immergluck Dan, "From risk-limited to risk-loving Mortgage Market: Origins of the U.S. Subprime Crisis and Prospect of Reform", *Journal of Housing and the Built Environment*, 26, 2011, pp. 245-262.

Ingves Stefan and Hoelscher David S., "The Resolution of Systemic Banking System Crises: the Way Forward", in *Systemic financial Crises: resolving large bank insolvencies*, Singapore, World Scientific, 2005, pp. 159-167.

Joerges Christian, "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form", *LEQS Paper*, No. 28/2010, revised in April 2013.

Joerges Christian, "Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralization of Constitutionalisation", in the *German Law Journal*, Vol. 10, No. 04, 2009, pp. 335-360.

Joerges Christian and Roedl Florian, "'Social Market Economy' as Europe's Social Model?" *EUI Working Paper*, No. 2004/8, 2004.

Joerges Christian and Neyer Juergen, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Committology" in *European Law Journal*, 3, 1997, pp. 273-299.

Kacperczyk Marcin and Schnabl Philipp, "When Safe Proved Risky: Commercial Paper during the Financial Crisis of 2007-2009", in the *Journal of Economic Perspectives*, Vol. 24, No. 1, 2010, pp. 29-50.

Kellermann Kersten, "Too Big to Fail: a Thorn in the Side of Free Markets", in *Empirica*, 38, 2011, pp. 331-139.

Kennedy Duncan, "The Stages of the Decline of the Public/Private Distinction", in the *University of Pennsylvania Law Review*, Vol. 130, No. 6, 1982, pp. 1349-1357.

Kingsbury Benedict, Krisch Nico and Stewart Richard B., "The Emergence of Global Administrative Law", in *Law and Contemporary Problems*, Vol. 68, 2005, pp. 15-61.

Kirkpatrick Grant, "The Corporate Governance Lessons from the Financial Crisis", in *Financial Market Trends*, 2009, pp. 1-30.

Kjaer, Poul, F., "The Structural Transformation of Embeddedness", *Normative Orders Working Paper*, Goethe University Frankfurt am Main, 05/2010.

Koskenniemi Martti and Leino Päivi, „Fragmentation of International Law? Postmodern Anxieties“, in the *Leiden Journal of International Law*, 15, 2002, pp. 553-579.

Krippner Gerta, R., and Alvarez Anthony, S., "Embeddedness and the Intellectual Projects of Economic Sociology", in *Annual Review of Sociology*, 33, 2007, pp. 219-240.

Krisch Nico, "The Case for Pluralism in Postnational Law", LSE Law, Society and Economy Working Papers, 12/2009.

Kroszner, Randall S., "Can the Financial Markets Privately Regulate Risk?; The Development of Derivatives clearinghouses and recent over-the counter innovations", in the Journal of Money, Credit and Payments Systems, 1999, pp. 596-618.

Kumm Mattias, "Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law", in the German Law Journal, Vol. 07, No. 04, pp. 341-370.

Ladeur Karl-Heinz, „The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law“, Osgoode CLPE Research Paper, No. 16/2011, March 2011.

Ladeur Karl-Heinz, Viellechner Lars, "Die transnationale Expansion staatlicher Grundrechte", in Archiv des Völkerrechts, Bd. 46, 2008, pp. 42-73.

Lane Philip R., "Financial Globalization and the Crisis", in the Open Economies Review, 24, 2013, pp. 555-580.

Lenaerts Koen and Guterrez-Fonds Jose A., "The Constitutional Allocation of Powers and General Principles of EU Law", in the Common Market Law Review, 47, 2010, pp. 1629-1669.

Majone Giandomenico, (ed.), "Regulating Europe", Oxon, Routledge, 1996.

Mallaby Sebastian, "Hands Off Hedge Funds", Foreign Affairs, Vol. 86, No. 1, 2007, pp. 91-101.

McMillan John and Woodruff Christopher, "Private Order Under Dysfunctional Public Order", in the Michigan Law Review, Vol. 98, 1999-2000, pp. 2421-2485.

Mengle „The importance of Close-Out Netting“, ISDA Research Note, available on the website of the International Swaps and Derivatives Association (ISDA) at <http://www.isda.org/researchnotes/pdf/Netting-ISDAResearchNotes-1-2010.pdf> (accessed last on 19.10.2014)

Mestmäker Ernst-Joachim, "Macht-Recht-Wirtschaftsverfassung", in der Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, 137, 1973.

Michaels Ralf, „Of Islands and the Ocean: The Two Rationalities of European Private Law“, in Brownsword Roger, Micklitz Hans-W., Niglia Leone, Weatherill Stephen, (eds.), "The Foundations of European Private Law", Bloomsbury Publishing, Oxford, 2011.

Michaels Ralf and Jansen Nils, "Private Law Beyond the State? Europeanization, Globalization, Privatization", Duke Law School Faculty Scholarship Series, Paper 78, 2007.

Micklitz Hans-W. and Reich Norbert, "The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)", in the Common Market Law Review, 51. 2014, pp. 771-808.

Micklitz Hans-W., "Pourquoi une édition spéciale relative aux théories du droit transnational?", Introduction, Cahiers à Thème Transnational Law RIDE 2013 1-2, 4-7.

Micklitz Hans-W. and Svetiev Yane, “A Self-Sufficient European Private Law – A Viable Concept?” EUI-ERC Working Paper 1/2012.

Miller Geoffrey, “Financial Private Regulation and Enforcement”, EUI Working Paper, RSCAS, 2011/50.

Mishkin Frederic S., “Over the Cliff: from the Subprime to the Global Financial Crisis”, in the *Journal of Economic Perspective*, Vol. 25, No. 1, 2011, pp. 49-70.

Muir Watt Horatia, “‘Party Autonomy’ in International Contracts: from the Makings of a Myth to the Requirements of Global Governance”, in the *European Review of Contract Law*, 3, 2010, pp. 1-34.

Omarova Saule T., “Rethinking the future of Self-Regulation in the Financial Industry”, in the *Brooklyn Journal of International Law*, 35, 2010, pp. 665- 706.

Pescatore Pierre, “International Law and Community Law – a Comparative Analysis”, *Collection des Conférences Européennes*, Nancy, 1968.

Picciotto Sol, Haines Jason, “Regulating Global Financial Markets”, in the *Journal of Law and Society*, Vol. 26, No. 3, 1999, pp. 351-368

Pozsar Zlotan, “The Rise and Fall of the Shadow Banking System”, *Moody’s Economy, Regional Financial Review*, 2008, pp. 13-25.

Reh Christine, Heritier Adrienne, Koop Chritel, Bressanelli Edoardo, “The Informal Politics of Legislation: Explaining Secluded Decision-Making in the European Union”, *ABSA Annual Meeting Paper*, 2010.

Riles Annelise, “Is New Governance the Ideal Architecture for Global Financial Regulation”, in *Monetary and Economic Studies*, November 2013.

Risse Thomas, “Neo-Functionalism, European Identity, and the Puzzles of European Integration”, in the *Journal of European Public Policy*, 12:2, 2005, pp. 291-309.

Rodrik Dani and Subramanian Arvind, “We must curb international flows of capital” in the *Financial Times*, February 25, 2008.

Rosen Kenneth T., Katz Larry, “Money Market Mutual Funds: An Experiment in Ad Hoc Deregulation: A Note”, in the *Journal of Finance*, Vol. 38, No. 3, 1983, pp. 1011-1017.

Sassen Saskia, “The Participation of States and Citizens in Global Governance”, in the *Indiana Journal of Global Legal Studies*, Vol. 10 No. 5, Issue 1, 2003, pp. 5-28.

Sauter Wolf, “Proportionality in EU Law: A Balancing Act?”, *TILEC Discussion Paper*, No. 2013-003, 2013.

Scharpf Fritz W., “Political Legitimacy in a Non-optimal Currency Area”, *MPIfG Discussion Paper*, 13/15, 2013.

Scharpf Fritz W., “Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis”, *MPIfG Discussion Paper*, 12/6, 2012.

Scharpf Fritz W., “Legitimacy in the Multilevel European Polity”, *MPIfG Working Paper*, 09/1, 2009.

- Scharpf Fritz W., “What have we learned? Problem-solving capacity of the multilevel European polity”, MPIFG working paper, No. 01/4, 2001.
- Scharpf Fritz W., “Economic Integration, Democracy and the Welfare State”, in the Journal of European Public Policy, 4:1, 1997, pp. 18-36.
- Schäuble Wolfgang, „Banking union must be built on firm foundations“, Financial Times, May 12, 2013, available at: <http://www.ft.com/cms/s/0/8bdaf6e8-b89f-11e2-869f-00144feabdc0.html#axzz3Md8hUPbh> last accessed on the 22.12.2014.
- Schiff Berman, Paul, „Global Legal Pluralism“, in the Southern California Law Review, Vol. 80, 2007, pp. 1155-1238.
- Schiff Berman Paul, The Globalization of Jurisdiction, 151 University of Pennsylvania Law Review, Vol. 151, 2002, pp. 311-529.
- Schwarcz Steven L., “Controlling Financial Chaos: The Power and Limits of Law”, in the Wisconsin Law Review, 2012, pp. 815-840
- Schwarcz Steven L., “Regulating Shadow Banking”, in the Review of Banking & Financial Law, 31, 2011-2012, pp. 619-642.
- Schwarcz Steven L., “Keynote Address: Understanding the Subprime Financial Crisis”, in South Carolina Law Review, Vol. 60, 2009, pp. 550-572.
- Schwarcz Steven L., “Systemic Risk”, in the Georgetown Law Journal, Vol. 97, 2008, pp. 193 – 249.
- Smith Timothy M., “Emerging Private Governance in the Global Green Technology Policy Regime”, Draft Paper for Workshop on Transnational Business Governance Interactions, EUI, May, 2011.
- Szablowski David, “Mimetic diffusion and the potential for interlocking regulation: the IFC performance standards and the extractive industries”, Draft Paper for Workshop on Transnational Business Governance Interactions, EUI, May, 2011.
- Taggart Michael, “From ‘Parliamentary Power’ to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century” in the University of Toronto Law Journal, 55, 2005, pp. 575-628.
- Taub Jennifer, “Recommendations for Reality-Based Regulatory Reform of Hedge Funds and Other Private Pools of Capital”, SAFER, October 21, 2009.
- Teubner Gunther, and Korth Peter, “Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society”, electronic copy available at: <http://ssrn.com/abstract=1416041>.
- Tuori Kaarlo, “Towards a Theory of Transnational Law”, Conference Draft Paper, Helsinki, 26.08.2010.
- Veron Nicolas, “A Realistic Bridge Towards European Banking Union”, Bruegel Policy Contribution, Issue 20013/09, June 2013.

Vives Xavier, “Competition and Stability in Banking: A New World for Competition Policy?” in *Financial Supervision in an Uncertain World*, ESI Annual Conference Report, Eijffinger Sylvester and Koedijk Kees (eds.), CEPR, 2010.

Wai Robert, „The Interlegality of Transnational Private Law“, in *Law and Contemporary Problems*, Vol. 71, 2008, pp. 106-127.

Walker Neil, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, in the *International Journal of Constitutional Law*, Vol. 6, 2008, pp. 373-396.

Walker Neil, “The White Paper in Constitutional Context”, part of contributions to the Jean Monnet Working Paper No.6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, 2001.

White Lawrence J., “Markets: The Credit Rating Agencies”, in *Journal of Economic Perspectives*, Vol. 24, No. 2, 2010, pp. 211-226.

Whytock Christopher A., “Domestic Courts and Global Governance”, in the *Tulane Law Review*, Vol. 84, 2009, pp. 67-123.

Wouters Jan and Odermatt Jed, “Comparing the ‘Four Pillars’ of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank and WTO”, Leuven Centre for Global Governance Studies, Working Paper No. 128, December 2013.

Wouters Jan and Geraets Dylan, “The G20 and Informal International Lawmaking”, Leuven Centre for Global Governance Studies, Working Paper No. 86, March 2012.

Zumbansen Peer, “Neither Public Nor Private, National Nor International: Transnational Corporate Governance form a Legal Pluralist Perspective”, *Journal of Law and Society*, Vol. 38, Issue 1, pp. 50-75, 2011

Zumbansen Peer, “The Next ‘Great Transformation’ of Markets and States in the Transnational Space: Global Assemblages of Corporate Governance & Financial Market Regulation”, CLPE Research Paper, 09/2009, Vol. 05, No. 02, 2009.

Zumbansen Peer, “Sustaining Paradox Bounders: Perspectives on Internal Affairs in Domestic and International Law”, in the *European Journal of International Law*, 15, 2004, pp. 197-211.

Primamry sources according to institutions

European Union

Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC,

2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173, 12.6.2014, p. 190–348.

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes Text with EEA relevance, OJ L 173, 12.6.2014, p. 149–178.

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, OJ L 176, 27.6.2013, p. 338–436.

Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90

Commission, COM (2013) 520 final, 2013/0253 (COD), Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, Brussels, 10.7.2013.

Commission Statement, “Finalizing the Banking Union: European Parliament backs Commission’s proposals (Single Resolution Mechanism, Bank Recovery and Resolution Directive, and Deposit Guarantee Schemes Directive)”, Statement/14/119, Brussels, 15 April 2014.

Commission Statement, “European Parliament and Council back Commission’s proposal for a Single Resolution Mechanism: a major step towards completing the banking union”, Statement/14/77, Brussels, 20 March, 2014.

Commission Memo, “Banking union: restoring financial stability in the Eurozone”, Memo/14/294, Brussels, 14 April 2014.

Commission Memo, “A comprehensive EU response to the financial crisis: substantial progress towards a strong financial framework for Europe and a banking union for the Eurozone”, Memo/14/244, Brussels, 28 March 2014.

Council Press Release, “Council agrees general approach on Single Resolution Mechanism”, 17602/13 (OR. en), PRESSE 564, Brussels, 18 December 2013.

Parliament Press Release, “Parliament negotiator rescue seriously damaged bank resolution system”, Committee on Economic and Monetary Affairs, 20.03.2014.

Parliament Report, “Report on the proposal for a regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (COM(2013)0520 – C7- 0223/2013 – 2013/0253(COD))”, A&-0478/2013, 20.12.2013.

Schuman Declaration, 9.05.1950, available at: http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm, accessed last on 16.12.2014.

G20

Group of 20, London Declaration, 2009.

Bank for International Settlements

Basel Committee for Banking Supervision

Cross-border Bank Resolution Group, “Report and Recommendations of the Cross-border Bank Resolution Group”, Bank of International Settlements, March 2010.

Financial Stability Board

FDS, Charter of the Financial Stability Board, endorsed by the Heads of State and Government of the Group of Twenty, Los Cabos Summit, 19 June 2012.

FSB, Standing Committee on Standards Implementation, “Handbook for FSB Peer Reviews”, 7. January 2014.

FSB Recommendations, “Key Attributes of Effective Resolution Regimes for Financial Institutions” October 2011 endorsed at the G-20 Summit in Cannes, November 2011.

FSB, Framework for Strengthening Adherence to International Standards, 9. January 2010.

FSB Peer Review Report, “Thematic Review on Resolution Regimes”, 11 April 2013.

FSB Progress Report of the FSB to the G-20, “Progress and Next Steps Towards Ending “Too-Big-To-Fail” (TBTF)”, 2 September 2013.

FSB Progress Report, “Resolution of Systemically Important Financial Institutions”, November 2012.

FSB Consultative Document, “Recovery and Resolution Planning: Making the Key Attributes Requirements Operational”, November 2012.

FSB Statement, “Policy Measures to Address Systemically Important Financial Institutions”, 4 November 2011.

IMF

Asmundson Irena, “Financail Services: Getting the Goods”, Finance and Development, IMF, 2012.

Brockmeijer Jan, “Macroprudential Policy: What instruments and How to Use Them? Lessons from Country Experiences”, IMF Working Paper, IMF, 2011.

Dodd Randall, “What Are Money Markets?” in Back to Basics, Finance and Development, IMF, 2012.

Dodd Randall, “Markets: Exchange or Over-the-Counter”, Finance and Development, IMF, 2012.

Gobat Jeanne, “Banks: At the Heart of the Matter” Finance and Development, IMF, 2012.

Jàcome Luis I. and Nier, Erlend W., “Macroprudential Policy: Protecting the Whole”, Finance and Development, IMF, 2012.

Kiff, John, “What is LIBOR?”, in Back to Basics, Finance and Development, IMF, 2012.

Kodres Laura and Narain Aditya, “Fixing the System”, Finance and Development, IMF, 2012.

Merrouche Ouarda and Nier Erlend, “What Caused the Global Financial Crisis? – Evidence on the Drivers of Financial Imbalances 1999-2007”, IMF Working Paper, IMF, 2010.

Valderrama Laura and Marc Quintyn, “Macroprudential Regulation under Repo Funding”, IMF Working Paper, 2010

Federal Reserve Bank of New York

Adrian Tobias and Shin Hyun Song, “The Shadow Banking System: Implication for Financial Regulation”, Federal Reserve Bank of New York, Staff Report No. 459, 2012.

Pozsar Zlotan, Adrian Tobias, Ashcraft Adam and Boesky Hayley, “Shadow Banking”, Federal Reserve Bank of New York, Staff Report No. 382, 2009.