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**Characteristics and consequences of European Union’s (EU) institutions participation or non-participation within global financial standard setters: will the European Union be overruled by global bodies?**

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SUMMARY: 1. Introduction. – 2. Global standard setting bodies and the financial sector. – 3. Where, why and how are global standards implemented? – 4. European Union participation in Standard setting bodies: problematic issues. – 5. What can we learn from EU external relations studies? – 6. The European Union and the distribution of powers in financial matters. – 7. Interactions between the EC and the global levels. – 8. Global standards setters and the problem of accountability: the EU as account holder.

## **1. Introduction**

The globalization of markets has shown the interdependency of national systems in many fields. As a matter of fact, it has been observed that mal-regulation in one country can produce negative effects all around the world. As these consequences cannot be effectively addressed by separate national regulatory and administrative measures, the importance of cooperation has been increasingly pointed out.

Historically, international cooperation has been conducted by states through bilateral or multilateral treaties. Traditionally, international organizations are established by means of an “agreement”, which regulate either the organization’s competences and goals or the principles governing its structure and its functioning<sup>1</sup>. The agreement also sets forth the member states’ reciprocal duties within the organization and their duties to the organization itself. Within this kind of cooperation rules are usually binding and non-compliance is often punished by sanctions.

In addition to this traditional way of cooperation, the emergence of other types of relationships, on a global level, has recently gained in importance<sup>2</sup>. Various transnational systems of regulation or regulatory cooperation have, in fact, been established not through international treaties, but through more informal intergovernmental networks of cooperation. Moreover, some organizations are compounded by individuals, corporations, NGO’s or other groups, instead of by states.

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<sup>1</sup> C.F. AMERASINGHE, *Principles of the institutional law of international organizations*, Cambridge, Cambridge University Press, 1996, 9.

<sup>2</sup> See, B. KINGSBURY, N. KRISCH and R. STEWART, *The emergence of a global administrative law*, IILJ Working paper 2004/1, *Global Administrative Law Series*, in [www.iilj.org](http://www.iilj.org); S. CASSESE, *Il diritto amministrativo globale. Una introduzione*, Riv. Trim. dir. pubbl., 2005, 337 ss; S. ROBERTS, *After government? On representing law without the State*, in *M.L.R.*, 2005, 1 ss; D. ZARING, *International law by other means: the twilight existence of international financial regulatory organizations*, Texas International Law Journal, 1998, 287 ss.

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

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

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

The final goal of this research project is to obtain a better comprehension of the interaction between the EC legal system and the emerging global "arena". More precisely, considering the weakness of EU representation within financial global bodies, the study aims at verifying if the EU is loosing its competence in favor of global bodies or if, confirming its functional nature, it is developing any instruments or mechanisms to maintain control on this matter of regulation. Therefore, starting from the EC and global financial architecture, this research will try to stress the formal and informal link between the EU and global bodies, with a special spotlight on Standard Setters' decision-making processes. In the attempt of highlighting "filters" provided by the EC system as an *a posteriori* check on global standards, the study will also focus on the process of the implementation of global standards into EC law.

The general purpose is to make a useful contribution to the studies on European Community governance with a particular focus on the international dimension of the EC system.

## **2. Global standard setting bodies and the financial sector**

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

For many years, the international financial sector has been characterized by a centralized system, set up by the Bretton Woods agreements and signed in 1944. The agreements' purpose was to regulate commercial and financial relations

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<sup>3</sup> See, J. WARD, *The new Basel Accord and developing countries: problems and alternatives*, 2002, available at [www.bis.org/bcbs/qis/resp3jward.pdf](http://www.bis.org/bcbs/qis/resp3jward.pdf), 34.

among the world's most industrialized countries and, ultimately, to create a sound international monetary system. In order to achieve this goal, the Bretton Woods framework provided for the establishment of two institutions: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), which is now part of the World Bank.

After the collapse of the Bretton Woods system, in the beginning of the 70's, no single international agency or unitary institutional framework arose to replace it. Therefore, the financial sector now appears "*decentralized, essentially based on informal international understandings, which are to be implemented at the level of domestic jurisdiction*"<sup>4</sup>.

Apart from bodies traceable to the "international administration" model, such as the International Monetary Fund (IMF), the World Bank (WB) and the Organization for Economic Co-operation and Development (OECD), transnational regulatory networks such as the Basel Committee on banking Supervision (BCBS), the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors (IAIS) and the most recent International Organization of Pension Supervisors (IOPS) also develop rules for banking, securities, insurance and pension supervision respectively<sup>5</sup>. In these bodies, not the states themselves but national administrative authorities are represented. Moreover, transnational administrative bodies' powers are not based on formal treaties but on informal agreements, so both the organization and the functioning of these bodies are flexible and depend mostly on cooperation between their members<sup>6</sup>.

The financial standard setters also include some hybrid organisms amongst their number. An example is given by the Financial Stability Forum (FSF), which brings together not only the above mentioned transgovernmental regulatory networks but also intergovernmental international organizations (such as the IMF and the World Bank) and private bodies with regulatory functions, like the International Accounting Standards Board (IASB) and the International Auditing and Assurance Standards Board (IAASB), one of the International Federation of Accountants' (IFAC) technical committees.

Although for a long time unnoticed, this kind of cooperation is not a novelty, indeed some informal intergovernmental networks such as the BCBS, for instance, date back many years<sup>7</sup>.

During the last decade, however, the number of transnational bodies intervening in many different fields has increased. Furthermore, their role has also changed during these years. While in the past they were simply transnational *fora*

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<sup>4</sup> M. GIOVANOLI, *A new architecture for financial market: legal aspects of international financial standard setting*, in M. GIOVANOLI (ed.), *International monetary law*, Oxford, 2000, 10.

<sup>5</sup> A classification of administrative global bodies is given by B. KINGSBURY, N. KRISCH and R. STEWART, *The emergence of a global administrative law*, cit.

<sup>6</sup> D. ZARING has stressed that "*they act out of international law because they are not considered international actors, as those can be only States*" (D. ZARING, *International law by other means: the twilight existence of international financial regulatory organizations*, cit., 286-287).

<sup>7</sup> C. FREELAND, *The work of the Basel Committee*, in R.C. EFFROS (eds.), *Current Legal Issues Affecting Central Banks*, Washington, 1994, 231; I. BORRELLO, *L'organizzazione sovranazionale ed internazionale della vigilanza sul credito*, Riv. trim. dir. pubblico, 1999, 423 ss; D. WOOD, *Governing global banking: the Basel Committee and the politics of financial globalisation*, Aldershot, 2005, 45 ss.

of discussion, these bodies have suddenly become important standard setters. In other words, from places devoted to the exchange of ideas, they have changed into transnational regulatory bodies, shifting many regulatory decisions from the national to the global level. The main reasons for this development can probably be found in the need of regulation perceived by market participants in a globalized world. In order to expand their market position and reduce costs, large firms call for a level playing field<sup>8</sup>; so, global bodies are filling the normative gap left by domestic regulators.

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

The absence of a centralized regulatory system does not mean a total lack of consistency. Despite the described fragmentation, the high number of varied actors which operate in the financial sector have developed various instruments of coordination over the last years. With the purpose of providing the widest spread of their standards, the above mentioned bodies have established a tight system of networking. This is particularly true for “public” or “public-private” bodies, such as the IMF, IOSCO or BCBS, which keep constantly in contact with each other. Representatives of each body, for example, are invited to attend almost all other bodies’ meetings. Also, during the decision-making process of one standard setter, the others are frequently asked to give their advice on the subject matter of regulation. With the aim to coordinate their activities in fields of common interest, such as financial conglomerates, the BCBS, the IOSCO and the IAIS have also recently set up the Joint Forum, an informal body which meets regularly three times per year. The Joint Forum is in charge to study issues of common interest to the three financial sectors and develop guidance and principles and/or identify appropriate best practices.

This kind of cooperation is not based on a command and control system, but rather on a consensus-building process<sup>9</sup>. Through intersectoral negotiations and contacts, global regulators aim to avoid possible antinomies between global standards and to fill regulatory gaps which may occur. Therefore, standard setters are engaged in an endless work of updating. Furthermore, reciprocal cross-referencing between global standards reveals a trend towards the creation of a coherent system of rules.

In such a context, a central role is played by the Financial Stability Forum (FSF), which is designed to improve “*co-ordination and information exchange among the various authorities responsible for financial stability*”<sup>10</sup>. One of the FSF’s main achievements is the “Compendium of Standards”, which brings together codes and rules developed by the financial standard-setting bodies participating in the FSF. Even though this compendium does not include all of the standards issued by global financial regulators, it is an attempt to codify global financial rules.

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<sup>8</sup> R. B. STEWART, *Accountability and the discontents of globalization: US and EU models for regulatory governance*, cit., 36 typescript.

<sup>9</sup> R. D. GERMAIN, *Global financial governance and the problem of inclusion*, in *Global governance*, 2001, 417.

<sup>10</sup> [www.fsforum.org/about/what\\_we\\_do.html](http://www.fsforum.org/about/what_we_do.html)

The above described processes (the building up of a network of regulators and the creation of a coherent and exhaustive system of norms) help to the spread of standards and favor the compliance of domestic governments<sup>11</sup>.

In order to achieve the same aim, a sort of division of labor among regulators can be observed. As a matter of fact, standard setters are not provided with any executive power or formal assessment instruments<sup>12</sup>. Apart from the pressure exerted on their members, which are expected to implement the global rules they helped to develop, they do not have the power to foster the addressees of global rules to comply with them. They leave this task to other international authorities. The Basel Committee itself, for example, admits that: “*Although Committee members individually collaborate in assessment missions, these are conducted primarily by the IMF and the World Bank. The Committee has decided not to make assessments of its own to maintain the current division of labor between the Committee’s standard-setting and the international financial institutions’ assessment functions*”<sup>13</sup>.

Within the context of financial markets, the IMF and WB play a key role toward the implementation and effectiveness of standards. More precisely, the Reports on the Observance of Standards and Codes (ROCSs) compiled by the two above mentioned organizations and their conditioned lending policy are considered two of the most important factors through which non binding standards tend to become mandatory, especially for developing countries<sup>14</sup>. Through these instruments, the IMF and the WB assess the compliance of domestic governments to rules developed by standard setters.

As mentioned above, in the financial sector, the importance of private bodies such as the International Accounting Standards Board (IASB) and the International Auditing and Assurance Standards Board (IAASB), or credit rating agencies, is growing<sup>15</sup>. Each of these bodies develop standards on their own, which are frequently incorporated in “public” or “public-private” bodies’ standards through cross-references<sup>16</sup>. One such example is the BCBS’ *Basel II* accord on *International convergence of capital measurement and capital standards* reference to rating agencies’ evaluations<sup>17</sup>. According to the *Basel II*,

<sup>11</sup> M. DE BELLIS, *Global standards for domestic financial regulations. Concourse, competition and mutual reinforcement between different types of global administration*, 2006, available at [www.bepress.com](http://www.bepress.com)

<sup>12</sup> S. CASSESE, *Global standards for national administrative procedure*, Law and Contemporary Problems, 2005, 124.

<sup>13</sup> BCBS, *Core principles Methodology – Consultative paper*, Basel, April 2006, in [www.bis.org/publ/bcbs124.pdf](http://www.bis.org/publ/bcbs124.pdf), p. 1.

<sup>14</sup> See, for example, J. WARD, *The new Basel Accord and developing countries: problems and alternatives*, cit., 33 ss; ID., *Is Basel II voluntary for developing countries?*, in *Financial Regulator*, 2002, 51 ss; R. P. DELONIS, *International financial standards and codes: mandatory regulation without representation*, Intern. Law Pol., 2004, 563; M. S. BARR e G. P. MILLER, *Global administrative law: the view from Basel*, European Journal of International Law, 2006, 32-34.

<sup>15</sup> The incorporation of private entities’ activity and standards in public regulatory processes give raise to many problems of accountability (see, S. CASSESE, *Legal imperialism and “Raison d’Etat” in the global administrative law*, paper presented to the Global Administrative Law Conference, New York University, 22-23 April 2005, 3; W. MATTLI and T. BUTHE, *Global private governance, lessons from a national model of setting standards in accounting*, Global Administrative Law Series, IILJ Working paper 2005/4, 6).

<sup>16</sup> M. DE BELLIS, *Global standards for domestic financial regulations. Concourse, competition and mutual reinforcement between different types of global administration*, cit., 114.

<sup>17</sup> [www.bis.org/publ/bcbs128.pdf](http://www.bis.org/publ/bcbs128.pdf)

rating agencies can be asked to assess the creditworthiness of banks on the basis of standards they had published themselves. The IOSCO's standards reference to IAASB global rules on accounting, which are also part of the FSF's *Compendium of Standards*, represent a further example.

However, public regulators' tendency to incorporate private entities' activity or standards is not unconditioned. In order to be entrusted with the task of carrying out the rating process, for example, rating agencies must meet the requirements fixed by global public authorities<sup>18</sup>. Similarly, IAASB activity is subject to the supervision by *Public Interest Oversight Board* (PIOB). This body, whose members are appointed by the BCBS, the IOSCO, the IAIS, the WB and the FSF, has been set up to assure that the IAASB acts in pursuit of the public interest<sup>19</sup>.

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

This research does not aim at a comprehensive analysis of all international financial actors. At least during the first stage, this study, therefore, will focus on the activity of the BCBS, the IOSCO and the IAIS, primarily for two reasons. First, among the financial standard setting bodies, the mentioned transnational administrative bodies are those who seem to have reached the highest degree of achievements in pursuing the spread and implementation of their rules. Second, the "administrative" nature of the above mentioned global bodies gives raise to a new issue for the European Community, different from questions arisen by treaty-based organizations which operate in the sector, such as the IMF. Thus, global actors dealing with financial issues other than the BCBS, the IOSCO and the IAIS will be taken into consideration only insofar as their activity is relevant for the above mentioned global bodies or for highlighting EC attitude toward financial fields covered by the BCBS, the IOSCO and the IAIS' standards.

### **3. Where, why and how are global standards implemented?**

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

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<sup>18</sup> See *Basel II*, par. 90 ss.

<sup>19</sup> Outcomes of the research on "International networks of financial regulators" and "Global standards for financial markets" coordinated by Professor S. Cassese and Professor S. Battini, 2007, forthcoming.

First, one ought to understand on which grounds the wide implementation is based. Scholars have made an effort to highlight the reasons why global financial standards are so largely obeyed. Some authors have stressed that the success of financial standards lies mainly on market forces' incentives<sup>20</sup>, standards setting bodies' expertise<sup>21</sup> or their ability to persuade<sup>22</sup>.

It would be hard to say which of the above factors plays the greatest role, as the effects of each of these elements cannot be easily determined. It seems rather to be a convergence of forces which pushes governments to implement financial standards. Moreover, possible answers to this question may be different depending on the perspective considered. For example, it is widely shared that developing countries are mostly encouraged to implement global standards by the WB and the IMF<sup>23</sup>. These organizations are able to make compliance with standards part of the conditions which must be fulfilled by a borrowing State, so the latter is practically forced to apply them. The same does not occur for standard setters' members. Their compliance is essentially a political issue<sup>24</sup>. As it happens within traditional international organizations, since decisions are primarily taken on a *consensus* basis, members are expected to implement rules to which they have previously given their consent<sup>25</sup>.

The second question which must be explored is through which mechanisms are global rules implemented in domestic systems. This question is strongly related to the nature and effects of financial standards. Many scholars have engaged themselves in an attempt to define the legal *status* of these rules. For the majority, they are "imperfect laws" or "laws in limbo" which need to be transformed into formal rules to be enforced<sup>26</sup>.

Depending on the legal system in which they are going to be transposed, these rules may be included into statute law (through a legislative process) or into administrative rules. The latter case mainly occurs for standards issued by transnational regulatory bodies, such as the IOSCO or the IAIS. As mentioned, members of these standard setters are domestic authorities which have the power at national level to regulate a particular economic field.

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<sup>20</sup> D. E. HO, *Compliance and international soft law: why do countries implement the Basle Accord?*, Journal of International Economic Law, 2002, 683.

<sup>21</sup> D. KERWER, *Standardising as governance: the case of credit rating agencies*, Max Planck Projektgruppe, March 2001, in [www.mpp-rdg.mpg.de/pdf\\_dat/001\\_3.pdf](http://www.mpp-rdg.mpg.de/pdf_dat/001_3.pdf). On the importance given to "global actors" by the supply of reliable information, see A. M. SLAUGHTER, *Global government networks, global information agencies, and disaggregated democracy*, in *Michigan Journal of International Law*, 2003, 1058 ss; M. DRAGHI, *Le istituzioni finanziarie internazionali nell'economia mondiale*, Riv. it. dir. pub. com., 2006, 799.

<sup>22</sup> A. M. SLAUGHTER, *A New World order*, Princeton, 2004, 213.

<sup>23</sup> M. GIOVANOLI, *A new architecture for financial market: legal aspects of international financial standard setting*, cit., 46-47; J. WARD, *The new Basel Accord and developing countries: problems and alternatives*, cit., 33 ss; ID., *Is Basel II voluntary for developing countries?*, cit., 51 ss; R. P. DELONIS, *International financial standards and codes: mandatory regulation without representation*, cit., 563; M. S. BARR e G. P. MILLER, *Global administrative law: the view from Basel*, cit., 32-34.

<sup>24</sup> ECB, *La cooperazione internazionale in materia di vigilanza prudenziale*, Monthly Bulletin, May 2002, 58.

<sup>25</sup> On the use of *consensus* in treaty-based international organizations, see A. CASSESE, *International law*, Oxford, 2001, 35.

<sup>26</sup> M. GIOVANOLI, *A new architecture for financial market: legal aspects of international financial standard setting*, cit., 35; M. FRATANNI and J. PATTISON, *International financial architecture and international financial standards*, The annuals of the American academy, Jan. 2002, 193.

The European Union does not have similar administrative authorities. As a matter of fact, the European Central Bank does not have competences in supervisory matters, but only in an advisory role (see art. 105.5 of the EC Treaty). Therefore, compliance with global financial standards is principally provided through the adoption of legislative acts. For example, the 2005/68/CE directive of the European Parliament and of the Council on reinsurance incorporates the IAIS' standards. Similarly, the 2003/71/CE directive has been explicitly adopted to make the EC securities rules consistent with the IOSCO's guidelines. More recently, the BCBS' *Basel II* accord has been transposed into the 2006/48/CE directive on the taking up and pursuit of the business of credit institutions<sup>27</sup>.

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

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

The consequences of the underlined feature of financial standards are twofold. First, national administrative authorities agree that in matters covered by global standards very little discretionary power is left at a national level<sup>28</sup>. Is this true also when standards are implemented through acts of a legislative nature? Normally, parliamentary process should guarantee the highest degree of democratic control. However, some authors have pointed out that in many cases, even parliaments have little freedom of decision in dealing with the incorporation of financial standards<sup>29</sup>. As it usually happens for the endorsement of international agreements, parliaments' powers are bound by decisions stipulated at a different level.

This remark is actually confirmed for the European Union by the content of the above mentioned directives. Apart from a few deviations, these directives look like the standards given off by the IAIS, the IOSCO or the BCBS. Thus, it is not surprising that during the implementing process of *Basel II*, the European Parliament criticized the lacking of parliamentary control over the global decision-making process<sup>30</sup>.

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<sup>27</sup> EC directives are available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

<sup>28</sup> Outcomes of the research on "International networks of financial regulators" and "Global standards for financial markets" coordinated by Professor S. Cassese and Professor S. Battini, 2007, forthcoming.

<sup>29</sup> M. GIOVANOLI, *A new architecture for financial market: legal aspects of international financial standard setting*, cit., 43.

<sup>30</sup> See, M. S. BARR e G. P. MILLER, *Global administrative law: the view from Basel*, cit., 29-30.

Another consequence of the detailed nature of some standards issued by global bodies is that they do not need any other specification. This means that, they can be implemented directly, as it occurs in practice. In some cases, national administrative authorities, stakeholders and judges use these standards before and independently from their transposition<sup>31</sup>.

To conclude, once financial standards are given off, they circulate in a way which is hardly traceable. Many factors jointly influence the implementation of global rules, so the latter's spread cannot be effectively kept under control. Furthermore, global financial rules are often so detailed that they can be enforced directly. Even when they are included in domestic law, frequently very little discretionary power is left to domestic institutions. This means that being part of global bodies and participating in their decision-making process is fundamental to keeping a regulatory power over these issues.

#### **4. European Union participation in standard setting bodies: problematic issues**

From the above considerations it follows that for a better understanding of the way in which the European Community deals with matters, related to financial markets its participation to standard setters' meetings and decision-making processes should be taken into consideration.

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

In addition to these common features, some aspects distinguish one financial standard setter from another.

The Basel Committee on Banking Supervision (BCBS) is the oldest and the least formalized of these standards setters. Set up by the G-10 central bank governors at the end of 1974, the Committee does not possess any treaty or bylaws. The number of its members is very limited (fourteen). The Committee is compounded only by central banks' governors of the richest countries. It is not a formal supranational authority, but provides a place for the on-going co-operation and coordination of prudential supervision policies by formulating standards, best practice and guidelines. Even if the BCBS declares to be open to new admissions, this does not occur practically. Applications to become a member cannot be addressed by any State wishing to do it. Rather, the BCBS may invite a country to join the group only when the economic system of that country has reached the level of development of the other members, and this decision is made by the BCBS itself. Significantly, only Spain has been asked to become a member of the body since it was created.

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<sup>31</sup> Outcomes of the research on "International networks of financial regulators" and "Global standards for financial markets" coordinated by Professor S. Cassese and Professor S. Battini, 2007, forthcoming.

The International Organization of Securities Commissions (IOSCO) consists of around 182 world securities regulators, including international organizations and private associations. However, decisions are made exclusively by ordinary members, a smaller group made up of 108 national authorities entrusted at a domestic level with the regulation of the securities sector. Associate and affiliate members can take part in the IOSCO's discussion meetings, but do not have voting right. The functioning of the organization is not regulated by any treaty, but only by the IOSCO-passed bylaws. According to the latter, any security commission or similar governmental agency may apply to become member of the organization<sup>32</sup>. As the Basel Committee, the IOSCO is a sort of meeting space for co-ordination. Through its permanent structure, it aims at promoting high standards of regulation in order to maintain efficient and sound markets, working on all major issues for securities regulators.

Similarly to the IOSCO, the International Association of Insurance Supervisors' (IAIS) membership comprises not only national administrative authorities (insurance industry supervisors). International organizations and private bodies are also eligible to become part of the membership. Within the IAIS, all members have voting rights, except for international organizations such as the European Community<sup>33</sup>. This global body was not formed by treaty, but rather is governed by a set of bylaws. The main goal of its members is to “*co-operate to contribute to improved supervision of the insurance industry on a domestic as well as an international level in order to maintain efficient, fair, safe and stable insurance markets for the benefit and protection of policyholders*”<sup>34</sup>. While the BCBS and the IOSCO seek to achieve their aims through a *consensus* voting system, the IAIS uses a majority principle.

As previously stated, national systems are “represented” within financial standard setters by their administrative authorities. Therefore, officials who take part in global bodies are not diplomats and do not represent national governments. As a consequence of their limited competence at a domestic level, national authorities simply carry national sartorial interests or, more frequently, their own interest at the discussing board<sup>35</sup>.

One might ask weather or not the European Union involved in the decision making process. In general, the EU is invited to participate in standard setting bodies' activities. However, the Community status within the above mentioned bodies is not very consistent and varies depending on the global body considered. For instance, the European Community is officially part of the IAIS but without voting rights, while, within the BCBS, it has only an observer status. The same

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<sup>32</sup> IOSCO's bylaws, cited by D. ZARING, *International law by other means: the twilight existence of international financial regulatory organizations*, cit., 292.

<sup>33</sup> Art. 6 IAIS' bylaws, available at [www.iaisweb.org](http://www.iaisweb.org). The organization admits also certain actors with observer status to attend IAIS' meetings. However, they do not have voting right, as international organizations which are members.

<sup>34</sup> Art. 2 IAIS' bylaws, available at [www.iaisweb.org](http://www.iaisweb.org)

<sup>35</sup> D. ZARING, *International law by other means: the twilight existence of international financial regulatory organizations*, cit., 301. Similar remarks have been pointed out for the EU committees, see J.H.H. WEILER, *Epilogue: “Comitology” as revolution – Infranationalism, constitutionalism and democracy*, in C. JOERGES and E. VOS (eds.), *EU committees: social regulation, law and politics*, Oxford, 1999, 342.

applies for the FSF, where the EU is a member. Contrarily, IOSCO membership is not granted to the European Community, even as an observer.

Within each of the above mentioned bodies, the European Community is represented through different institutions. The Commission takes part in the IAIS and to the BCBS. As observer, it also attend the Joint Forum's meetings. In some cases, there is a double representation, as it happens for the BCBS. Here, in addition to the Commission, the European Central Bank take part to the decision making process. Moreover, the latter institution is solely in charge to embody European Community interests at the FSF's meetings. In any case, the Council never takes part in standard setting bodies' membership<sup>36</sup>.

In general, however, European Community has no voting rights. It can participate to global bodies' activities and discussions during the decision-making process but the final decision does not depend on the EU's consent.

From an organizational point of view, then, the EU seems to have a secondary position in comparison to its Member States, which are usually full members and give the impression that EU is losing power and importance in favor of national or transnational systems. This appears inconsistent with the fact that, as we have seen, it transposes financial standards into EC law as it was a full member.

The research purpose is to highlight the real power exercised by the European Community within financial standard setting bodies and over matters covered by global standards. Is the EU truly being bypassed by those bodies and by Member states' authorities? Which role does the European Community really play in the decision-making process? Does the observer status give the EC sufficient tools to assert its interests in fields regulated by standard setters? Does it have the power to influence final decisions or not?

In order to answer to the above mentioned questions, it shall be pointed out not only the position the EU possesses itself in relation to global standard setting bodies, but also the position reached through formal and informal linkages between the EU and standard setters, as well as between the EU and Member states which are full members of the mentioned global bodies. Is the EU's weak representation compensated by Member States' presence? In other words, are European Community's priorities embodied by Member states or by other bodies during the decision making process? Is the EU developing any system to coordinate Member states' positions in order to make them consistent with the EU's goals? In the negative case, should the European Union develop any instruments to make up its lack of representation?

The preceding questions are not pointless. In some cases not all the EC Member states are also members of standard setters. The Basel Committee gives us an example. Within its membership only eight of the twenty-seven actual EC Member states are represented. Moreover, it is largely shared that decisions of the BCBS are mainly influenced by the dominant position of United Kingdom,

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<sup>36</sup> On the contrary, usually for economic and monetary issues is the Council which decides at international level. The Commission shall only be fully associated to the negotiations (C. ZILIOLI and M. SELMAYR, *The external relations of the euro area: legal aspects*, Common Market Law Review, 1999, 282).

together with the United States one<sup>37</sup>. Considering that through the transposition of global standards into EC law they become binding also for EC Members states which are not involved in standard setters' decision-making process, the way in which the EU and EU Member states participate to those bodies' activities appears quite relevant.

## 5. What can we learn from EU external relations studies?

The above underlined issues are not completely unknown. Similar problems have been tackled by scholars when studying the relations between the EU and international organizations.

In this context it has been pointed out that problems of EU external relations have two main reasons, depending on which viewpoint we adopt to look at EU's international activity<sup>38</sup>. On one hand, usually international organizations are made up of States and they do not allow other international organizations (such as the EU) to become full members<sup>39</sup>. Then, in the majority of the cases the EU has an observer status<sup>40</sup>. On the other hand, at the EU level the problem in dealing with EU's external relations is twofold. Only in few provisions the EC Treaty provides explicitly for an external competence in a specific subject matter. At the end of the '60s, that appeared in contrast with the increasing of EU internal competences<sup>41</sup>. So, to fill the gap the European Court of Justice developed the *parallelism doctrine*. According to the latter, the EU might entertain relations with third countries or organizations when two conditions are fulfilled: the parallel internal competence had already been used for the adoption of secondary legislation and the external competence is necessary for the achievement of one of the objective of the Treaty<sup>42</sup>.

In addition, when dealing with EU's external relations another aspect has to be born in mind. The European Union is a functional organization. This means that it does not have general sovereignty but its capacity is limited to those matters which Member States assign to it. So in some fields the Community has exclusive competence but in others not. In the first case the power of negotiation belongs to the EU. However, problems may raise when the international organization's treaty does not allow the EU to become full member. In that case, the EU acts, through

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<sup>37</sup> D. ZARING, *Informal procedure, hard and soft, in international administration*, *Global administrative law series*, IILJ Working paper, 2004/6, 2006, available at [www.iilj.org](http://www.iilj.org), 19; M. FRATANNI and J. PATTISON, *International financial architecture and international financial standards*, cit., 195.

<sup>38</sup> R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, The Hague/London/Boston, 1995, 119.

<sup>39</sup> As it has been pointed out EC accession to international organizations as full member is prevented both by Member states who are afraid of losing their international power and by other members of the considered international organization mostly because of issues concerning voting weights (see, P. EECKHOUT, *External relations of the European Union*, Oxford, 2004, 200-201).

<sup>40</sup> On the observer status of the EU, see R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, cit., 170 ss.

<sup>41</sup> F. DEHOUSSE and K. GHEMAR, *Le traité de Maastricht et les relations extérieures de la Communauté européenne*, *European Journal of International Law*, 1994, 157.

<sup>42</sup> Opinion 1/76 of the ECJ, available at [www.curia.eu](http://www.curia.eu). On the implied powers of the EC, see R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, cit., 70 ss; P. EECKHOUT, *External relations of the European Union*, cit., 58 ss;

the medium of its Member States which are required to follow a common position in the interest of the EU<sup>43</sup>.

More often the EU shares its competence with the Member states. In this case, the differentiation of EU internal distribution of powers leads to many different scenarios of external relations<sup>44</sup>. It is not my intention to go into the many difficulties to which power sharing at EU level may give rise, for example concerning voting rights. In general, for the purpose of this research it is enough to notice that when in matters covered by EU laws Member states have not completely lost their power, the EU and Member states shall act jointly also at the international level<sup>45</sup>. To emphasize that aim, the ECJ refers to the duty of co-operation laid down in article 10 of the EC Treaty. According to that provision, Member states shall facilitate the achievement of the Community's tasks and abstain from any measure which could jeopardize the attainment of the objective of the Treaty<sup>46</sup>. In dealing with mixed external actions, including the exercise of EU exclusive competence through Member states, the ECJ insisted on the requirement of unity in the international representation of the EU. As a consequence, in so far as an international organization of which the Community does not have a member status (namely, it does not have voting right) deals with matters falling in the scope of the Communities competence or governed by Community law, Member states have to coordinate their positions.

The EC Treaty does not provide for any rules on how to negotiate in the mentioned cases. In order to achieve the "close association" required by ECJ jurisprudence, in practice Member States and EU have developed many instruments to reach a common position prior to the formal decision within the international organization takes place<sup>47</sup>. Consensus among Member states is achieved through co-coordinating meetings conducted by the institutions of the European Community at different levels, exchange of information and documents, formal and informal agreements both among Member states and between the latter and the EU<sup>48</sup>.

Of course these practices and principles have been developed in a different context, namely governed by State actors and international rules. However, the experience in that framework may be useful for better understanding the global

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<sup>43</sup> P. EECKHOUT, *External relations of the European Union*, cit., 201. An alternative offered to the EC, is to authorize Member states to act on its behalf (see, R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, cit., 110)

<sup>44</sup> E. DE SMIJTER, *The external relations of a differentiated European Community*, in B. DE WITTE, D. HANF and E. VOS (eds.), *The many faces of differentiation in EU law*, Antwerpen - Oxford - New York, 2001, 269 ss.

<sup>45</sup> In this case, both the EU and Member states become contracting partners through the so-called mixed agreements (on this issue see, O'KEFFE and H.G. SCHERMERS, *Mixed agreements*, Kluwer, 1983; J.H.H. WEILER, *The external legal relations of non-unitary actors: mixty and the federal principle*, in J.H.H. WEILER, *The constitution of Europe: "do the new clothes have an emperor?"* and other essays on European integration, Cambridge, 1999, 130 ss.

<sup>46</sup> Opinions 2/92 and 1/94 ECJ, available at [www.curia.eu](http://www.curia.eu). On the duty of co-operation, see R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, cit., 147 ss; P. EECKHOUT, *External relations of the European Union*, cit., 209 ss.

<sup>47</sup> R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, cit., 190-193; P. EECKHOUT, *External relations of the European Union*, cit., 212-216.

<sup>48</sup> The procedure is based on an analogy with EC treaty provisions concerning explicit external competence and EC institutions internal agreements (R. FRID, *The relations between the EC and International organizations. Legal theory and practice*, cit., 192).

phenomena. Furthermore, successful solutions elaborated at the international level may constitute a model to solve problems that may rise at a global level.

Then, it is worth to consider if the EU organs have developed any links or a decision-making process similar to those created at the international level. For example, does the principle of co-operation apply also in the global context? In the affirmative case, does it apply in the same way as in the international context and does it imply the same consequences? And still, if no mechanism of coordination has been created, should the EU make any step in that direction?

The consideration of the international level may be useful also to verify if the same problems which arise in that context comes out also in the global one. As outlined above, EU external relations give raise to a high number of questions, in particular related to the way in which the internal division of competence may be accordingly maintained at the international level.

For economic and financial matters that problem is becoming more and more relevant. As it has been traditionally recognized, economic policy belongs generally to Member states. However, in practice the division of powers in those matters is not always easy to define<sup>49</sup>. Also, the Treaty does not provide an explicit external competence of the EU in the economic policy, so it is necessary to turn to the *parallelism doctrine*. As a consequence, representation of the European Union within international organizations which deals with economic and financial issues has always been a crucial point of the debate on EU international activity.

The accomplishment of the Monetary Union has made the situation worse. After 1999, monetary competence has been hand from the Member states over the EU. Some scholars suggest that the EU external representation should be reconsidered accordingly<sup>50</sup>. This is a problematic issue mainly for two reasons. On the one hand, since monetary issues are strongly related to many economic matters, it is hard to define within which boundaries the EU exclusive monetary policy shall be limited. On the other hand, as monetary policy is formulated by the European Central Bank, the latter has become a new international player, raising some problems concerning the division of representative powers also among EU institutions.

Considering the informal nature of global standard setting bodies we would expect a less problematic approach to the above mentioned issues. The present research will then consider if the same or similar problems encompass also financial standard setting bodies. In other words, does the division of substantive power according to Community law constitute a problem for EU participation in global bodies' activities? In the affirmative case, in which way standard setters have worked it out? And from an EU perspective how the problem of representation is solved? Does the internal division of power

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<sup>49</sup> I. PERNICE and F. HOFFMEISTER, *The division of economic policy powers between the European Community and its Member states – status quo and proposals de lege ferenda*, in A. VON BOGDANDY, P.C. MAVROIDIS and Y. MÉNY (Eds.), *European integration and international co-ordination*, The Hague/London/New York, 2002, 363 ss.

<sup>50</sup> See, C. ZILIOLO and M. SELMAYR, *The external relations of the euro area: legal aspects*, cit., 273 ss; R. TORRENT, *What is the ECB the central bank of?: reaction to Zilioli and Selmayr*, *Common Market Law Review*, 1999, 1229 ss; E. DENTERS, *Representation of the EC in the IMF*, in M. GIOVANOLI (ed.), *International monetary law*, 2000, Oxford, 2000, 211 ss.

determine the level (observer, member) and the nature (sole or joint) of the participation of the Community and the Member states in global bodies?

## 6. The European Union and the distribution of powers in financial matters

The question concerning how the European Community deals with standard setting bodies cannot be faced without taking into consideration the peculiar features of the EU organization. For our purpose at least two important aspects have to be envisaged. On the one hand, the division of competences between Member states and the European Union on financial issues falling under global bodies' regulation, on the other hand, the European Union institutional structure in those fields.

First of all, it is worth to remind that at national level, oversight of financial firms' behavior is usually left to independent authorities. Indeed, it is a common understanding that those matters, which are strongly related to financial stability and require long term decisions, shall be kept out of political forces.

The EU Treaty does not provide for a similar authority at the Community level. According to article 105.5 of the EC Treaty, the ECB competence in the field of banking supervision is limited and it is only a power "*to contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system*". Likewise, within the securities sector only an advisory role is granted to the ECB for prudential supervision by article 105.4 of the EC Treaty and article 25 of the Protocol to the Statue of the ESCB<sup>51</sup>. However, the Council may decide unanimously to assign the competence to the ECB (art. 105.6 EC Treaty)<sup>52</sup>. Neither the Treaty nor other dispositions include any similar provisions for the insurance field<sup>53</sup>.

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

Even though the EU does not have explicit regulatory power in the three above mentioned sectors, its intervention has been of an increasing importance over the last years. The 2005/68/CE directive on reinsurance, the 2003/71/CE directive on securities offered to the public and the 2006/48/CE directive on the taking up and pursuit of the business of credit institutions are one of such example<sup>54</sup>.

In particular, the financial governance in the EU is marked out by two main ideas: minimum harmonization of rules and national supervision<sup>55</sup>.

The harmonization of securities, banking and insurance sectors is based on the Treaty objective of building up a common market (art. 2 of the EC Treaty). The aim for financial matters is essentially achieved through the principles of

<sup>51</sup> See, N. MOLONEY, *EC securities regulation*, Oxford, 2002, 872.

<sup>52</sup> C. ZILIOLO and M. SELMAYR, *The external relations of the euro area: legal aspects*, cit., 314 ss.

<sup>53</sup> The Constitutional Treaty leave the framework unchanged.

<sup>54</sup> EU directives are available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

<sup>55</sup> I. BORRELLO, *L'organizzazione sovranazionale ed internazionale della vigilanza sul credito*, cit., 423 ss; P. FRATANGELO, *International and european co-operation for prudential supervision*, Riv. dir. bancario, 2003, 8.

mutual recognition and home country control within the framework of the free movement of services and freedom of establishment (artt. 43-48 and 49-55 of the EC Treaty respectively).

From the organizational point of view, some scholars have pointed out that co-operation among supervisory authorities is a natural consequence of the establishment of common rules at the EU level<sup>56</sup>. This is due to two main reasons. First, because of the need of a uniform implementation of the EC set of laws. Second, because the increasing number of cross-border activities call for a transnational joint actions to avoid that undertakings may escape from prudential supervision.

Others have asserted that also international cooperation, namely in the banking sector, is a consequence of prudential supervision organization in EC law<sup>57</sup>. As mentioned, the EC treaty originally left this field to national authorities, setting up the European System of Central Banks (ESCB) only to support national central banks by providing them with a forum within which to exchange experiences and good practices<sup>58</sup>.

In practice, in addition to the ESCB, the Community has encouraged the constitution of multilateral *fora* since the very beginning of the construction of the Single market for financial services<sup>59</sup>. The first EC multilateral forum dates back to 1972 when the *Group de Contact* was established<sup>60</sup>. This body brings together senior officials of central banks from the Member states (plus Lichtenstein, Iceland and Norway) with the aim of exchanging information and drafting comparative studies. It plays also an important role during the legislative process since it is frequently asked by the Commission to give advices on all major legislative proposals. Some other similar bodies have been built up, like the Banking Advisory Committee (BAC) and the Banking Supervision Committee (BSC). Moreover, the model offered by the banking sector has been reproduced in the securities and insurance ones.

Within the considered sectors some informal bodies made up of national regulators can also be identified. An example is given by the Forum of European Securities Commission (FESCO), (now called European Securities Committee - ESC), set up in 1997 by the initiative of national regulatory authorities in the securities field to foster the accomplishment of the financial internal market through the development of common standards on supervision. It played an important role in the approaching of supervisory practices and it also performed well in the development of standards in matters not covered by EU law<sup>61</sup>.

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<sup>56</sup> N. MOLONEY, *EC securities regulation*, cit., 880 ss; P. FRATANGELO, *International and european co-operation for prudential supervision*, cit., 9.

<sup>57</sup> P. CLAROTTI, *L'internazionalizzazione della vigilanza sulle banche*, in AA.VV, *Sviluppo della finanza internazionale e interdipendenza dei sistemi finanziari*, Milano, 1984, 173.

<sup>58</sup> R. SMITS, *The European Central Bank. Institutional aspects*, London, 1997, 339-343

<sup>59</sup> Multilateral *fora* are not the only instrument of cooperation. The latter can be performed also through bilateral relations between supervisory authorities regulated by Memoranda of Understanding (MoU) (N. MOLONEY, *EC securities regulation*, cit., 881-882; P. FRATANGELO, *International and European co-operation for prudential supervision*, cit., 4-6).

<sup>60</sup> European Commission, *Institutional arrangements for the regulation and supervision of the financial sector*, Brussels, 1999, cited by P. FRATANGELO, *International and European co-operation for prudential supervision*, cit., 10.

<sup>61</sup> See, N. MOLONEY, *EC securities regulation*, cit., 859 ss.

At the end of the 90's, before the accomplishment of the monetary union, the financial system was brought all up for discussion. The Council of Cardiff in 1998 concluded that it was ought to push integration beyond to set up a system adequate for the establishment of the monetary union and for the fulfillment of the planned enlargements<sup>62</sup>. According to the Financial Sector Action Plan (FSAP) of the European Commission the only way out was the setting up of a modern financial system<sup>63</sup>.

In order to achieve that goal, one of the most important issues that ought to be re-considered was the EC legislative process and implementation of rules. The financial sector apparatus was not up to the task of warranting a modern and efficient system of law-making. It appeared too slow and badly organized to keep up with the pace of financial market changes. Roles and tasks of the different bodies operating in that field clearly needed to be redefined.

Therefore, in 2000 the EcoFin Council consigned a group of wise man (chaired by B.A. Lamfalussy) to propose practical solutions to improve the EC law-making apparatus. The Lamfalussy final report proposed a four level regulatory approach aiming at allowing the EU to respond rapidly and flexibly to financial markets developments<sup>64</sup>. The Report was endorsed by the 2001 Stockholm European Council and suddenly implemented by EU law<sup>65</sup>.

Each step represents a different level of the regulatory process. The first level is intended to be the one within which general framework of core value of new laws are adopted by a co-decision process. In this level, actors involved are not only the EcoFin (and of course the CO.RE.PER), the Commission and the Parliament but also the ECB and two others Committees. One is the Financial Service Committee (FSC), which consists of Member States financial ministers' representatives and the European Commission. The other, called Economic and Financial Committee (EFC), is of an "hybrid" political-technical nature. It is made up of representatives of finance ministers and national central banks, the ECB and the European Commission.

Principles agreed on through the co-decision process are implemented in a twofold way. On one hand, sector-specific comitology committees (of the regulatory type) assist the European Commission to adopt technical measures in order to specify the details of the framework (Second Level). On the other hand, national supervisory authorities are in charge of ensuring a consistent and equivalent transposition of EU rules through enhanced supervisory cooperation (Third Level). In order to achieve this aim, the EU financial architecture comprises three sector-specific committees which bring together national supervisory authorities' representatives in banking, securities and insurance

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<sup>62</sup> Presidency conclusions, Cardiff European Council, 1998, point 17, available at [www.consilium.eu](http://www.consilium.eu).

<sup>63</sup> European Commission, *Financial services: implementing the framework for financial markets: action plan*, COM(1999)232 final, 11 May 1999.

<sup>64</sup> Wise Men Group, *Final report of the Committee of wise men on the regulation of European securities markets*, Brussels, 15th February 2001, available at [www.europa.eu/comm/internal\\_market/en/finances](http://www.europa.eu/comm/internal_market/en/finances). Originally the report was conceived to be applied to the securities field. However, in 2004 both the European Parliament and Council agreed to its extension to banking and insurance sectors.

<sup>65</sup> Presidency conclusions, Stockholm European Council, 2001, Annex 1, available at [www.consilium.eu](http://www.consilium.eu)

sectors respectively (the Committee of European Banking Supervisors – CEBS; the Committee of European Securities Regulators – CESR and the Committee of European Insurance and Occupational Pension Supervision - CEIOPS), plus one representative from the Commission. Within those Committees, members are expected to exchange information and good practices, as well as to develop common interpretation recommendations. They may also develop consistent guidelines and common standards in areas not covered by EU law<sup>66</sup>.

The Commission in its role of guardian of the Treaty, underpinned by Member states, is responsible for the compliance of the latter to EU rules (Fourth level).

According to the Lamfalussy report, furthermore, all the regulatory process (and especially the first three stages) shall be based on three main principles: transparency, involvement of market practitioners and consumers and accountability of both comitology and regulators committees. In particular, accountability is achieved providing for mechanisms adequate to inform the European Parliament, such as hearings in front of the Parliament, regular reporting and the granting of the observer status to the European Parliament<sup>67</sup>.

In practice, the scheme drawn by the Lamfalussy report is not as clearly defined as it could appear on a first approach.

First of all, the concrete functioning of the rulemaking process may result less structured than the one sketched in the Lamfalussy report. Particularly, the order in which each step of the rulemaking process is developed does not necessarily coincide with that described by the Lamfalussy report. In fact, the first and the second stage might overlap and the first level measures' content might in practice be determined by measures adopted in the second level<sup>68</sup>.

Secondly, the activity of each of the above mentioned actor is not limited to solely one level of the Lamfalussy procedure. For example, the Committees of regulators (CEBS, CESR and CEIOPS) play an active role not only in the third stage of the rule-making procedure but also in the first two stages (the co-decision and the comitology ones). More precisely, these bodies take part in the work of the Economic Financial Committee (EEFC) and the Financial Services Committee (FSC)<sup>69</sup>. As previously seen, the latter are consulted by the Council during the co-decision process. Moreover, the CEBS, the CESR and the CEIOPS may act as advisory bodies during the legislative process<sup>70</sup>. Finally, the Committees of regulators operate as technical advisory bodies during the second step of the Lamfalussy procedure, since they give advices to the Commission for the

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<sup>66</sup> See, Lamfalussy Report, p. 7.

<sup>67</sup> See, Lamfalussy Report, p. 47. See also, Commission decision 2001/527/CE and the previous proposal COM(2001)281 and Explanatory memorandum in which the Commission commits itself to inform the EP regularly, to send meeting agendas etc.

<sup>68</sup> See, R.M. LASTRA, *Legal foundations of international monetary stability*, Oxford, 2006, 340; J. MENDES, *Accountability in rule-making in the area of financial services: the EU in the context of global regulation*, Paper presented at the Second Global Administrative Seminar, Viterbo 2006, available at [www.iilj.org/research/ViterboConferenceReports2006.html](http://www.iilj.org/research/ViterboConferenceReports2006.html).

<sup>69</sup> See, for example “about CEIOPS”, available at [www.ceiops.org](http://www.ceiops.org).

<sup>70</sup> MENDES, *Accountability in rule-making in the area of financial services: the EU in the context of global regulation*, cit., 5

adoption of technical measures implementing the framework principles of the first level<sup>71</sup>.

Thirdly, the Lamfalussy report does not provide for the establishment of links between the different actors which take part in the regulatory process, except for those officially undertaken by the Commission, the European Parliament and the Council. In other words, relationships between Committees are not regulated by formal rules but they are left to Committees' organizational powers. In fact, the CEBS and the CEIOPS, for example, declare to keep in contact with others Committees of regulators involved in the financial regulatory process<sup>72</sup>.

With the intent of highlighting the role played by the various actors intervening in the banking, insurance and securities sectors and the influence they exert on the decision-making process, this research will then focus on the nature and functions of relationships developed within the financial sector. Are there any formal or informal links among the above mentioned actors? Are these bodies developing any instrument of coordination? In the affirmative case, what are the aims and the consequences of the establishment of such relationships? Are the EU actors building up a system similar to that observed for the global standards setters? Which role is played by the Commission in this context?

## **7. Interactions between the EC and the global levels**

The global level and, in particular, financial standard setting bodies are not taken into consideration by the regulatory architecture provided for by the Lamfalussy report. Of course this task was not within the mandate of the Wise Men Group, who was requested to focus on the European financial regulatory framework and to propose arrangements for rendering the law-making and implementation processes more efficient. However, considering the observed EU implementation of global standards it is worth to analyze how financial standards get in the EU system and with which effects.

First of all, I would like to analyze the consequences of direct participation or non-participation of the EU in global standard setting bodies. What are the factors which influence the EU implementation of global standards? Is the participation in standard setting activities relevant? Particularly, what does this participation imply? Is the EU under a "duty" to apply decisions taken by the standard setters because of its participation in global bodies? And, if the EU is not taking part in the decision-making process, are there any other kinds of relationships between the EU and the standard setters which may be relevant for pushing the EU to adopt global standards?

The latter query is related to the second set of questions that this research is intended to address, namely the linkage between the EU financial system and the global one. As seen in the previous paragraph, the global level as well as the EU level is characterized by the presence of many different actors. This study will focus on interactions between bodies operating within each of the two levels. Are the EU Committees setting up any formal or informal links with the global actors?

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<sup>71</sup> See, for example, "about CEIOPS", available at [www.ceiops.org](http://www.ceiops.org).

<sup>72</sup> See, for example, "about CEBS", available at [www.c-ebs.org/documents/CEBS.pdf](http://www.c-ebs.org/documents/CEBS.pdf); "about CEIOPS", available at [www.ceiops.org](http://www.ceiops.org).

Are the EU organs taking part in the standard setters' decision-making process coordinated with the other EU's organs which operate in the same field?

In order to understand the way in which global standards get in the EU system and to highlight the relationships between the global and the EU level, it appears particularly relevant to look at the influence trained by the Committees of regulators for the development of financial markets rules. From the description of the EU financial architecture it comes out that the mentioned bodies play a leading role. As above mentioned, the CEBS, the CESR and the CEIOPS are involved from the very beginning of the regulatory process and they keep intervening during all the following steps. Moreover, some scholars have argued that national supervisory authorities represent the most important actors within the Lamfalussy procedure mainly because of the characters of their advices, as well as the peculiarity of the decision-making process they employ<sup>73</sup>. The technical nature of the advices, combined with the fact that they often resort to experts and consultation inputs, give to their opinions authoritativeness. In addition, the CEBS, the CESR and the CEIOPS' decisions are taken by consensus, so they represent an agreed solution among national regulators. All these factors make extremely difficult for the Commission to diverge from the above mentioned bodies' advices.

From the consideration that global standard setters are made by the same actors, namely national supervisory authorities, it might be inferred that the latter could represent the main mechanism through which global standards are transposed into EU rules. As a matter of fact, it is highly likely that during the EU rule-making process national authorities propose solutions consistent with those agreed at global level (within the standard setters).

Indeed, this conclusion has to be verified and depend mostly on the questions posed in the preceding paragraph. However, if the above mentioned statement was true, this would give rise to at least two other questions.

First, even if the type of actors which operate at the EU and at the global level are the same (namely, national supervisory authorities) the composition of bodies in which they are brought together might vary from the EU context and the global one. As mentioned above, standard setters do not necessarily operate in a plenary composition. Therefore, not all Member states' authorities participate to global decision-making process in the same way and even those who take part to the development of global standards have different weight. Is this problem addressed by the EU? In the affirmative case, in which way? Are there any instruments through which national authorities not represented at the global level may influence the content of the rules that are going to be implemented at the EU level? For example, does the EU Committee of regulators' participants have the same powers? Is the content of the global standards critically discussed before being transposed at the EU level?

The preceding questions are related to another issue which has to be considered. It is widely recognized that financial global standards' success is mainly attributable to the ability of standard setters to react flexibly and rapidly to

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<sup>73</sup> J. MENDES, *Accountability in rule-making in the area of financial services: the EU in the context of global regulation*, cit.

market changes<sup>74</sup>. In order to be competitive at a global level stakeholders need rules immediately applicable. The latter are then the rules which have the highest probability of implementation within the global financial market.

The importance of keeping up with market developments has been underlined also at the EU level. As already mentioned, the starting point of the Lamfalussy proposal was the remark that EU financial rule-making process was too slow. However, aiming at rendering the EU system more efficient and flexible, the Lamfalussy's report reorganization of the financial sector's architecture and decision-making process make it similar in certain aspects to the global one. It is thus interesting to verify if the EU is attempting to build up its own system of rules, alternative to that provided by Global standard setting bodies. Will the EU be able to create a concurrent system of rules? Will the EU trend of incorporating global financial standards be stopped or inverted?

### **8. Global standards setters and the problem of accountability: the EU as account holder**

The outcomes of questions concerning interactions between the EU and the global level will be useful also to face up with a problem which has recently given rise to a lively debate, namely the accountability of global standard setters<sup>75</sup>.

As mentioned, global bodies' activity has a strong impact on governments and individuals as their standards, guidelines and codes are implemented as they were mandatory. However, those bodies are not directly legitimated by States and, ultimately by a democratic control. Traditional instruments of accountability, such as electoral or supervisory ones, are lacking. In fact, it has been pointed out that conceptual categories used for national or international systems cannot even be employed at global level due to the different hallmarks of global bodies and the peculiar context within which they operate<sup>76</sup>. The basic questions of "who is accountable whom for what, with what sanctions, and under what standards and procedures if any"<sup>77</sup> should be thus redefined.

Some scholars look at the development of procedural instruments, such as transparency, stakeholders participation or reason giving as a possible solution to the problem of legitimacy.

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<sup>74</sup> See, for example, D. ZARING, *International law by other means: the twilight existence of international financial regulatory organizations*, cit., 286; ID., *Informal procedure, hard and soft, in international administration*, cit., 40; M. S. BARR e G. P. MILLER, *Global administrative law: the view from Basel*, cit., 17.

<sup>75</sup> See, for example, B. KINGSBURY, N. KRISCH and R. STEWART, *The emergence of a global administrative law*, cit.; M. SHAPIRO, "Deliberative", "independent" technocracy v. democratic politics: will the globe echo the E.U.?, 2004, available at [www.iilj.org/publications/wp\\_globadminlaw.htm](http://www.iilj.org/publications/wp_globadminlaw.htm); J. FERREJOHN, *Accountability in a Global Context*, 2007, available at [www.iilj.org/publications/wp\\_globadminlaw.htm](http://www.iilj.org/publications/wp_globadminlaw.htm).

<sup>76</sup> B. KINGSBURY, N. KRISCH and R. STEWART, *The emergence of a global administrative law*, cit., 13; J.H.H. WEILER, *The geology of international law – governance, democracy and legitimacy*, ZaöRV, 2004, 559 ss; D. ZARING, *Informal procedure, hard and soft, in international administration*, cit., 42; R. B. STEWART, *Accountability and the discontents of globalization: US and EU models for regulatory governance*, cit., 17-18 e 22-23 typescript.

<sup>77</sup> R. B. STEWART, *Accountability and the discontents of globalization: US and EU models for regulatory governance*, cit., 10 typescript.

As the majority of global bodies, also the BCBS, the IOSCO and the IAIS have recently made a move towards a more transparent decision-making process. Many financial standard setters' decisions are published on their website, as well as the main achievements of their meetings. Moreover, the above mentioned bodies enmesh stakeholders and third regulatory authorities through audits or notice and comment procedures. Still, the BCBS, the IOSCO and the IAIS sometimes give reasons when adopting decisions which diverge from the consultative process' outcomes.

Yet, the above mentioned mechanisms depend on global standard settings' will<sup>78</sup>. Those who participate in the notice and comment procedure or consult the documents published do not have any right against standard setters. They cannot ask, for instance, to have access to documents which are not in the website, nor to take part to the decision-making process if the standard setter did not invite them to do it.

Relying upon the administrative nature of financial standard setters, other commentators assert that accountability problems are less worrying than they may appear<sup>79</sup>. As a matter of fact, standard setters' members are national authorities accountable to their respective States, so standard setters are indirectly accountable to those States. In other words, the latter may control global bodies' activity through the medium of administrative authorities' domestic mechanisms of legitimacy.

Apart from the fact that domestic accountability instruments might vary considerably from one national system to another, the above mentioned opinion does not take into consideration some other critical aspects. First of all, domestic accountability instruments indeed cannot be considered a valid mechanism of control for States which are not "represented" within the standard setters. Furthermore, through domestic accountability mechanisms States can at best control their administrative authorities' behavior during the standard setters' decision-making process but not the global body as a whole. This implies also that the degree of accountability to national governments depend on the decision-making system used by the standard setter. As a matter of fact, the more the latter move away from the *consensus* system the more the opinion of each standard setter's member loses weight. So the independence of global standard setting increases, increasing accordingly the need for accountability mechanisms concerning the mentioned body in itself and not attributable to the sum of its members.

Similar considerations can be pursued also if we consider the EU as account holder. As already pointed out, in some cases the EU is not "represented" in standard setting bodies and if it is "represented", it does not have voting rights. So, accountability measures concerning EU institutions which participate in standard setting bodies cannot be considered effective for global bodies' accountability.

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<sup>78</sup> Outcomes of the research on "International networks of financial regulators" and "Global standards for financial markets" coordinated by Professor S. Cassese and Professor S. Battini, 2007, forthcoming.

<sup>79</sup> D. ZARING, *Informal procedure, hard and soft, in international administration*, cit., 41 ss; M. S. BARR e G. P. MILLER, *Global administrative law: the view from Basel*, cit.,

From a different perspective, it has been noticed that, except from the fact that the EU actors operate within an institutionalized framework under the supervision of the European Commission, other EU bodies and Member states authorities, the EU and the global system have many features in common<sup>80</sup>. Both systems are in fact characterized mostly by horizontal relationships, deliberation by consensus and informal links.

Originally, only in few areas the EU performed executive tasks (direct administration). Most of the time, the role of enforcement agencies was left to Member States' administrations (indirect administration)<sup>81</sup>. Over the years, that simple model of administration has changed following the expansion of EU activities and the consequent need of a coordinated enforcement of common policies. This has led to the continual birth of institutional structures and *ad hoc* instruments with the aim of fostering co-operation between different authorities or solving technical issues which could not be addressed effectively by the Commission solely. Committees, agencies and, lately, bodies made up by national regulators have thus enriched the EU administrative system, making it a "network of administrations" linked but not fixed together<sup>82</sup>. The financial field does not seem to make exception to the described scenario.

In a global arena "*dominated by networks, fluid roles and mobile alliances*"<sup>83</sup> the EU appears to fit easily. The present research will therefore attempt to verify if global financial regulators are trying to be englobed by the EU net and with which consequences both for the EU system and for the global one.

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<sup>80</sup> B. STEWART, *Accountability and the discontents of globalization: US and EU models for regulatory governance*, cit., 37 typescript.

<sup>81</sup> See, J. SCHWARZE, *Droit administratif européen*, Bruxelles, 1994, 15 ss; J.A.E. VERVAELE (ed.), *Compliance and enforcement of European Community law*, Oxford, 1999; ID., *Shared governance and enforcement of European law: from comitology to a multi-level agency structure*, in C. JOERGES and E. VOS (eds.), *EU committees: social regulation, law and politics*, Oxford, 1999, 132.

<sup>82</sup> R. DEHOUSSE, *Regolazione attraverso reti nella Comunità europea: il ruolo delle agenzie europee*, Riv. it. dir. pub. com., 1997, 629 ss; S. CASSESE, *Le reti come figura organizzativa della collaborazione*, in A. PREDIERI and M. MORISI (Eds.), *L'Europa delle reti*, Giappichelli, Torino, 2001, 43 ss; H.C.H. HOFMANN and A.H. TÜRK, *An introduction to EU administrative governance*, in H.C.H. HOFMANN and A.H. TÜRK (eds.), *EU administrative governance*, Northampton, 2006, 3.

<sup>83</sup> S. CASSESE, *Regulation, adjudication and dispute settlement beyond the State*, 2006, 11 typescript.