



Available online at www.sciencedirect.com

ScienceDirect

Policy and Society xxx (2016) xxx–xxx

policy
and
society

www.elsevier.com/locate/polsoc

Cooperative or competitive? Private regulators and public supervisors in the post-crisis European financial services landscape[☆]

Olha O. Cherednychenko^{a,b,*}

^a University of Groningen, The Netherlands

^b Groningen Centre for European Financial Services Law, The Netherlands

Abstract

This article explores the interplay between private regulators and public supervisors within principles-based regulation and meta-regulation in the post-crisis European retail financial services landscape. It shows that the way in which the compliance with such regulatory frameworks is supervised and enforced may determine the type of relationship between private regulators and public supervisors – cooperative or competitive – that prevails at a specific moment in time. While there is evidence of both cooperation and competition between the two in the post-crisis era, a predominantly competitive relationship between private regulators and public watchdogs may severely undermine the practical importance of co-governance arrangements. A significant degree of cooperation between private regulators and public supervisors is key to ensuring their effectiveness. Public supervision and enforcement must therefore be responsive to the peculiarities of co-governance arrangements.

© 2016 Policy and Society Associates (APSS). Elsevier Ltd. All rights reserved.

Keywords: Private regulation; Public supervision; Public enforcement; Co-governance; Cooperation; Competition; Financial services; EU

1. Introduction

Financial services, such as payment, credit, investment, and insurance, have become a critical element of modern European societies. Financial services allow citizens to meet their essential needs, such as having a home or sufficient income after retirement, and to fully participate in society. In mobilising savings and allocating investment, financial services are also highly important for the EU economy. A single market in financial services would act as a catalyst for economic growth and provide lower prices and better quality goods and services for consumers.¹

While initially the European financial industry played a major role in the regulation of financial services across the EU, the last three decades or more have witnessed the rise of public regulation in this area. This trend received a major

[☆] An earlier version of this paper was presented at the workshop ‘The Causes and Consequences of Private Governance: The Changing Roles of State and Private Actors’ held on 6–7 November 2014 at the Mannheim Centre for European Social Research (MZES). I gratefully acknowledge funding for this event by the COST Action IS1309 ‘Innovations in Climate Governance: Sources, Patterns and Effects’ (INOGOV), MZES, and the Lorenz von Stein Foundation.

* Correspondence to: University of Groningen, Faculty of Law, Oude Kijk in ’t Jatstraat 26, 9712 EK Groningen, The Netherlands.

E-mail address: o.o.cherednychenko@rug.nl.

¹ See, for example, Economic and Financial Committee (EFC), *Report on Financial Integration*, No. 171, Brussels, 2002.

<http://dx.doi.org/10.1016/j.polsoc.2015.12.005>

1449-4035/© 2016 Policy and Society Associates (APSS). Elsevier Ltd. All rights reserved.

Please cite this article in press as: O.O. Cherednychenko, Cooperative or competitive? Private regulators and public supervisors in the post-crisis European financial services landscape, *Policy and Society* (2016), <http://dx.doi.org/10.1016/j.polsoc.2015.12.005>

boost in the aftermath of the global financial crisis that was triggered by the collapse of the subprime mortgage market in the US in 2007.² According to the now prevailing policy stance, the crisis exposed the risks that the lack of public regulation in the financial services field can pose not only to individual consumers but also to the proper functioning of the financial markets and economy at large.³ A frequently mentioned example in this context is widespread irresponsible lending in the largely unregulated US subprime mortgage.

However, it would be misleading to conclude from this that, in the post-crisis era, to use the words of the former French president Nicolas Sarkozy, '[s]elf-regulation as a way of solving all problems is finished.'⁴ Private regulation in the financial services field has not been entirely displaced by public regulation in the post-crisis European financial services landscape.⁵ Contrary to the traditional dichotomy between self-regulation by private actors and command and control regulation by public actors, there is still room for the interplay between the two in governing financial services in a multi-level EU legal order.⁶ The regulatory styles that enable such an interplay include, in particular, principles-based regulation and meta-regulation (or management-based regulation) which are familiar from before the crisis and remain on the agenda in the post-crisis EU.⁷ In fact, the interface between the financial services industry and financial regulators is necessary in the post-crisis era, given that the financial services sector remains a 'decentred' regulatory space⁸ that is characterised, inter alia, by a high degree of complexity, fragmentation of knowledge, resources and capacity for control, as well as unpredictability of actor behaviour.

When co-governing public goods, such as financial services, public and private actors may cooperate or compete with each other.⁹ As will be illustrated in this article, which form of the relationship between the two prevails at a specific moment in time may be considerably influenced by the way in which the compliance of private actors with principles-based regulation or meta-regulation is supervised and enforced by public watchdogs.¹⁰ The interplay between private regulators and public supervisors in the financial services field is particularly interesting in the present context, given the general post-crisis trend towards strengthening public supervision and enforcement in this area across the EU. In particular, with the establishment of a new institutional framework for financial supervision – the European System of Financial Supervision (ESFS), the post-crisis era has witnessed a major move towards a greater Europeanisation and centralisation of public supervision in the financial services field. The ESFS is formed of the three sectoral European Supervisory Authorities (ESAs) – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) – plus the European Systemic Risk Board (ESRB) and national supervisory authorities. In particular, the ESAs avail themselves of far-reaching powers to govern the financial services industry. This can be illustrated by using the example of ESMA, whose mission is to enhance investor protection and to reinforce stable and well functioning

² On the main characteristics of the global financial crisis, see, for example, J. Tosun, A. Wetzel, & G. Zapryanova, 'The EU in Crisis: Advancing the Debate', *Journal of European Integration* 36 (2014) 195, 196 *et seq.*

³ See, for example, Financial Services Authority (FSA), 'The Turner Review. A Regulatory Response to the Global Financial Crisis', available at: <http://www.fsa.gov.uk>. This view, however, is not shared by all commentators. For the post-crisis defence of free financial markets and self-regulation, see, for example, J. Allison, *The Financial Crisis and the Free Market Cure: Why Pure Capitalism is the World Economy's Only Hope* (New York: McGraw Hill, 2012); E.P. Stringham, *Private Governance: Creating Order in Economic and Social Life* (Oxford: Oxford University Press, 2015).

⁴ "'Laissez-faire' capitalism is finished, says France", *EU Observer*, 26 September 2008, <https://euobserver.com/political/26814>.

⁵ On this is more detail, see O.O. Cherednychenko, 'Public and Private Financial Regulation in the EU: Opposites or Complements?', in N. Dorn (Ed.), *Controlling Capital: Public and Private Regulation of Financial Markets* (London & New York: Routledge, 2016), forthcoming. Cf. M. Moschella & E. Tsingou, 'Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process', *Regulation and Governance* 7 (2013) 407; M. Andenas & I.-H. Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (London & New York: Routledge, 2014) 101 ff. See also F. Cafaggi & A. Renda, 'Public and Private Regulation: Mapping the Labyrinth', CEPS Working Document No. 370/October 2012.

⁶ Cf. e.g. F. Cafaggi, 'Private Regulation in European Private Law', in A.S. Hartkamp *et al.*, *Towards a European Civil Code* (Alpena an den Rijn: Kluwer Law International, 2011), 91, 100 *et seq.*

⁷ Cf. J. Black, 'Regulatory Styles and Supervisory Strategies', in N. Moloney *et al.* (Eds.), *The Oxford Handbook of Financial Regulation* (Oxford: Oxford University Press, 2015), 218.

⁸ J. Black, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy* 27 (2002) 1; J. Black, 'Mapping the Contours of Contemporary Financial Services Regulation', *Journal of Corporate Law Studies* 2 (2002) 253; J. Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation', *Public Law* (spring) (2003) 63.

⁹ See J. Tosun, S. Koos & J. Shore, 'Co-Governing Common Goods: Interaction Patterns of Private and Public Actors', in this Special Issue.

¹⁰ Cf. J. Black, 'The Rise, Fall and Fate of Principles-Based Regulation', in K. Alexander & N. Moloney, *Law Reform & Financial Markets* (Cheltenham: Edward Elgar, 2011) 3, 10.

Download English Version:

<https://daneshyari.com/en/article/5118410>

Download Persian Version:

<https://daneshyari.com/article/5118410>

[Daneshyari.com](https://daneshyari.com)