Abstract

The paper aims at examining how European law interacts with global law and standards. Does EU law tend to use the global one, or is in competition with it? The paper takes into account this issue, through the exam of some cases relating to financial services (more specifically, to banking, accounting and auditing). In a number of cases, EU strengthens global financial standards, as they become mandatory through European recognition. Still, European enforcement of global private standards cannot be explained as a public body’s retreat from the regulation of some sectors.

First, EU establishes, in the accounting and in the auditing sector, a precise endorsement procedure and the criteria for the evaluation of the global standards. Thus, a common hybrid public-private model seems to be established in both sectors. Second, EU’s control is not a purely *ex post* one: on the contrary, the public regulator tries to play a more active role within the international standard setting process, influencing the global regulator’s agenda and proposing changes to its governmental structure. Within EU’s efforts to influence global regulators, the establishment of due process and transparency requirements seems to play a key role.
Summary

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4. Summing up.
1. The spread of global standards and the role of the EU.

Global standards are not a new phenomenon. Private sector standards developing organizations, such as the International Organization for standardization (ISO) and the International Electro-technical Commission (IEC), have been developing international standards since 70s. The Basel Committee, which develops standards for banking supervision, was established by the G10 central-bank Governors in 1974.

Nevertheless, recently what has been called a sort of “explosion” of global standards has been observed. The setting of international standards is becoming an increasingly significant issue, due to the globalization process. On the one hand, their number is increasing. According to Oecd, 80% of world trade is affected by global standards. As non tariff barriers to trade have replaced tariffs and quotas as the most effective obstacles to international trade, and as standards have become one of the most important non-tariff barriers to trade, standards’ great economical relevance has been pointed out. Moreover, they are considered an extremely effective tool of regulation in international governance, alternative to hard law.

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4 OECD, Regulatory Reform and International Standardization, 29 Gennaio 1999, TD/TC/WP(98)36/FINAL, p. 4: «The impact of standards on trade is so widespread that, on purely economic grounds, almost all sectors would justify attention; one estimate claims that up to 80% of trade (equivalent to around $4 trillion annually) is affected by standards or associated technical regulations».

5 On this point, see W. Mattli and T. Büthe, Setting International Standards: Technological Rationality or Primacy of Power?, World Politics, 2003, p. 1 et seq.

On the other hand, what has recently been changing is the increasing reference to these technical standards within different regulatory regimes, which therefore lend a greater legal force to the former. One example is the TBT obligation for WTO members to use “international standards” as a basis for their technical regulations. Another case is the SPS reference to the Codex Alimentarius Commission standards.

The legal impact global standards have on domestic legal orders can be improved also through other mechanisms, less official but sometimes almost equally effective. Global financial standards established by transnational regulatory networks (like the Basel Committee, IOSCO and IAIS) are endorsed by the international financial institutions, namely the IMF and the World Bank, and used in drafting the Reports on the Observance of Standards and Codes (ROSCs), which constitute an essential tool for the assessment of States’ compliance with global financial standards. Thus intergovernmental international organisations encourage States to implement rules first established by transnational regulators.

The interplay between domestic and global level is a core element to understand global standards development process. As a matter of fact, standards and codes established at the global level need to be implemented by domestic authorities. Their effectiveness depends on countries’ compliance.

7 This particular process is called “borrowing regime”: see S. Battini, Il sistema istituzionale internazionale dalla frammentazione alla connessione, in Riv. It. Dir.Pub. Com., 2002, p. 969 et seq. and the bibliography cited therein for a fuller discussion of the point.

8 Art. 2.4, Tbt: «Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations». For a fuller discussion of the point, R. Howse, A new device for creating international legal normativity: the WTO technical barriers to trade and international standards, in Constitutionalism, Multilevel Trade Governance and Social Regulation, edited by C. Joerges and E.-U. Petersmann. p. 383 et seq.

9 Art. 3.1. Sps: «To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3». About Sps reference to other international organizations’ activity, see T. P. Stewart e D. S. Johanson, The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics, in Syracuse Journal of International Law and Commerce, 1998, Vol. 26, p. 27 et seq.

As the domestic entities charged to act this implementation are usually administrative ones\(^\text{11}\) (for example, it is up to domestic securities regulators to implement IOSCO’s codes and principles), the development of global standards is particularly relevant for domestic administrative law development\(^\text{12}\).

Moreover, standards established at the global level are increasingly influencing domestic laws and administrations, directly penetrating within domestic legal orders\(^\text{13}\). As areas traditionally falling within domestic regulation’s scope are constantly shifting under international organizations or transnational regulators’ action, domestic administrative law is being increasingly affected by international standards and codes. Therefore, domestic regulatory policies are becoming the result (and, sometimes, the pure application) of rules established at the global level. Thus, global standards are a crucial issue especially for purposes of studying the emerging features of global administrative law\(^\text{14}\).

The emergence and spread of global standards raises a number of questions. The one this paper is addressing is the following: what kind of interactions are raising between EU law and global law and standards? Does EU law tend to use the global one, or is in competition with it? As has been suggested, three main hypothesis may occur: the European Union could reinforce global law, imposing member States to implement it, it could protect domestic law from the global one, or could be neutral\(^\text{15}\). According to

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a second perspective, EU can act as a “sword”, helping globalization in achieving its objectives, or a “shield” against global regulation development\textsuperscript{16}.

The paper takes into account this issue, through the exam of some cases relating to the financial services’ sector. Financial services constitute one of the areas in which the density of global regulation may be seen most clearly\textsuperscript{17}, and is therefore a particularly interesting sector for the purposes of studying the ways in which global regulation influences domestic laws and administrations. Besides, several examples of EU’s intervention in global standards implementation process may be found.

The first part of the paper will look at the different type of global regulators we can find in the financial sector. In the second part, I’ll pick up three examples of EU’s intervention in global financial standards setting process, coming from banking, accounting and auditing areas, in order to see whether it is a reinforcing, a diminishing or a neutral kind of intervention.

2. Global standards for financial services and the different types of global financial regulators.

The globalisation of financial markets has been matched by the increasing production of international standards, codes of good practice, guidelines and principles for financial services\textsuperscript{18}. The beginning of cooperation between national supervisory authorities dates back to 1974 when the Basel Committee was established by the G10 central-bank Governors\textsuperscript{19}. During the last decade, however, the number of international and transnational bodies intervening within the sector has grown steadily. The


\textsuperscript{17} As regards the spread of global regulatory systems, see S. Cassese, \textit{Le droit administratif global: une introduction}, in \textit{Droit administratif}, 2007 p. 17 et seq.


\textsuperscript{19} See I. Borrello, \textit{L’organizzazione sovranazionale ed internazionale della vigilanza sul credito}, in \textit{Riv. Trim. Dir. Pub.}, p. 423 et seq. on the nexus between an internationalization of banking and credit activities and the establishment of networks between the national supervisory authorities, as well as the historical reasons for founding the Basel Committee.
development of global rules and principles and their implementation at a national level have been pointed out as a core instrument to promote a sound financial system and to prevent the occurrence of financial crises\textsuperscript{20}.

It is a particularly interesting sector for the purposes of studying the global regulatory regime’s distinguishing features and the ways in which it influences domestic laws and administrations. Furthermore, such a context offers examples of various types of global administration\textsuperscript{21}.

Bodies traceable to the “international administration” model (i.e. intergovernmental international organizations) intervene within the financial services sector. Indeed, the International Monetary Fund, the World Bank and the OECD (Organization for Economic Co-operation and Development) all establish standards for monetary and fiscal transparency, insolvency and corporate governance.

In the second place, transnational regulatory networks such as Basel, the International Organization of Securities Commissioners (IOSCO – 1983), the International Association of Insurance Supervisors (IAIS – 1994) and the most recent International Organization of Pension Supervisors (IOPS – founded in Paris on 12\textsuperscript{th} July 2004) also develop rules for banking, securities, insurance and pension supervision respectively\textsuperscript{22}.

Third, the financial standard-setting bodies also include some hybrid organisms (corresponding to the hybrid intergovernmental-private administration) amongst their

\textsuperscript{20} See, \textit{ex multis}, \textit{Follow-up Group on Incentives to Foster Implementation of Standards, Report for the meeting of the FSF on 6/7 September 2001}, par. 10. Of particular interest is the G7 communiqué of 30\textsuperscript{th} October 1998 quoted therein, in which the Finance Ministers and Central Bank Governors reached an agreement “on the following specific reforms to strengthen the international financial system…. increase the transparency and openness of the international financial system; \textit{identify and disseminate international principles, standards and codes of best practice}; \textit{strengthen incentives to meet these international standards}” (italics added).

\textsuperscript{21} About the different types of global regulators, see B. Kingsbury, N. Krisch and R. Stewart, \textit{The Emergence of Global Administrative Law}, quoted at 14, here at 20, who divide the models of global administration into five types (administration by formal international organizations; administration based on collective action by transnational networks of governmental officials; distributed administration; hybrid intergovernmental/private administration and administration by private institutions with regulatory functions).

\textsuperscript{22} For a broad discussion about transnational regulatory networks, their role and significance, A.M. Slaughter, \textit{A New World Order} (2004).
number. One such example is the Financial Stability Forum (FSF)\textsuperscript{23}, which brings together not only the transnational regulatory networks for banking, securities and insurance supervision (BCBS, IOSCO and IAIS, respectively), but also intergovernmental international organisations (the IMF, the World Bank, the OECD and the Financial Action Task Force on Money Laundering - FATF belong to it\textsuperscript{24}), the Bank for International Settlements (BIS) together with its committees (the Committee on Payment and Settlement Systems - CPSS and the Committee on the Global Financial System - CGFS), the ECB and national administrative authorities (such as central banks, supervisory authorities and treasury departments) in the G7 countries and Australia, The Netherlands, Hong Kong and Singapore (the last four countries may each have just one single representative, whereas the G7 countries all have three). Finally, also organizations set up by private bodies, such as 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, belong to it.

The last two are therefore examples of private global governance whilst, according to some commentators, even credit rating agencies are financial standard-setting bodies\textsuperscript{25}.


\textsuperscript{24} Founded by G7.

3. EU and global financial standards: three examples.

How can EU react to the spread of global standards? Is it merely accepting their existence and growing importance in financial governance, is it using them or is EU law in competition with global standards? Three examples seem to illustrate a trend in EU’s attitude towards global financial standards.

3.1. The EU Capital Requirements Directive.

The Basel Committee on Banking Supervision (Basel Committee or BCBS) needs no presentation. Established in 1974, it is one of the most powerful and well known transgovernmental regulatory network.26 Standard setting for banking supervision is one of its main activities.

In June 200427, the BCBS published, after an extensive consultative process, the International Convergence of Capital Measurement and Capital Standards: a Revised Framework (the so-called “Basel II”)28. The new accord is intended to substitute the 1988 Basle Capital Accord.29

The new capital accord modifies the ways of determining bank capital adequacy requirements. Under the 1988 accord, one single method was used and this was valid

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27 The first version of Basel II was published in 2004; in November 2005, the Committee issued an updated version of the revised Framework incorporating the additional guidance set forth in the Committee’s paper The Application of Basel II to Trading Activities and the Treatment of Double Default Effects, while on 4 July 2006, the Committee issued a comprehensive version of the Basel II Framework: for the different versions of the document, see http://www.bis.org/publ/bcbsca.htm.
for all banks (the amount of capital had to be at least equal to 8 per cent of “risk weighted” assets). The new accord allows banks to choose between two methodologies for calculating the capital requirements for credit risks, the standardised approach (according to which risk weights - and, consequently, the capital requirements that a bank has to respect - depend on the issuer’s rating\(^{30}\)), and the “internal ratings” method (IRB).

The great significance which has been attributed to Basel II is connected not only to the different methodology for calculating capital requirements, but also to the fact that Basel II has a larger scope of action than the 1988 accord. Basel II is divided into three pillars: while the first establishes minimum capital requirements, the second sets the key principles of banking supervisory review process and the third relates to market discipline.

At the European level, the Capital Requirements Directive, comprising Directive 2006/48/EC, relating to the taking up and pursuit of the business of credit institutions, and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions\(^{31}\), dates back to 2006.

The Directive is designed to implement Basel II rules, but widens their context of application remarkably. Indeed, whereas the Basel Committee accord is addressed exclusively to internationally active banks, the Community Directive binds merely domestic active banks as well. Moreover, the new Directive comprises all Basel II’s three pillars: this means that the European legislator didn’t choose the least effective rules amongst those drafted by the BCBS. On the contrary, even the most intrusive ones

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\(^{30}\) The variations are significant. By way of example, consider that the following risk weights for rated corporated claims: 20 per cent for ratings from AAA to AA-; 50 per cent from A+ to A-; 100 per cent from BBB+ to BB-; 150 per cent for below BB-. The standard risk weight for unrated claims on corporate will be 100 per cent (para. 66 of Basel II).

(those concerning the banking supervisory review process - the so called “second pillar”) gained binding force.

Two more aspects need to be considered. First, global standards’ influence on European law looks even more significant if one bears in mind that also the existing European banking legislation was based on the 1988 Capital Accord.

On the other hand, it has been stated that “in order to maximise consistency between the EU legislation and the international framework, the European Commission and EU members of the Basel Committee have had as a primary objective ensuring the suitability of Basel II for application in the EU Single Market”.

Thus, the Capital Requirements Directive suggests that the European implementation process of global financial standards may have the following features.

First, it may reinforce global standards: in this case, capital rules change their legal force, as they are no more soft law within the European context, but they gained binding force. Moreover, in this hypothesis global standards result strengthened not only because of their stronger legal force, but also because of the larger scope of application (also to domestic active banks instead of purely internationally active ones).

Second, according to European authorities’ declarations, member states’ representatives (and the Commission in the role of observer) were aware of the purpose of implementing global banking rules at the European level during Basel II negotiations. Therefore, the extent to which EU can make her views heard within the global standard-setting process and the extent to which EU will implement global rules at European level may be intertwined. Even if there is no general external representation of the EU in the BCBS, the participation of many of its members, along with EU’s observer status

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32 This statement does not involve a judgement on the effectiveness of Basel II regulation. I just want to point out that the second pillar establishes rules for the domestic supervisory process, and is therefore intended to shape domestic institutions’ action.
within the BCBS and its committees seems to be a powerful means of making EU’s point of view heard at the global level.

3.2. EU and the global standards on accounting.

3.2.1. The IASB: structure and activity.

The International Accounting Standards Board (IASB) is an international organization made up of private entities, which establishes standards and guidelines for the accounting sector. Founded on April 1, 2001, it is the successor of the International Accounting Standards Committee (IASC), created in June 1973 in London. As its standards have been spreading steadily, it can be said it is a particularly interesting example of global private regulation.

The IASC Foundation Constitution, which outlines IASB’s structure and establishes the rules it must respect during the standard setting activity, has been approved in 2000 and first revised in 2001 and 2002. The Constitution requires the Trustees to review the Constitution every five years, and has been reviewed in 2005 and 2007.

The objectives of the IASC Foundation are: to develop, in the public interest, a single set of high quality, understandable and enforceable global accounting standards; to promote the use and rigorous application of those standards; to bring about convergence of national accounting standards and international accounting standards.

36 In November 2003, the Constitution Committee has been established, with the task of consulting with a high number of organizations, about several issues ruled by the Constitution: see Press Release, Trustees announce the process for constitutional review, 12 November 2003, A public document for consultation has been published on 23 November 2004 (see the IASC Foundation Consultation paper, Review of the Constitution, Proposals of the IASC Foundation Trustees), and, after a period for comments by the interested parties (until 23 February 2005), the new text has been approved on 21 June 2005. The last reviewed has been completed on 31 October 2007.
Accounting standards established until 2001, by the IASC, are named International Accounting Standards (IAS), while standards produced by IASB after that date have been called International Financial Reporting Standards (IFRS). As the IASB adopted, and continues to update, the IAS, global accounting standards are frequently referred to as the IAS/IFRS.

IASB’s structure is complex, and has been modeled after the American Financial Accounting Standards Board (FASB), the American regulator (also of a private nature), which sets standards for the accounting. It is made up of four main constituent bodies. The IASB is the standard-setting body of the IASC Foundation. The Standards Advisory Council (SAC), which represents the industry and the accountancy profession, is responsible for commenting on IASB’s projects. The International Financial Reporting Interpretation Committee (IFRIC) is charged on interpreting accounting standards; IFRIC interpretations, anyway, are valid only if approved by the IASB. The Trustees of the International Accounting Standards Committee Foundation (IASC) appoint the members of all the other three bodies (IAS, SAC and IFRIC).

The reform of 2005 modified both IASB’s structure and standard setting procedure. First, the review process changed the number and the composition of the trustees. According to the text of 2002, nineteen individuals were members of the trustees: six appointed from North America, six from Europe, four by the Asia/Pacific region, three from any area. After the review, the number of the Trustees has been raised to twentytwo, amending the number of Trustees from Asia/Oceania and from other areas respectively to six and four. The aim of this review has been to gain a more

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39 Constitution, para. 1.
40 Constitution, para. 38.
41 Constitution, para. 37.
42 Constitution, para. 31 (a).
43 Constitution, para. 15.
44 Constitution, para. 6. The text of 2007 doesn’t change the number of trustees. The discussion on the point can be found in Proposals for change, para. 31 et seq.
balanced geographical representation, diminishing the previous euro-american dominance.

Second, IASC Constitution review gave the Trustees a new, twofold function: to establish the operating procedures and due process for the IASB, the IFRIC and the SAC and to review compliance with these procedures.\textsuperscript{45} In the text of 2002, due process was not mentioned about the ordinary activity of IASB’s bodies, but only in the context of the procedure of reviewing the Constitution itself. Para. 15 (h) of the Constitution\textsuperscript{46} establishes that amendments to the Constitution must be approved “following a due process, including consultation with the Sac and publication of an exposure draft for public comment”. Thus, after the review of the Constitution due process is intended as a principle which must be respected during a larger part of IASB activity: not only at the moment of emending the Constitution, but also during the activity of each of its bodies. This prevision has been implemented with the publication of IASB’s Due Process Handbook in 2006.\textsuperscript{47}

During the debate concerning the Constitution review, it was proposed to permit alternative funding arrangements of the IASB. At the moment, the IASC Foundation depends upon voluntary contributions from public and private sources. This raises the concern of a conflict of interests, as the standard setting procedure might take special consideration of the strongest financial supporters. For these reasons, it had been proposed to allow an alternative system, using a form of listing or registration fees.\textsuperscript{48} Such an attempt, aimed at fostering IASB’s independence, did not succeed, and nothing has been changed about the financing rules in the text of the Constitution.

It is now a common claim that both the IAS and the IFRS have gained more and more prominence during the last decade, because of a number of mechanisms.\textsuperscript{49}

\textsuperscript{45} Constitution para. 15, lett. f and g. The text of 2007 doesn’t change this point. For the rationale behind the reform, see Proposals for change, para. 57 and para. 106 and seq.
\textsuperscript{46} The same requirement was set forth in the text of 2002, para. 15 (g).
\textsuperscript{48} Proposals for change, para. 68.
First, they have been used by the Financial Stability Forum (FSF). Between the most important actions undertaken by the forum, there is the *Compendium of Standards*: this brings together financial and economic standards, internationally recognized as «important for sound, stable and well functioning financial systems», established by the members of the FSF\(^{50}\). The “Compendium” highlights 12 “key standards” that are deemed essential for sound financial systems. Within the FSF Compendium there are also some IAS and IFRS\(^{51}\): in this way, standards first established by a private regulator are later recognized by a hybrid, private-public regulator.

A second mechanism is connected with the use of international standards on accounting and auditing by the IMF and the World Bank in their Reports on the Observance of Standards and Codes (ROSCs)\(^{52}\). These are a part of the Financial Sector Assessment Program (FSAP), founded in 1999 by these two intergovernmental organizations\(^{53}\). They are reports on countries’ degree of compliance with some global financial standards, wholly coinciding with the FSF Compendium’s 12 Key Standards. The IMF and the World Bank’s staff prepare the reports at the request of the State concerned. Thus the compilation of a ROSC is voluntary just as the report’s publication depends on the State’s consent. At the same time, a State’s refusal to publish a ROSC may negatively affect market operators’ judgments\(^{54}\). Both the IMF and the World Bank (not to mention the FSF) have strongly remarked the important role which might be played by these assessment instruments, and the number of ROSCs that have been prepared is considerable: by the end of December 2004 605 ROSC modules had been completed for over 116 States and 74 per cent of them have been published on the IMF web site\(^{55}\). Therefore, through these mechanisms, rules established by private bodies are subject to assessment by international intergovernative organizations.

\(^{50}\) See [http://www.fsforum.org/compendium/about.html](http://www.fsforum.org/compendium/about.html).

\(^{51}\) See [http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html](http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html).


\(^{54}\) *Follow-Up Group on Incentives to Foster Implementation of Standards, Report for the meeting of the FSF on 6/7 September 2001*, p. 9, note 22.

\(^{55}\) *FSF Ongoing and Recent Work Relevant to Sound Financial Systems. Note by the FSF Secretariat (with inputs from various bodies) for the FSF Meeting on 11 March 2005*, p. 12.
Third, a last mechanism which determined a growing recognition of IASB’s standards is the incorporation of these rules within a different legal order: this is the case of the reference EC Regulation n. 1606/2002 (so called Ias Regulation)\(^56\) makes to IAS/IFRS, which we are now going to look at.

3.2.2. The EU Approach to Accounting Harmonization.

The Eu’s approach to accounting harmonization is the result of a long process, which has its roots in the accounting directives and «the demand of some of Europe’s larger companies to issue their securities and raise capital on international capital markets»\(^57\). Starting with the Communication of the Commission * Accounting Harmonisation: A New Strategy vis à vis International Harmonisation*, in 1995, EU strategy in the accounting sector has changed steadily. From an approach based on the establishment of binding rules, carried on through EU bodies, EU has moved to an approach aimed at incorporating internationally recognized accounting standards and principles, the International Accounting Standards (IAS) and the International Financial Reporting Standards (IFRS), established by the IASB\(^58\). The main problem to be addressed was that accounts prepared by European companies according to the Directives were no longer accepted for international capital market purposes, and companies were thus obliged to prepare two sets of accounts\(^59\). The choice of endorsing the international harmonization process originated from the observance of the time-consuming process for updating the accounting directives and their rapid obsolescence,

\(^{59}\) COM 95(508), para. 3.3. For an international political economy perspective on European approach on accounting, see P. Leblond, *The International Dimension of the Harmonization of Accounting Standards in the EU*, paper for delivery at the Eusa, Ninth Biannual International Conference, March 31st - April 2nd, 2005, Austin, Texas, available at [http://aei.pitt.edu/2998/](http://aei.pitt.edu/2998/).
contrasted to the greater flexibility of standards produced by private regulators\textsuperscript{60}. This approach was further developed in 2000, with the Communication about \textit{EU Financial Reporting Strategy: the way forward}\textsuperscript{61}.

EU Regulation n. 1606/2002\textsuperscript{62}, quoted above, provides a procedure to “decide on the applicability within the Community of international accounting standards”. In particular, with Regulation CE n. 1606/2002 (so called IAS Regulation), a systematic incorporation of IAS/IFRS standards has been planned. In this way, global accounting standards, first established by private entities, gain binding force through European recognition. Nevertheless, Regulation CE n. 1606/2002 does not call for a simple incorporation of internationally recognized accounting standards, but requires an extremely complex procedure.

IAS Regulation requires all publicly traded EU companies to prepare their consolidated accounts using IFRS since 2005\textsuperscript{63}. According to IAS Regulation, when deciding on the applicability of IAS/IFRS, the European Commission must evaluate if the international standards correspond to the criteria set out in the Regulation itself: in particular, IAS/IFRS standards can be endorsed only if they are conducive to the European public good, and if they meet the criteria of understandability, relevance, reliability and comparability required of the financial information needed for making economic decisions and assessing the stewardship of management\textsuperscript{64}.

When deciding on the adoption of the standards, the European Commission is assisted by two committees. The Accounting Regulatory Committee (ARC), established by Art.6 of the Regulation, is a comitology committee; made up of representatives from the Member States, it decides whether IAS are to be adopted, on the basis of the Commission's proposals\textsuperscript{65}.

\textsuperscript{60} COM 95(508), para. 4.3, and 5.1.
\textsuperscript{63} Regulation CE n. 1606/2002, art. 4.
\textsuperscript{64} Regulation CE n. 1606/2002, art. 3.2.
\textsuperscript{65} About the ARC, see \url{http://ec.europa.eu/internal_market/accounting/committees_en.htm#arc}.
In the assessment of international accounting standards, a technical committee provides support and expertise to the Commission as well: the European Financial Reporting Advisory Group (EFRAG)\(^{66}\). This is an experts committee, made up of representatives from the private sectors of several Member States (for example, the European Federation of Accountants (FEE), the European Insurance Organisation (CEA), the European Banking Federation (EBF), the European Association of Craft Small- and Medium-sized Enterprises (UEAPME), the European Federation of Accountants and Auditor (EFAA))\(^{67}\). IAS Regulation provided for support by a technical committee\(^{68}\); later on, cooperation with the EFRAG has been strengthened with the Working Arrangement between European Commission and EFRAG\(^{69}\). This Committee has a consultative function, providing the support and expertise needed to assess IAS compatibility with the criteria set forth in the Regulation and to advise the Commission on whether or not to propose to adopt the standards\(^{70}\). According to some commentators, EFRAG serves «as a bridge between the Commission as a public standard setter and the IASB as a private one»\(^{71}\).

With the Commission Decision 2006/505/EC of 14 July 2006, also a Standards Advice Review Group (SARG) has been set up\(^{72}\). As the EFRAG is a private body, it has been established to create an institution structure with the task of advising the Commission on the objectivity and neutrality of its opinions, in order to foster the transparency and credibility of the endorsement process\(^{73}\). The SARG is made up of

\(^{66}\) See http://www.efrag.org/content/default.asp?id=4103.
\(^{67}\) See http://www.efrag.org/content/default.asp?id=4096.
\(^{68}\) Regulation CE n. 1606/2002, recital 10.
\(^{70}\) Working Arrangement, para. 1.
seven members, appointed on the basis of technical expertise and independency. When the group identifies a particular concern in EFRAG’s opinion, the chairman of the group shall enter into a dialog with EFRAG with a view to resolve the matter, before the group issues its final advice.

Finally, the Committee of European Securities Regulators (Cesr) is charged on assisting the Commission in implementing the IAS.

After the approval of IAS Regulation, the process of endorsement of accounting standards has been intense: until October 2007, seventeen adoption regulations have been approved. Some cases seem to point out the ambiguities of the endorsement procedure: for example, standard IAS 39 has been amended several times, and is thus only in part applied in the European legal order. This seems to show that conflicts between different accounting approaches still exist.

The new European strategy for the accountancy sector outlines a hybrid public-private model, the consequences of which still have to be explored. How does the public regulator control the private one? Is it a purely ex post control, or does the public regulator try to play a more active role in the international standard setting process?

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74 Commission Decision 2006/505/EC, art. 3.1 and 3.2.
75 Commission Decision 2006/505/EC, art. 4.6.: «When the group identifies a particular concern, the chairman of the group shall enter into a dialog with EFRAG with a view to resolve the matter, before the group issues its final advice. The Commission may assist in the discussions between the group and EFRAG with the aim to establish a balanced solution».
76 About CESR’s role, see Committee of European Securities Regulators (Cesr), Proposed Statement of Principles of Enforcement of Accounting Standards in Europe, Consultation Paper, October 2002, Cesr/02-188b; Committee of European Securities Regulators (Cesr), Consultation on the Statement of Principles of Enforcement of Accounting Standards in Europe, Feedback Statement, 12 March 2003, Cesr/03-074 and Committee of European Securities Regulators (Cesr), Standard No. 2 on Financial Information. Coordination of enforcement activities, April 2004, Cesr/03-317c.
79 For a critical point of view, see D. Simonds, Speaking in tongues. Dragging America down the rocky road to a set of global accounting rules, in The Economist, May 17th 2007, arguing that «There is only one difference, but it is a big one—the rule on how to account for financial instruments».
In the accounting sector, the EU, on the one hand, makes standards - first established as voluntary - mandatory; on the other hand, it does not resign from controlling the compatibility of standards with European law, and their effectiveness. Public enforcement of global private standards cannot be explained as a public body’s retreat from the regulation of a certain sector (in this case, the accounting one): rules which are enforced are not entirely private ones, but hybrid regulation, private-public, takes place\textsuperscript{81}.

Moreover, some documents show the EU’s effort at taking part in the international standard setting process within the IASB. In the \textit{Communication} of 1995, the aim of ensuring an appropriate European input into IASC’s work, in order to influence its agenda, «so that its output will increasingly reflect the EU viewpoint », was clearly stated\textsuperscript{82}. In commenting on 2005 proposed review of IASB’s constitution, the Commission argued that the very composition of IASB’s constituent bodies – namely, the IASB itself, the IFRIC and the Board of Trustees - «should correspond more to all the jurisdictions that directly apply the standards or have declared that they will make the IAS mandatory in the near future»\textsuperscript{83}. From this point of view, the incorporation of IAS within European law constitutes a sort of counterpart to a stronger position of EU \textit{vis à vis} the global private standard setter for accounting.

Thus, the case of global standards for accounting looks similar to the example concerning the banking sector for one point: EU reinforces the global private standard, which results in binding community law. On the other hand, it diverges from the former example for three aspects: first, in this case EU recognition does not operate towards one single standard, but takes into account all the standards, both existing and future, one global regulator can establish; second, EU establishes a control procedure and criteria for the endorsement; third, this more precise and complex model results not only

\textsuperscript{81} On this point, see also S.Botzen, \textit{Transnational Expert-driven Standardisation – Accountancy Governance from a Professional Point of View}, quoted at 49, at 56.
\textsuperscript{82} COM 95(508), para. 5.4.
\textsuperscript{83} Commission’s response to changes proposed to the Constitution of the International Accounting Standards Committee Foundation (Iascf), 7\textsuperscript{th} march 2005, \textit{Letter from Alexander Schaub, Director-general, DG Internal Market and Services, European Commission and Annex}, available at http://ec.europa.eu/internal_market/accounting/ias_en.htm#status-adoption.
in EU’s adoption of standards established at the global level, but also in EU’s influence upon the global regulator.

3.3. EU and the global standards on auditing.

3.3.1. The Ifac: structure and activity

The least known of the financial global standard setters taken into account here, the International Federation of Accountants (IFAC), is a private international organization which establishes standards for auditing: in particular, it sets standards for education and ethics of the auditors, and the exercise of their profession.\(^{84}\)

Founded in 1977, with headquarters in New York, the IFAC has worked for a long time in a tight connection with the more famous International Accounting Standard Board (IASB), and has conquered only recently a stronger independence from the latter. Despite its growing role within global financial governance, it has attracted little attention in scientific literature.\(^{85}\)

Over the past 30 years, IFAC’s membership has grown, form the 63 members at the beginning, to now include 157 members.\(^{86}\) This organization is made up of private entities, representatives of the professional organizations of the accountants (for example, take part in the organization the Consiglio nazionale dei dottori commercialisti e degli esperti contabili).\(^{87}\)

According to IFAC Constitution (in the text modified in 2006), the mission of the IFAC is to “serve the public interest”; in particular, it aims at strengthening the accountancy profession in several ways: establishing and promoting adherence to high

\(^{84}\) See http://www.ifac.org/About/.
\(^{86}\) See http://www.ifac.org/About/.
\(^{87}\) See http://www.ifac.org/About/MemberBodies.tmpl.
quality professional standards and furthering the international convergence of such standards.\textsuperscript{88}

IFAC’s structure is the following. The Council consists of one representative for each member, and is responsible for deciding constitutional and strategic matters and electing the Board. The Board, comprised of the President, the Deputy President and not more of 20 members (chosen as to reflect the level of financial contribution to IFAC by member bodies), has all the powers necessary to take the actions necessary to achieve the mission of the IFAC\textsuperscript{89}. There are also ten committees, four of which charged with a standard setting function, the most important of which is the International Auditing and Assurance Standards Board (IAASB), setting standards for auditing.\textsuperscript{90} During the standard setting procedure, each of these committees must follow some due process rules, established in 2006 with the IFAC’s Standards-Setting Public Interest Activity Committees’ Due Process and Working Procedures\textsuperscript{91}. One of IFAC’s committee, the Compliance Advisory Panel (CAP), is charged with the assessment and compliance with IFAC’s standards of this organization’s members.\textsuperscript{92}

Similarly to the IASB, the IFAC’s standards (the International Standards on Auditing (ISA)) are part of the FSF Compendium of standards\textsuperscript{93}, and is subject to IMF and World Bank’s assessment through the ROSCs.\textsuperscript{94}

3.3.2. EU’s strategy for auditing


\textsuperscript{89} Also those not explicitly mentioned in the Constitution: see para. 3 and 5 Constitution.

\textsuperscript{90} The other three standard setting committees are the International Accounting Education Standards Board (IAESB), the International Ethics Standards Board for Accountants (IESBA) and the International Public Sector Accounting Standards Board (IPSASB), which establish standards, respectively, for accountancy education, for international ethics codes for the accountants, and on the accounting and financial reporting needs of national, regional and local governments: see http://www.ifac.org/About/Structure.php#.


\textsuperscript{92} See http://www.ifac.org/Compliance/.

\textsuperscript{93} See http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html.

EU started to focus on international standards on audit since 1999, when the Committee on Auditing undertook a preparatory work on the use of ISAs in the EU\(^\text{95}\). This work was conducted through a benchmarking exercise of ISAs against Member States’ audit requirements, and showed that there was already a high degree of convergence with ISAs\(^\text{96}\).

The first European act referring to Ifac’s standards on auditing is the Commission Recommendation on Statutory Auditors’ Independence, issued in May 2002, stating that further steps were necessary towards assuring audit quality, and that, for that purpose, the Commission intended “to come forward with a broader strategy on auditing which will address issues such as the use of International Standards on Auditing (ISAs)\(^\text{97}\). Such a strategy was further explained in 2003, with the Communication about Reinforcing the statutory audit in the EU. The reason for the new approach was explicitly pointed out. After the collapse of Enron and subsequent financial reporting scandals, strong initiatives were needed in order to reinforce investor confidence in capital markets and to enhance public trust in the audit function in the EU, and the Commission regarded statutory audit as a key factor in a larger system in charge of ensuring proper financial reporting for the EU capital market\(^\text{98}\).

Along with other initiatives, the Communication of 2003 envisaged the use of ISAs as a requirement for all EU statutory audits from 2005 onwards\(^\text{99}\). At the same time, from the Commission’s point of view, a successful implementation of such a binding requirement called for the completion of a number of preliminary actions. At the European level, the development of a set of principles for the assessment of ISAs and the evaluation of possible endorsement systems were needed. Moreover, the Commission suggested the IFAC to undertake some actions as well, stressing ISAs’

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\(^{95}\) About EU’s policy for auditing, see also D.Mugge, *Keeping competitors out: industry structure and transnational private governance in global finance*, in J.-C.Graz, A. Nölke (Eds.), *Transnational Private Governance and its Limits*, quoted at 49, p. 29 et seq., at 38-39.


\(^{98}\) COM/2003/0286 final, at 3-4.

quality needed to be improved and IFAC’s structure had to be revised, in order to guarantee the independence of the standard setting process.

According to Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, member states shall require statutory auditors and audit firms to carry out statutory audits in compliance with international auditing standards adopted by the Commission.

Two aspects of the discipline set by the Directive must be pointed out: the first concerns the endorsement procedure and the second one the exceptions to the general rule mentioned above. On the one hand, the Commission decides on the applicability of international auditing standards within the Community in accordance with the comitology procedure. Moreover, the Directive explicitly mentions three criteria the Commission must take into account. International auditing standards shall be adopted for application in the Community only if they: (a) have been developed with proper due process, public oversight and transparency, and are generally accepted internationally; (b) contribute a high level of credibility and quality to the annual or consolidated accounts; and (c) are conducive to the European public good.

On the other hand, audit procedures or requirements in addition to the international auditing standards may be imposed, but Member States must demonstrate these «stem from specific national legal requirements relating to the scope of statutory audits» and shall communicate them to the Commission and Member States before their adoption. In any case, this possibility is admitted only until 29 June 2010.

EU’s use of international standards on auditing looks similar to its approach towards accounting standards. First, the endorsement procedure discussed above reminds the accounting sector one. In particular, also Regulation n. 1606/02 provides the criteria the Commission must take into account in the evaluation process, and

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100 COM/2003/0286 final, at 7.
103 Directive 2006/43/EC, art. 26.3.
requires it to follow the comitology procedure. Moreover, technical committees helping the Commission in the evaluation process have been set up, such as the European Group of Auditors' Oversight Bodies (EGAOB)\textsuperscript{105}. This element seems to point to the establishment of a common model in the accounting and in the auditing sector as well.

Second, EU’s use of international standards matches with its pressure upon the global standard setter - in the auditing sector as in the accounting one. As mentioned above, the Communication about \textit{Reinforcing the statutory audit in the EU} called for more independence in IFAC’s (and more specifically in its standard setting committee for auditing, the IAASB) structure. Later on, the proposal for the directive on statutory audit explicitly stated that the Commission’s final decision on whether and to what extent to endorse ISAs depended largely «on satisfactory governance arrangements relating to the operation of the IAASB being established»\textsuperscript{106}.

Moreover, EU seems to have forced IFAC to follow at least three of the criteria set forth in Directive 2006/43/EC for the Commission’s evaluation of international standards, namely the due process, public oversight and transparency requirements.

First, EU is deeply involved in the establishment of the Public Interest Oversight Board (PIOB)\textsuperscript{107}. Established in February 2005, this body acts an oversight role with respect to IFAC’s activities which have been evaluated, at the moment of the Board’s establishment, as “public interest” activities, in order to ensure that they are properly responsive to such public interest\textsuperscript{108}. The PIOB includes eight members, nominated by

\textsuperscript{105} Commission Decision 2005/909/EC of 14 December 2005, \textit{setting up a group of experts to advise the Commission and to facilitate cooperation between public oversight systems for statutory auditors and audit firms }, in \textit{O.J. L 329}, 16/12/2005, p. 38 – 39. Between EGAOB’s tasks, there is the one of contributing «to the technical examination of international auditing standards, including the processes for their elaboration, with a view to their adoption at the community level» (art. 2).


\textsuperscript{108} This oversight role comprises a number of powers. First, the Piob can approve or reject nominations of members to all the bodies it oversees, and can request the removal of the chair if deemed necessary. Thus, one might infer that global public regulators such as the Bcbs, the Iosco, the Iais and the World Bank indirectly affect the composition of Ifac’s internal committees, through the members they appoint in the Piob. Moreover, the Piob oversight the very internal functioning of Ifac’s committees, through the evaluation of their due process procedures, and goes as far as influencing the content of their regulatory
the BCBS, the IOSCO, the IAIS and the World Bank. Remarkably, the European Commission names two observers. In this way, it closely controls the functioning of an organism charged with the public oversight of the IFAC.

Second, IFAC’s approval in 2006 of the Due Process and Working Procedures mentioned above seems to have a strong connection with the requirement, set forth in Directive 2006/43/EC, for the Commission to take into account whether due process was followed during the standard setting procedure. From this point of view, EU forced the global private regulator to improve its transparency.

4. Summing up.

In all the cases examined above, EU ends up in strengthening global financial standards, as they become mandatory through European recognition. In the case of the Capital Directive, also the scope of application tends to be deepened (as mentioned above, the Directive applies to all banks, and not only to internationally active ones).

In the accounting and – more recently – in the auditing sectors, though, a complex model of regulation takes place. What are the main features of EU’s intervention in the implementation of global financial standards in these areas?

First, in the accounting and auditing sectors EU doesn’t recognize one single standard (even if very significant, such as the Base II), but all the standards one global regulator is going to set (potentially, all the IAS/IFRs and all the ISAs).

activity, suggesting issues to be included in their work program. Finally, the Piob prepares an annual report that discusses its own activity, which shall be transmitted to the Ifac’s members, to the Fsf and global regulators for the financial sector, and to the general public through the publication on its web site. Moreover, the link between the PIOB and the transnational networks and the international organizations mentioned above does not cease with the constitution of this body: on the contrary, the PIOB is subject to a periodical evaluation by the Monitoring Group (composed by the same public global regulator), which can remove its members About Piob’s mission and powers, see http://www.iibo.org/index.php, and First Public Report of the PIOB, May 2006, available at http://www.iibo.org/reports.php, p. 4. 

Second, EU does not resign from controlling global standards. Both in the accounting and in the auditing sector, it establishes a precise endorsement procedure and the criteria for the evaluation of the global standards. Thus, a common hybrid public-private model seems to be established in the accounting and in the auditing sector as well.

Still, from this point of view, EU’s strategy for auditing seems to go one step further, compared to the one for accounting. Directive 2006/43/EC provides for some criteria which are in common with the accounting sector, but others are new. In particular, it requires the Commission to take into account, in evaluating the global standards, if they are internationally recognized and if they respect the due process, public oversight and transparency requirements. In this way, EU not only controls the content of global standards, in order to check whether they are conducive to the European public good, but also affects the global regulator’s decision-making procedure. As IFAC’s approval in 2006 of the Due Process and Working Procedures seems to be connected with the requirement set forth in the Directive, EU seems to have effectively influenced the global private regulator, forcing it to foster its transparency.

Third – and strongly connected with the previous point - , EU’s control is not a purely *ex post* one: on the contrary, the public regulator tries to play a more active role within the international standard setting process, influencing the global regulator’s agenda and proposing changes in its governmental structure. As mentioned above, in the *Communication* of 1995 about the new strategy for accountancy, the aim of ensuring an appropriate European input into IASC’s work, in order to influence its agenda, was explicitly mentioned. Even more significantly, the proposal for the directive on statutory audit stated that the Commission’s final decision on ISAs’ endorsement depended «on satisfactory governance arrangements relating to the operation of the IAASB being established»\(^\text{111}\).

Thus, European enforcement of global private standards cannot be explained as a public body’s retreat from the regulation of some sectors. This complex model results not only in EU’s adoption of standards established at the global level, but also in EU’s efforts to influence the global regulator. Within this action of control over the activity of global private standard setters, due process and transparency requirements seem to have gained a key role.