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Learning from Eddy: a meditation upon organizational reform of financial supervision in Europe

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With the March 2008 release of the US Treasury Department's Blueprint for a Modernized Financial Regulatory Structure, the reorganization of financial regulation in the United States is, once again, an issue of public debate in American policy circles. Fortunately, this is also a subject which Eddy Wymeersch recently addressed in *The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors*. Like much of Professor Wymeersch's academic writing, this article offers American readers a unique and illuminating view into European regulatory practice, combining the theoretical sophistication of an accomplished academic with the pragmatic insights of a senior regulatory official. My goal in this chapter is to meditate upon Professor Wymeersch's description of the evolving supervisory practices in Europe and draw out potentially useful implications for policy issues raised in the Treasury Department's *Blueprint* and how regulatory reform might be implemented in the United States.

At the outset I should acknowledge the envy with which I regard my academic and regulatory counterparts working in other jurisdictions. While the United States prides itself in having a dynamic economy that fosters innovation and invention, the country's capacity to reform the structure of its regulatory institutions pales in comparison to the ability of member states of the European Union – or other developed countries such as Japan and Australia – to modernize their regulatory bodies. As has often been noted, the American system of financial regulation is a product of nearly two centuries of bureaucratic accretions, dating back to the free banking statutes of the 1830s. Over the generations, numerous oversight bodies have been added and few eliminated with the resulting maze of supervisory bodies incomprehensible to those

familiar with the supervisory systems of other leading economies and a source of extraordinary cost and unnecessary complexity for regulated firms and practicing attorneys in the United States.

With effort and patience, one can come to understand how and why the American regulatory structure has evolved in the way it has and a large portion of any academic course on financial regulation in the United States is typically dedicated to unpacking the mysteries of regulatory jurisdiction in this country.[1] A national taste for federalism explains why we have overlapping systems of state oversight in banking and securities. Anachronistic and long-abandoned interpretations of the Commerce Clause of the US Constitution allowed insurance regulation to develop exclusively at the state level in the late nineteenth and early twentieth centuries. An aversion to concentrated sources of governmental power has led American politicians to retain sectoral division of supervisory agencies – that is, separate regulatory bodies for banking, insurance and securities – and also our even more fragmented oversight of depository institutions (Federal Deposit Insurance Corporation (FDIC), Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), and Federal Reserve Board), securities/futures (Securities and Exchange Commission (SEC) plus the Commodities Future Trading Commission (CFTC)), and insurance (distinguishing freestanding insurance companies regulated at the state level from employer-provided pensions and health insurance covered by the Employee Retirement Income Security Act of 1974 at the federal level). On top of these latent political preferences and historical accidents, the political impediments inherent in our divided and increasingly partisan political system make it difficult to effect financial reform, at least as compared to the parliamentary systems of government found in most other developed nations. Finally, add in a national predilection to review any idiosyncratic aspect of governmental structure as a manifestation of American exceptionalism, and one can develop a relatively rich though not always inspiring explanation of why the American system of financial regulation has strayed so far from the models of supervisory oversight upon which the rest of the world is converging.

But whatever the explanation of the Rube Goldberg complexity of regulatory oversight in the United States, there is still much to learn from the experience of other countries in reforming their own supervisory

[1] H.E. Jackson and E.L. Symons, *The Regulation of Financial Institutions: Cases and Materials* (West Publications, 1999).

systems. My purpose in reflecting upon Professor Wymeersch's article is to consider how the regulatory reforms with European members states over the past decade might inform our understanding of the Treasury Department's recent proposal and, more specifically, to consider how that experience can help us evaluate the many conflicting arguments that have been made for and against more radical proposals to consolidate financial regulation in this country.

I.

In modern debates over regulatory reform, the issue is typically framed in terms of a question of the degree to which and the manner in which traditional sectoral agencies should be consolidated into a smaller number of regulatory bodies. There are two basic approaches to consolidation. The first and simpler approach is to combine two or more sectors of the financial services industry under a consolidated regulatory body, such as the British Financial Services Authority.[2] Alternatively, existing agencies can be reconstituted into new and specialized organizational units designed to advance specific regulatory objectives, like ensuring the fairness and transparency of interactions between financial firms and their customers (sometimes called market conduct) or safeguarding the safety and soundness of financial institutions (often denominated prudential supervision). Adopting terminology coined by Michael Taylor, this second approach is often labelled a 'twin peak' or 'multi-peaked' model, depending on how many different regulatory objectives are specified and assigned to separate agencies.[3] The Treasury Department's recent *Blueprint* contains elements of both approaches. In terms of combinations, the Department recommends in the relatively near future the merger of the SEC and CFTC as well as the consolidation of banking supervisory bodies, including its proposed merger of the Office of Thrift Supervision with the Comptroller of the Currency and also its more obliquely recommended combination of the currently divided FDIC and Federal Reserve oversight of

[2] H.E. Jackson, 'An American Perspective on the FSA: Politics, Goals & Regulatory Intensity', in L. J Cho and J. Y. Kim (eds.), *Regulatory Reforms in the Age of Financial Consolidation: The Emerging Market Economy and Advanced Countries* (Korean Development Institute, 2006), 39–71 (avail. at www.kdi.re.kr/kdi_eng/database/report_read05.jsp?1=1&pub_no=00009931).

[3] M.W. Taylor, *Twin Peaks: A Regulatory Structure for the New Century* (London: Centre for the Study of Financial Innovation, 1995).

state banks.[4] Over the longer run, the proposal envisions the creation of multi-peaked objective-oriented agencies, focusing on prudential regulation, market conduct and market stability, an objective centred on minimizing systemic risks. As the Treasury also envisions the creation of two smaller regulatory units – one for oversight of corporate issuers and the other to contain government guarantee funds – the Blueprint's long-term recommendations might best be labelled a 'three peak, two foothill' model of regulation.[5]

Within policy circles, the debates over the reform of financial regulatory systems have been well-rehearsed at this point, and the basic trade-offs are fairly well understood.[6] The combination of single-sector agencies offers the promise of greater efficiency and efficacy, as consolidated agencies enjoy economies of both scale and scope. The advantages are, it is argued, capable of simultaneously improving the quality and lowering the cost of financial supervision, while also benefitting regulated firms by offering a single point of supervisory contact and eliminating sources of regulatory duplication and inconsistency. The on-going consolidation of the financial services industry is often cited as further justification for the combination of supervisory functions, as an integrated regulatory supervisor is said to be better equipped to oversee conglomerates that offer a full spectrum of financial products

[4] United States Department of the Treasury, *Blueprint for a Modernized Financial Regulatory Structure* (Mar. 2008), 89–100 (avail. online at www.treas.gov/press/releases/reports/Blueprint.pdf).

[5] United States Department of the Treasury, *Blueprint for a Modernized Financial Regulatory Structure* (note 4, above), 137–80.

[6] For more extensive treatments of the subject, see R.J. Herring and J. Carmassi, 'The Structure of Cross-Sector Financial Supervision', *Financial Markets, Institutions & Instruments*, 17 (2008), 51–76; United States Government Accountability Office, 'Financial Regulation: Industry Trends Continue to Challenge the Federal Regulatory Structure', GAO-08–32 (Oct. 2008); E.F. Brown, 'E Pluribus Unum – Out of Many, One: Why the United States Needs a Single Financial Services Agency', *University of Miami Business Law Review*, 14 (2005), 1–101; L.T. Llewellyn, 'Institutional Structure of Financial Regulation and Supervision', in J. Carmichael, A. Flemming, and L.T. Llewellyn (eds.), *Aligning Financial Supervisory Structures with Country Needs* (World Bank Institute, 2004), 17–92; D. Masciandraro and A. Porta, 'Single Authority in Financial Markets Supervision: Lessons for EU Enlargement', in D. Masciandaro (ed.), *Financial Intermediation in the New Europe* (2004), 284–320; C. Briault, 'Revisiting the Rational for a Single National Financial Services Regulator', FSA Occasional Paper Series No. 16 (Feb. 2002); T. Di Giorgio and C. Di Noia, 'Financial Regulation and Supervision in the Euro Area: A Four-Peak Proposal', Wharton Financial Institutions Center Working Paper 01–02 (Jan. 2001); R.K. Abrams and M.W. Taylor, 'Issues in the Unification of Financial Sector Supervision', IMF Working Paper WP/00/213 (Dec. 2002); H.M. Schooner, 'Regulating Risk Not Function', *University of Cincinnati Law Review*, 66 (1998), 441–88.

and manage their own risks on an organization-wide basis. The growing dominance of financial conglomerates in global markets also raises the costs of single-sector supervision, as consolidated firms are thought to be more capable of exploiting opportunities for regulatory arbitrage – that is, instances in which different regulators establish different substantive rules to deal with functionally similar products or activities – which single-sector agencies have difficulty identifying and correcting. Relatedly, consolidated agencies are thought to be better equipped to identifying regulatory gaps, that is, pockets of economic activity that fall outside the remit of traditional financial sectors, with hedge funds and perhaps subprime mortgage lending activities and securitization activities being prominent examples in recent times.

The case against regulatory consolidation is also multi-faceted. To begin with, there is the absence of irrefutable evidence that consolidated agencies are any more efficient than their single-sector predecessors, at least in terms of total regulatory costs.[7] More substantively, critics of consolidated supervisory functions argue that the goals of supervision differ across industry sectors and that a combination of regulatory functions may actually dilute the quality of supervision by imposing a standardized model of oversight on all sectors of the industry. Combined oversight may also diminish market discipline as government guarantees traditionally limited to certain sectors, like banking, may be assumed to extend more broadly in a country where all sectors have a common supervisory agency. In addition, there is concern that regulatory consolidation produces a governmental monopoly, less likely to respond to changing market conditions and potentially more prone to wholesale regulatory capture or at least a supervisory posture tilted in favour of large conglomerates at the expense of smaller more specialized firms.

Regulation by objective, the third multi-peaked model of regulatory organization, is a bit of a hybrid approach and thus shares some of the advantages and disadvantages of the two other models.[8] By reducing the number of supervisory units, regulation by objective offers potential efficiency advantages over traditional sectoral regulation, and it also addresses

[7] See M. Ćihák and R. Podpiera, 'Is One Watchdog Better than Three? International Experience with Integrated Financial Sector Supervision', IMF Working Paper 06/57 (Mar. 2006) (finding evidence of quality improvements not cost savings from consolidated supervision).

[8] J.J.M. Kremers, D. Schoenmaker and P.J. Wierts, 'Cross-Sector Supervision: Which Model', in R. Herring and R.E. Litan (eds.), *Brookings-Wharton Papers on Financial Services* (2003), 225–43.

concerns of regulatory arbitrage as functionally similar products and services are under the jurisdiction of the same supervisory body. But, like fully consolidated oversight, regulation by objective risks imposing one-size-fits-everyone rules, which discount unique characteristics of traditional sectors and subsectors. Moreover, multi-peaked models generate new problems of coordination, duplication and gaps, as the lines between functions such as market conduct, prudential regulation and market stability are not clear, and many regulatory structures, like disclosure or even capital requirements, advance all three objectives. With regard to concerns over governmental monopolies and supervisory rigidity, multi-peaked models again constitute an intermediate case, less centralized than fully consolidated operations but less attuned to sectoral differences than traditional sectoral oversight.

Another much discussed dimension of regulatory consolidation is the appropriate supervisory role of central banks. Oftentimes, reorganization entails the movement of bank supervision away from the central bank, as happened in the United Kingdom when the supervisory powers of the Bank of England were transferred to the new Financial Services Authority in the late 1990s. Less frequently, but occasionally, the central bank itself becomes the consolidated regulatory, thereby expanding its jurisdiction as a result of reorganization. Finally, in certain multi-peaked models, including perhaps the Treasury Department's *Blueprint*, the central bank may itself be designated the 'peak' responsible for market stability. The often-voiced concern about this aspect of regulatory reorganization is the possibility that moving direct supervisory oversight out of a central bank diminishes the bank's ability to effect appropriate monetary policy and maintain financial stability.

Like many important issues of public policy, the debates over regulatory reorganization rest on numerous, conflicting claims regarding the consequences of various kinds of reforms. Seldom do policy analysts have unambiguous empirical evidence to validate their intuitions. But, in the case of the financial regulation, we do have the benefit of looking to the experiences of the dozens of European jurisdictions which have engaged in regulatory reorganizations over the past two decades, as well as Professor Wymeersch's very helpful synthesis of what we might learn.

II.

In many respects, Professor Wymeersch's portrayal of European regulatory consolidation covers familiar arguments for and against regulatory consolidation, with the growth of financial conglomerates pushing

supervisors towards sectoral consolidation and the creation of amalgamated agencies posing concerns over the homogenization and dilution of supervisory oversight. But where Professor Wymeersch's analysis covers new territory is in its explication of how the process of financial consolidation has actually occurred in the twenty-five EU Member States his article surveys.

A.

Consider, for example, Professor Wymeersch's description of modern regulation within the traditional sectors. Typically, one discusses sectoral oversight in terms of the regulatory structure applicable to the core lines of business: banking, securities and insurance. But a recurring theme of Professor Wymeersch's article is the accretion of numerous cross-sectoral regulatory regimes that are already in place in most industrialized countries – money-laundering rules, privacy requirements, anti-terrorism measures, and measures to police tax avoidance.[9] As is true in the United States, regulations addressing these over-arching issues of public policy tend to be imposed uniformly across the financial services industry – that is, on a consolidated basis – and then implemented on a sector by sector basis. Thus, in even the most fragmented of modern supervisory systems (that is, in the United States), we observe many elements of consolidated regulation, albeit implemented in a haphazard, diffuse and likely inefficient manner.

Another theme of Professor Wymeersch's description of European practices is the incremental and variegated manners in which member states have transitioned to consolidated financial services oversight. While foreign observers tend to focus on the fact that a substantial majority of EU Member States now maintain consolidated supervisors, Professor Wymeersch's front line reporting reveals that many countries have made the transition only haltingly and often have only gone partway down the path. Moreover, if one looks closely at the organizational structure within the regulatory apparatus of different EU member states, one can often observe that old sectoral models of oversight have not disappeared even within jurisdictions that maintain a single financial services agency.

[9] E. Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors', *European Business Organization Law Review*, 8 (2007), 245–6.

Consider first the initial stages of financial reform. In many jurisdictions, reform has often been a gradual process. The front end of regulatory consolidation is sometimes accompanied by ad hoc efforts to coordinate sectoral bodies, such as the creation of a coordinating council in the Netherlands and several other jurisdictions or the use of memoranda of understanding to coordinate existing bodies in Germany and the United Kingdom.[10] While Professor Wymeersch reports that these preliminary efforts typically lack sufficient strength to effect significant changes in regulatory practices, they often serve as the first step in a complex supervisory quadrille that ultimately results in legislated reforms enacted through parliamentary procedures. If true, then perhaps the much-publicized memorandum of understanding between the SEC and CFTC in the spring of 2008 will someday come to be marked as the opening movement of this process in the United States as would be subsequent efforts to achieve written agreements between the SEC and Federal Reserve Board

Also of potential interest to US observers is Professor Wymeersch's discussion of the role of industry conglomeration in regulatory consolidation. Within the United States, the merger of banking and securities firms – facilitated by the passage of the Gramm–Leach–Bliley Act in 1999 – has long been recognized as a reason to develop better coordination between banking and securities regulators. And the decision of the Federal Reserve Board to extend credit to Bear Stearns and subsequent actions with respect to AIG have only reinforced the need for this coordination. Within parts of the EU, one sees similar developments, particularly in the London markets, where the lines between major banks and securities firms have long been blurred. But what is interesting about Professor Wymeersch's account of industry consolidation is his emphasis on the combination of banks and insurance companies in many continental European jurisdictions and his assertion that the regulatory objectives in these two areas are actually quite closely aligned, focused as they are on prudential oversight and thus highly likely to benefit from integrated supervision. For American financial analysts, less attuned to insurance regulation which is largely regulated to state bodies, the notion that there are serious benefits to be gained from combining banking and insurance regulation is eye-opening, but upon reflection not wholly implausible.

Perhaps the greatest lesson to be learned from Professor Wymeersch's survey of regulatory practices in Europe is the array of organizational

[10] Ibid., 262.

arrangements currently in place within the EU. Putting aside the several countries that have not yet combined all three core sectors into one body, one still sees ample variation in approaches. On the one hand, many jurisdictions maintain separate sectoral divisions for front line oversight within integrated regulatory structures. This practice is quite common in the Nordic states but exists elsewhere around the world, most notably in Japan. In contrast, other consolidated agencies, such as the British FSA, organized their chief supervisory units into retail and wholesale markets (a sort of mini-twin-peaks approach within integrated agencies) but also have something of a sectoral matrix approach that maintains expertise along traditional lines but with a special unit for complex organizations. Perhaps not surprisingly, integrated supervision does not in practice consist of an undifferentiated blob of civil servants loosed upon the financial service industry. Rather, in many jurisdictions, operations are divided into supervisory units that would be readily intelligible to one versed only in traditional sectoral oversight.

B.

A commonly cited, but as yet not well-documented virtue of consolidated financial oversight is cost savings in government payrolls. Although Professor Wymeersch alludes to these financial savings, as well as even greater savings accruing to regulated firms that need only deal with one supervising body,[11] his emphasis is on the qualitative improvements that consolidated supervisory agencies provide – an aspect of integrated supervision that has been explored elsewhere but not with nearly as much institutional detail as Professor Wymeersch is able to offer.[12]

To begin with the most mundane, many administrative functions are common to all regulatory bodies: personnel offices, information technology departments, various support personnel at all levels, and even top positions such as the executive director or governing board.[13] Aside from the elimination of redundant offices, consolidated departments have inherently larger mandates, which are apt to attract more experienced and senior personnel. Oftentimes, expanded scope will afford increased

[11] Wymeersch, 'The Structure of Financial Supervision in Europe', (note 9, above), 263.

[12] For supporting views, see M. W. Taylor and A. Fleming, 'Integrated Supervision: Lessons of Northern European Experience', *Finance and Development*, 36 (1999), 18; Ćihák and Podpiera, 'Is One Watchdog Better than Three?', (note 7, above).

[13] Wymeersch, 'The Structure of Financial Supervision in Europe', (note 9, above), 260.

flexibility, allowing examiners or enforcement staff to be transferred from one sector to another depending on changing conditions.

In terms of substantive expertise, there are to begin with the mounting number of topics – money laundering, tax avoiding, privacy, and financial education – that in many jurisdictions apply to all sectors of the financial services industry and must be staffed repeatedly and inefficiently under traditional sectoral regulation.[14] With integrated agencies, policy making can be combined and streamlined. But if one looks inside the substance of traditional sectoral regulation, there are many more instances of highly comparable matters of substantive expertise: fitness qualifications for new owners or controlling shareholders; suitability standards for investment products (and exemptions for qualified parties); limitations on transactions with affiliated parties; diversification requirements; disclosure obligations of various sorts; and licensing procedures for new firms.[15] Most modern systems of financial regulation share these same core elements. While the technical requirements (and even terminology) often differ from sector to sector, the differences are often more the product of historical happenstance than major distinctions in substantive policy. Attorneys, economists and other policy analysts trained up to deal with these matters in one sector could quite easily apply their expertise in other sectors. Very plausibly, they would do their jobs better and make life substantially easier for regulated parties if they had the broader remit afforded under a consolidated supervisor.[16]

An excellent example of the benefits of a cross-sectoral purview is capital requirements. Much attention has focused on the reform of bank capital requirements under the Basel II process, which has attracted the attention of some of the world's most talented financial economists and been supported by literally hundreds of working papers and dozens and dozens of academic conferences and symposia. Many of the issues that have been explored in the Basel II process – value-at-risk models, internal ratings, back-testing procedures – are potentially applicable to other types of financial institutions, such as securities firms and insurance companies. Within the more integrated European system, these connections are more easily drawn. In fact, securities firms in Europe are subject to the Basel II capital requirements (and not the different SEC net capital rules applicable to broker

[14] Ibid., 245–56, 248–9.
[15] Ibid., 270–1. [16] Ibid., 275.

dealers in the United States). As Professor Wymeersch explains, even the new insurance Solvency II directive is heavily informed by the Basel II capital rules.[17] Thus the oversight of insurance companies in Europe indirectly draws on the expertise of the Basel process in a way that would be difficult to imagine in the United States, where insurance capital rules fall within the bailiwick of the NAIC and state insurance commissions, which have few formal connections to banking regulators and the large number of highly trained economists housed in the Federal Reserve regional banks.

C.

Another insight available in Professor Wymeersch's account concerns the persistence of jurisdictional and substantive conflicts within consolidated regulatory frameworks and the manner in which those conflicts are resolved. Regulatory reorganizations within the financial services industry do not so much eliminate the existence of conflicts, as they alter the dimension on which conflicts arise and change the locus of their resolutions.

Take the case of the classic form of twin-peak regulation, where market conduct is delegated to one agency and prudential oversight is given to another. While this division of authority works well in theory, in practice it entails considerable potential overlap in regulatory design. To begin with, market conduct rules can have prudential implications, as, for example, improper lending practices can give rise to private claims and enforcement actions, which in the extreme can threaten institutional solvency. On the other hand, ample capital reserves – the core of prudential regulation – can have market conduct implications, as well-capitalized concerns are more likely to police their own business activities in order to prevent reputational losses and diminution of franchise value. For these reasons, prudential regulators may have different views on market conduct issues that conflict with the views of the market conduct regulator and vice versa. Sometimes, a policy that advances market conduct regulation – say enhanced disclosure of financial weakness – can actually conflict with prudential considerations or even market stability. Thus one regulatory body may oppose additional disclosures whereas another opposes it, and the issue of the proper hierarchy of regulatory functions is called into question.[18]

[17] Ibid., 269. [18] Ibid., 245, 249.

In the early years of twin-peak regulation in Australia, there were many examples of regulatory conflicts of this sort and it took a number of years (and several memoranda of understanding) to devise a practical system for implementing this form of divided regulatory authority. Professor Wymeersch suggests that similar problems have arisen in multi-peaked regulatory structures in the European context.[19]

With a fully consolidated regulatory structure, similar conflicts arise. If the agency is organized around traditional sectoral divisions, then the same inter-sectoral conflicts arise across divisions. For consolidated agencies organized around functional divisions – that is, replicated multi-peak models within a single agency – the same overlaps and potentially divergent views described above will arise in this context too. What is different about the consolidated agency, as Professor Wymeersch notes, is where these inevitable conflicts will be resolved, and that is within the agency itself, presumably at the highest level.[20] Conflict resolution in the United States and in other jurisdictions where regulatory jurisdictions is divided across numerous regulatory bodies is more complex. In some instances, cross-agency compromises, typically in the form of memoranda of understanding, can be used to reconcile disagreements. But, as Professor Wymeersch notes, these are complicated to negotiate and tend to leave important issues unresolved or unforeseen.[21] The alternative is resolution in courts or through legislative intervention.[22] But these solutions – as exemplified in the United States – tend to be time-consuming and unreliable, with many inter-jurisdictional conflicts allowed to drag on for years.[23]

In this light, one of the less well understood virtues of consolidated regulatory structures is their built-in ability to resolve through internal mechanisms the inevitable conflicts that arise across industry sectors and regulatory functions. Of course, this advantage carries with it an amplification of one of the greatest potential problems with consolidation: the centralization of excessive governmental authority within a single administrative body, a topic to which I now turn.

[19] Ibid., 247, 267.

[20] Ibid., 243; R. M. Kushmeider, 'Restructuring US Financial Regulation', *Contemporary Economic Policy*, 25 (2007), 337.

[21] Ibid., 267–8.

[22] Ibid., 281–2.

[23] H.E. Jackson, 'Regulation of a Multisectored Financial Services Industry: An Exploratory Essay', *Washington University Law Quarterly*, 77 (1999), 319–97.

D.

Perhaps the most vexing questions surrounding the consolidation of financial regulatory functions concern issues of accountability and maintenance of appropriate regulatory focus. Especially in the United States, where concerns over aggregation of governmental authority have a special and historic salience, regulatory consolidation is often portrayed as almost un-American on the grounds that divided government is inherently better than centralized authority, at least in this hemisphere. On a more instrumental dimension, the benefits of regulatory competition among diverse and overlapping regulatory agencies are thought to prevent governmental stasis, to combat regulatory capture, and to ensure appropriate regulatory reforms in light of market and technological developments. European experience with consolidated supervision, as Professor Wymeersch recounts, offers a somewhat different perspective on all of these lines of argument.[24]

To begin with, a number of European jurisdictions have attempted to hardwire political accountability into the enabling statutes for their consolidated regulatory bodies. The best example of this is the British FSA, for which Parliament set forth a clear set of regulatory goals and principles of good regulation to which the agency is expected to abide.[25] To ensure fidelity to these statutory guidelines, the FSA prepares annual reports, holds annual meetings, works with a larger number of advisory groups populated with different public constituencies, and – for at least its first decade of existence – seems to have honed fairly tightly to the guidelines that the British legislative process established. According to Professor Wymeersch's account, similar mechanisms of accountability are found in other European statutes.[26]

Another lesson of Professor Wymeersch's analysis is that domestic regulatory competition of the sort illustrated by SEC versus CFTC conflicts is not the sole source of competitive pressure on regulatory agencies. Within an increasingly globalized economy, regulatory

[24] Wymeersch, 'The Structure of Financial Supervision in Europe', (note 9, above), 277–86.

[25] For a more detailed discussion, see M. W. Taylor, 'Accountability and Objectives in the FSA', in M.C. Blair et al. (eds.), *Blackstone's Guide to the Financial Services and Markets Act 2000* (Blackstone Press, 2001), 17–36. See also E. Hüpkes, M. Quintyn and M.W. Taylor, 'The Accountability of Financial Sector Supervisors – Principles and Practice', *European Business Law Review*, (2005) 1575–620; Briault, 'Revisiting the Rational for a Single National Financial Services Regulator', (note 6, above).

[26] Wymeersch, 'The Structure of Financial Supervision in Europe', (note 9, above), 277–9, 281.

competition across international boundaries offers a quite plausible substitute for the kind of regulatory competition that once only existed within nation states. (Indeed, within the quite permeable national boundaries of the European Union, Professor Wymeersch seems to see an excessive amount of regulatory competition.) But the key point for policy analysts fearful of the aggregation of regulatory functions within a single national regulatory body is that cross-border regulatory competition is now an important dynamic, which will put a natural constraint on the ability of a domestic consolidated regulator to fall behind in regulatory innovations.[27] And, of course, in most jurisdictions, not all regulatory functions are moved into consolidated agencies, with central banks and Ministries of Finance (such as the US Treasury) usually also retaining some market oversight role and offering a source of domestic checks on consolidated agencies.

Another and somewhat surprising insight from Professor Wymeersch's survey is the reportedly diminished role of regulatory capture with consolidated regulatory bodies. Among US academics, one of the principal failings of administrative agencies is their tendency to fall under the influence of the firms they oversee.[28] A potential concern about consolidated supervision is that the dangers of regulatory capture could be multiplied as the jurisdiction of the regulatory agency is expanded. But what Professor Wymeersch reports from Europe is that the relative power of any sector of the financial services industry is diminished with respect to consolidated agencies and so the ability of any single sector to capture the agency is diminished.[29] To be sure, this portrayal does not ensure that a coordinated effort on the part of the entire financial services industry would not be successful in having undue influence on regulatory authorities. But it does suggest that in at least some instances consolidated agencies may be more resistant to regulatory capture than their single-sector predecessors.

E.

A final insight to be drawn from Professor Wymeersch's description of current EU practices concerns the distinction between regulation – that

[27] In a similar vein, interaction with multilateral organizations, such as ISOCO or the Basel Committee on Banking Supervision, provides further checks on any single countries regulator getting too far out of line of evolving international standards.

[28] J.R. Macey, 'Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty', *Cardozo Law Review*, 15 (1994), 909–49.

[29] Wymeersch, 'The Structure of Financial Supervision in Europe', (note 9, above), 265, 278–9.

is, the articulation of regulatory requirements – and supervision – the application of those legal requirements to various sectors of the financial services industry through oversight, examination and inspection, and both formal and informal enforcement activity. While financial supervision in Europe is increasingly implemented through consolidated agencies, financial regulation in the region is often still effected along traditional sectoral lines. The EU directives governing the financial sector are the best example of this phenomenon, structured as they are around securities sector (e.g. the prospectus directive, the transparency directive or MiFID), the banking sector (e.g. the capital adequacy directive and the second banking directive), and insurance sector (the solvency directive).[30] [31] As Professor Wymeersch explains, this fragmented lawmaking process produces many of the problems common in the United States. Functionally similar insurance and securities products are subject to different conduct of business rules, creating regulatory anomalies and opportunities for regulatory arbitrage.[32] Thus, while much attention has been focused on the supervisory consolidation within many EU Member States, many of the benefits of this consolidation are not fully realized as long as regulatory standards are largely set on a sectoral basis. Here seems to be an area where Brussels needs to catch up with the Member States.

Another idiosyncrasy of the EU regulatory structure is the dispersion of supervisory authority across member states, whether to consolidated regulatory units of the sort found in the United Kingdom or to more traditional sectoral bodies of France and Spain. This phenomenon raises serious questions as to whether regulatory policy established at the community level is being implemented and enforced consistently across the region, issues which the Lampfalussy process was designed to address, but which still has not been fully resolved, at least judging from Professor Wymeersch's account.[33] Perhaps ironically, the principal organizational mechanism being employed to monitor and correct uneven implementation or enforcement is sectoral-based coordinating councils, such as the Committee of European Securities Regulators (CESR), which Professor Wymeersch has chaired. Thus, the fully consolidated regulatory agencies, such as the British FSA or Professor Wymeersch's

[30] The financial conglomerate directive would be a counterexample (ibid., 260), as would the privacy directive.

[31] Ibid., 244.

[32] Ibid., 254 and n. 37.

[33] Ibid., 288.

own Belgium Banking, Finance and Insurance Commission (CBFA), find themselves operating under sectoral directives established at the EU level and then coordinating with the authorities of other member states through sectoral counsels such as CESR. It is apparently the fate of consolidated supervisors to have to operate, at least initially, in a world built upon sectoral structures.

While the institutional details of European regulatory organization reflect many conditions peculiar to the evolution of the European Union and larger issues of constitutional structure, certain aspects of European practice do, perhaps, have lessons for the United States and other jurisdictions. The distinction between regulation and supervision is an important one. Within the United States there is intense political resistance toward consolidation of traditional supervisory units, whether across sectoral lines, such as banking or securities, or even among depository institutions (such as banks, thrifts and credit units) or functionally similar products such as securities or futures. But European practice reveals that it is possible to distinguish regulatory consolidation from supervisory consolidation. The United States might possibly proceed with regulatory consolidation – establishing uniform national standards across sectoral boundaries – and still retain supervision and enforcement within our traditional sectoral-based oversight units, at least for a transitional period. In many areas, such as money laundering, privacy safeguards and truth in lending, this is already the state of affairs although these rule-making functions are currently located in different administrative units. Recent initiatives to broadening the Federal Reserve Board's authority over issues of market stability could be seen as a continuation of this process. As I explore in greater detail elsewhere, one could easily imagine the creation of another industry-wide regulatory unit – perhaps built upon the current President's Working Group for Financial Markets – to develop consistent American regulation and associated policy-making functions for other areas of financial regulation, including consumer protection, the mechanical aspects of regulation such as fitness standards or affiliated party transactions, and other rules common to all sectors of the financial services industry. In this way, the United States could begin to achieve many of the benefits of consolidated supervision, but without disrupting our traditional supervisory structure and taking on all of the quite formidable political challenges that consolidation of those units would entail.

If the United States were to head down this path, it would become the converse of the current European model. Whereas the EU system

now largely depends on sectoral regulation at the EU directive level with mostly consolidated supervision and enforcement among member states, the path toward consolidation that I imagine for the United States would consist of moving towards consolidated regulation through congressional legislation as well as a newly devised regulatory agency to articulate most forms of financial regulation and perhaps the Federal Reserve Board for issues related to market stability, but could retain for some years sectoral supervision and enforcement along current lines. The United States and the European Union could then engage in a quite interesting form of regulatory competition over which form of financial regulatory consolidation works best.[34]

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For many years, financial regulation was a national affair, and regulatory structures evolved in response to national conditions and domestic constituencies, with little attention to developments beyond national borders. Today, however, financial regulation is inherently a global undertaking, with an ever-increasing volume of cross-border transactions and an ever-escalating mobility of financial firms. Nowhere in the world can financial regulators proceed without attention to evolving supervisory practices in other jurisdictions. For a number of decades now, American legal academics have had the great good fortune to be able to look to the work of Professor Wymeersch for a lucid and insightful window into the European regulatory perspectives. All of us very much look forward to many more years of this most important and illuminating work.

[34] One of the challenges of devising a more integrated form of financial regulation in the United States is dealing with the fact that the scale of the US economy and its regulatory operations is so much greater than that of other jurisdictions, (Jackson, 'An American Perspective on the FSA', (note 2, above), 39–71). For an argument that scale factors should not inhibit full consolidation of financial regulatory functions in the United States, see Brown, 'E Pluribus Unum – Out of Many', (note 6, above), 1–101.