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Antonio Marcacci

Transnational Securities Regulation

How it Works, Who Shapes it

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Munich, Germany

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Foreword

Transnational securities regulation has become the guarantor for effective and sustainable global financial markets, including the regulation of risk. The 2008 financial crisis has been a strong driving force, and so is, increasingly, the climate crisis. A monograph of the key standard-setter at the international level—IOSCO—has been missing. IOSCO is well known to the insiders of financial market regulation, but its concrete governance, working mechanisms, role in the new post-crisis international financial architecture, and impact on cross-border enforcement have not been analyzed in a comprehensive and contextual way. Dr. Antonio Marcacci fills this gap, and he does so in an excellent manner. He analyzes the operational structure of IOSCO, what he terms its *minilateral*[1] governance, key aspects of its continuing work program, standard-making, accountability, legitimacy, and implementation alongside the available sanctions mechanisms. Dr. Marcacci's monograph is the most comprehensive legal analysis on IOSCO so far.

Dr. Marcacci argues that while the United States had dominated IOSCO until 2008, the European Union has emerged as a second regulatory power, and, he explains, this is shifting IOSCO's internal balance from unipolarity to bipolarity. The so-called Brussels effect has been well known and subject of study in political science and legal literature for quite some time. The EU, because of the size of its market and the buying power of its citizens, is able to impose its higher standards on the rest of the world.

Research on the role of the US and EU in transnational securities regulation has been missing, beyond a number of studies focusing on the impact of US regulators. Dr. Marcacci's book fills this other significant gap. The monograph examines specific fields of IOSCO regulatory production or output, from the fundamental objectives and principles of securities regulation to more complex topics such as insider trading, retail investor protection, credit rating agencies, financial benchmarks, and derivatives. He reviews the role and influence of the US and EU

[1] See Note 315, Chap. 2.

regulatory authorities on the content of IOSCO standards, and also the impact the other way, of the IOSCO impact on US and EU regulatory choices. Supported by a substantial amount of valuable research, including interviews with the Organization's senior management, Dr. Marcacci shows the emergence of the EU as a global regulatory power able to influence IOSCO's normative production. Significantly, as pointed out in the last chapter, the EU's standing in the transnational regulatory arena is yet to consolidate and, as Dr. Marcacci suggests, the current decade might witness IOSCO move towards what he terms *minipolarity*.

Dr. Marcacci's book provides an original and interesting examination of a difficult subject that has received too little previous examination and certainly not in this depth and detail. The quality of this book will promote necessary and timely debate and discussion. Dr. Marcacci's book provides a most useful contribution to academic study on the international securities and capital markets. It is also a must-read not only for those involved in transnational securities regulation but also for those interested in the "Brussels effect" and the emergence of the EU as a global regulatory player in general.

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I wish to warmly thank all private-sector international experts I had the privilege to discuss with about the future of transnational financial regulation: Carlo Comporti from Paris, Ross Delston from Washington, DC, Scott Morris from Copenhagen, Kathrin Rauschnabel from New York, Massimo Scolari from Milan, and Kevin Taylor from London. Importantly, no opinion or reflection expressed in the book can be referred to the interviewees, to whom only that information as explicitly mentioned in specific footnotes can be attributed.

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This book is dedicated to my family, in its most encompassing meaning.

March 2022

Munich, Germany Antonio Marcacci

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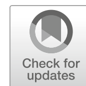
Abbreviations

AC	Assessment Committee
AIFMD	Alternative Investment Fund Managers Directive
AMCC	Affiliate Members Consultative Committee
AMERC	Africa/Middle-East Regional Committee
APRC	Asia-Pacific Regional Committee
BCBS	Basel Committee on Banking Supervision
CCP	Central Counterparty/Clearing House
CESR	Committee of European Securities Regulators
CFTC	Commodity Futures Trading Commission
CGFS	Committee on the Global Financial System
CPSS/CPMI	Committee on Payment and Settlement Systems/Committee on Payments and Market Infrastructures
CR	Country Review
CRA	Credit Rating Agency
CRD/CARR	Capital Requirements Directive/Regulation
CT	Coordination Team
DCM	Designated Contract Market
DFA	Dodd-Frank Act
EBA	European Banking Authority
EC	European Commission
ECB	European Central Bank
ECJ	Court of Justice of the European Union
EMIR	European Market Infrastructure Regulation
ERC	Europe Regional Committee
ESMA	European Securities and Markets Authority
EU	European Union
FBM	Financial Benchmark
FINRA	Financial Industry Regulatory Authority
FSAP	Financial Sector Assessment Program

FSB	Financial Stability Board
G20	Group of Twenty
GDPR	General Data Protection Regulation
GLEIF	Global Legal Entity Identifier Foundation
IAA	1940 Investment Advisers Act (United States)
IAIS	International Association of Insurance Supervisors
IARC	Inter-America Regional Committee
IFC	International Finance Corporation
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISDA	International Swaps and Derivatives Association
ISIM	IOSCO Standards Implementation Monitoring
ISO	International Organization for Standardization
ISSB	International Sustainability Standards Board
ITFSC	Implementation Task Force as its own Sub-Committee
JF	Joint Forum
LEI	Legal Entity Identifier
MAD/MAR	Market Abuse Directive/Regulation
Member(s)	When capitalized, *Members* refer to IOSCO Members
MSs	Member States of the European Union
MiFID I/II	Markets in Financial Instruments Directive I/II
MiFIR	Markets in Financial Instruments Regulation
MMoU	Multilateral Memorandum of Understanding
MoU	Memorandum of Understanding
MSP	Major Swap Participant
MTF	Multilateral Trading Facility
NFC+/-	Non-Financial Counterparties Plus/Minus
OECD	Organisation for Economic Co-operation and Development
OTC	Over the counter
PRA	Oil Price Reporting Agency
PRIIPS	Packaged retail and insurance-based investment products
ROSC	Report on the Observance of Standards and Codes
RT	Review Team
SA	1933 Securities Act (United States)
SD	Swap Dealer
SEA	1934 Securities Exchange Act (United States)
SEC	Securities and Exchange Commission
SEF	Swap Execution Facility
SROCC	Self-Regulatory Organization Consultative Committee
TR	Trade Repository
TR	Thematic Review
TSR	Transnational Securities Regulation
UCITS	Undertakings for Collective Investment in Transferable Securities
UK	United Kingdom

UPI	Unique Product Identifier
US	United States
UTI	Unique Transaction Identifier
WB	World Bank

Chapter 1
Introduction



Abstract This book sheds light on two questions—"*How does the global standard-setter for securities markets work*?"; "*Who influences its regulatory production*?"—and is organized accordingly. The first part analyzes the International Organization of Securities Commissions—IOSCO. The second part delves into the normative influence exerted by the two jurisdictions that are currently considered as the Regulatory Powers, the United States and the European Union. After describing the structure of the book, this opening Chapter, first, delimits the scope of Securities Regulation, then offers a short overview of Transnational Law and Regulation, and, finally, draws a demarcation around Transnational Securities Regulation.

The 2008 financial crisis bluntly exposed how globally intertwined capital markets are. It became clear that wealth elastically[1] flows from one jurisdiction into another,[2] leveraging digital technologies[3] that allow sophisticated transactions to be quickly executed across borders.[4] As a result, the law chases the capital. . .which often slips away. National regulatory and supervisory authorities face the hurdle of detecting *who* has done *what*, *how*, and *where*—with all four elements sometimes happening

[1] "Elastic regulatory targets, such as capital, are more mobile and thus can easily be moved to a different jurisdiction", Bradford (2020), p. 48.

[2] "Regulatory authorities are confronted with internationalization on three fronts, challenging their traditional methods of operation: - the internationalization of the intermediaries whose activities they regulate; - the increasing volume of cross-border investment; - the development of transnational markets which are more difficult to supervise.", IOSCO (1990), p. 4.

[3] On automation in financial markets Angel et al. (2011).

[4] "The pace of internationalization has been accelerated by rapid advances in technology facilitating cross border transactions of financial services business. Technological changes have changed the mechanism for dissemination of information, and the techniques used in effecting transactions and portfolio management. New methods of trading and information dissemination have, by making possible 24 hour trading, contributed to the globalisation of financial markets. Moreover, developments in trading technology and techniques have created unprecedented challenges to market transparency." IOSCO (1990), p. 4.

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outside of their home jurisdiction, but still affecting their domestic markets.[5] To tackle common problems, authorities try to cooperate, aware that not even the strongest among them is able to tame global markets alone. This book concerns the answers that so far domestic securities regulatory authorities have jointly given to mutual, cross-border challenges, i.e., Transnational Securities Regulation (TSR).

1.1 Research Questions

The book sheds light on two questions—"*How does the global standard-setter for securities markets work*?"; "*Who influences its regulatory production*?"—and is organized accordingly. The first part analyzes the International Organization of Securities Commissions—IOSCO. IOSCO is the only transnational *and* transgovernmental network bringing together public securities regulators[6] and tasked with officially setting global standards for securities markets, infrastructures, and players.[7] It was first established in the '70s as a regional forum, but it turned global soon after and, particularly after the 2008 crisis, has increased in importance.[8] The interconnection of securities markets at a global level has led more and more domestic authorities to join IOSCO, especially from emerging markets. On the one hand, this was inevitable due to the degree of interdependence that financial markets have achieved. On the other hand, increased membership has led to increased internal complexity and changed the equilibrium within the Organization. Now IOSCO unites public securities authorities from almost all jurisdictions in the world—covering 95% of financial markets.[9]

The first part provides a comprehensive analysis of how IOSCO functions; its internal club-shaped, *minilateral* governance (Chap. 2); its particularly unorthodox legal nature (Chap. 2); relationships with peer organizations (Chap. 3); flexible standard-making procedures (Chap. 4); combined implementation strategies (Chap. 5); and cooperative enforcement mechanism (Chap. 6). To begin with,

[5]On cross-border enforcement in the field of insider trading and market manipulation: Austin (2017); for a theoretical approach on the triad of actors, norms and processes (who does what, how, why, in whose interest): Zumbansen (2013); Zumbansen (2015); Zumbansen (2016b).

[6]Other organizations set standards for stock markets and exchanges. A leading example of these is the World Federation of Exchanges (WFE) [on the WFE, see Blair et al. (2021)]. Chapter 3 focuses on standard-setters with which IOSCO interacts.

[7]The transnational financial area is split along the traditional lines of securities, banking, and insurance sectors, with the Basel Committee on Banking Supervision covering the banking sector and the International Association of Insurance Supervisors covering the insurance sector. This structure reflects the domestic separation of oversight responsibilities in many jurisdictions, as Newman and Posner point out: "the legacies of domestic regulatory institutions created pressures that worked against centralization in international regulation.", Newman and Posner (2018), p. 46.

[8]Dalhuisen highlights that "IOSCO has gained in stature since the 2008 financial crisis", Dalhuisen (2019), p. 594.

[9]IOSCO (2021a).

while its membership would formally characterize its regulatory production as *public* transnational regulation, IOSCO's nature is more multifaceted and rests upon the combination of external statutes, an autonomous General Secretariat without a founding treaty of public international law, and an intra-Organization document prescribing internal rules of procedure.[10] Second, IOSCO is unique but not alone. It interacts with political fora, similar hybrid entities, purely private actors, and even international institutions based on international treaties. Most importantly, such interactions are multifaceted: technical *and* political, peer-to-peer *and* hierarchical. Third, analyzing the consensus method shows the internal balance of power in the standard-making procedures. Fourth, given the non-binding nature of IOSCO and the (formally) voluntary compliance with its standards, the Organization leverages alternative implementation techniques. In the IOSCO world, implementation represents a mark of how respected by its peers a domestic regulator craves to be, i.e., reputational risk. Fifth, while actual enforcement remains at the domestic level, IOSCO has created a cooperation mechanism for cross-border prosecutions. Here enforcement is a mark of how committed a domestic regulator is vis-a-vis its peers.

The second part of the book analyzes the sway wielded by the two jurisdictions that are currently considered as the "rule-making giants",[11] the United States and the European Union. The US has traditionally dominated IOSCO since its origin. The establishment in 1974 of a Pan-American forum for securities regulators—the "Inter-American Conference of Securities Commissions (IACSC)[12]—was a US idea. The IACSC was renamed IOSCO in 1983, when some countries outside of the Americas became official Members a year later.[13] Against the backdrop of a few "middle powers",[14] the US SEC has been the primary force—or 'pole'—within IOSCO for many years. The emergence of the EU in the last 10 years has altered this equilibrium.

The focus here is double-hatted. On one hand, the book maps the chairpersonship in key internal bodies that Members have been able to obtain over the years. As a matter of fact, in a consensus-based standard-making system, the role of the Chair is particularly important to address topics and channel discussions. Special attention is given to the US and EU regulators and the roles they have played in IOSCO. On the other hand, the book carries out a deep, multi-chapter analysis of the standards' content of which unfolds through the following clusters. First, cross-topic horizontal standards, i.e., standards providing either high-level principles bridging multiple areas or techniques managing deference between securities regulators and mitigating

[10] Literature on the fading public/private dichotomy in the transnational realm is vast, see for instance: Cassese et al. (2012); Zumbansen (2016a).

[11] Newman and Posner define the US and the EU as "the two rule-making giants", Newman and Posner (2018), p. 6. Drezner underscores the importance of market size Drezner (2008).

[12] Also called the "Inter-American Association of Securities Commissions" in Sommer (1996).

[13] IOSCO (2021a).

[14] Term used in Kempthorne (2013), p. 48.

conflicts of securities regulation (or conflicts of regulatory law[15]). Second, topic-related vertical standards addressed to public regulators. Third, topic-related vertical standards addressed to specific private parties. Forth, topic-related vertical standards that are set in concert with other global standard-setters, in particular the Committee on Payments and Market Infrastructures (CPMI). Each cluster contains at least two case studies and for each case study, the book highlights where and how the influence wielded by the EU and the US emerges.

The book, in the end, provides a theorical scaffolding on two different perspectives around Transnational Securities Regulation. The first perspective hinges on the standard-setter's core features—in particular, that being a private law club of public law members (Chap. 2)—and observes how its regulatory production has achieved a level of sophistication that starts resembling a sectorial *Transnational Privatized Regulatory Law*. The second perspective views Transnational Securities Regulation as a playground for Regulatory Powers that is witnessing a shift from a de facto *unipolarity* to a de facto *bipolarity.*[16] *Within* the IOSCO perimeter,[17] I circumscribe the term *polarity* to mean the 'force of regulatory influence' of a jurisdiction,[18] i.e., an IOSCO Member. This occurs when one Member succeeds in steadily influencing IOSCO's regulatory outcome. Importantly, unlike Braford's Brussels Effect that focuses on unilateral import/export,[19] the analysis here focuses on standards negotiated *within* IOSCO. While the US has been the polar player in IOSCO since its foundation, the EU as such has been slowly but progressively emerging as a second regulatory power.

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[15] Buxbaum defines the term "conflicts of regulatory law" as that "body of law meant to determine the sphere of applicability of various forms of administrative law in the international arena", Buxbaum (2009), p. 659. Buxbaum refers to the work that Neumeyer had carried out already in '30s, developing "a structural approach to conflicts of regulatory law that drew on the private international law model, in the form of a comprehensive theory of international administrative law (*internationales Verwaltungsrecht*)." See: Neumeyer (1936). See also Buxbaum's seminal analysis on the different kinds of conflicts of laws, crossing the public and private realms Buxbaum (2019).

[16] Newman and Posner also notice that "[a]fter the turn of the millennium, the politics within IOSCO changed dramatically as the SEC no longer dominated as it once had and representatives from the European Union and its member countries had taken on a more active role.", Newman and Posner (2018), p. 57. From a more general standpoint, Drezner speaks of "great power concert" and argues that "the great powers – defined [. . .] as governments that oversee large internal markets – remain the primary actors writing the rules that regulate the global economy. The variable affecting global regulatory outcomes is the distribution of interests among the great powers. A great power concert is a necessary and sufficient condition for effective global governance over any transnational issue. Without such a concert, government attempts at regulatory coordination will be incomplete, and nonstate attempts will prove to be a poor substitute.", Drezner (2008), p. 5.

[17] In 2014, within a wider, more general context, Mügge identified a "bipolar global financial governance", Mügge (2014), p. 320.

[18] Raustaila speaks of "'regulatory export': the export of regulatory rules and practices from major powers to weaker states" and how "powerful states are using networks to export their preferred regulatory models.", Raustiala (2002), p. 7, 8.

[19] Bradford (2020).

1.2 Scope and Definitions

So far, much of legal scholarship has paid particular attention to formalized, treaty-based global institutions like the World Trade Organization (WTO) [20] characterized by "formal shared administration";[21] or to well-developed private associations like ISDA[22] and the International Organization for Standardization (ISO).[23] Much attention has been paid to the Basel Committee on Banking Supervision (BCBS) given its extraordinary, concrete impact on domestic banking prudential regulation. This book, instead, focuses on Transnational Securities Regulation as adopted by the only global standard-setter in the securities field that brings together securities regulators, IOSCO.

Since terms such as *transnational* or *financial* and *securities* are used in many different contexts and this causes confusion, the below sections give the readers some basic definitory boundaries—humbly acknowledging that such complex topics cannot be dealt with fully here. With this aim, I delimit, first, the scope of Securities Regulation, then I offer a short overview of Transnational Law and Regulation, and, finally, I draw a demarcation around Transnational Securities Regulation. As for the meaning of 'regulation', I follow Black's definition as adopted by Baldwin, Cave, and Lodge: regulation is "the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification".[24] This wide-ranging definition covers the phenomena tackled in this book.

1.2.1 Securities Regulation in the United States

The term 'Securities Regulation' is typical of the United States. In one of the first court cases in which the meaning of 'regulation' was delineated, this was "defined [. . .] as the act of regulating; the act of reducing to order or of disposing in

[20] As pointed out by Stewart and Ratton Sanchez: "The WTO provides an especially rich context for application and explication of GAL. [. . .] The WTO offers a prime example of the most important axes of GAL: the development of mechanisms for transparency, participation, and reason-giving in the internal administrative decision-making processes of global regulatory bodies; the absorption of global administrative law norms in states' domestic administrative structures and procedures; and the legal issues presented by increasingly close linkages among different global regulatory institutions.", Stewart and Ratton-Sanchez-Badin (2009), pp. 30, 2–3. Other key publications are: Mitchell (2006); Lamy (2006); Steinberger (2006); Peel (2006); Illy and Marceau (2009); Berman and Pauwelyn (2009).

[21] On WTO and formal shared administration: Craig (2015), pp. 774–784.

[22] For instance Saguato (2013).

[23] On ISO and shared administration: Craig (2015), pp. 784–793. On ISO – IOSCO relations, see Chap. 3.

[24] Baldwin et al. (2010), p. 13, citing Black (2001).

accordance with rule or established custom; a rule, order or direction from a superior or competent authority; a governing or prescribing a course of action."[25] Importantly, in US legal terminology, the 'regulation' phenomenon is strongly linked to the well-known experience of the independent regulatory commissions.[26] These commissions are governmental authorities endowed with quasi-legislative and quasi-judicial powers and operating in highly specialized economic sectors where technical expertise and independence from political interference are perceived as needed.[27] In our case, such independent commissions are, above all, the Securities and Exchange Commission (SEC) and, also, the Commodity Futures Trading Commission (CFTC). The US system of securities regulation is complex, and literature is extensive—with some leading examples[28] taking an advanced global legal perspective. The American legal scholarship in the domestic securities field is well-rooted and sophisticated.[29]

The concept of security is the primordial nucleus of US securities regulation. It represents property rights that may be negotiated and transferred. Basically, a security is what the law defines it to be[30] and, over time, it has become a large macro-category that includes many contracts negotiated over trading venues. Under US Securities Laws, several Acts circumscribe the definition of 'security', but they do not perfectly overlap due to the different purposes and scopes of the single pieces of legislation.[31] Nevertheless, the statutory cornerstone of US Securities Law on primary markets—the 1933 Securities Act[32] (SA)—provides an encompassing

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[25] *Curless v. Watson, Indiana Supreme Court (1913).* Also *State v. Miller, 33 New Mexico Supreme Court (1927*): "A regulation means a rule of order prescribed by a superior or competent authority, relating to the action of those under its control. A regulation means a governing direction, precept, law, or any rule for the ordering of affairs, public or private. The power to regulate includes the power to restrain and also to prohibit within certain limits, although perhaps not to prohibit entirely, the thing which is the subject of the regulation." Both cases mentioned by Greco (2004), pp. 5–6.

[26] Interestingly, Laurent Richer highlights how, in the US, the term "regulation" is also strictly related to anti-trust law. Indeed, free-market competition must be assured by anti-trust laws and in the absence of a functioning market mechanism (such as "natural monopolies"), then "competition is replaced by regulation": "*En droit américain, la «regulation» se situe à l'opposé du droit 'antitrust' et se définit par rapport à ce droit. Les lois 'antitrust' visent les entreprises qui interviennent sur des marchés libres; elles sont supposées assurer la concurrence par la correction des restrictions artificielles à la liberté. Mais, dans certaines industries, notamment dans celles où existent des «monopoles naturels», comme l'électricité, la compétition est remplacée par la «regulation», qui est «généralement considérée sur un continuum comme l'opposé de l'antitrust»",* Richer (2002), pp. 230–231, citing Sullivan and Harrison (2000), p. 73.

[27] Greco (2004), p. 7.

[28] See Pan and Jackson (2001); Simmons (2001); Scott and Wellons (2002); Scott (2008); Pan and Jackson (2008); Scott (2010); Shirley (2004); Brummer (2010b); Brummer (2010a); Verdier (2009); Zaring (1998); Zaring (2013); Zaring (2016); Coffee (2014); Posner (2018).

[29] Some recent leading examples: Palmiter (2014); Cox et al. (2016); Choi and Pritchard (2019); Steinberg (2021); Cox and Langevoort (2021); Coffee et al. (2022).

[30] Collins (2011), p. 115.

[31] Ibid, p. 115.

[32] Truth in Securities Act, Pub.L. 73–22, 15 u.S.C. § 77a et seq, 1933.

definition of security, which was subsequently clarified by the United States Supreme Court.[33] Other key pieces of legislation—the 1934 Securities Exchange Act[34] (SEA) and the 1940 Investment Advisers Act[35] (IAA)—govern secondary markets and investment services. Professionals either brokering in or providing advice on securities must follow different conduct-of-business rules (suitability, fiduciary duty),[36] depending on their legal nature and registration with federal supervisors (broker-dealers, investment advisors). The federal authority administrating securities regulation, adopting regulatory measures, and carrying out public enforcement activities on US securities markets is the SEC, with the CFTC having jurisdiction over derivatives and derivative-linked products. Private enforcement mechanisms—in particular, securities class actions[37]—play a peculiar role, which is complementary to public enforcement.[38]

Over time, internationalization and extraterritoriality have emerged in US Securities Regulation as a result of the globalization of financial markets. Since the beginning of the 1980s, on the one hand, the SEC has been increasingly involved in international regulatory dialogues with its peers,[39] within and outside networks like IOSCO, with a view to achieving some degree of regulatory convergence and, above all, cooperation in cross-border enforcement actions (Chaps. 6 and 9). On the other hand, the spillover effects of extraterritoriality have developed and evolved.[40] With particular regard to securities class actions and their reach to non-US plaintiffs and non-US defendants, the 2010 *Morrison v. National Australia Bank* case[41] tried to narrow down extraterritoriality but the decision was partially overturned[42] by the 2010 Dodd-Frank Act (DFA).[43] The DFA was adopted in the aftermath of the 2008 crisis, and while taking into account a 2009 international policy agreement achieved by the Group of Twenty,[44] has introduced rules on over-the-counter (OTC) derivatives with extraterritorial reach in order to tame regulatory arbitrage[45] and systemic

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[33] *SEC v. W. J. Howey Co., United States Supreme Court (1946)*. The Court stated that when a contract "involves an investment of money in a common enterprise with profits to come solely from the efforts of others", then the contract must be considered an "investment contract".

[34] Securities Exchange Act, Pub.L. 73-291, 48 Stat. 881, 1934.

[35] Investment Advisers Act ch. 686, Title II, Sec. 201, 54 Stat. 847, 1940.

[36] Karmel (2016).

[37] Coffee (2006); Karmel (2007).

[38] Langevoort (2005);Coffee (2007); MacNeil (2015).

[39] Honegger (1983); Pitt and Hardison (1992).

[40] Greene and Potiha (2012); Cox (2012); Coffee (2014).

[41] *Morrison v. National Australia Bank, 561 United States Supreme Court 247 (2010)*. On state of affairs of civil liability for transnational securities frauds in the aftermath of *Morrison* Licht (2016).

[42] Elgadeh (2011).

[43] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, 124 stat. 1376, 2010.

[44] G20 Leaders Statement: The Pittsburgh Summit (2009).

[45] Johnson (2013–2014).

risk, paving the way for requests for substituted compliance[46] and mutual recognition (Chap. 11).

1.2.2 Securities Regulation in the European Union

Historically speaking, European national credit (or banking), securities (or financial in *stricto sensu*) and insurance markets were strictly separated, and players were allowed to operate in just one of these markets.[47] In the last 30 years, EU law has introduced many provisions that have either harmonized or replaced preexisting domestic rules. One of the results is that now the three sectors composing financial markets in *lato sensu* are much closer to each other (sometimes they even overlap) and players can easily operate across markets that were previously ring-fenced. However, even if this separation has gradually diminished, it still exists today.

Niamh Moloney defines European Securities Regulation as "those [. . .] measures which concern the regulation of securities-market participants (issuers of securities, collective investment schemes, market intermediaries, and investors) and the operation of the markets themselves."[48] Posner has shown that the EU has been emerging as a US regulatory counterpart with the turn of the millennium.[49] Among other elements, the 1998 Financial Services Action Plan (FSAP) and the introduction of the Lamfalussy Procedure were a watershed in the EU Securities Regulation,[50] with the 2004 Markets in Financial Instruments Directive[51] (MiFID I) representing the key outcome of the Plan and the cornerstone of EU Securities Regulation. MIFID is built on the concept of financial instrument as a contract enforceable before a court of law[52] and on the duties stemming from the issuance, trading, servicing, and processing of financial instruments. Under EU Law, securities are themselves

[46] Jackson (2015); Rosenberg and Massari (2013); Welling (2016).

[47] Amorosino (2008), p. 4.

[48] Moloney (2008), p. 3.

[49] Focusing on regulatory cooperation and dialogue between the EU and the US instead of IOSCO's internal dynamics, Posner has argued that "improved EU bargaining leverage set the stage for serious dialogue, showing that iterative processes may breed deliberation and thereby the trust necessary for mutual recognition and other forms of sovereignty-sharing in contexts that lack formal institutions.", Posner (2009), p. 693.

[50] Moloney (2014).

[51] 2004 MiFID I – Directive (EC) 2004/39, OJ L 145/1, 30.4.2004 – replaced the 1993 ISD – Directive 93/22/EEC OJ L 141/27, 11.6.1993 – and it was subsequently replaced by the 2014 MiFID II package (Directive (EU) 2014/65, OJ L 173, 12.6.2014, and Regulation (EU) 600/2014, OJ L 173, 12.6.2014). Strictly speaking, "MiFID II" only refers to the Directive, whereas "MiFIR" refers to the Regulation.

[52] Pistor: "financial instruments [are] contractual commitments that are enforceable in a court of law.", Pistor (2013), p. 319.

considered financial instruments as listed in Annex I—Section C of MiFID I (confirmed under MiFID II).

Given the traditional different national approaches that characterize European financial systems,[53] MiFID brought about a significant innovation. Unlike the American law-maker, due to the competence constrain given by the EU Treaties, the European law-maker has no direct power over contract law, including contracts tradable in financial markets,[54] limited powers on public enforcement,[55] and no power over traditional private enforcement mechanisms.[56] All these tasks fall into the remit of the Member States. To circumvent its limits vis-a-vis contract law, the EU lawmaker has drawn up a list of contracts that *are* financial instruments without delving into the content. The result is that negotiating one of these contracts entails mandatory compliance with the duties regulated under MiFID. Tellingly, while MiFID is a piece of public law, it makes significant inroads into private law.[57] Importantly, notwithstanding existing constraints, the EU has been eventually able to leverage regulation and an innovative governance[58] to build the Single Market, including the one in financial instruments.

In this context, although the European Commission (EC) still retains formal regulatory powers, the long-awaited[59] European Securities and Markets Authority

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[53] Story and Walte (1997); Demirguc-Kunt and Levine (1999); Crouch (2000). Not only do national peculiarities affect securities laws but also company laws, for a comparative analysis see the leading contribution of Andenas and Wooldridge (2009).

[54] In the words of the European Court of Justice: “It is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19(4) and (5) of Directive 2004/39”, C-604/11 *Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA*.

[55] Moloney (2014).

[56] Micklitz (2015).

[57] On this topic, see Tison (2010); Grundmann (2013); Cherednychenko (2009); Cherednychenko (2011); Mak (2009); Busch (2012); Mak (2015); Mak (2016); Cherednychenko (2019); Andenas and DellaNegra (2017); Wallinga (2020). Recently on the tensions between regulatory standards and private law in fiduciary law in the transnational financial context, including EU law Binder (2020). Moving from an economic perspective, Goodhart, Hartmann, Llewellyn, Rojas-Suarez, and Weisbrod highlight the danger that regulatory requirements may generate on traditional private-law aspects, i.e., that “an implicit contract is perceived as having been created between the user of financial services and the regulator [. . .]. The obvious danger is that an implicit contract creates the impression that the consumer need not take care with respect to the firms with which he or she deals in financial services. This is the moral hazard of regulation: regulation itself creates the image that less care need be taken.”, Goodhart et al. (1998), p. 15. For comprehensive overviews on European Private Law Alpa and Andenas (2005); Hesselink (2006); Bussani and Werro (2009); Alpa and Andenas (2010); Alpa and Andenas (2022).

[58] See the seminal contribution of Majone, Majone (1994); Majone (1996); Majone (1997).

[59] Pan (2003) Avgerinos (2003); Wymeersch (2010). Also in the press, in particular as a way to counterbalance the power of the US SEC: “*Il serait du reste souhaitable d’instituer une autorité européenne de tutelle des marchés financiers dont les pouvoirs de contrôle et de sanction s’étendraient à toute entreprise, même non cotée, qui compterait plus de 300 actionnaires*

(ESMA) established in 2010 has over time gained remarkable influence in terms of rulemaking process, supervisory convergence/coordination, and even direct supervision (in limited cases).[60] Extraterritoriality and substituted compliance are also present in the EU's financial law,[61] especially in those areas also covered by global standards such as derivatives (Chap. 11). Compared to the US, the international involvement of the European institutions (European Commission and ESMA) in the transnational securities regulatory arena is much more recent. Notwithstanding that, the EU has been able to build its own voice (Part II).

In summation, both EU and US securities regulations are currently designed to manage the issuance, sale, and trading of financial instruments in general—from the simplest, like common stocks, to the most complex, such as derivates. Brummer highlights that this activity works through three different subfields.[62] First, ensuring that information concerning firms and instruments is reliable and useful for (retail and institutional) investors in order to reduce the information asymmetry between providers/issuers and investors. Second, setting the basic procedures serving as a necessary constraint towards efficient trading of financial instruments. Third, regulating both stock exchanges and other venues where the trading of instruments takes place, as well as the financial institutions and intermediaries doing the trading.

1.2.3 Securities Regulation

As a result of the above, by 'Securities Regulation' this book means those regulatory measures adopted by public regulatory authorities (but, to some extent, also delegated to private actors) concerning the issuance and marketing of financial instruments[63] and governing primary and secondary capital markets; investment activities and investment services; intermediaries, their reporting duties, disclosure obligations, and rules of conduct—including (retail) investor protection. In this meaning, regulation is different from supervision.[64]

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européens quel que soit le lieu de son siège social et qui ferait ainsi pendant à la SEC", Rosenfeld and Veil (2004).

[60] Moloney (2018)

[61] Scott (2014).

[62] Brummer (2012), p. 8.

[63] Pettet (2005), p. 313.

[64] As also pointed out by Walker: "the term regulation [. . .] refer[s] to the body of legal rules, regulations or administrative requirements established by financial authorities or by market participants (generally referred to as self-regulatory systems) to limit or control the risks assumed by banks or other financial institutions and to the imposition of such provisions either generally or on the activities of a particular bank or other institution. Supervision will be understood to refer to the associated or complimentary process of monitoring or reviewing compliance by financial institutions with any specific sets of regulatory provisions imposed or with more general standards of prudent or proper behaviour in any particular market.", Walker (2001), p. 1.

Securities Regulation is public in nature, but it is not isolated from private law—where it makes inroads that vary across jurisdictions.[65] It can be delimited to those rules adopted by regulatory authorities and—where existing[66]—supervised self-regulatory[67] organizations that are geared at directing the behavior of market participants towards higher standards of ethics, such as preventing the mis-selling[68] of securities or insider dealing and market manipulation, with the ultimate goal of preserving market integrity, i.e., conduct regulation.[69] *Par contre*, prudential regulation differs from conduct regulation in that it aims at ensuring that financial institutions like banks or securities firms constantly keep their capital and liquidity endowments adequate in view of the surrounding and prospective market conditions and avoid taking up too much risk.[70] A differentiating feature—though not outright—between the conduct-of-business and prudential approaches is that the former takes in close consideration the micro, individual behavior; whereas the latter pays particular attention to the macro, high-level approach that tackles market stability as a whole.[71] When viewed from this angle, it is relatively intuitive that conduct regulation makes inroads into private law relationships. Finally, the term Financial Regulation is sometimes employed as synonymous with Securities Regulation, and at other times as an umbrella term encompassing Banking, Securities, and Insurance Regulation. To avoid misunderstandings, this book uses the more clear-cut term 'Securities Regulation'.

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[65] See Note 57 above.

[66] As Newman and Posner point out: "the particular balance and linkages between private self-regulation and direct public regulation varied tremendously cross-nationally and temporally", Newman and Posner (2018), p. 47.

[67] Bovet provides the following encompassing definition of autorégulation: "*L'autorégulation peut être définie comme (a) un ensemble de normes d'organisation, de comportement ou techniques, (b) produites généralement par des organismes de droit privé, (c) spontanément ou en vertu d'une délégation étatique (explicite ou implicite), (d) avec ou sans fonction de surveillance.*", Bovet (2019), p. 54.

[68] "Misselling can be defined as unfair or improper sale of financial products. The complexity of the construction of financial products and the dominant position of the financial institutions offering them make the materialisation of some risks (losses) more likely, which the consumers and investors are usually unaware of.", Martysz and Rakowski (2021), p. 121.

[69] Sheng (2005), p. 4. Andrew Sheng was chair of the IOSCO Technical Committee in 2004/2005 (Chap. 7).

[70] "[P]rudential regulation is primarily designed to strengthen systemic stability and improve the functioning of banking markets", Deng et al. (2014), p. 100.

[71] Sheng (2005), pp. 5–6.

1.2.4 Transnational Law and Regulation

Transnational law has been subject to a long academic debate.[72] In 1956 Jessup provided an encompassing definition of “transnational law” as “to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”[73] Soon after, Goldman and Schmitthoff developed an alternative approach based on a new *lex mercatoria* within the boundaries of international commercial arbitration.[74] While Schmitthoff was highlighting the key complementing and supplementing role “of international and national law by self-made law”, Goldman was focusing on “autonomous transnational economic law”.[75] This New Law Merchant is a transnational (commercial) law that represents a “third category of law beyond the traditional dichotomy of national and international law [, . . .] conceived as an autonomous legal system beyond the nation state, which is based on general legal principles, [whose] application, interpretation, and development remain with international commercial arbitration.”[76] In his seminal studies on *lex mercatoria*, Teubner has highlighted the self-deconstruction of the hierarchy of legal norms in the context of globalization, where “legal pluralism is no longer only an issue for legal sociology, but becomes a challenge for legal practice itself.”[77] Dalhuisen has thoroughly analyzed the modern *lex mercatoria*[78] and pointed out that “private law including commercial law had been thought of as being transnational until the 19th Century especially on the European Continent. This was confirmed by the general acceptance of the Roman law as superior customary law even though in commerce there was local law but it was not nationalistic, it was often regional or

[72] Very recently Zumbansen “Transnational law is at the center of lively discussions ranging from pronouncing the death of law to announcing the renewal of law. With stakes that high, the expectations for this field are potentially overwhelming. It is still unsettled what transnational law *is*.” Zumbansen (2021a), p. 4. On the different angles: “The expression ‘transnational law’ is used in connection with contract law and adjudication but also with public international law, corporate law and regulation. Perhaps one of the most active enquiries into transnational contexts has been made in connection with transnational corporate governance.”, Heidemann (2018), p. 5. To mention a few leading publications on transnational law: Joerges et al. (2004); Djelic and Sahlin-Andersson (2006); Abbott and Snidal (2009) Calliess and Zumbansen (2010); Bekker et al. (2010); Fenwick et al. (2013); Büthe and Mattli (2013); Dalhuisen (2014); Halliday and Shaffer (2015); Wood et al. (2015); Zumbansen (2021b).

[73] Jessup (1956), p. 1.

[74] Mentioned by Calliess (2007), p. 476.

[75] Zumbansen (2002), p. 425.

[76] Calliess (2007), p. 476.

[77] Teubner (2002), p. 199. Also Teubner (1992); Teubner (1997a); Teubner (1997c).

[78] Dalhuisen (2014).