American University International Law Review

Volume 23 | Issue 2 Article 5

2007

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FILLING GAPS IN EUROPEAN UNION SECURITIES LAW: CONTRACTUALLY ORGANIZED SUPERVISION & THE COLLEGE OF EURONEXT REGULATORS

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INTRODUCTION

The European Community ("EC")[1] has faced significant challenges in completing the internal market.[2] Chief among them has been the task of creating a single market in financial services, which requires the harmonization of European Union ("E.U.") Member State laws that govern the operation of national securities markets.[3] The principles of proportionality and subsidiarity,[4] which limit the

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1. Because this Comment is concerned solely with measures to harmonize internal market securities legislation of the States Parties to the Treaty Establishing the European Community ("EC Treaty"), this Comment will refer to action under the EC Treaty as action by the European Community ("EC") rather than the European Union ("E.U."). General references to supranational bodies, however, will be to the E.U. rather than the EC. *Cf.* NIAMH MOLONEY, EC SECURITIES REGULATION 5 n.6 (2002) (distinguishing among actions taken under the EC pillar and under other pillars of the E.U.).

2. *See Commission White Paper on Completing the Internal Market*, at 4, ¶¶ 4-7, COM (1985) 310 final (June 1985) [hereinafter *1985 White Paper*] (discussing the fact that measures to integrate the internal market stalled in the late 1970s after common customs tariffs were implemented because of the proliferation of non-tariff barriers in E.U. Member States).

3. *See* Eddy Wymeersch, *The Harmonisation of Securities Regulation in Europe in the New Trading Environment* 1 (Fin. Law Inst., Universiteit Gent, Working Paper No. WP 2000-16, 2000), *available at* http://www.law.ugent.be/fli/WP/WP2000-pdf/wp2000-16.pdf [hereinafter Wymeersch Working Paper] (stating that the poor integration of European stock exchanges is the Achilles heel of EC capital market integration). *Compare* Emilios Avgouleas, *A Critical Evalution of the New EC Financial-Market Regulation: Peaks, Troughs, and the Road Ahead*, 18 TRANSNAT'L LAW 179, 224-29 (2005) (suggesting that enhanced EC-level securities regulation would serve as a complement to the financial market integration already accomplished by the European Monetary Union ("EMU")), *with* Rosa M. Lastra, *Regulating European Securities Markets: Beyond the Lamfalussy Report*, *in* FINANCIAL MARKETS IN EUROPE: TOWARDS A SINGLE REGULATOR? 211 (Mads Andenas & Yannis Avgerinos eds., 2003) (suggesting that harmonization of E.U. Member State securities markets is a necessary precondition for exploiting the full potential of the EMU).

4. *See* PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW: FROM THE TREATY OF ROME TO THE TREATY OF AMSTERDAM 76-80 (Patrick Del Duca trans., Kluwer Law International 2d ed. 1999) (1992) (discussing Protocol (30) on the Application of the Principles of Subsidiarity and Proportionality that was attached to EC Treaty by the Treaty of Amsterdam and arguing that the problem of the subsidiarity principle is not whether the EC may take action, but rather pursuant to which Treaty competence should the EC state that it is taking action). *See generally* LINDA SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW 79-81 (2004) (arguing that the subsidiarity principle does divide legislative powers between the E.U. and E.U. Member States, but that the principle as worded in Article 5 EC is susceptible of multiple interpretations).

power of the E.U. to enact legislation binding on Member States, has complicated the task of harmonizing Member State securities laws because the Treaty Establishing the European Community ("EC Treaty")[5] does not provide the E.U. an unequivocal competence for creating a unified European securities market.[6] The process of harmonizing securities regulation has not met with particular success,[7] and reforms of the E.U. legislative framework for constructing a single market in financial services are still underway.[8] Inconsistent implementation at the national level of EC financial markets directives has significantly limited regulatory convergence in EC securities markets.[9]

In this Comment, I evaluate the role of cooperative arrangements between securities regulatory authorities in Europe in facilitating the harmonization of Member State securities law.[10] Specifically, I analyze what Professor Eddy Wymeersch has termed "contractually organized supervision" for the regulation of multi-jurisdictional financial market participants in E.U. Member States.[11] In Part II, I

5. Consolidated Version of the Treaty Establishing the European Community, *reprinted in* Consolidated Versions of the Treaty on the European Union and the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

6. *See infra* Part I.D (discussing the EC Treaty mandate to create a "common market").

7. *See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* 7-18 (Feb. 15, 2001), *available at* http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf [hereinafter *Final Lamfalussy Report*] (sounding alarm at the fact that the E.U.'s framework for adopting legislation in the field of securities regulation was rigid, complicated, and poorly tooled for responding to the pace of change in contemporary global financial markets).

8. *See* European Commission, *Internal Market and Services Directorate General, FSAP Evaluation Part I: Process and Implementation* 9-11 (Jan. 24, 2007), *available at* http://ec.europa.eu/internal_market/finances/docs/actionplan/index/070124_part1_en.pdf (stating that the extent of success of Levels 3 and 4 of the Lamfalussy Process is not yet clear because legislation adopted pursuant to the Lamfalussy Process is still in the stages of implementation).

9. *See Final Lamfalussy Report*, *supra* note 7, at 13-14.

10. To limit the scope of discussion in this complicated area of regulation this Comment will focus on EC legislation pertaining to the regulation of trading markets.

11. *See* Wymeersch Working Paper, *supra* note 3, ¶ 3 ("Multiplicity of supervision therefore co-exists with a [*sic*] certain forms of co-ordination. A whole body of rules and practices has sprung from this approach, leading to new forms of

outline the market context in which intra-European and transatlantic regulatory cooperation is taking place. In Part III, I analyze the trading market rule harmonization framework of the Memorandum of Understanding on the Supervision, Regulation, and Oversight of the Euronext Group ("Euronext Regulatory MOU")[12] and I evaluate the relationship of the cooperative arrangement to EC securities legislation. In Part IV of this Comment, I offer three suggestions for incorporating the positive attributes of the Euronext Regulatory MOU into EC supervisory practice.

I. BACKGROUND

Technology, demutualization, and regulatory reorganization have a significant impact on the emerging structure of securities exchanges globally.[13] The debates regarding the future of regulatory cooperation in light of the merger of the New York Stock Exchange ("NYSE") and the Euronext securities exchanges make the influence of these phenomena on the regulatory dynamic undeniable. Regulatory cooperation and convergence can take many forms, however, and the E.U. has struggled to adopt an approach to the convergence of E.U. Member State securities regulation that achieves convergence efficiently and ensures high standards of regulation without adopting legislation that strays beyond the EC internal market competence.[14]

'contractually' organised supervision, that clearly go beyond the minimum norms laid down in the directives and in the regulations of the states involved.").

12. Memorandum of Understanding on Supervision, Regulation, and Oversight of the Euronext Group, Mar. 22, 2001, *available at* http://www.amf-france.org/documents/general/3622_1.pdf [hereinafter Euronext Regulatory MOU].

13. *See* Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORDHAM L. REV. 2541, 2566-67 (2006) (identifying that the forces of deregulation, technology, and globalization have led to an increase in competition among stock markets at the international level and noting that globalization is the strongest of the three forces).

14. *See* EC Treaty, *supra* note 5, arts. 2, 3(c), 14. The authority of E.U. institutions to legislate in the financial services area derives at its most basic level from Articles 2 and 3(c) of the EC Treaty. *See generally* MOLONEY, *supra* note 1, at 5-8 (discussing the EC Treaty internal market competence as applied to securities markets). Article 2 sets the task of establishing a common market and economic and monetary union, while Article 3 states that the common market should be free of obstacles to the free movement of goods, persons, services, and

A. THE RAPID CHANGES TAKING PLACE IN U.S. AND EUROPEAN SECURITIES MARKETS REQUIRE A FLEXIBLE APPROACH TO REGULATION

The transformation the contemporary securities industry is undergoing is the result of the related phenomena of trade automation and demutualization.[15] The combined effect of these developments has significant consequences for the path that EC harmonization efforts must take because the basic purpose of regulation is to countervail market failures[16] and securities markets are changing dramatically, particularly in the E.U. States.[17] Because

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capital. *See* EC Treaty, *supra* note 5, arts. 2, 3(c). Article 14 further elaborates that the common market should be an "area without internal frontiers" and that the free movement of goods, persons, services, and capital should be ensured through Community action. *See id.* art. 14.

15. *See* Roberta S. Karmel, *Turning Seats into Shares: Causes and Implications of Demutualization of Stock and Futures Exchanges*, 53 HASTINGS L.J. 367, 370-73 (2002) (arguing that demutualization is a response to the increased competition that resulted from the deregulation wave of the 1980s and thus that the consolidation and internationalization phenomena that we are witnessing in contemporary capital markets has roots in deregulation); *see also* Eilís Ferran, *Examining the United Kingdom's Experience in Adopting the Single Financial Regulator Model*, 28 BROOK. J. INT'L L. 257, 257 (2003) (evaluating the trend towards consolidation into one agency of regulatory authority over financial services in the insurance, banking, and securities sectors).

16. *See* MOLONEY, *supra* note 1, at 298-300 (discussing the market failure rationale in the context of the EC Investment Services Directive ("ISD")). Market failure occurs when transactions that take place in an unregulated marketplace do not increase social welfare—i.e. the unregulated market yields a "deadweight loss." *See id. But see* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 217-18 (2005) (cautioning that market failure alone does not justify government regulation, particularly when such regulation is applied across borders, since regulation has costs as well and a regulatory regime might itself yield a deadweight loss); Roberta Romano, *The Need For Competition in International Securities Regulation*, 2 THEORETICAL INQ. L. 387, 543-45 (2001) (criticizing United States' mandatory disclosure regime as decreasing social welfare in scenarios where disclosure is not justified under a cost-benefit analysis). *See generally* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 717 (1984) (discussing the history of the debate in the United States regarding the desirability of a mandatory securities disclosure system and arguing that a mandatory disclosure system is justified because information regarding issuers' financial condition suffers from a classic public good problem).

17. *See Commission White Paper on Financial Services Policy 2005-2010*, at 8, ¶ 3.1 COM (2005) 629 final (Dec. 5, 2005), *available at* http://ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf

regulatory regimes essentially define the shape that a market can take,[18] the securities regime that the E.U. is constructing must prove sufficiently flexible that the securities industry can continue to adapt technology to securities transactions and provide innovative products.[19]

Demutualization occurs when the membership of a traditional non-profit organization that operates a stock exchange reorganizes the exchange as a for-profit institution, generally as a response to increased competition.[20] The phenomenon of demutualization is not

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(stating that European securities market participants are increasingly organizing their activities on a pan-European scale). European securities exchanges are on par with if not more advanced than United States markets in terms of adapting technology to securities trading. *See* Norman S. Poser, *Automation of Securities Markets and the European Community's Proposed Investment Services Directive*, 55 LAW & CONTEMP. PROBS. 29, 33–35 (1992) (noting that United States exchanges failed to adapt technology to trading as quickly as the London exchanges despite the fact that deregulation in the United States originally was a catalyst for deregulation in Europe, which then brought pressure to bear on the European exchanges to employ technology to lower their costs and compete effectively); *see also* Marc Pagano & Benn Steil, *Equity Trading I: The Evolution of European Trading Systems*, *in* THE EUROPEAN EQUITY MARKETS: THE STATE OF THE UNION AND AN AGENDA FOR THE MILLENNIUM 4-9 (Benn Steil et al. eds., European Capital Markets Institute 1996) (discussing the role that the London Stock Exchange ("LSE") has played in spurring the restructuring of European continental exchanges).

18. *See* Poser, *supra* note 17, at 29 (stating that the provisions of the ISD would determine what role technology could play in harmonized securities markets). The ISD, however, was repealed by the Markets in Financial Instruments Directive because, *inter alia*, the ISD was not able to provide for regulation of new technologies that came into being after its enactment. *See* Council Directive 2004/39, arts. 2-3, 2004 O.J. (L 145) 1 (EC) [hereinafter Markets in Fin. Instruments Directive] (noting that the EC should develop a legal framework to "encompass the full range of investor-oriented activities").

19. *See* Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 53-54 (2002) (arguing that "top-down" regulatory approaches are inappropriate for the regulation of markets characterized by rapid change and complexity).

20. *See* Fleckner, *supra* note 13, at 2558-59 (discussing demutualization of traditional "open outcry" exchanges as a response to the rapid growth of electronic communication networks ("ECN")); *see also* Karmel, *supra* note 15, at 368-69 (suggesting that, prior to the demutualization wave, the lack of competition among exchanges and the favorable regulatory environment made it rational for the members of non-profit exchanges to continue to operate the exchanges as non-

limited to the U.S. securities markets—the majority of global equities exchanges already have demutualized.[21] The most recent demutualization to occur in the United States is that of the NYSE, which began in December 2005 with the elimination of private trading in NYSE memberships,[22] and which reached a conclusion on March 8, 2006 when the NYSE entered into a reverse-merger arrangement for its combination with Archipelago.[23] Demutualization has proceeded at a faster pace in Europe.[24]

It is important to place these phenomena in context, however. The current wave of trade automation and demutualization is part of a larger cycle of deregulation, technological adaptation, and reregulation, which leads to heightened competition and, thus, a new wave of automation.[25] In the securities markets, reregulation is the phenomenon whereby a regulatory authority modifies its rules to cope with the new technologies that exchanges adopt in a deregulated environment.[26] Because deregulation is a response to

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profit organizations because the income generated by the exchanges redounded to the members through lowered access fees).

21. *See* Roel C. Campos, Comm'r, SEC, Regulatory Role of Exchanges and International Implications of Demutualization (Mar. 10, 2006), *available at* http://www.sec.gov/news/speech/spch031006rcc.htm (stating that seventeen stock exchanges throughout the world have demutualized since 1987 and that demutualization poses significant challenges for securities regulators).

22. *See* Gene Colter, *NYSE Closes Its Books and Folds Up Its Seats To Start Life as a For-Profit Exchange*, WALL ST. J., Dec. 31, 2005, at B3.

23. *See* Aaron Lucchetti et al., *NYSE to Acquire Electronic Trader And Go Public*, WALL ST. J., Apr. 21, 2005, at A1; *see also* HEMENDRA ARAN & ALPESH B. PATEL, GLOBAL FINANCIAL MARKETS REVOLUTION 176-77 (2006) (discussing the structure of Archipelago prior to its merger with the NYSE).

24. *See* Karmel, *supra* note 15, at 368 (noting that the first stock exchange to demutualize was the Stockholm Stock Exchange in Sweden); Fleckner, *supra* note 13, at 2555-56 (noting that SEC statements and some case law suggested that the Securities Exchange Act required U.S. exchanges to have a "traditional membership structure").

25. *See* Manning Gilbert Warren, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 187 (1990) (distinguishing two types of regulatory changes in financial services in the 1980s: access deregulation and prudential reregulation). Access deregulation refers to the removal of regulations that restrict the movement of capital, thus increasing the scarcity and price of capital; prudential reregulation refers to the rule adjustments that regulators make in the wake of access deregulation to ensure investor confidence and promote efficient markets. *See id.*

26. *See id.*

competitive pressure,[27] and because competition between exchanges is now taking place globally,[28] it is clear that regulatory changes in Europe must be answered by regulatory changes in the United States, and vice versa.[29] Appropriate reregulation of securities markets is vital to capital formation because deregulation generally results in expanded investment opportunities[30] and the conduct of newly minted markets in those investments must have an appropriate set of rules to ensure investor confidence.[31]

The regulatory cycle outlined above has consequences not only for the structure of the market but also for the diversity of products traded in those markets.[32] The terms of reference of the Committee of Wise Men on the Regulation of European Securities Markets ("Wise Men")[33] explicitly acknowledged the difficulty that EC internal market legislation was having in constructing a regulatory regime that would facilitate innovation in European securities markets.[34]

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27. *See* Pagano & Steil, *supra* note 17, at 12 (arguing that continental European regulators liberalized securities trading rules because of competition from U.K. automatic quotation trading systems).

28. *See generally* Norman S. Poser, *The Stock Exchanges of the United States And Europe: Automation, Globalization, and Consolidation*, 22 U. PA. J. INT'L ECON. L. 497, 500-06 (2001) (discussing the structure of the major stock exchanges of the United States and Europe and contemplating the possibility of mergers between those exchanges).

29. *See id.* at 532-39 (noting that the European countries have not historically implemented self-regulation as the United States has and further arguing that any transnational system of stock market regulation will have some degree of self-regulation).

30. *See* Poser, *supra* note 17, at 32 (arguing that the "Big Bang" increased the efficiency of London stock markets and, consequently, continental European issuers flocked to the London markets to list their securities). The "Big Bang" deregulated the LSE by permitting variable broker commission rates, opening exchange membership to foreign firms, computerizing the exchange quotation system, and abolishing the broker/dealer single capacity restriction. *See id.* at 31.

31. *See* Warren, *supra* note 25, at 188-90 (arguing that European regulators in the 1980s hesitated to adapt regulation to technological applications out of fear of regulatory arbitrage because the elimination of monetary controls pursuant to EC Treaty mandates made it easy for investors to move capital to those markets with the most favorable regulatory environment).

32. *See* Avgouleas, *supra* note 3, at 180-86 (noting that E.U. legislators were having difficulty creating a flexible regime that could harmonize effectively E.U. Member State securities legislation without becoming too rigid or stifling innovation in the quickly changing financial markets).

33. *See infra* Part I.D (discussing the findings of the Lamfalussy Committee).

34. *See Initial Report of the Committee of Wise Men on the Regulation of*

Within the United States, competition among regulatory regimes has fostered an environment where a financial service provider may choose the regulator most suitable for the product that the provider would like to offer.[35] In Europe, the consolidated regulator is increasingly more common,[36] thus diminishing the potential for intra-

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European Securities Markets 30 (Nov. 9, 2000), *available at* http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/initial-report-wisemen_en.pdf [hereinafter *Initial Lamfalussy Report*] (requesting the Wise Men to address the extent to which E.U. legislation is capable of facilitating technical innovation in securities trading systems); *see also Final Lamfalussy Report*, *supra* note 7, at 20 (noting the tradeoff between ensuring the harmonization of Member State laws through binding EC Regulations on the one hand, and ensuring the competitiveness of European exchanges on the other).

35. *See* Romano, *supra* note 16, at 392-97 (suggesting that a regulatory authority will acknowledge the inefficiency of a particular rule only when regulated entities are able to relocate to other jurisdictions and engage in value-creating activity that would be prohibited under the regulatory regime of the initial regulator). Regulatory flexibility has been particularly conducive to product innovation in the derivatives markets. *See id.* at 394 n.19 (citing Edward Kane, *Regulatory Structure in Futures Markets: Jurisdictional Competition between the SEC, the CFTC, and Other Agencies*, 4 J. FUTURES MARKETS 367, 380 (1984)). *But see* Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279, 370 (1997) (arguing that regulators have an incentive to facilitate product innovation because of the tendency of a regulated entity's new products to continue to be subject to the authority of the original regulator, regardless of whether the product's characteristics suggest that it should be under the authority of a regulator with authority over a different financial services field).

36. Austria, Denmark, France, Germany, Sweden, and the United Kingdom have opted for a consolidated regulator to administer financial markets legislation. *See* Rosa M. Lastra, *The Governance Structure for Financial Regulation and Supervision in Europe*, 10 COLUM. J. EUR. L. 49, 50-53 (2003) (discussing the creation of the German Federal Financial Supervisory Authority ("BaFin") and the U.K. Financial Services Authority ("FSA")). Regulators generally adapt their structure to more effectively supervise the market participants over which they have authority. *See id.* The French consolidated financial markets supervisor Autorité des Marchés Financiers ("French AMF") came into existence on August 1, 2003 with the passage of the Loi No. 2003-706 de Sécurité Financière of August 1, 2003, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], August 2, 2003. *Id.* at 50 n.3; *see also* Giorgio Di Giorgio & Carmine Di Noia, *Financial Market Regulation and Supervision: How Many Peaks For the Euro Area?*, 28 BROOK. J. INT'L L. 463, 471-72 (2003) (noting that Ireland also has commenced plans to create a single financial regulator). Belgium, Luxembourg, and Finland however, have retained sectoral distinctions among regulators. *See id.* at 472-73. The Netherlands has adopted the most uncommon approach, whereby regulatory authority is divided according to the particular goal of regulation, rather than sectoral competence. *See id.* (noting that one regulatory authority ensures

jurisdictional choice, or arbitrage, among types of financial services authorities.[37] However, inter-jurisdictional regulatory choice is an important driver of capital market growth in Europe; indeed, this is a basic premise of Euronext's successful business model.[38] But in terms of product innovation in capital markets, the E.U. faces a more basic challenge. European securities markets are less well developed than their U.S. counterparts because of the historical reliance on debt as opposed to equity financing.[39] Thus, while it is crucial that the E.U. move quickly to integrate European capital markets,[40] the

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market transparency and investor protection goals, while market integrity goals are left to the central bank).

37. *See* Roberta S. Karmel, *Reconciling Federal and State Interests in Securities Regulation in the United States and Europe*, 28 BROOK. J. INT'L L. 495, 495-97 (2003) (describing competition between the SEC, the Commodity Futures Trading Commission ("CFTC"), the U.S. Federal Reserve Board, and the U.S. Treasury Department for jurisdiction to regulate financial markets and products at the federal level); *see also* Jorge E. Viñuales, *The International Regulation of Financial Conglomerates: A Case-Study of Equivalence as an Approach to Financial Integration*, 37 CAL. W. INT'L L.J. 1, 8-9 (2006) (arguing that the purpose of regulation should be to establish a competitive field for market participants that are subject to different regulatory regimes). One can identify two relevant vectors for "arbitrage" among regulators: intra-jurisdictional choice among banking, securities, derivatives, and insurance regulators; and inter-jurisdictional choice between equivalent financial markets regulators from different jurisdictions. *See id. See generally* Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563, 635-37 (1998) (arguing that national regulatory systems do compete to attract market participants, but that such regimes also interact with one another and can function to complement the foreign regulatory regime, or to undermine that regime). *But see* Warren, *supra* note 25, at 189 (criticizing the debate on regulatory arbitrage and arguing that historical precedent demonstrates that market participants do not migrate to the jurisdiction with the lowest regulatory costs).

38. *See infra* Part I.B.1 (discussing the business model of Euronext and the manner in which it exploits the mutual recognition principle).

39. *See Initial Lamfalussy Report*, *supra* note 34, at 9 (noting that European corporations have been more heavily dependent on bank loans for financing than corporations in the U.S. and that as recently as the early 1980s less than twenty percent of business financing was in the form of equity); *see also* MOLONEY, *supra* note 1, at 22 (examining the 1966 Segre Report findings regarding the underdevelopment of European capital markets and outlining the initial phases of EC securities market integration); Warren, *supra* note 25, at 193-94 (discussing the potential for increased development of the secondary market for equities in Europe).

40. *See* Robert A. Schwartz, *Equity Trading II: Integration, Fragmentation, & the Quality of Markets*, *in* THE EUROPEAN EQUITY MARKETS: THE STATE OF THE

legislative approach to integration must remain flexible so as not to stifle the growth of an already laggard equity market.[41]

B. THE MERGER OF NYSE GROUP & EURONEXT N.V. POSES SIGNIFICANT CHALLENGES FOR EC SECURITIES MARKET HARMONIZATION EFFORTS

Despite the uncertain EC regulatory environment, Euronext N.V. and other cross-border European securities exchanges have pushed regulators to converge national securities law.[42] Euronext has done this by electronically linking multiple E.U. Member State securities exchanges and cooperating with securities authorities from those jurisdictions with a view to harmonizing legislation applicable to securities trading.[43] However, the recently announced merger of Euronext with the NYSE has thrown into doubt the role of market participants such as Euronext in advancing the goal of EC securities law harmonization.[44]

UNION AND AN AGENDA FOR THE MILLENNIUM, *supra* note 17, at 61 (explaining that market fragmentation occurs in two instances: competition among market architectures and fragmentation from one market "pirating" the price discovery taking place in another market). The former is healthy for the market while the latter reduces liquidity in the traded instruments. *See id.*

41. *Compare Final Lamfalussy Report*, *supra* note 7, at 7-8 (urging E.U. bodies to quicken the pace of harmonization measures in the securities field to capture the significant economic benefits from capital markets integration before market fragmentation entrenches financial market participants in a non-uniform national-level regulatory framework), *with* Committee of European Securities Regulators, Ref. No. 04-333f, *Preliminary Progress Report: Which Supervisory Tools For the EU Securities Markets?, An Analytical Paper by CESR* 2 (Oct. 2004), *available at* http://www.cesr.eu/index.php?docid=2541 [hereinafter *Himalaya Report*] (arguing that the degree of convergence in securities market regulation depends on which securities market participants one is addressing). The Committee of European Securities Regulators ("CESR") feels that securities market integration is a long term process which will require regulators to revamp their supervisory powers to adapt the EC securities harmonization measures to the markets over which they have regulatory authority. *See id.*

42. *See* Euronext N.V., 2005 REGISTRATION DOCUMENT AND ANNUAL REPORT 18-19 (2006), *available at* http://www.euronext.com/file/view/0,4245,1626_53424_824839144,00.pdf [hereinafter EURONEXT ANNUAL REPORT] (stating that Euronext's harmonization efforts led to the creation of the Euronext College).

43. *See id.* (lauding the advantages of Euronext's IT infrastructure in facilitating cross-border trading).

44. *See infra* Part III.B (arguing that NYSE's influence may lead the newly formed enterprise to focus its attention on areas of the world beyond Europe).

1. Market Participants Such As Euronext Play a Crucial Role in EC Harmonization Efforts

Euronext N.V. is an Amsterdam-based holding company formed in September 2000 that operates stock and derivatives exchanges in Belgium, France, the Netherlands, Portugal, and the United Kingdom.[45] Euronext's wholly owned subsidiaries operate the exchanges and the subsidiary market operators must comply individually with national securities exchange regulation.[46] Although the Euronext business model is built upon the mutual recognition principle[47] that is at the core of EC securities harmonization legislation, Euronext has proceeded beyond the minimum

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45. *See* EURONEXT ANNUAL REPORT, *supra* note 42, at 12-13; ARAN & PATEL, *supra* note 23, at 141-44 (outlining the structure of Euronext N.V. and giving a chronology of the consolidation of the Amsterdam, Brussels, Paris, and Lisbon equity exchanges and the London International Financial Futures and Options Exchange ("LIFFE")); *see also* Poser, *supra* note 28, at 504-05 (noting that, as of 2001, the $2.4 trillion market capitalization of Euronext markets made Euronext the second largest exchange in Europe behind the LSE).

46. *See generally* EURONEXT ANNUAL REPORT, *supra* note 42, at 161-62 (discussing the applicability of national regulations to the operations of Euronext exchanges in the five distinct Euronext jurisdictions). Because Euronext is a holding company, it is not directly subject to regulation as an exchange operator. *See id.*

47. *See* Andrea M. Corcoran & Terry L. Hart, *The Regulation of Cross-Border Financial Services in the EU Internal Market*, 8 COLUM. J. EUR. L. 221, 236-46 (2002) (explaining the principle of mutual recognition). Recognition by one E.U. Member State of a regulated entity's compliance with the regulatory requirements of another E.U. Member State is premised on a prior harmonization of minimum standards among EC states under agreed EC securities legislation. *See id.* Additionally, such mutual recognition requires that the home country of the regulated entity continue to supervise that entity's compliance with the national level regulations of the jurisdiction from which it is hailing. *See id.*; *see also* Yannis V. Avgerinos, *Problems with Home Country Control and Investment Services*, *in* FINANCIAL MARKETS IN EUROPE: TOWARDS A SINGLE REGULATOR?, *supra* note 3, at 87-93 (criticizing the home country control element of the Single European Act's harmonization framework on the grounds that the success of the home country control element is dependent upon the institutional and professional capabilities of the home country regulator, while EC legislation does not provide for standards in this area); Avgouleas, *supra* note 3, at 183 (describing the rationale for the transition to the more flexible framework of mutual recognition and minimum harmonization). The *1985 White Paper* recommended the adoption of the mutual recognition, minimum harmonization, and home country control principles. *See id.* The 1986 Single European Act incorporated these principles into the Treaty of Rome. *See id.*

harmonization[48] aspect of EC securities legislation and sought to create a unified set of listing and trading rules for Euronext exchanges.[49]

Euronext utilizes a business model that exploits the mutual recognition principle.[50] An issuer that wishes to list a security on a Euronext exchange must comply with the listing requirements of the jurisdiction from which it hails and thereafter the issuer may access the aggregate capital pool of Euronext's electronically linked exchanges.[51] To list on a Euronext exchange an issuer must comply with all the listing standards of Euronext Rulebook I as well as the rules of Euronext Rulebook II that pertain to the jurisdiction that the issuer has chosen as its "entry point."[52] Rulebook I contains listing requirements that have been harmonized among all Euronext jurisdictions, while Rulebook II contains non-harmonized rules. By increasing the number of harmonized listing rules in Rulebook I, Euronext thereby decreases the number of distinct listing requirements in Rulebook II with which an issuer must comply for listing and admission to trading on all Euronext exchanges.[53] Thus,

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48. *See generally* Gerard Hertig, *Regulatory Competition for EU Financial Services*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 221-22 (Daniel C. Esty & Damien Geradin eds., 2001) (explaining the relationship between mutual recognition and minimum harmonization of standards).

49. *See Initial Lamfalussy Report*, *supra* note 34, at 15-16 (discussing the inadequacy of mutual recognition and minimum harmonization as driving principles for EC securities law harmonization); *see also* MOLONEY, *supra* note 1, at 861-70 (explaining the Lamfalussy Process for adoption of securities law harmonization measures).

50. *See* EURONEXT ANNUAL REPORT, *supra* note 42, at 15-16 (noting that Euronext takes advantage of the harmonization of European financial market regulations in offering access to multiple European markets).

51. *See id.* (explaining the role of cooperative rule harmonization in Euronext's business model); *see also* PROSPECTUS OF NYSE EURONEXT, INC. 349-51 (Euronext, N.V., Nov. 27, 2006), *available at* http://www.euronext.com/file/view/0,4245,1626_53424_979643772,00.pdf [hereinafter NYSE EURONEXT PROSPECTUS] (discussing Euronext's harmonized Rulebook I, which sets listing requirements for all Euronext jurisdictions, and Rulebook II which contains additional, distinct listing requirements for each individual jurisdiction).

52. *See* EURONEXT ANNUAL REPORT, *supra* note 42, at 15-16.

53. *See id.* at 13 (stating that cash-settled instruments on the Amsterdam, Brussels, Lisbon, and Paris exchanges are traded through a single order book). An issuer accesses the liquidity pool of all Euronext markets after complying with the listing requirements of its home jurisdiction. *See id.* at 15-16. An issuer need only

Euronext provides issuers with the opportunity to access a larger pool of capital at a lower cost.[54]

The mutual recognition principle is premised on prior harmonization by E.U. Member States of minimum standards contained in EC legislation.[55] While it is clear that Euronext's business model attracts listings by offering issuers an expanded market with the aid of the mutual recognition principle, Euronext has proceeded beyond the goal of minimum harmonization of standards on which the mutual recognition principle is premised.[56] Indeed, Euronext has worked actively with regulators in the five Euronext jurisdictions to harmonize the listing rules for its exchanges.[57] The Euronext Regulatory MOU establishes the framework for such cooperative rule harmonization.[58] Under the terms of the Euronext Regulatory MOU, Euronext is obligated to cooperate with the securities authorities ("Euronext College")[59] of the jurisdictions in

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comply with those requirements in Rulebook II that pertain to the market in which the issuer would like to list and trade its securities. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 198. However, traders in Euronext markets are permitted access to the order book of all Euronext markets with the result that an investor from a jurisdiction in which the issuer is not listed can nevertheless trade in that issuer's securities. *See id.*

54. *See* EURONEXT ANNUAL REPORT, *supra* note 42, at 19.

55. *See infra* Part I.D (discussing the three-part harmonization framework of the Single European Act). The minimum harmonization approach has proved inadequate, however, and legislation adopted pursuant to the Financial Services Action Plan under the Lamfalussy Process since March 2001 has proceeded beyond minimum harmonization and created free standing EC level regulatory regimes in a number of areas. *See* Avgouleas, *supra* note 3, at 181 (noting that EC legislation has established a framework that is relatively independent of national laws in the areas of market abuse, exchange licensing, and alternative trading systems).

56. *See supra* notes 47-50 and accompanying text (explaining the relationship of the mutual recognition principle, harmonization of minimum standards, and home country control).

57. *See* Di Giorgio & Di Noia, *supra* note 36, at 476 (arguing that the mutual recognition and minimum harmonization approach failed to bring about convergence of securities regulation).

58. *See generally* Euronext Regulatory MOU, *supra* note 12.

59. *See id.* art. I, paras. 1.1, 1.2 (establishing a Chairmen's Committee and a Steering Committee to facilitate cooperation under the Euronext Regulatory MOU). The group of regulatory authorities that are signatory to the MOU is known as the College of Euronext Regulators, or Euronext College. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at A-15 (defining the Euronext College as the Committee of Chairmen of the AMF, the Netherlands Authority for the Financial

which Euronext operates regulated markets. The Euronext College has authority under the Euronext Regulatory MOU to approve the modification and harmonization of Euronext Rulebooks.[60] Euronext must also consult with the Euronext College to obtain non-opposition to the issuance of Euronext notices for interpreting or implementing the provisions of the Rulebooks.[61] In general, Euronext's cooperation with the Euronext College encompasses the harmonization of domestic regulations pertaining to listing requirements, prospectuses, on-going obligations of listed companies, take-over bids, and disclosure of large shareholdings.[62] Clearly, then, the goals of the Euronext Regulatory MOU are identical to the goal of creating harmonized securities regulation in the EC.

2. The NYSE Euronext Merger Will Change the Dynamic of EC Securities Law Harmonization

NYSE Group, Inc. reached an agreement of merger with Euronext on June 1, 2006.[63] Commentators billed the merger as creating the

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Markets (Autoriteit Financiele Markten), the Belgian CBFA, the Portuguese Securities Market Commission (Comiss˜ao do Mercado de Valores Mobiliarios or "CMVM"), and the U.K. Financial Services Authority ("FSA")).

60. *See* Euronext Regulatory MOU, *supra* note 12, art. III, ¶ 3.1.1.

61. *See id.* art. III, ¶ 3.1.1.

62. *See id.* art. VII, ¶ 7.1.

63. *See* Press Release, NYSE Group, Inc., NYSE Group and Euronext N.V. Agree to a Merger of Equals (June 2, 2006), *available at* http://www.nyse.com/press/1149157439121.html; Aaron Lucchetti et al., *NYSE, Euronext Set Plans to Form a Market Giant: Landmark $20 Billion Deal By U.S., Europe Exchanges Faces Oversight Questions*, WALL ST. J., June 2, 2006, at A1 (quoting Joel Seligman, a distinguished expert in securities law and the President of the University of Rochester, as stating that the combined NYSE Euronext "will be potentially subject to a new form of international regulation. We may be moving to a new type of exchange that is extra-territorial, a world stock exchange"). *See generally* Poser, *supra* note 28, at 500-01, 524-28 (describing the structure of the NYSE). NYSE Group, Inc. operates the NYSE, a traditional, "open outcry" exchange, and NYSE Arca, an electronic derivatives and equities exchange acquired by NYSE Group as part of NYSE's merger with Archipelago Holdings, Inc. *See* Press Release, NYSE Group, Inc., New York Stock Exchange and Archipelago Exchange Agree To Merge 2 (Apr. 20, 2005), *available at* http://www.nyse.com/pdfs/joint_release.pdf (announcing NYSE-Archipelago merger and outlining terms of merger transaction); *see also* Fleckner, *supra* note 13, at 2558-59 (discussing the NYSE-Archipelago merger in light of the falling price of NYSE seats, crises in upper-level management at the exchange, and fraud investigations against the NYSE and specialist firms).

world's first transatlantic stock exchange.[64] Soon after the announcement of the merger a flurry of speculation arose as to whether U.S. and European securities exchange regulation might overlap among the exchanges operated by the merged entity.[65] Specifically, because the combination agreement proposes that the merged NYSE Euronext entity be incorporated in Delaware,[66] European regulatory authorities have expressed concern at the possibility that stricter U.S. corporate governance legislation might be applied to companies listed on Euronext exchanges as a consequence of the ownership of Euronext exchanges by the U.S.-based NYSE Euronext entity.[67] However, U.S. and European

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64. *See, e.g.*, Lucchetti et al., *supra* note 63.

65. *See* Jeremy Grant, *Hurdles Appear in the Race for Exchange Consolidation The Planned NYSE-Euronext Deal Raises Doubts About Who Regulates What, Says Jeremy Grant*, FIN. TIMES, June 15, 2006, at 24 (noting "regulatory uncertainty" regarding the extent to which Sarbanes-Oxley legislation might apply to companies listed on Euronext exchanges as a consequence of the merger of NYSE with Euronext); Jeremy Grant, *Regulators Face Uncharted Waters if Deal Goes Ahead NYSE-EURONEXT*, FIN. TIMES, June 9, 2006, at 24 [hereinafter *Uncharted Waters*] (quoting Anthony Belchambers, CEO of the United Kingdom Futures and Options Association, as stating that some key terms defining the extra-territorial reach of U.S. securities and commodities regulation is under review, thus contributing to uncertainty over the reach of U.S. corporate governance standards).

66. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 200 (describing structure of proposed NYSE Euronext merger transaction and the legal personality of the merged entity).

67. In the U.K. in late 2006, Economic Secretary to the Treasury Edward Balls was drafting legislation that would give the U.K. FSA "veto power over a U.S.-owned U.K. exchange if it were to produce rules that that did not fit current British regulatory templates." *See* Jeremy Grant, *Regulators and Companies Fight Legislative Creep Europe is Seeking Ways of Reducing the Back-Door Impact on Business of Possible US Legislation*, FIN. TIMES, Oct. 31, 2006, at 29. In the Netherlands, Finance Minister Gerrit Zalm had initially threatened to thwart the merger by withholding Euronext's license to operate the Amsterdam exchange. *See* Digby Larner, *NYSE-Euronext Deal Clears Hurdle: Dutch Minister Withdraws Veto Threat as Concerns Over Regulations Are Eased*, WALL ST. J., Dec. 19, 2006, at C3. In France, the Chairman of the AMF, Michel Prada, noted the concern of French regulatory authorities over the governance structure of the newly minted NYSE Euronext entity, with particular regard to regulatory review of board appointments at the new entity to ensure that senior management did not engage in excessive risk taking. *See* Norma Cohen, *'Veto' Hurdle For Euronext Deal: Regulators Want Say in Board Appointments: Concerns Remain Over Merger of Exchanges*, FIN. TIMES, Dec. 1, 2006, at 13. Indeed, the former President of France, Jacques Chirac, went so far as to call on Euronext to form a "Franco-German Alliance" rather than agree on a merger with an American exchange. *See*

securities and commodities authorities that regulate NYSE Group and Euronext equities and derivatives exchanges have repeatedly stated that mere joint ownership of such exchanges by entities hailing from different jurisdictions will not cause the regulatory standards of one jurisdiction to be applicable to exchange operations or companies listed on exchanges in another jurisdiction.[68]

But NYSE Group and Euronext shareholders have not been discouraged by the uncertainty of the regulatory regime that ultimately will govern a combined NYSE Euronext.[69] Euronext shareholders approved the merger on December 19, 2006,[70] and NYSE Group Shareholders approved the merger on December 20, 2006.[71] Commentators have suggested that NYSE Group's incentive

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Alistair MacDonald & Edward Taylor, *Chirac Frowns on NYSE-Euronext: Deutsche Boerse Takes Heart From French Leader's Call For Franco-German Alliance*, WALL ST. J., June 7, 2006, at C4.

68. *See* Press Release, Autorité des marchés financiers, SEC Chairman, Euronext Regulators Meet to Discuss Cooperation in the Event of the NYSE Euronext Combination (Sept. 27, 2006), *available at* http://www.amf-france.org/documents/general/7342_1.pdf (reaffirming regulators' initial assertions that Euronext exchanges would not be subject to SEC regulation merely because of their ownership by a U.S.-based holding company); Letter from the Chairman's Committee of the Euronext Regulators to Jean-François Théodore, Chairman and CEO of Euronext N.V. (Dec. 5, 2006), *available at* http://www.amf-france.org/documents/general/7509_1.pdf [hereinafter Euronext Letter] (stating that the Euronext College does not believe that the current structure of the combined NYSE Euronext entity would give rise to regulatory "spillover" from the United States to Euronext exchanges, but that such an assessment was strictly confined to the structure of the combined entity as represented to the College in the preparatory documents, and in the light of public and private statements by the SEC to the effect that such regulatory "spillover" would not occur); *see also* Annette L. Nazareth, Comm'r, SEC, Remarks Before the UCLA Law Third Annual Institute on Corporate Aspects of Mergers and Acquisitions (Oct. 23, 2006), *available at* http://www.sec.gov/news/speech/2006/spch102306aln.htm (noting that the Securities Exchange Act of 1934 would not require registration of the Euronext exchanges with the U.S. Securities & Exchange Commission and that Euronext exchanges did not intend to offer their products directly in the United States).

69. *See* Press Release, Euronext N.V., Euronext Shareholders Approve Combination with NYSE Group 1 (Dec. 19, 2006), *available at* http://www.euronext.com/file/view/0,4245,1626_53424_997980078,00.pdf (noting that over 98% of Euronext shareholders approved of the merger).

70. *See id.*

71. *See* Press Release, NYSE Group, Inc., NYSE Group Shareholders Overwhelmingly Approve Combination with Euronext, Preliminary Results Indicate 1 (Dec. 20, 2006) *available at* http://www.nyse.com/press/1166613

to pursue the combination with Euronext arises from a desire to circumvent stricter U.S. corporate governance legislation,[72] to realize economies of scale from consolidation of trading activities onto standard trading platforms across the merged entity,[73] and to expand the NYSE's operations in bond and derivatives markets.[74] Irrespective of the rationale for the combination, however, U.S. and European regulatory agencies clearly will face significant challenges in creating arrangements to supervise NYSE Euronext and to negotiate shared regulatory authority over the combined entity's operations once NYSE Euronext has matured as a combined organization and has pursued further combinations with exchanges in other markets.[75]

560168.html (reporting that, of the NYSE Group shareholders that participated in the vote, 99.7% voted in favor of the merger with Euronext and estimating that the deal should officially close in the first part of 2007).

72. *See* Aaron Lucchetti, *NYSE, via Euronext, Aims to Regain Its Appeal for International Listings*, WALL ST. J., June 30, 2006, at C1 (reporting that NYSE Group's Chief Executive hopes the merger will allow companies to participate in foreign exchanges that employ "less intrusive" regulations); *see also* James J. Cramer, *Behind the Euronext Deal*, WALL ST. J., May 26, 2006, at A10 (noting that many private equity firms choose to list on Euronext rather than the NYSE due to Euronext's less strict regulations, which allow for more flexible financing and greater opportunities for capital formation).

73. *See Uncharted Waters*, *supra* note 65, at 24 (suggesting that subsequent to the merger Euronext and NYSE will seek to integrate technology across exchanges with a view to generating significant cost savings in the combined entity).

74. *See* Aaron Lucchetti, *Big Board Sees a Bond Bonanza: With Euronext's System, NYSE Aims to Rebuild Its Trading Book; First, Thain Must Sell the Merger*, WALL ST. J., June 21, 2006, at C1; Alistair MacDonald et al., *NYSE to Unveil Proposed Tie-Up With Euronext as Rival Scrambles*, WALL ST. J., May 22, 2006, at A1.

75. *See* Gaston F. Ceron, *NYSE Group's Shareholders Approve Takeover of Euronext: Support Is Overwhelming For Trans-Atlantic Deal: More Consolidation Seen*, WALL ST. J., Dec. 21, 2006, at C3 (noting that the combined NYSE Euronext is most likely to seek further expansion in Italy and Asia); Campos, *supra* note 21 (speculating about the regulatory implications of a transatlantic exchange merger and opining that regulatory approval of such a merger would only be necessary in the event that changes to trading rules accompany the merger).

But ancillary to the issues of regulatory and legislative "creep"[76] from the United States to Europe is the question of the future of efforts to harmonize the securities regulation of E.U. Member States pursuant to the Financial Services Action Plan[77] ("FSAP").[78] Harmonization of E.U. Member State securities regulation is ancillary to this issue of regulatory creep because the harmonization of E.U. Member State securities regulation created the regulatory conditions that were necessary for Euronext to become a successful pan-European exchange and thus an attractive partner for combination with NYSE Group.[79] Consequently, before one may

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76. *See* William P. Albrecht, *Regulation of Exchange-Traded and OTC Derivatives: The Need for a Comparative Institution Approach*, 21 IOWA J. CORP. L. 111, 122-23 (1995) (defining regulatory "creep" as "the expansion of regulation into areas where, from an efficiency perspective, it is not needed" and arguing that regulators have incentives to impose their regulatory regime on all actors in a given field, regardless of whether such regulation is necessary to cure market failures in the regulated field); *see also The US-EU Regulatory Dialogue: The Private Sector Perspective: Hearing Before the Subcomm. on Domestic and International Monetary Policy, Trade and Technology of the H. Comm. on Financial Services*, 108th Cong. 10 (2004) (testimony of Richard E. Thornburgh, Chairman, Securities Industry Association) (encouraging mutual prior consultation between the U.S. Congress and the European Parliament regarding legislation, such as Sarbanes-Oxley corporate governance standards, that has potential extraterritorial effects with a view to preventing conflicts between the legislative goals of Europe and the United States).

77. *See Commission Financial Services Action Plan: Implementing the Framework for Financial Markets* COM (1999) 232 final (May 11, 1999), *available at* http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm #documents.

78. *See* Jonathan R. Macey, *US and EU Structures of Governance as Barriers to Transatlantic Regulatory Cooperation*, *in* TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 360 (George A. Bermann et al. eds., 2000) (pointing out the fallacy of premising U.S.-E.U. regulatory dialogues on bilateral cooperation, when in fact E.U. regulatory policy and legislation is enforced and executed by E.U. Member State agencies and that divergences among those agencies are unavoidable); *see also* Robert A. Prentice, *Regulatory Competition in Securities Law: A Dream (That Should Be) Deferred*, 66 OHIO ST. L.J. 1155, 1223-24 (2005) (noting that European securities regulators are reaching consensus that U.S.-style corporate governance standards contribute to capital formation and suggesting that European regulators are converging on corporate governance regulation that is broadly similar to that found in the United States).

79. *See The US-EU Regulatory Dialogue and Its Future: Hearing Before the H. Comm. on Financial Services*, 108th Cong. 1 (2004) (statement of Michael G. Oxley, Chairman, Comm. on Financial Services) ("[C]onvergence and equivalence

evaluate the future relationship between U.S. and European or E.U.-level securities regulation one must understand the terms on which E.U. Member States have undertaken to integrate their national frameworks for securities regulation.

C. MEMORANDA OF UNDERSTANDING ARE THE PRIMARY MEANS FOR FACILITATING COOPERATION AMONG SECURITIES REGULATORY AUTHORITIES

Cooperation between national securities regulators has traditionally taken place via memoranda of understanding ("MOUs").[80] The U.S. Securities & Exchange Commission ("SEC") has led the way in establishing such regulatory arrangements.[81] These arrangements are generally considered non-binding statements of intent and create no obligations on the part of the regulators that are party to the arrangements.[82] Although European securities regulators also have utilized MOUs extensively,[83] a prime example being the Euronext Regulatory MOU, cooperation between E.U. Member State regulatory authorities takes place in the larger context of EC common market legislation. Thus, the purpose and effect of MOUs

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in regulatory structures can only make sense where convergence is already underway in the markets and where differences in regulation can have a detrimental impact.").

80. *See* SEC, International Cooperation in Securities Law Enforcement 3 (2004), *available at* http://www.sec.gov/about/offices/oia/oia_enforce/intercoop.pdf [hereinafter International Cooperation] (noting the necessity of international cooperation and information sharing among securities regulators and recognizing MOUs as a common mechanism to facilitate these ends); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 22 (2002) (citing MOUs as the mechanism of choice due to their "loose and adaptable framework").

81. *See* International Cooperation, *supra* note 80, at 3 (pointing out that there have been over 30 MOUs between the SEC and foreign securities regulators and recognizing the SEC as among the first regulators to become a party to the Multilateral MOU of 2002); Raustiala, *supra* note 80, at 23 (noting that the MOU between the SEC and the Chilean authority for securities regulation dates back to 1993).

82. *See* Raustiala, *supra* note 80, at 22-23; International Cooperation, *supra* note 80, at 3 (characterizing MOUs as vehicles for information sharing).

83. *See* Michael Foot, Managing Director, U.K. FSA, Speech at the Guernsey Financial Service Commission Seminar on International Cooperation and Exchange of Information (June 5, 2003), *available at* http://www.fsa.gov.uk/Pages/Library/Communication/Speeches/2003/sp134.shtml (stating that the FSA has approximately 150 MOUs with various regulatory authorities).

among E.U. Member State securities authorities must be considered in light of EC legislation.[84]

D. ARRANGEMENTS FOR REGULATORY COOPERATION BETWEEN E.U. MEMBER STATES MUST BE ANALYZED IN LIGHT OF THE EC FRAMEWORK FOR HARMONIZATION OF SECURITIES LEGISLATION

Prior to the adoption of the Markets in Financial Instruments Directive ("MiFID"),[85] there was no comprehensive EC scheme for regulation of securities trading markets.[86] EC regulation of securities trading markets was largely limited to the Investment Services Directive ("ISD").[87] Indeed, rules traditionally associated with the regulation of trading markets were scattered among individual directives that addressed public offers, issuer disclosure, the provision of investment services, and market integrity controls.[88] This can be partly attributed to the fact that EC legislative instruments must state the specific EC Treaty authority that causes

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84. *See* TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 17-19 (2d ed. 2006) (discussing the manner in which the European Court of Justice ("ECJ") fills "gaps" in Community law by reference to general principles of E.U. law). The ECJ has held that national courts must interpret national law in light of applicable E.U. legislation. *See, e.g.*, Case C-106/89, Marleasing v. Comercial Internacional de Alimentacion, 1990 E.C.R. I-4135 (explaining that Member State authorities, including the courts, have an obligation to undertake measures that advance their commitment to abide by E.U. legislation); *see also* MENGOZZI, *supra* note 4, at 129-30 (discussing the *Marleasing* decision and the primacy of Community law over national law).

85. Markets in Fin. Instruments Directive, *supra* note 18. The MiFID repealed the ISD. *Id.* at recital 2.

86. *See id.* at recital 5 (declaring the need for a comprehensive EC trading markets regime to apply to all types of trading facilities); *see also* MOLONEY, *supra* note 1, at 648 ("Harmonization of the substantive operational regulation of [European] markets, in the interests of investor protection and the integrity of the price-formation process, has largely been sidelined."). Moloney attributed the lack of a consensus on EC trading market regulation pre-MiFID to the fact that trading markets are not in possession of the internal market "access passport" to which investment firms are generally entitled. *Id.* at 648, 658. Harmonization through reregulation, argues Moloney, would occur if exchanges were in possession of such access passports. *Id.*

87. *See* Council Directive 93/22, 1993 O.J. (L 141) 27 (EEC) [hereinafter Investment Services Directive].

88. *See* MOLONEY, *supra* note 1, at 647 (pointing out that the securities trading market regime includes directives concerning market integrity and market abuse).

the instrument to be binding on Member States.[89] This Treaty authority is known as the legal basis.[90] The legal basis of the Community legislative instrument defines the scope of the legislation, including the method of Community decisionmaking and whether the instrument is directly applicable or calls for the harmonization of Member State law.[91] The Community decisionmaker[92] has relied on a number of different legal bases for adopting directives in the area of securities regulation.[93] This is a consequence of the fact that securities regulation, in general, involves rules affecting the conduct of disparate actors, instruments, and institutions.[94] Authority for regulating conduct thus has fallen

89. *See* EC Treaty, *supra* note 5, art. 253 (requiring that legislative acts state their legal basis); *see also* SENDEN, *supra* note 4, at 69 ("[Article 249] provides a catalogue of Community instruments, but not for a general competence to adopt them."). Senden distinguishes between specific and general legal basis provisions. Legislation directed at the establishment of the common market, of which the securities market is a part, derives from general legal basis provisions. *See id.* at 70-71.

90. *See* SENDEN, *supra* note 4, at 70.

91. *See id.* at 72.

92. *See* Fernanda Nicola & Fabio Marchetti, *Recent Developments: Constitutionalizing Tobacco: The Ambivalence of European Federalism*, 46 HARV. INT'L L.J. 507, 507 n.3 (2005) (denoting "Community decisionmaker" as a term of art in European Union law). The institution or group of institutions that has authority to act under the EC Treaty depends on which legal basis the decisionmaker cites as validating the legislative instrument that the decisionmaker is adopting. *See generally* CARL FREDERIK BERGSTRÖM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM 1-10 (2005) (discussing the division of responsibility among the European Commission, Council and Parliament in the adoption of legislation).

93. *See* MOLONEY, *supra* note 1, at 8 (stating that EC securities legislation has relied on the free movement competences set forth in Articles 44(2)(g), 47(2) and 55 of the EC Treaty and the general single market competences set forth in Articles 94 and 95 of the EC Treaty). The choice of legal basis has significant implications for the legislative procedure that the Community decisionmaker must employ to adopt legislation. *See* SENDEN, *supra* note 4, at 75-76 (discussing the division of power among the Council, Commission and Parliament). The method of adopting legislation has, in turn, a significant effect on the content of such legislation because of the divergent constituencies of the Council, Commission, and Parliament. *See id.*; *see also Final Lamfalussy Report*, *supra* note 7, at 33-35 (discussing the need to apprise the Parliament of the status of proposed legislation under the co-decision procedure advocated by the Wise Men).

94. *See generally* LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION (Aspen Law & Business, 4th ed. 2001) (taking a comprehensive look at the framework of securities regulation and outlining its

under different EC Treaty legal bases, with the resulting atomization of the EC securities regulatory regime into many distinct pieces of legislation.[95]

There were two general reasons for the absence of a comprehensive framework for exchange regulation prior to the enactment of the MiFID. First, Member States hesitated to subject their exchanges to EC-wide competition—partly because of the difficulty of creating a common regulatory framework that could embrace divergent exchange models throughout Member States.[96] Second, Member States were at times ambivalent regarding the extent of the EC Treaty mandate for creating a common market because the EC Treaty does not confer on EC institutions the general authority to regulate the common market.[97] The compromise of the Single European Act ("SEA")[98] responded to this ambivalence by laying the groundwork for a three-part common market harmonization program: harmonization of minimum standards accompanied by mutual recognition of national laws that conform to such standards and continuous home country supervision of a

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impact on participants such as brokers, dealers and investment advisors, and its dictates for market behavior).

95. *Compare* Markets in Fin. Instruments Directive, *supra* note 18, art. 2 (citing Article 47(2) of the EC Treaty as its legal basis), *with* Council Directive 2003/6, 2003 O.J. (L 96) 16 (EC) (citing Article 95 of the EC Treaty as its legal basis). An important concern in the choice of legal basis is the fact that EC Treaty legal bases cannot alone support a general Community power to regulate the securities market. *See* MOLONEY, *supra* note 1, at 9 (discussing the European Court of Justice's recent tendency to diligently review the legal basis cited for community action and its reluctance to accept the single market competences as sufficient authority for action).

96. *See* Benn Steil, *Equity Trading IV: The ISD and the Regulation of European Market Structure*, *in* THE EUROPEAN EQUITY MARKETS: THE STATE OF THE UNION AND AN AGENDA FOR THE MILLENNIUM, *supra* note 17, at 124-25 (describing the debate between France and Italy on the one hand, and the U.K., Germany, and the Netherlands on the other, in which the Member States negotiate for concessions that favor their own domestic exchange models).

97. *See* Case C-376/98, Germany v. Parliament and Council, 2000 E.C.R. I-8419, ¶ 83 (finding that the Community's powers "are limited to those specifically conferred on it"); *see also* MENGOZZI, *supra* note 4, at 71-72 (stating that Article 249 of the EC Treaty does not bestow on the Community general powers; rather, Article 3 of the EC Treaty mandates that the Community only take action in accordance with powers specifically assigned to it by the Treaty).

98. *See* Single European Act, 1987 O.J. (L 169).

regulated entity's compliance with home country standards.[99] The framework of the SEA represented a compromise between those who would have granted the EC the authority to legislate towards the creation of a unified market, and the more conservative approach that would pursue mere "convergence" of national legislation.[100]

Article 249 of the EC Treaty confers on the EC the power to issue directives, regulations, and decisions[101] to achieve Treaty objectives.[102] Regulations are directly applicable in national legislation and thus supersede conflicting national law.[103] The

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99. *See generally* Lastra, *supra* note 36, at 61 (tracing the origins of the SEA's three-part harmonization framework to the *1985 White Paper*). The SEA defined in more concrete terms the extent of market unification envisaged by the Treaty, thereby resuscitating what critics considered a faltering drive to complete the internal market. *See* Claus-Dieter Ehlermann, *The Internal Market Following The Single European Act*, 24 COMMON MARKET L. REV. 361, 363-72, 381-86 (1987) (discussing the relationship between the SEA's Articles 8(a) and 100(a) and the origin of those provisions in the *1985 White Paper*). The SEA amendments also had widespread consequences for political and monetary developments of the EC institutions. *See* Kenneth A. Armstrong, *Governance and the Single European Market*, *in* THE EVOLUTION OF EU LAW 750-51 (Paul Craig & Gráinne de Búrca eds., Oxford Univ. Press 1999) (suggesting that the Single European Market initiative created an impact at the micro, meso, and macro levels). A former Judge of the Court of Justice of the European Communities has criticized the SEA's redefinition of EC Treaty common market goals. *See* Pierre Pescatore, *Some Critical Remarks on the "Single European Act,"* 24 COMMON MARKET L. REV. 9, 11-12 (1987) (suggesting that setting deadlines for the completion of the "internal market" envisaged by the Single European Act, as opposed to the broader "common market" concept contemplated in the original EEC Treaty, limits the capacity of the amended EC Treaty to achieve pervasive harmonization of markets).

100. *Compare* Pescatore, *supra* note 99, at 11-12 (criticizing the SEA and arguing that the European Court of Justice's interpretation of the common market goals of the EC Treaty and the combined acts of Community institutions provides sufficient legal basis for the EC to unify Community markets), *with* Ehlermann, *supra* note 99, at 361-64 (lauding the SEA for defining "common market" to be "an area without internal frontiers").

101. EC securities legislation has employed the decision instrument of Article 249 EC Treaty sparsely because of the limited applicability of that instrument. *See* MOLONEY, *supra* note 1, at 19. Decisions are binding on those to whom they are addressed. EC Treaty, *supra* note 5, art. 249.

102. EC Treaty, *supra* note 5, art. 249.

103. *Id.* art. 249; *see* SENDEN, *supra* note 4, at 47 (stating that Community regulations need not be transposed directly into Member States' laws because regulations supersede conflicting national laws). Regulations may, however,

principles of proportionality and subsidiarity[104] had counseled against the use of the regulation because that legislative instrument is less respectful of the sovereignty of Member States than the directive.[105] The directive is the most common binding legislative instrument in the EC securities regulation regime.[106] The directive binds Member States as to the result to be achieved.[107] Thus, Member States must modify their national laws so as to achieve the objectives of the directive.[108] This has resulted in a significant problem of inconsistent national level implementation of the terms of directives among Member States.[109]

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contain terms that the Member State is required to implement into national law. *See id.*

104. *See* SENDEN, *supra* note 4, at 79-81 (discussing the origin of the principle of subsidiarity that is contained in Article 5 of the EC Treaty). The subsidiarity principle stands for the proposition that the E.U. may adopt legislation only if one of the treaties comprising the E.U. has conferred a power to act. *See id.* at 81. While the principle of subsidiarity determines at the threshold whether the EC may enact legislation that is binding on Member States, the principle of proportionality elucidates the secondary issue of the permissible scope of EC legislation. *See* TRIDIMAS, *supra* note 84, at 176. While the principle of subsidiarity is operative only where the EC shares a competence with Member States, the principle of proportionality is operative in instances of shared competences and where the EC has an exclusive competence as well. *See id.*

105. *See Final Lamfalussy Report*, *supra* note 7, at 14 (attributing the sparse use of regulations in the EC securities regime as a result of "subsidiarity pressure" from Member States); *see also* MOLONEY, *supra* note 1, at 17 (characterizing the directive as having a "split competence structure" and suggesting that this alleviates Member State sovereignty concerns).

106. *See* MOLONEY, *supra* note 1, at 17.

107. *See* EC Treaty, *supra* note 5, art. 249. *See generally* SACHA PRECHAL, DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY OF DIRECTIVES AND THEIR ENFORCEMENT IN NATIONAL COURTS 44-58 (1995) (discussing the general nature of Member States' obligation to achieve the results that a directive dictates).

108. *See* SENDEN, *supra* note 4, at 49. The directive not only obliges Member States to achieve the objectives of the directive, but requires that Member States apply and enforce national law so as to achieve the objectives of the directive as well. *See id.*

109. *See Initial Lamfalussy Report*, *supra* note 34, at 33 (stating that 75% of respondents consulted by the Wise Men during the evaluation of the EC securities legislation framework considered that Member States neither transposed nor implemented directives consistently); *see also* MOLONEY, *supra* note 1, at 17-19 (attributing the problem of inconsistent implementation to the fact that, at times, legislative provisions are vague and lack clear definitions). Moloney also cites the absence of guiding principles as a cause of divergent implementation of directives that are insufficiently clear as to their objective. *See id.* at 18.

Indeed, the Wise Men identified the problem of inconsistent implementation as a major impediment to the completion of the common EC securities market.[110] Thus, the Wise Men called on the Community decisionmaker to make greater use of the regulation for securities legislation[111] and to supplement the SEA harmonization program with a four level hierarchy of legislation that is intended to minimize the problem of inconsistent national level implementation of EC securities directives.[112] The Wise Men also called for the establishment of the Committee of European Securities Regulators ("CESR").[113] CESR now serves two distinct functions in the EC securities regime.[114] As an advisory body under Level 2 of the Lamfalussy Process, CESR consults with the Commission during the drafting of securities legislation.[115] Under Level 3 of the Lamfalussy Process, CESR serves as a forum for collaboration among securities authorities to ensure consistent implementation of EC securities legislation.[116]

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110. *See Final Lamfalussy Report*, *supra* note 7, at 13-15 (stating that the national level implementation problem is a result of both ambiguity in the directives themselves, as well as the lack of coordination among national securities regulators charged with administering national regulations).

111. *See id.* at 26 (proposing the use of regulations over directives).

112. *See generally* Avgouleas, *supra* note 3, at 185-88 (discussing the Lamfalussy Process' four-level regulatory approach). "Level 1" legislation largely is to consist of directives that outline general principles, while "Level 2" directives and regulations are to elucidate technical details of regulation that are necessary to avoid inconsistent implementation by Member States. *See id.* "Level 2" legislation is to employ the comitology procedure, thus excluding the active involvement of the Parliament and increasing the efficiency of the legislative process. *See id.* "Level 3" is directed towards cooperation among national regulators and consistency in administration of the law, while "Level 4" of the Lamfalussy Process seeks to ensure consistency in enforcement. *See id.*

113. *See Final Lamfalussy Report*, *supra* note 7, at 31. The Wise Men had designated the body the Committee of European Securities Regulators prior to its creation. *See id.*

114. *See* Lastra, *supra* note 36, at 63 n.48 (stating that CESR was established on June 6, 2001 as an advisory committee to the European Commission). CESR grew out of the cooperative forum that previously existed under the auspices of the Federation of European Securities Commissions ("FESCO"). *See id.*

115. *See Final Lamfalussy Report*, *supra* note 7, at 31 (noting that CESR, also known as "ESRC," serves as an "independent advisory committee" during Level 2 of the Lamfalussy Process).

116. *See Final Lamfalussy Report*, *supra* note 7, at 31.

II. ANALYSIS

The foregoing discussion demonstrates that market forces have begun to drive harmonization of E.U. Member State securities regulation independently of EC legislative efforts towards this end. The success of the pan-European stock exchange Euronext and its recently announced merger with the NYSE demonstrate the power of market-driven harmonization.[117] The market-driven harmonization of securities rules governing the operation of Euronext markets occurs under the consultative framework of the Euronext Regulatory MOU.[118] However, the relationship of the Euronext Regulatory MOU to EC securities legislation is not clear.[119] It is important, then, to understand how the Euronext Regulatory MOU interacts with EC securities legislation so that these instruments do not work at cross-purposes.[120]

A. THE EURONEXT REGULATORY MOU IS TAILORED TO THE GOAL OF INTEGRATING EC SECURITIES TRADING MARKETS

I argue that the regulatory authorities of Belgium, France, and the Netherlands originally created the Euronext College to address the challenges of exchange consolidation in light of the absence of a well-defined mandate to harmonize Member State trading market rules. Although EC internal market legislation provided regulators with general harmonization imperatives, there was no EC directive or regulation directly applicable to harmonization of trading market

117. *See* NYSE Group and Euronext Announce Merger: U.S.-European Deal to Create Global Exchange, 13 NYSE GROUP NEWSLETTER (NYSE Group, Inc., New York, N.Y.), June 2006, *available at* http://www.nyse.com/about/publication/1145959806931.html (announcing and detailing the merger of the NYSE Group with Euronext). *Cf.* Cally Jordan & Giovanni Majnoni, *Regulatory Harmonization and the Globalization of Finance*, *in* GLOBALIZATION AND NATIONAL FINANCIAL SYSTEMS 265-68 (James A. Hanson et al. eds., 2003) (arguing that market participants play a crucial and often overlooked role in inducing convergence of regulatory standards).

118. *See* Euronext Regulatory MOU, *supra* note 12, art. I (explaining that the goal of cooperative supervision is to enhance the efficiency of the overall regulatory framework).

119. *See infra* Part II.A.2 (discussing the differing viewpoints concerning the need for and goals of the Euronext Regulatory MOU).

120. *Cf. infra* Part II.A (analyzing the Euronext Regulatory MOU in the context of the EC).

rules at the time Euronext was created.[121] The harmonization framework established in the Euronext Regulatory MOU is effective because technological advances are driving the global consolidation of the financial services industry and are thus constantly changing the structure of the industry and the regulatory dynamic.[122] Because the Euronext Regulatory MOU provides for close cooperation between industry and the regulators in developing new rules for securities exchange regulation, the rules thus negotiated are better informed of the emerging structure of the industry. Moreover, the Euronext Regulatory MOU has the additional benefit of harmonizing securities exchange regulation without the negative effects of "race to the bottom," since multiple regulators of varying levels of expertise and regulatory approaches are involved in the harmonization process.[123]

Generally, one can identify three degrees of regulatory convergence.[124] First, non-binding MOUs facilitate cooperation between regulatory authorities in the enforcement of their statutes.[125]

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121. *See supra* notes 87-90 and accompanying text (discussing the ISD and the lack of a coherent framework for EC regulation of trading markets).

122. *See* Raustiala, *supra* note 80, at 22 (noting that MOUs help generate "loose and adaptable frameworks"); *supra* note 25 and accompanying text (discussing the cycle of deregulation, technological adaptation, increased competition, and reregulation).

123. *See* Manning Gilbert Warren, *Regulatory Harmony in the European Communities: The Common Market Prospectus*, 16 BROOK. J. INT'L L. 19, 50-51 (1990) (suggesting that the mutual recognition principle requires E.U. Member States with higher standards to accept the lower regulatory standards of other jurisdictions, thus placing pressure on the state with the higher standard to level the playing field for its nationals by withdrawing its higher standard of regulation).

124. *See Examining the Impact of the Sarbanes-Oxley Act and Developments Concerning International Convergence: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 11-12 (2004) (statement of Andrew Sheng, Chairman, Securities & Futures Commission of Hong Kong) (distinguishing between harmonization of applicable laws and convergence between regulatory goals and principles). *Cf.* Shaffer, *supra* note 19, at 32-33 (comparing three methods for lowering regulatory barriers to trade: harmonization of rules, mutual recognition of foreign standards, and national treatment).

125. *See* Raustiala, *supra* note 80, at 22-23 (comparing MOUs to mutual legal assistance treaties ("MLATs") and arguing that regulators prefer MOUs as a vehicle for information sharing because action under an MOU does not trigger the procedural complexities and involvement of judicial authorities as is the case under an MLAT). Authorities tend to employ the MLAT when a jurisdiction has more

Second, one can see an increasing degree of convergence in "positive comity" accords[126] and agreements regarding mutual recognition of foreign regulatory standards.[127] Third, the greatest degree of

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stringent secrecy laws and when the regulator is seeking information for use in criminal rather than civil proceedings. *See id.* at 31-38.

126. *See* Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 951 (2002) (describing positive comity initiatives as an expansion of the principle of mutual assistance inherent in MOU and MLAT arrangements and noting that contemporary trends in bilateral competition enforcement agreements exhibit characteristics of "shared sovereignty"). Positive comity agreements enable the regulatory authority of one jurisdiction to enforce the standards of a foreign jurisdiction when the foreign jurisdiction so requests. *See id.* at 951 n.109. Regulators tend to view such arrangements favorably because they limit the potential for conflict arising from extraterritorial application of law. *See* OECD Committee on Competition Law & Policy, *CLP Report on Positive Comity* ¶ 59 (OECD Doc. DAFFE/CLP(99)19) (June 1999), *available at* www.oecd.org/dataoecd/40/3/2752161.pdf (stating the EC's position that recourse to positive comity accords has the desirable effect of limiting U.S. extraterritorial application of competition law). *See generally* Merit E. Janow, *Transatlantic Regulatory Cooperation in Competition Policy: The Case for 'Soft Harmonization' and Multilateralism Over New US EU Institutions*, *in* TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS, *supra* note 78, at 253-61 (discussing the 1998 U.S.-E.U. Positive Comity Accord). The 1998 Positive Comity Accord delineates the terms on which the competition authorities of one nation may refer suspected anticompetitive conduct that is occurring within the jurisdiction of one country and harming the interests of the referring nation. *See id.* at 254; *see also* Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-EC, 37 I.L.M. 1070 (1998) [hereinafter 1998 Positive Comity Accord].

127. *See* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 918-21 (1998) (terming mutual recognition agreements to be "normal reciprocity" agreements and citing the example of the U.S.-Can. Multijurisdictional Disclosure System ("MJDS")); Hertig, *supra* note 48, at 221 (describing mutual recognition as both a "negative integration" and a "positive integration" approach to harmonization). The mutual recognition principle was also a core element of EC securities harmonization prior to the adoption of the Lamfalussy Process, which mandated more comprehensive legislation. *See* Warren, *supra* note 25, at 198 (stating that the SEA represented a tactical change in the sense that, after the SEA, EC legislation no longer sought to create uniform rules, but rather required Member States to implement minimum regulatory standards and to recognize the adequacy of compliance with such standards throughout the EC); *supra* note 112 (detailing the Lamfalussy Process). *But cf.* MOLONEY, *supra* note 1, at 197 (discussing the failure of the EC mutual recognition approach); Felicia H. Kung, *The Rationalization of Regulatory Internationalization*, 33 LAW & POL'Y INT'L BUS. 443, 462-64 (2002) (criticizing

convergence arises in the EC mandate to actively harmonize the securities legislation of Member States.[128] The Euronext Regulatory MOU does not fall squarely into any of these three categories,[129] but rather must be understood as a unique arrangement to facilitate the achievement of the harmonization mandates of EC securities legislation in light of gaps in that legislation.[130] The Euronext Regulatory MOU does not resemble the MOUs to which the SEC is a party because the signatories to the Euronext Regulatory MOU treat the arrangement as creating positive legal obligations. Finally, the Euronext Regulatory MOU itself is modeled on the EC harmonization framework that existed prior to the advent of the Lamfalussy Process.

1. U.S. SEC MOUs Do Not Seek Convergence in Regulatory Standards Among Jurisdictions

It is important to recognize at the outset that the fact that a cooperative arrangement between regulatory authorities is not labeled an MOU does not necessarily mean that the instrument shares the characteristics normally associated with MOUs.[131] In the context of cooperation in securities law enforcement,[132] MOUs that

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mutual recognition under MJDS because it does not treat all issuers equally, encourages regulatory arbitrage, and stifles innovation in regulatory standards).

128. *See supra* note 100 and accompanying text (discussing EC Treaty mandate to create a single internal market).

129. *Cf.* Raustiala, *supra* note 80, at 37-38 n.173 (noting that the DOJ has a number of less formal international arrangements that do not rise to the level of a binding international treaty, such as an MLAT). Raustiala argues that these instruments resemble MOUs, but that the DOJ nevertheless treats them as binding sole executive agreements. *See id.*

130. *Cf.* Wymeersch Working Paper, *supra* note 3, at 3 (discussing "contractually organi[z]ed supervision" of financial services providers).

131. *See* Raustiala, *supra* note 80, at 37-38 (noting that DOJ employs a number of informal international arrangements that resemble MOUs while not being labeled MOUs).

132. *See id.* at 30-32 (stating that SEC MOUs provide avenues for the sharing of information, policy initiatives, and enforcement resources between regulators). SEC MOUs are generally of three types: enforcement MOUs, regulatory MOUs, and technical assistance MOUs. Technical assistance MOUs focus on providing assistance to foreign regulators, primarily from jurisdictions with underdeveloped markets, in developing a regulatory policy and in training personnel in the effective enforcement of regulatory policy. *See id.* at 32-35 (arguing that the provision of technical assistance to developing markets has the desirable side-effect of

the SEC has concluded generally state that they create no legal obligations on the part of the signatory authorities and merely express the intent of the signatories as to a future course of action.[133] Enforcement MOUs generally delineate the terms on which the authorities intend to share information needed to investigate or litigate potential violations of the securities laws.[134] These MOUs are

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influencing regulatory policy choices in developing markets and "exports" SEC-style regulation and enforcement); *see also* Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 293-97 (2004) (arguing that the SEC's annual international enforcement and market development training institutes provide a visible forum for "export" of U.S. securities regulatory standards); Frank S. Shyn, *Internationalization of the Commodities Market: Convergence of Regulatory Activity*, 9 AM. U. J. INT'L L. & POL'Y 597, 640-42 (1994) (discussing the CFTC's enforcement and regulatory MOUs). The SEC's regulatory MOUs do not provide for convergence in regulatory policy, as does the Euronext Regulatory MOU, but rather they are arrangements for prudential supervision of particular financial services firms. *Cf.* Raustiala, *supra* note 80, at 29-30 (stating that the SEC has entered over "30 MOUs with foreign authorities," each detailing required cooperative efforts).

133. *See* Raustiala, *supra* note 80, at 23 (stating that MOUs have a "quasi-legal authority"). *See, e.g.*, Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ¶ 15(a), U.S.-Sing., May 16, 2000, *available at* http://www.sec.gov/about/offices/oia/oia_bilateral/singapore.pdf [hereinafter SEC-Sing. Enforcement MOU] (declaring that the MOU is not legally binding and does not supersede domestic law). MOUs sponsored by international organizations such as the International Organization of Securities Commissions ("IOSCO") also operate in terms on a non-binding basis. *See* OICU-IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, Members of the International Organization of Securities Commission, ¶ 6(a), May 2002 (declaring that the MOU is not legally binding and does not supersede domestic law); *see also* David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 561-69 (2005) (discussing the role of IOSCO in facilitating cooperation among securities regulators).

134. *See* International Securities Enforcement Cooperation Act of 1990, Pub. L. No. 101-550, title II, 104 Stat. 2714 (1990) (granting the Commission the authority to release records for multiple purposes including for enforcement of rules and regulations). *See generally* Pamela Jimenez, *International Securities Enforcement Cooperation Act and Memoranda of Understanding*, 31 HARV. INT'L L.J. 295, 295-97 (1990) (explaining how the International Securities Enforcement Cooperation Act, S. 2544, 100th Cong., 2d Sess. (1988), gave the SEC authority to enter into the information sharing arrangements that form the foundation of MOUs). The SEC's MOUs also contain provisions that limit the permissible use of information obtained under the MOU. *See, e.g.*, SEC-Sing. Enforcement MOU, *supra* note 133, ¶ 19(a)(ii) (stating that a requesting authority may use information for a purpose beyond the specific need identified in an initial request for assistance, but within the general framework of such request, only where the information is sought to be

generally confined to information sharing efforts and do not contemplate actual enforcement of domestic law for the benefit of the foreign jurisdiction.[135] Indeed, the information sharing arrangements of SEC enforcement MOUs do not implicate traditional international comity[136] considerations either, since the invocation by a foreign regulator of its investigatory and subpoena powers at the behest of the SEC generally does not involve conflicts among foreign and domestic law.[137]

The SEC also has entered into four MOUs that it identifies as "regulatory MOUs,"[138] but these instruments constitute little more than information sharing arrangements tailored to the prudential supervision of particular financial services firms that are subject to

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used to support a charge of violation of the laws administered by the requesting authority).

135. *But see* 1998 Positive Comity Accord, *supra* note 126, ¶¶ 14, 19 (distinguishing between providing investigatory assistance to a foreign authority and conducting enforcement proceedings at the behest of a foreign authority). The 1998 Positive Comity Accord, however, in the context of cooperation in competition law enforcement, does contemplate enforcement of domestic law for the benefit of a foreign jurisdiction. *See id.* A regulatory authority acts on a positive comity request of a foreign authority by engaging in domestic law enforcement proceedings to remedy harm occurring in the foreign jurisdiction. *See id.* ¶ 18.

136. *See id.* ¶ 18 (defining "negative comity" as the consideration that the judicial authorities of one nation give to the effect that enforcement action may have on the interests of a foreign jurisdiction).

137. *See, e.g.*, SEC-Sing. Enforcement MOU, *supra* note 133, ¶ 15(d)(i) (declaring that a request for investigatory assistance may be denied if such assistance contravenes the domestic law of the requested authority). *But see* George C. Nnona, *International Insider Trading: Reassessing the Propriety and Feasibility of the U.S. Regulatory Approach*, 27 N.C.J. INT'L L. & COM. REG. 185, 198 (2001) (arguing that compelling foreign banks to reveal customer records that are protected under domestic law implicates international comity concerns in international insider trading litigation). Prior to the adoption of MOUs, the SEC relied on MLATs for investigatory assistance in foreign jurisdictions, and MLATs often contained "dual criminality" clauses, which required the subject matter of the investigation to implicate the criminal laws of the United States and the foreign nation providing the assistance. *See id.* at 199-200; *see also* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 79 (1991) (arguing that a court's use of international comity to decline enforcement of otherwise applicable local law has the effect of protecting the jurisdictional choices of private parties).

138. *See* SEC, Cooperative Arrangements with Foreign Regulators (2007), *available at* http://www.sec.gov/about/offices/oia/oia_cooparrangements.htm (last visited Feb. 4, 2007) (listing and categorizing the MOUs to which the SEC is a party).

regulation in multiple jurisdictions.[139] Similar to SEC enforcement MOUs, they state that they create no legal obligations on the part of the signatory agencies.[140] The regulatory MOUs permit the SEC to conduct on-site visits in the territory of a foreign jurisdiction to ensure compliance with ongoing obligations under U.S. securities laws.[141] The innovation of SEC regulatory MOUs is that these arrangements augment the information sharing provisions of an enforcement MOU by extending the arm of the SEC compliance and inspection program[142] such that the SEC may have direct access to the records of foreign firms that are subject to self-regulatory organization ("SRO"),[143] broker-dealer,[144] or clearing organization[145]

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139. *See* Undertaking on Consultation and Cooperation Regarding Belgian Firms That Are Members of U.S. Clearing Organizations, U.S.-Belg., 1-2, July 6, 2006, *available at* http://www.sec.gov/about/offices/oia/oia_bilateral/belgium.pdf [hereinafter U.S.-Belg. Undertaking] (stating that the Belgian financial regulatory authority, the CBFA, intends to provide the SEC with information relevant to the financial condition of Belgian firms that participate in U.S. clearing organizations); Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws and Declaration on Cooperation and Supervision of Cross-Border Investment Management Activity, U.S.-H.K., ¶¶ 2-3.9, Oct. 5, 1995, *available at* http://www.sec.gov/about/offices/oia/oia_bilateral/hongkong.pdf (delineating the terms of assistance in conducting on-site inspections of financial service providers and explaining the purpose for consultation between securities authorities in China and Hong Kong); Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms, U.S.-U.K., ¶¶ 21(a)(1), 23, Mar. 14, 2006, *available at* http://www.sec.gov/about/offices/oia/oia_multilateral/ukfsa_mou.pdf [hereinafter U.S.-U.K. Regulatory MOU] (providing for on-site compliance inspections and exchange of records pertaining to the financial condition of particular firms).

140. *See, e.g.*, U.S.-Belg. Undertaking, *supra* note 139, at 2 (stating that the Undertaking does not create legal obligations, confer rights, or supersede domestic law).

141. *See* U.S.-U.K. Regulatory MOU, *supra* note 139, ¶¶ 7(a), 23 (granting the SEC the authority to conduct a "routine, sweep, or for-cause regulatory visit to, or inspection of the books, records, and premises of, a Firm" located in the United Kingdom).

142. *See* John H. Walsh, *Right The First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry*, 1997 COLUM. BUS. L. REV. 165, 177-84 (1997) (discussing the SEC compliance inspection and examinations program and the manner in which it promotes market integrity by discouraging SRO member misconduct). The SEC periodically inspects the records of SROs to ensure that the SRO is adequately supervising the conduct of SRO members. *See id.* at 178.

143. *See* CFTC On-line Glossary, http://www.cftc.gov/educationcenter/glossary

compliance with U.S. securities laws.[146] Essentially, such MOUs create a joint surveillance program.[147] The SEC's enforcement and regulatory MOUs thus do not contemplate coordination or convergence in securities regulation proper.[148] Rather, these arrangements seek to circumvent the slow process of information sharing under mutual legal assistance treaties ("MLATs"),[149] while minimizing the potential for jurisdictional conflict that would arise if a court were to compel the production of documents in a foreign jurisdiction.[150]

/glossary_s.html#selfregulatory (last updated Sept. 4, 2007) (defining SROs as "exchanges and registered futures associations that enforce financial and sales practice requirements for their members"); Brandon Becker, *A Regulatory Perspective on The Global Securities Market*, 1987 COLUM. BUS. L. REV. 309, 310 (1987) (discussing the complexity of SRO oversight where there are international linkages between securities markets operating as SROs).

144. *See* Walsh, *supra* note 142, at 170-71 (discussing supervisory requirements of broker-dealers over their employees).

145. *See generally* Benn Steil, *International Securities Markets Regulation*, *in* INTERNATIONAL FINANCIAL MARKET REGULATION 209, 214-18 (Benn Steil ed., John Wiley & Sons 1994) (explaining the components of a clearance and settlement system for securities transactions). The risks involved in cross-border securities transactions increase where divergent standards exist to determine specifics such as the moment at which ownership of a subject security arises during an international transaction. *See id.* at 216-17.

146. *See* Becker, *supra* note 143, at 311-12 (characterizing the SEC-FSA MOU as a "surveillance sharing procedure").

147. *See id.*

148. *But see* Slaughter, *supra* note 132, at 292-93 (explaining how networks, regardless of whether the network has the purpose of converging regulation, will influence the policy and enforcement approaches of regulators and tend to bring about a degree of convergence).

149. *See* Nnona, *supra* note 137, at 199-200.

150. *See* Treaty on Mutual Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 27 U.S.T. 2020, 2040 (outlining documents the state must make available to foreign authorities); Swiss Supreme Court Opinion Concerning Judicial Assistance in the Santa Fe Case, 22 I.L.M. 785, 795 (1983) (holding that the U.S. DOJ request for judicial assistance from Swiss Courts in compelling the production of documents from Swiss banks does not meet the compulsory measures requirement of the Treaty because insider transactions qualify as neither unfaithful management nor fraud under Swiss law); Paul G. Mahoney, *Securities Regulation By Enforcement: An International Perspective*, 7 YALE J. ON REG. 305, 317 n.60, 318 (1990) (discussing the conflicts between the SEC and Swiss courts in early insider trading cases for which Swiss courts refused to compel the production of documents under the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters).

2. The Euronext Regulatory MOU Is Not Merely a Statement of Intent, but Rather Creates Independent Regulatory Obligations for Euronext

The primary concern of the Euronext Regulatory MOU, on the other hand, is the establishment of a "coherent" regulatory framework for Euronext markets.[151] The Euronext Regulatory MOU only cursorily touches upon enforcement-related information sharing and surveillance of the activities of market participants for compliance purposes.[152] Filling that role is the Federation of European Securities Commissions ("FESCO") Multilateral Memorandum of Understanding,[153] which already delineated the terms of enforcement and compliance cooperation among European securities regulators at the time the Euronext Regulatory MOU was drafted.[154] Further, the Euronext Regulatory MOU does not state in terms that it is not binding,[155] as is the case with all MOUs to which

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151. *See* Euronext Regulatory MOU, *supra* note 12, art. I (outlining the principles and objectives of cooperation by the College of Euronext Regulators).

152. *See id.* art. X.

153. *See* Committee of European Securities Regulators, Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities art. 3 (Jan. 26, 1999), *available at* http://www.cesr-eu.org/popup2.php?id=190 (detailing the scope of mutual assistance in enforcement, monitoring, and investigation required from members of the FESCO); Corcoran & Hart, *supra* note 47, at 281-82 (discussing the activities of FESCO). CESR superseded FESCO as a cooperative forum and gained a mandate to advise the European Commission on proposed EC securities legislation. *See* John F. Mogg, *European Union Law Essays: Regulating Financial Services in Europe: A New Approach*, 26 FORDHAM INT'L L.J. 58, 73-74 (2002) (discussing the role of CESR in providing advice to the European Commission on the drafting of EC securities legislation under the Lamfalussy Process).

154. *See* Committee of European Securities Regulators, The Role of CESR at "Level 3" Under The Lamfalussy Process: Action Plan For 2005 CESR/04-527b ¶ 1.2 (Oct. 2004), *available at* http://www.cesr-eu.org/popup2.php?id=2550 [hereinafter Role of CESR at "Level 3"] (contrasting the cooperation dynamic among regulators in FESCO with the heightened cooperation mandate of CESR). CESR's Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities has succeeded the FESCO MMOU. *See* Committee of European Securities Regulators, Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities CESR/05-335 (May 2005), *available at* http://www.cesr-eu.org/popup2. php?id=190.

155. *See generally* Euronext Regulatory MOU, *supra* note 12.

the SEC is a party.[156] Indeed, the language used in portions of the document suggests that, at the very least, the MOU does not disclaim that its provisions create legal obligations on the part of Euronext or the signatory authorities.[157]

The agreement is the foundational document of the Euronext College.[158] The Euronext College consists of a Chairman's Committee[159] and a Steering Committee,[160] which has authority under the MOU to create working parties[161] to address particular aspects of the coordinated regulation of Euronext. The Chairmen's Committee consists of the Chairmen of the regulatory authorities that are party to the MOU.[162] Significantly, the MOU identifies particular actions, decisions, and events which require that Euronext obtain prior

156. *See id.* (regarding non-binding nature of SEC MOUs).

157. *See id.* at pmbl. ("[W]hereas each of the authorities involved adheres to this MOU and will perform the functions that correspond to the powers conferred upon it by its national laws."); *id.* art. XI, ¶ 11.3 (the French, English, and Dutch versions of this MOU "are deemed to have an equal legal value"); *id.* at pmbl. (defining how the authorities "intend to exercise their responsibilities with respect to the co-ordinated regulation and supervision of Euronext").

158. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at A-15 (defining the College of Euronext Regulators).

159. *See* Euronext Regulatory MOU, *supra* note 12, art. I, ¶ 1.1 (stating that the Chairmen's Committee consists of the Chairmen of the regulatory authorities that are party to the MOU).

160. *See id.* art. I, ¶ 1.2. (stating that the Steering Committee prepares the meetings of the Chairmen's Committee).

161. *See id.* (granting the Steering Committee authority to create working parties).

162. *See id.* art. I, ¶ 1.1 (stating that the Chairmen of the full signatory authorities comprise the Chairmen's Committee). Currently, the Chairmen's Committee is composed of the Chairmen of the French AMF, the Netherlands AFM, the Belgian CBFA, the Portuguese CMVM, and the U.K. FSA; NYSE EURONEXT PROSPECTUS, *supra* note 51, at 134 (defining the Committee of Chairmen of the College). The MOU provides that a regulatory authority that has jurisdiction over any new trading markets that Euronext might acquire can become a party to the MOU and participate in the regulatory coordination of the College. *See* Euronext Regulatory MOU, *supra* note 12, art. XI, ¶ 11.5. Euronext Amsterdam N.V. and Euronext Brussels Market Authority, two of the market operator subsidiaries of Euronext N.V., are associated signatory authorities to the MOU, but as such are not participants in the Chairmen's Committee. *See id.* at pmbl. Thus, the College as regulator takes decisions at arm's length from the regulated entity, demonstrating that the drafters of the MOU were mindful of the dangers of regulatory capture. *See id.* art. VII, ¶ 7.1.

approval[163] or non-opposition[164] from the Euronext College, or notify the Steering Committee of the Euronext College of the occurrence of such events.[165] Thus, where a Euronext securities market takes action or makes a decision that falls within a review competence[166] of the Euronext College, Euronext must submit that decision or action for the review of the Euronext College as if it were a free-standing regulatory body.[167] Such obligations are independent of national level obligations to submit such action or decision for review to the securities regulator with authority over the particular jurisdiction in which the Euronext market that is taking the action or decision is located.[168] Thus, Euronext's obligation to the Euronext College is independent and additional to its obligations to comply with national law.[169]

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163. *See* Euronext Regulatory MOU, *supra* note 12, art. II, ¶ 2.1.

164. *See id.* art. III, ¶ 3.1.

165. *See id.* art. IV, ¶ 4.1. Euronext must notify the Steering Committee of the admission, sanction, suspension, or exclusion of a market member, or the listing or delisting of, or suspension of trading in, a financial instrument. *See id.* art. IV, paras. 4.1.1-4.1.2.

166. *See id.* arts. II-IV (describing the prior approval, non-opposition, and notification competences of the College).

167. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 194 (stating that the Chairmen's Committee of the College takes decisions by consensus).

168. *See* Euronext Letter, *supra* note 68 (stating that Euronext's submissions to the College regarding the NYSE Euronext merger, which the College is required to review under Article 2.1.3, are adequate, but that such submissions in no way operate to satisfy obligations to the national securities authorities that may exist under national law); *see also* Press Release, Autorité des marchés financiers, France, Euronext Regulators Committee: Constitution of An Ad Hoc Committee on Projected Mergers Between Euronext and Other Market Operators (June 29, 2006), *available at* www.amf-france.org/documents/general/7189_1.pdf (stating that Euronext must obtain domestic authorization for its merger with the NYSE independently of the approval granted by the College).

169. *See generally* EURONEXT ANNUAL REPORT, *supra* note 42, at 163-64 (listing the competences of the national securities authorities that have jurisdiction over Euronext's Amsterdam, Brussels, Lisbon, and Paris markets, and the London International Finance Futures and Options Exchange ("LIFFE")). Under Dutch law Euronext must also obtain prior approval of the Netherlands AFM for the adoption of its Rulebooks. *See id.* at 163. The French AMF also must approve the Rulebooks of regulated markets. *See id.* at 164. *See generally* Guido Ferrarini, *Exchange Governance and Regulation: An Overview*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND 248-51 (Guido Ferrarini, ed., Kluwer Law International 1998) (discussing the modification of Belgian, French, and Dutch law pertaining to the regulation of exchanges in

Decisions at the Chairmen's Committee are taken by consensus.[170] The regulatory relationship of each individual Euronext market operator with the securities authority in the relevant jurisdiction is thereby altered because events that trigger the prior approval or non-objection obligations will require the involvement of the entire Euronext College.[171] Despite the convergence in EC securities regulation that has taken place thus far, European regulatory authorities nevertheless have significantly divergent regulatory approaches to securities markets.[172] One can expect that Euronext College review of a proposed change of the Euronext Rulebook or the issuance of an interpretation of those rules is not certain to yield the same results as would obtain if the home country regulator alone were to review the measure pursuant to applicable domestic law.[173]

On the one hand, Euronext is subject to regulatory oversight that is not dictated exclusively by the national law of any jurisdiction in which Euronext operates, but on the other hand, there was no EC securities legislation directly on point when the Euronext College was created.[174] Euronext was thus operating in a regulatory gap in the

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response to the provisions of the ISD and the implementation of the ISD's mandate to treat exchanges as "regulated markets").

170. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 194 (stating that the Chairmen's Committee of the College takes decisions by consensus).

171. *See* Euronext Regulatory MOU, *supra* note 12, art. II, ¶ 2.1.

172. *See, e.g.*, Yannis V. Avgerinos, *The Need and the Rationale for a European Securities Regulator*, *in* FINANCIAL MARKETS IN EUROPE: TOWARDS A SINGLE REGULATOR?, *supra* note 3, at 164-65 (discussing FSA's comments regarding the perceived impossibility of harmonizing U.K. and German regulation of exchanges).

173. *See* Euronext Regulatory MOU, *supra* note 12, art. II, ¶ 2.1 (listing decisions subject to prior approval of the Euronext College); *id.* art. III, ¶ 3.1 (listing decisions subject to non-opposition by the Euronext College).

174. *Compare* Investment Services Directive, *supra* note 87, art. 23.3 (directing Member State authorities to "collaborate closely in order more effectively to discharge their respective responsibilities in the area covered by this Directive" in cases where investment firms had established operations in multiple Member States), *with* Markets in Fin. Instruments Directive, *supra* note 18, art. 56.2 (requiring home and host Member States to "establish proportionate cooperation arrangements" for the supervision of regulated markets, where the operations of a regulated market in a host state are of "substantial importance" for the securities markets of the host state). Thus, the regulatory cooperation provisions of the ISD were clearly more modest and limited to supervision of investment firms, while the regulatory cooperation provisions of the MiFID are applicable to regulated markets as well.

EC securities regime and the Euronext Regulatory MOU was concluded to fill this gap.[175]

No less significant is the fact that the parties to the MOU have treated the instrument as creating positive legal obligations.[176] The Prospectus of NYSE Euronext, Inc. ("NYSE Euronext Prospectus") states that the Euronext College must approve the NYSE Euronext combination before the filing and commencement of the tender offer that will consummate the merger of the NYSE and Euronext.[177] The MOU thus appears to have created legal obligations that Euronext and the NYSE are willing to recognize, even if the MOU is not a

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175. *Cf.* Wymeersch Working Paper, *supra* note 3, at 3 (stating that regulators in the field of prudential supervision of financial conglomerates had begun to coordinate action through MOUs); *see also* MOLONEY, *supra* note 1, at 881-82 (stating that the co-operation procedures contained in EC financial markets directives have compelled national regulators to enter into MOUs to organize cooperative efforts). Professor Wymeersch refers to the use of MOUs to coordinate harmonization efforts as "contractually organized" supervision, particularly in cases where market participants are included in the regulatory dialogue of the MOU. *See* Wymeersch Working Paper, *supra* note 3, at 3. *But see* Susanne Bergstraesser, *Cooperation Between Supervisors*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND, *supra* note 169, at 378-80 (suggesting that MOUs delineating the terms of information exchange should not be necessary in a field regulated by E.U. directives, as such directives would provide the terms of information exchange and oblige the regulatory authorities to exchange information on those terms). However, it is clear that the Euronext Regulatory MOU is not limited to information exchange. Indeed, and as Bergstraesser concedes, MOUs are a useful mechanism for facilitating intensive collaboration between regulators on a project that requires joint effort. *See id.* at 379 (discussing the advantages of cooperation among banking authorities to achieve the mandates of the Second Banking Coordination Directive). Harmonization of the complicated web of rules that constitutes EC securities regulation will require intensive collaboration and joint efforts, and this is precisely what the MOU seeks to facilitate through the Chairmen's and Steering Committees of the College.

176. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 148-51 (outlining the conditions that each party must fulfill before the NYSE Euronext combination can occur).

177. *See id.* at 134 (discussing the regulatory approvals necessary to complete the NYSE Euronext combination). Article II of the Euronext Regulatory MOU requires that Euronext obtain the prior approval of the Chairmen's Committee for "[a]lliances, mergers, cross shareholdings (major acquisitions) and cross membership agreements which could occur at the level of Euronext N.V. or at the level of its subsidiaries." *See* Euronext Regulatory MOU, *supra* note 12, art. II, ¶ 2.1.3.

binding international arrangement between the regulatory authorities themselves.[178]

3. The Euronext Regulatory MOU Is an Outgrowth of Harmonization Framework of the Single European Act & Investment Services Directive

The Euronext Regulatory MOU is remarkable for the innovative cooperative relationship that it establishes with industry[179] to facilitate convergence in EC securities regulation.[180] Yet the arrangement strikes a surprisingly skeptical tone towards such convergence in light of EC legislation[181] that directs Member States to harmonize domestic securities law.[182] An analysis of the

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178. *Cf.* Markets in Fin. Instruments Directive, *supra* note 18, art. 56.2 (establishing an obligation for securities authorities of Member States to cooperate). The MiFID has provisions that may cause contractual supervisory arrangements such as the Euronext Regulatory MOU to rise to the level of binding obligations under E.U. law. *See id.*

179. *See supra* notes 59, 158-69 and accompanying text (discussing the bifurcated Committee structure of the College and its arm's length collaborative relationship with Euronext regulated markets).

180. *See* Euronext Regulatory MOU, *supra* note 12, pmbl., recital 1 ("Having regard to the E.U. Directives in the securities field and the co-operation mechanism established by them.").

181. *See supra* notes 101-09 and accompanying text (discussing the distinction between directives and regulations and the EC Treaty basis of the ISD and the MiFID).

182. *Compare* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.1 (stating that the regulatory authorities are undertaking their "best efforts" at harmonizing national regulation of listing requirements, prospectuses, on-going obligations of listed companies, take over bids, and disclosure of large shareholdings), *with* Communication from the Commission to the European Parliament and the Council on Upgrading the Investment Services Directive (93/22/EEC), at 8, COM (2000) 729 final (Nov. 15, 2000), *available at* http://ec.europa.eu/internal_market/securities/docs/isd/2000/com-provision_en.pdf [hereinafter *Upgrading the ISD*] (stating that Articles 22-27 of ISD establish minimum levels of convergence of supervisory responsibilities). However, nether the ISD nor preceding financial markets directives had yet to establish in a legislative instrument a framework for EC level stock exchange regulation. *See generally* Andrew Whittaker, *A European Law for Regulated Markets? Some Personal Views*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND, *supra* note 169, at 269-73 (discussing the absence in the ISD of numerous provisions necessary for appropriate exchange regulation). Thus, the new MiFID, which replaces the ISD, is intended to remedy the shortcomings of the ISD in exchange regulation and expand on the ISD's role in spurring the development of European ATSs. *See* Markets in Fin. Instruments Directive, *supra* note 18, pmbl., recitals 1, 2

framework that the Euronext Regulatory MOU establishes for cooperation reveals that this skeptical tone is an echo of the EC framework for securities law harmonization that existed prior to the adoption of the Lamfalussy Process.[183]

More remarkable still is the role that the SEA has played in supplying a harmonization framework for the regulation of securities trading markets.[184] Because the business structure of and competitive relationship between European securities exchanges changed dramatically in the era during and after the adoption of the ISD,[185]

(explaining the changes that have occurred in European markets since the adoption of the ISD and the necessity for comprehensive legislation for the regulation of exchanges); *see also* Avgouleas, *supra* note 3, at 188-91 (discussing the inadequacy of the ISD in light of competition between automated and traditional exchanges).

183. *See generally Final Lamfalussy Report*, *supra* note 7, at 4-6 (outlining a proposal for a new approach to EC securities legislation to combat the dilemma of inconsistent national level rule implementation). The Wise Men recognized that the harmonization framework of the Single European Act, which was based on mutual recognition, minimum harmonization, and home country control, had failed to yield an adequate degree of harmonization among the rules that ultimately applied to market participants. *See* MOLONEY, *supra* note 1, at 13-16 (discussing the extent to which the EC has adopted legislation that mandates different degrees of harmonization in Member State law). Thus, the implication of the Lamfalussy distinction between Level 1 framework principles and Level 2 implementing measures is that EC securities legislation directed towards minimum harmonization had failed to provide adequate guidance to the national authorities as to the result that national implementing legislation must achieve. *See id.* at 861-62.

184. *See* Single European Act, 1987 O.J. (L 169) 1.

185. *See generally* Marco Pagano, *The Changing Microstructure of European Equity Markets*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND, *supra* note 169, at 200-04 (discussing the influence of U.K. deregulation on the competitive relationship among European trading systems). Changes in the structure of European trading markets were a consequence of both the competition among national rules, which was spurred by U.K. deregulation, as well as the ISD's provisions pertaining to "regulated markets." *See supra* note 96 and accompanying text (discussing the hesitancy of Member States to embark on an EC trading markets regime in light of the divergence of market structures among Member States). Because the ISD permits a trading market to establish remote trading screens in other Member States, there was a fear that such trading screens could in effect establish new trading markets that did not require the approval and supervision of the jurisdiction in which they were established. *See* Steil, *supra* note 96, at 129-30; *see also* Stephen M. Schaefer, *Competition Between Regulated Markets in London*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND, *supra* note 169, at 211-12 (evaluating the "unbundling" of listing, clearing and

and because the corpus of EC securities regulation contained no single directive applicable to exchange regulation,[186] E.U. Member State regulators were faced with a significant regulatory challenge when Euronext merged the exchanges of Amsterdam, Brussels, and Paris.[187] EC securities directives supplied a general imperative to harmonize regulation,[188] yet the ISD did not provide a comprehensive framework for the regulation of exchanges.[189] Rather, the ISD was primarily intended to harmonize Member State regulation of investment firms.[190]

But securities exchanges had begun to demutualize and adapt technology to trading, thus creating the possibility that a trader located in one Member State could participate remotely in an

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settlement, regulation, and pricing information services as a result of the ISD's provisions permitting investment firms to remotely access regulated markets in other Member States).

186. *See* Markets in Fin. Instruments Directive, *supra* note 18, recital 1 (the ISD focused on the regulation of services provided by banks and investment firms); *see also* Whittaker, *supra* note 182, at 271 (comparing ISD provisions pertaining to "regulated markets" with the requirements for recognition as an "investment exchange" under the U.K.'s 1986 Financial Services Act). Of course, the MiFID has superseded the ISD as the EC instrument for the harmonization of investment services and exchange regulation. *See* Markets in Fin. Instruments Directive, *supra* note 18, recital 1.

187. *See supra* notes 42-62 and accompanying text (discussing Euronext's consolidation of western European securities exchanges).

188. *See* Euronext Regulatory MOU, *supra* note 12, pmbl., recital 1 (stating that the MOU should be understood within the context of the cooperative arrangements contained in EC securities directives). The EC securities directives do not contain imperatives to conclude MOUs to facilitate cooperation. *See* Bergstraesser, *supra* note 175, at 379 (the ISD does not discuss the conclusion of MOUs between regulatory agencies). Rather, the imperative to collaborate on supervision is more generalized. *See Upgrading the ISD*, *supra* note 182, at 8 (noting that ISD Articles 22-27 call on regulators clearly to divide supervisory responsibilities among themselves). ISD Article 23.3, for instance, provides that, where an investment firm operates in multiple E.U. jurisdictions, the Member State regulators must collaborate closely to effectively discharge their responsibilities under the Directive. *See* Investment Services Directive, *supra* note 87, art. 23.3.

189. *See, e.g.*, MOLONEY, *supra* note 1, at 647-48 (characterizing the extent of EC securities trading-market regulation as "light" and stating that EC exchange regulation largely is confined to the ISD).

190. *See* Markets in Fin. Instruments Directive, *supra* note 18, recital 1 (describing the ISD as largely limited to harmonizing rules of authorization and operating requirements for investment firms).

exchange located in another Member State.[191] Trading in securities is an investment service that implicates the EC Treaty freedom to establish[192] and to provide services[193] in all E.U. Member States.[194] The difficulty in formulating the ISD was essentially that it was impossible for the EC to provide for the freedom of investment firms to access foreign exchanges[195] without providing its logical counterpart—the freedom of exchanges to provide remote access to trading.[196] The logical impossibility of decoupling these two freedoms required the ISD to contain provisions pertaining to regulated markets.[197] And yet the hesitancy of Member States[198] at

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191. *See* Pagano & Steil, *supra* note 17, at 40-42 (noting that the expansion of an exchange's member base, by attracting remote members through electronic trading screens, enhances the liquidity of an exchange while lowering transaction costs). The Stockholm Stock Exchange was the first European exchange to take advantage of the ISD's remote membership provisions. *See id.* at 41.

192. *See* EC Treaty, *supra* note 5, art. 43.

193. *See id.* art. 49.

194. *See generally* MOLONEY, *supra* note 1, at 311-27 (discussing the applicability to investment intermediaries of the EC Treaty freedom to establish and freedom to provide services). It is also not insignificant that, prior to the demutualization and automation of exchanges, the Community decisionmaker was hard pressed to identify a legal basis in the EC Treaty for legislation that sought to regulate generally the operation of securities exchanges, which largely functioned as non-profit associations. *Cf. supra* notes 91-95 and accompanying text (discussing the varying legal bases of EC securities legislation).

195. Investment Services Directive, *supra* note 87, art. 15.1. *See generally* MOLONEY, *supra* note 1, at 658-63 (describing the "access passport" of ISD Article 15). ISD Article 15 requires that a Member State ensure an ISD investment firm's access to a regulated market located in that Member State, provided that the ISD investment firm has obtained authorization as an investment intermediary in its home state. *See id.* at 658.

196. *See* Steil, *supra* note 96, at 129 (stating that designation as a "regulated market" under the ISD presented competitive advantages for exchanges). ISD Article 15.4 requires a home Member State to permit a regulated market that is located in a host Member State to provide "appropriate facilities" such that an investment firm in the home state may trade in that regulated market without being physically present at that market. *See* Investment Services Directive, *supra* note 87, art. 15.4. These twin access passports essentially would decouple the investment firm's freedom to provide services from its freedom of establishment. *See id.*

197. *See Upgrading the ISD*, *supra* note 182, at 7-8 (stating that the freedom of regulated exchanges to place remote trading screens in Member States is a corollary to the Article 14 "passport" that investment firms have to provide services in Member States); *see also* Corcoran & Hart, *supra* note 47, at 239-40 (stating that the right of an investment firm to provide services throughout the common market creates a concomitant necessity that a regulated market facilitate the realization of that right by providing remote access). *But see* MOLONEY, *supra*

that time to establish a comprehensive regime for EC regulation of trading markets meant that the ISD's provisions on regulated markets were poorly defined.[199] Because of the lack of clarity regarding the role of the ISD concept of "regulated market" in EC securities regulation,[200] the ISD created a regulatory vacuum in the area of trading markets.[201]

The Euronext College adapted to this regulatory vacuum by importing the tripartite harmonization framework of the SEA[202] to exchange regulation via the cooperative arrangement outlined in the Euronext Regulatory MOU.[203] The ISD is structured upon the

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note 1, at 660 & n.66 (stating that the "remote-access passport" of regulated markets and the investment firm passport operate independently of one another). Professor Ferrarini suggests that when a regulated market provides remote access to an investment firm operating within its home state the investment firm passport itself, and its concomitant notification obligation, is not implicated. *See id.*

198. *See* Steil, *supra* note 96, at 124-25 (identifying two points of dispute between Member States regarding the inclusion of trading market provisions in the draft ISD: whether to confine trading to established exchanges and on what terms to require reporting of transactions); *see also* MOLONEY, *supra* note 1, at 653 (discussing the influence of divergent market structures on the conflict as to whether the ISD should include detailed provisions regarding trading markets).

199. *See* MOLONEY, *supra* note 1, at 656 (contrasting the detailed treatment of investment firms in the ISD with the absence in the ISD of a provision defining the characteristics of a trading market). Much of this can be attributed to the substantial divergence in market structures among the Member States. *See* Pagano & Steil, *supra* note 17, at 12-20 (contrasting the trading infrastructures of the Amsterdam, Brussels, Madrid, Milan, and Paris exchanges in the early 1990's).

200. *See* Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets, at 5, COM (2002) 625 final (Nov. 19, 2002) (stating that the ISD is inadequate for harmonizing securities trading markets because it does not establish clear rules for consolidation of and competition between trading infrastructures). The European Commission characterized the ISD's provisions regarding regulated markets as "underdeveloped." *See id.* at 6.

201. *See id.* at 32 (stating that ISD provisions on regulatory cooperation were created for an EC-wide trading environment that was substantially less integrated).

202. *See* Single European Act, 1987 O.J. (L 169) 1; Avgouleas, *supra* note 3, at 182-84 (discussing the limitations of the SEA framework for harmonizing Member State regulation).

203. *Cf.* Request for Comment, Boards of Trade Located Outside of the United States and the Requirement to Become a Designated Contract Market or Derivatives Transaction Execution Facility, 71 Fed. Reg. 113, 34072-74 (June 13, 2006) (seeking comment on a threshold U.S. "contact level" at which a foreign board of trade ("FBOT") would be required to register with the CFTC). The CFTC is currently reevaluating its criteria for requiring FBOTs to register to conduct

harmonization framework that the SEA originally implemented: minimum harmonization of standards accompanied by mutual recognition and home country control.[204] The Euronext Regulatory MOU framework applies these harmonization principles to exchange regulation.[205]

The Euronext Regulatory MOU provides that the Euronext College will endeavor to harmonize regulation of listing requirements, prospectuses, ongoing obligations of listed companies, takeover bids, and disclosure of large shareholdings.[206] This reflects the minimum harmonization principle that ensures the viability of mutual recognition and home country control.[207] The MOU also provides that, while listing on a Euronext exchange is predicated on

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business in the United States, and thus is modifying its regulatory approach to fill a type of "regulatory vacuum." *See id.*; *see also* Transcript of Hearing on What Constitutes a Board of Trade Located Outside of the United States Under the Commodity Exchange Act Section 4(a), at 80-81, Commodity Futures Trading Commission (June 27, 2006) (statement of Michael Gorham, Director, Illinois Inst. of Tech., Ctr. for Fin. Markets), *available at* http://www.cftc.gov/files/opa/opafbotpublichearingtranscript062706.pdf (arguing that CFTC requirements that a board of trade report large trades and limit the size of positions that traders can hold in a product deter traders from operating through CFTC registered exchanges).

204. *See* Lastra, *supra* note 36, at 60-61 (tracing the origins of the SEA's three-part harmonization framework to the *1985 White Paper*). The use of directives, which require implementation in national law, rather than regulations, which have direct effect in E.U. Member States, was preferred out of ambivalence over the strength of the EC Treaty mandate to create a unified, rather than common market. *See generally* Pescatore, *supra* note 99, at 9-18 (criticizing the SEA for renouncing the mandate of full harmonization and arguing that the EC had made more progress towards creating a common market than generally had been appreciated). The use of directives also serves as a conciliatory gesture towards the principle of subsidiarity. *See* Lastra, *supra* note 36, at 61 n.39 (identifying the relationship between the SEA and the Protocol on the Application of the Principles of Subsidiarity and Proportionality, 1997 Treaty of Amsterdam Protocols).

205. *See supra* notes 47-62 and accompanying text (explaining how the Euronext Regulatory MOU applies and exceeds the minimum harmonization standards of EC legislation).

206. *See* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.1 (providing that the general thrust of cooperation in the Euronext College is the authorities' "best efforts" to harmonize regulation).

207. *See generally* MOLONEY, *supra* note 1, at 14-15 (describing the minimum harmonization element as permitting a degree of regulatory competition, while preventing competition between regulators that might result in inadequate protections).

the approval by one Euronext College regulator, the Euronext College will apply a "streamlined mutual recognition procedure" for offerings in multiple Euronext jurisdictions.[208] This is a clear application of the mutual recognition principle.[209] The MOU also ventures a definition of "public offering."[210] However, at the time the MOU was drafted, the determination of whether a public offer had taken place was not yet a settled issue in EC securities market legislation.[211] Thus, again, the Euronext Regulatory MOU appears to be filling gaps in Community law.

The final element of the SEA harmonization framework that is mirrored in the Euronext Regulatory MOU is home country control. The ISD employed the home country control element extensively,[212] and the later Prospectus Directive[213] replaced the mutual recognition

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208. *See* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.2.

209. *See* MOLONEY, *supra* note 1, at 69 (stating that a host Member State must recognize a document that meets the regulatory requirements of the issuer's home country if the home country has complied with the minimum harmonization mandates of an EC directive that pertains to the content or approval process of such document). The host state may impose additional language and translation requirements, however, and Euronext Regulatory MOU Article 7.2 provides for this as well. *Compare id.* at 69 (host states may impose additional language requirements), *with* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.2 (the streamlined mutual recognition procedure is subject to domestic language requirements).

210. *See* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.2 ("The mere fact of being listed on a regulated market in one of the jurisdictions involved does not necessarily constitute a public offering in the other jurisdictions.").

211. *See* Commission Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading, at 7-8, COM (2001) 280 final (May 30, 2001) (stating that the definition of "public offer" was inconsistent both before and after the adoption of the Prospectus Directive, 89/298/EEC, 1989 O.J. (L 124) 8)); *see also* MOLONEY, *supra* note 1, at 177-84, 221-22 (characterizing the definition of public offer as a lacuna in the EC disclosure system). It is also not clear whether the Article 7.2 "definition" of public offer is intended to be an interpretation of that term as it is used in EC securities directives or an interpretation of the manner in which the national authorities intend to interpret their domestic law concerning public offerings. *See id.*

212. *See* Investment Services Directive, *supra* note 87, art. 23.3 (declaring that the success of the harmonization of internal market rules is dependent on the "grant of a single authorization valid throughout the Community and the application of the principle of home Member State supervision").

213. Council Directive 2003/71, 2003 O.J. (L 345) 64 (EC) [hereinafter Prospectus Directive].

approach with exclusive home country control.[214] But the Prospectus Directive was still in development at the time Euronext was created.[215] The Euronext Regulatory MOU applies home country control to ongoing disclosure obligations of Euronext listed issuers[216] and, in addition, adopts the term of art created in the ISD—"regulated market"[217]—to assist in determining the competent home country authority. Again, the Euronext Regulatory MOU appears to reach into the patchwork of EC securities legislation to piece together a framework for regulating trading markets.[218] The MOU also provides for negotiation between College regulators on the identification of a home country supervisor in the case of companies listed in multiple jurisdictions, or in a jurisdiction other than that of incorporation.[219]

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214. *See* MOLONEY, *supra* note 1, at 227-29 (comparing the use of home country control in the ISD with its adoption as a control mechanism in the Prospectus Proposal).

215. *See* Press Release, European Commission, Commission Welcomes Council's Adoption of Prospectuses Directive (July 15, 2003), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1018&format=HTML&aged=1&language=en&guiLanguage=en. Two years elapsed between the proposal and adoption of the Directive. *See id.*

216. *See* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.3 (identifying the competent authority of the regulated market where the issuer is primarily listed as responsible for supervising ongoing disclosure obligations).

217. *See* Steil, *supra* note 96, at 115-16 (discussing the development of the concept of "regulated market" during the drafting of the ISD). The French distinguished between markets that respected the principles of transparency, fairness, and security and those that essentially were over-the-counter ("OTC") markets. *See id.* The French desired that the access privileges that the ISD was to grant to investment firms and exchanges would be limited to markets that respected such principles. *See id.*

218. *See supra* notes 212-19 and accompanying text (discussing how the regulations regarding home country control in the MOU are yet another example of how the MOU compliments EC securities legislation).

219. *See* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.4 (concerning take-over bids). The Prospectus Directive also contains guidance as to the identification of a home Member State supervisor. *See* Prospectus Directive, *supra* note 213, pmbl., art. 14 (stating that the home Member State should be "the one best placed to regulate the issuer for the purposes of this Directive"). One can easily see how multiple directives with divergent interpretations of "home supervisor" could subject a single issuer to "home country control" by multiple supervisors. *Compare id. with* Euronext Regulatory MOU, *supra* note 12, art. VII, ¶ 7.4. The negotiation procedure in the Euronext College can thus serve to alleviate this divergence. *Cf.* Tommaso Padoa-Schioppa, Member of the Executive Board, European Central Bank, Lecture at the London School of Economics, Financial

Thus, it appears that the Euronext College gathered a framework for harmonizing trading market rules from the "regulated market" provisions of the ISD, as well as the general harmonization framework of the SEA and the directives pertaining to issuer disclosure that were in development at the time of the Euronext merger. The arrangement was an innovative response to the innovative trading market model that Euronext had created. This cycle of deregulation, demutualization, technological adaptation, and reregulation is consistent with that outlined above.

B. THE RULE HARMONIZATION PROCESS OF THE EURONEXT REGULATORY MOU DIMINISHES THE PROBLEM OF INCONSISTENT RULE IMPLEMENTATION

The Wise Men reported that one of the most significant impediments to the establishment of a single market in financial services was inconsistent national level implementation of EC securities directives.[220] The Wise Men attributed inconsistency in implementation of directives to a number of factors, including ambiguity in the text of directives,[221] the nature of the directive itself,[222] as well as a lack of coordination among the administrative

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Markets Group: EMU and Banking Supervision (Feb. 24, 1999), *available at* http://www.ecb.int/press/key/date/1999/html/sp990224.en.html (stating that the implementation of the Second Banking Coordination Directive required banking authorities to negotiate MOUs to determine satisfactorily which regulators were "home" and which were "host" authorities).

220. *See Final Lamfalussy Report*, *supra* note 7, at 18 (stating that inconsistent implementation of EC legislation is "severely handicapping the emergence of a pan-European market"); *see also supra* notes 110-16 and accompanying text (discussing the findings of the Wise Men and the recommended four-Level approach to the adoption of EC securities legislation and the monitoring of national level implementation).

221. *See Initial Lamfalussy Report*, *supra* note 34, at 18 (stating that lobbying efforts and compromises among Member States during the legislative process often result in a directive that lacks a clear legislative vision).

222. *See supra* notes 105-08 and accompanying text (contrasting the directive with the regulation as a legislative instrument). Because the directive is binding only as to the result to be achieved, and because the text of directives is often ambiguous regarding this result, it is not surprising that such legislation has seen inconsistent implementation by Member States. *See id.*

authorities charged with implementing and enforcing the national laws.[223]

While the Wise Men's proposals for modifying the EC legislative process have addressed the inadequacies of EC securities legislation itself, and while the creation of CESR surely will assist the Commission in crafting legislation at Level 2 that recognizes the variations among national markets,[224] there remains the problem of inconsistent transposition of securities directives into national law, as well as inconsistency among Member States in the administration and enforcement of national laws that have been modified pursuant to EC securities directives.[225] CESR is tasked with facilitating this process, but there are doubts as to the legal basis of CESR—particularly regarding its role in facilitating the modification of national laws.[226] This is a consequence of the fact that the EC Treaty does not grant the Community decisionmaker the authority to change national law,[227] but only to enact regulations that will supersede national law, or directives that create an obligation on the part of the Member State to modify national law to achieve the objectives of the directive. Because CESR is an E.U. institution, and because its collaborative role at Level 3 under the Lamfalussy Process implies that CESR is participating in the modification of national law,[228]

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223. *See Final Lamfalussy Report*, *supra* note 7, at 15 (decrying the lack of effective coordination among Member State regulators).

224. *See Himalaya Report*, *supra* note 41, at 2-3 (lauding the work of CESR). CESR has two "hats": at Level 2 under the Lamfalussy Process CESR assists in the development of the legislation, and at Level 3 CESR assists national authorities in the consistent implementation of the legislation. *See Final Lamfalussy Report*, *supra* note 7, at 31.

225. *See Final Lamfalussy Report*, *supra* note 7, at 37 (discussing the role of CESR at Level 3 in facilitating the consistent transposition, administration, and enforcement of national laws pursuant to EC securities directives).

226. *See Himalaya Report*, *supra* note 41, at 2 (referring to doubts regarding the EC Treaty legal basis of CESR).

227. *See* Role of CESR at "Level 3", *supra* note 154, at 7-8 (stating that the responsibility for transposing directives lies with the Member States, and that the national regulators often have a significant role in assisting the national legislatures in the development of national laws that implement the securities directives). *But see* Case C-106/89, Marleasing v. Comercial Internacional de Alimentacion, 1990 E.C.R. I-4135 (holding that national courts are obliged to interpret national law "in light of the wording and the purpose" of E.U. directives).

228. *See supra* notes 114, 116 and accompanying text (discussing Level 3 of the Lamfalussy Process). *See generally* Role of CESR at "Level 3", *supra* note 154, at

there is a suspicion that CESR is undertaking a competence that the EC Treaty does not confer on the Community decisionmaker.[229]

The collaborative mechanisms of the Euronext College, however, provide amply for ensuring convergence in securities trading markets regulation without implicating the concern that EC bodies are acting beyond their EC Treaty competences. This is because the Euronext College is not itself an E.U. institution, but merely a collection of national supervisors that cite as their common objective the attainment of the goals of EC securities directives.[230] The Euronext College approach to harmonization of securities trading markets regulation is thus well suited to the EC Treaty principle of subsidiarity and is therefore an excellent vehicle for harmonizing Member State securities law without implicating EC Treaty subsidiarity concerns.

Reliance on established regulatory authorities rather than newly established EC authorities has the additional benefit of clarity in regards to which agency possesses regulatory authority.[231] The proliferation of financial market regulators at the national level in E.U. Member States already has caused confusion as to which national level financial markets authority is responsible for ensuring the proper implementation of EC securities legislation.[232] At the same time, however, EC securities legislation has arrived in some E.U.

3-4 (delineating CESR's role in facilitating consistent transposition of directives into national law as falling in the following areas: the production of administrative guidelines, interpretive recommendations, common standards, peer reviews, and comparisons of regulatory practice).

229. *See* Inter-Institutional Monitoring Group, Third Report Monitoring The Lamfalussy Process 25-33 (Nov. 17, 2004), *available at* http://ec.europa.eu/internal_market/securities/docs/monitoring/third-report/2004-11-monitoring_en.pdf [hereinafter IIMG Third Report] (discussing the legitimacy of CESR's participation in the transposition of directives into national laws in light of the principle of subsidiarity). The Commission decision establishing CESR refers to CESR's role in assisting in the transposition of directives only cursorily. *See id.* at 28.

230. *See supra* notes 151-69 and accompanying text.

231. *See infra* notes 232-35 (discussing the confusion created by the proliferation of EC authorities).

232. *See Final Lamfalussy Report*, *supra* note 7, at 15-16 (noting that there are 40 national regulators with authority to supervise securities markets in the E.U.); *see also supra* note 36 and accompanying text (discussing reorganization of financial market supervisors at the national level).

Member States only to find that there is no supervisory authority to implement and enforce the legislation.[233] The Wise Men noted that the disparate competences of the securities authorities in E.U. Member States would make it particularly difficult for newly minted EC advisory bodies to construct harmonization measures capable of effective implementation by all the concerned securities authorities.[234] Given that some E.U. Member States have reformed their financial markets supervisory authorities in an *ad hoc* fashion to respond to the mandate to implement legislation that is essentially foreign to their national securities regulation regime, there is a danger that a confusing web of implementing authorities will spring up throughout the E.U. as a response to EC securities legislation and increase regulatory compliance costs.[235]

The uncertainty that accompanies such regulatory restructuring poses the danger of reducing the effectiveness of EC legislation at fostering the necessary convergence among technical rules that ultimately apply to securities market participants.[236] As convergence

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233. *See* Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT'L L. 9, 23 (1999) (stating that Germany was two years late in implementing the Insider Trading Directive because it did not have an appropriate administering authority for insider trading regulation). Germany created the Federal Supervisory Authority for Securities Trading as a consequence. *See id.* Before these reforms Germany had no statute prohibitive of insider trading. *See id.* at 22 n.61.

234. *See Final Lamfalussy Report*, *supra* note 7, at 15-16 (urging convergence among regulatory structures).

235. *See* Eddy Wymeersch, *The Implementation of the ISD and CAD*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND, *supra* note 169, at 40 (distinguishing between prudential and transactional supervision, and noting that E.U. Member State implementation of EC Directives has tended to place prudential supervisory authority in the hands of banking regulators, while a variety of agencies have appeared in E.U. Member States to administer provisions relating to transactional supervision of securities market participants).

236. *See Final Lamfalussy Report*, *supra* note 7, at 37-38 (stressing the need for knowledgeable regulatory authorities for the effective implementation of securities harmonization legislation). The Lamfalussy Report also called for the involvement of market participants in the harmonization process and suggested that private entities act as a sounding board for the adequacy of harmonization measures among states. *See id.* The involvement of market participants in regulatory convergence was a crucial element in the success of the Euronext exchange model. *See supra* notes 46-62 and accompanying text (discussing the Euronext business model).

among technical rules is the crux of harmonizing EC securities regulation, it is imperative that the national administering authorities also achieve similar outcomes in terms of the enforcement of those rules.[237] Because rule enforcement is to a considerable extent a function of regulatory philosophy, and because different agencies have different embedded constituencies and approaches to regulation, the national level structure of securities authorities likely will have an effect on the success of EC securities regulation harmonization efforts.[238]

The collaborative framework of the Euronext Regulatory MOU, however, minimizes these concerns. Collaboration among regulators has external "network effects" that encourages convergence in approaches to regulation.[239] Convergence in enforcement and regulatory philosophy, as opposed to mere harmonization of applicable law, is a necessary component of EC securities law harmonization as well.[240] Although cooperation under the auspices of CESR provides the opportunity for encouraging convergence in these areas, that forum has the drawback of implicating EC Treaty

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237. *See* Ferran, *supra* note 15, at 304-05 (suggesting that the role of national regulatory authorities will shift once the ESC and CESR have garnered more influence in EC regulatory decisions and that in the future the national authorities will resemble administrators rather than rule makers).

238. *See Global Markets, National Regulation, Cooperation: Statement Before the H. Comm. on Financial Services*, 108th Cong. 12-14 (2004) (statement of Ethiopis Tafara, Director, Office of Int'l Affairs, SEC) (noting that the substantial differences in regulatory philosophy between the United States and E.U. Member States may work to the detriment of cross-border capital flows); *see also* Ethiopis Tafara, Director, Office of Int'l Affairs, SEC, The SEC's Experience in the Development of an Integrated Securities Market in the United States, Speech at the Second Annual European Financial Services Conference (Jan. 27, 2004), *available at* http://www.sec.gov/news/speech/spch012704et.htm (noting that the differences among regulatory philosophies of the E.U. Member States derives from the countries' divergent pasts). Newer Eastern European Member States likely have substantially underdeveloped regulatory philosophies as their securities markets have existed for little more than a decade. *See id.*

239. *See infra* note 286 and accompanying text (discussing regulator "networking" and associated influences on regulatory convergence).

240. *See* IIMG Third Report, *supra* note 229, at 25-28 (discussing the extent to which CESR is charged with applying "peer pressure" to regulators to converge their approaches to securities law enforcement). Disparities amongst national regulators in enforcement of harmonized securities laws easily can give rise to opportunities for regulatory arbitrage, which is exactly what harmonization is supposed to eliminate. *See id.* at 10.

subsidiarity concerns. Cooperation under the Euronext Regulatory MOU does not implicate these concerns.

III. RECOMMENDATIONS

I recommend that the SEC and the Euronext College clarify the reach of provisions related to regulatory convergence among NYSE Euronext markets in the recently penned Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related To Market Oversight ("NYSE Euronext MOU").[241] Next, I suggest additional arrangements that E.U. Member States can undertake to employ market participants in regulatory convergence efforts in the E.U. Finally, I attempt to shed light on the important role that the Euronext Regulatory MOU and similar arrangements can play in facilitating dialogue among European regulators and developing the administrative capacity of European securities authorities.

A. THE NYSE EURONEXT MOU MUST NOT INTERFERE WITH THE HARMONIZATION PROCEDURES OF THE EXISTING EURONEXT REGULATORY MOU

On September 26, 2006, Chairman Cox of the U.S. SEC met with the Chairman's Committee of the Euronext College to discuss the regulatory issues raised by a combined NYSE Euronext.[242] The SEC and the Euronext College reiterated their assessment of the regulatory implications of the merger and stated that they foresaw no "spillover" of exchange regulation from the United States to Europe.[243] But such assurances are an inadequate basis on which to build an industry subject to pervasive and costly regulation, especially when that industry is the cornerstone of national

241. *See* Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related To Market Oversight U.S. SEC-College of Euronext Regulators (Jan. 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-8_mou.pdf [hereinafter NYSE Euronext MOU].

242. Press Release, U.S. Securities & Exchange Commission, SEC Chairman, Euronext Regulators Meet to Discuss Cooperation in the Event of the NYSE Euronext Combination (Sept. 27, 2006), *available at* http://www.sec.gov/news/press/2006/2006-165.htm.

243. *See id.*

economies.[244] NYSE Euronext and the exchanges that might follow its path need more certainty from regulators regarding the extent to which they may be exposed to future cross-border regulation. The fact that NYSE Group and Euronext are willing to enter into a merger that gives rise to uncertain risks of costly regulatory "spillover" demonstrates how big the stakes are in this merger.

In an attempt to address these concerns, the SEC and the Euronext College authorities[245] concluded the NYSE Euronext MOU on January 25, 2007.[246] The MOU contains standard enforcement information sharing,[247] market surveillance,[248] and confidentiality provisions.[249] The MOU also states that it is not binding.[250] On its face, the NYSE Euronext MOU appears to resemble traditional SEC enforcement MOUs.

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244. *See, e.g.*, Ajay Shah & Susan Thomas, *Securities Market Efficiency*, *in* GLOBALIZATION AND NATIONAL FINANCIAL SYSTEMS, *supra* note 117, at 145-46 (discussing the constraints that illiquid securities markets pose to the efficient distribution of capital in developing economies).

245. *See* NYSE Euronext MOU, *supra* note 241, art. 6, ¶ 29 (listing the signatories of the MOU as the Chairmen of the regulatory authorities comprising the Euronext College and the Chairman of the SEC). However, all consultation, cooperation, and exchange of information pursuant to the terms of the MOU is bilateral—between the SEC and the Euronext College—which implies that the Euronext College will become the contact point for the SEC whenever an enforcement or supervision issue pertaining to NYSE Euronext arises. *See id.* ¶ 10. Thus, the NYSE Euronext MOU appears to constrict the independent regulatory authority of the European regulators even further because transatlantic requests for assistance with respect to NYSE Euronext must now be made between the SEC and the Euronext College pursuant to the terms of the NYSE Euronext MOU. *See id.*

246. *See* Press Release, U.S. Securities & Exchange Commission, SEC, Euronext Regulators Sign Regulatory Cooperation Arrangement (Jan. 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-8.htm (stating that the MOU will take effect when Euronext Paris S.A. announces the acceptance of the NYSE Euronext offer).

247. *See* NYSE Euronext MOU, *supra* note 241, ¶¶ 20-21 (delineating how information sharing requests are to be executed).

248. *See id.* ¶ 19 (expressing regulators' agreement to develop practical arrangements to coordinate regulatory oversight of NYSE Euronext's integrated functions).

249. *See id.* ¶¶ 22-27 (delineating permissible uses of information obtained pursuant to the MOU).

250. *See id.* ¶ 7.

But the NYSE Euronext MOU contains provisions regarding convergence of trading markets regulation as well.[251] Specifically, the MOU contemplates coordination between the SEC and the Euronext College on the harmonization of trading rules across NYSE Euronext markets.[252] However, whereas the NYSE Euronext MOU appears to defer to NYSE Euronext's initiative in the harmonization of trading rules,[253] the Euronext Regulatory MOU was premised on the general EC imperative to harmonize securities regulation and the obligation that regulators undertook to work towards this goal.[254] Consequently, the Euronext College has hitherto played a lead role in the harmonization of trading rules.[255] But with the advent of this new relationship between the SEC and the Euronext College, it is an open question as to who bears the initiative in the harmonization of EC securities trading markets regulation: the combined NYSE Euronext, the Euronext College, or the SEC.[256]

It is important that the NYSE Euronext MOU, and the SEC in particular,[257] do not interfere with the harmonization framework of

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251. *See* NYSE Euronext MOU, *supra* note 241, ¶ 18 (providing for coordinated decision making in market supervision).

252. *See id.* ¶ 18(a) (stating that harmonization of trading rules is an area of coordination, but that coordinated decision making under the MOU is not limited to the areas outlined in the MOU).

253. *See id.* ¶ 18 ("Where NYSE Euronext and its Markets seek to harmonize their rules, the Authorities will work together to coordinate their regulatory approval processes and to facilitate the development and implementation of consistent rules, where appropriate.").

254. *See* Euronext Regulatory MOU, *supra* note 12, pmbl., art. VII, ¶ 7.1 (stating that the regulatory authorities will make their "best efforts" to harmonize domestic regulation).

255. *Cf.* Wymeersch Working Paper, *supra* note 3, at 3 (remarking that arrangements for "contractually organized supervision" have achieved convergence of standards that is beyond the minimum harmonization contemplated by EC securities directives).

256. *See generally* Jordan & Majnoni, *supra* note 117, at 259-79 (comparing "government-induced" and "market induced" models of financial market integration and concluding that market forces alone do not achieve an optimal harmonized regulatory regime because market-led harmonization tends to promote forms of competition that undermine financial stability).

257. *See* Raustiala, *supra* note 80, at 32-33 (explaining that the SEC's international training programs have the side-effect of promoting U.S.-style securities regulation); *see also* Nnona, *supra* note 137, at 203-04 (arguing that the SEC tends to use umbrella regulatory fora such as IOSCO to spread its regulatory agenda, just as it did with the "exportation of U.S. insider trading laws").

the Euronext Regulatory MOU—otherwise the harmonization of EC securities trading market regulation could suffer a setback.[258] Ultimately, the incentives that once drove Euronext to pursue active harmonization of regulation with the Euronext College could diminish in a combined NYSE Euronext entity because the control dynamic in the new company will change.[259] Whether NYSE Euronext and its new management and board will continue to push intra-European securities regulation harmonization after the merger is unclear.[260] But the E.U. still has an unequivocal interest in intra-European exchange consolidation because of the significant efficiencies that European capital markets have to gain from such consolidation.[261] Thus, it is in the interest of the E.U. to make it clear that cooperative arrangements such as the Euronext Regulatory MOU remain open to market participants to facilitate the consolidation of markets and convergence in regulation.[262]

As a defense to this uncertain regulatory regime, the combined NYSE Euronext is implementing an innovative device, including a "material adverse change of law" clause, that the company will

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258. *See* Campos, *supra* note 21 (reflecting on the possibility of a transatlantic exchange merger prior to the announcement of the NYSE Euronext deal, and suggesting that "no country is going to allow its primary market to be foreign owned and/or overseen by a foreign regulator without a fight"). Commissioner Campos did suggest, however, that the creation of a holding structure could mitigate the "problem" of foreign ownership. *See id.* In fact, the holding structure is exactly what NYSE Euronext has opted for. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 60.

259. *See* Cohen, *supra* note 67, at 13 (noting that regulators desired change in board seat allocation in the combined entity to ensure proper regulatory balance). The Dutch Finance Minister had threatened to withhold the approval of the Dutch AFM if he could not obtain a European voice in the appointment of the board of NYSE Euronext, which is incorporated in the United States. *See id.*; *see also* Nicolas Paraise, *NYSE's Euronext Deal Gets Positive Dutch Signal*, WALL ST. J., Dec. 8, 2006, at C3 (withdrawing the Dutch threat of veto of deal conditional on assurances to prevent U.S. regulatory creep).

260. *See* Aaron Lucchetti, *Meet the Big(ger) Board - SEC Is Close to Clearing Way for NYSE-Euronext Merger*, WALL ST. J., Feb. 8, 2007, at C1 (stating that the NYSE, pending the closure of the NYSE Euronext merger, has already begun to pursue interests in exchanges in India and Tokyo).

261. *See generally Final Lamfalussy Report*, *supra* note 7, at 9 (describing the potential efficiency gains realizable from the integration of European financial markets).

262. *Cf. id.* at 8 (stating that the E.U. has no "divine right" to the benefits of an integrated capital market, but must actively build the integrated market).

trigger for protection against costly increases in regulation resulting from changes in U.S. or European law.[263] This device consists of a Delaware trust in the United States and a Dutch foundation in the Netherlands that is empowered to take action to "mitigate" the effect of U.S. or European extraterritorial regulation that has an adverse effect on NYSE Euronext exchanges or the issuers listed on those exchanges.[264] The primary duty of the trustees of the Delaware trust and the board of directors of the Dutch Foundation "shall be to act in the public interests of the markets operated by Euronext and NYSE Group, respectively, and their respective subsidiaries if and only to the extent necessary to avoid or eliminate a material adverse change of law."[265] The remedies available to the Delaware trustees and Dutch board for curing the effect on a market of an adverse change in securities law in any relevant jurisdiction include the assumption of limited management responsibilities necessary for (a) changing the rules of the relevant securities exchange; (b) altering the terms of listing agreements on an NYSE Euronext exchange; (c) altering the terms of contractual arrangements with financial services providers operating on NYSE Euronext markets; (d) changing information and communications technology employed in the markets, and; (e) changing clearing and settlement arrangements on NYSE Euronext markets.[266] Interestingly, the market supervision areas in which the Dutch foundation and the Delaware trust have power to undertake remedies bear a remarkable resemblance to the areas of cooperation identified in the Euronext Regulatory MOU.[267]

The arrangement nevertheless begs the question of why it should be necessary for NYSE Euronext to create a structure that is in nature adversarial towards the community of regulators when the regulatory framework that created the conditions for the success of the stock exchange at the center of this merger—Euronext—was

263. *See* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 114-21 (outlining the "material adverse change of law" clause in the merger agreement and the potential effects of it).

264. *See id.* at 114-15.

265. *Id.*

266. *See id.* at 117-18.

267. *Compare id.*, *with* Euronext Regulatory MOU, *supra* note 12, art. V. Part II of the Euronext Regulatory MOU addresses the supervision of clearance and settlement activities, but that portion of the Euronext Regulatory MOU is not publicly available. *See id.* recital 7.

fundamentally non-adversarial and, indeed, cooperative.[268] The fact that the SEC's philosophy of securities regulation is substantially different from that of its counterparts in Europe supports the conclusion that a combined NYSE Euronext will change the dynamic of regulatory cooperation at the transatlantic and intra-European level.[269]

It is not clear what effect the new NYSE Euronext MOU will have on the continued operation of the Euronext Regulatory MOU.[270] It must be recalled in general that the SEC's approach towards MOUs is that they are not binding instruments and create no obligations on the part of the signatory regulators.[271] But, as I have argued in this Comment, the Euronext Regulatory MOU essentially functions as a mechanism for filling gaps in EC securities legislation. Whereas the regulatory framework of the Euronext Regulatory MOU involved the active cooperation of Euronext market regulators and Euronext towards the harmonization of trading market rules, the defensive devices embodied in the Dutch foundation and the Delaware trust suggest that a different approach towards securities law cooperation and convergence might emerge as a consequence of the NYSE Euronext merger and the less ambitious approach to regulatory convergence of the NYSE Euronext MOU.[272]

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268. *See* Euronext Regulatory MOU, *supra* note 12, pmbl. (setting forth a coordinated and cooperative approach to regulation and supervision of the Euronext markets).

269. *See, e.g.*, MOLONEY, *supra* note 1, at 8-9 (stating that the E.U. has not yet articulated a clear regulatory philosophy). On the other hand, statutory regulation of securities in the U.S. dates back to the 1930s. *See id.* at 3-4.

270. *Compare* Euronext Regulatory MOU, *supra* note 12, art. XI, ¶ 11.5 (permitting other regulatory authorities to become party to the Euronext Regulatory MOU), *with* NYSE Euronext MOU, *supra* note 241, art. 2, ¶ 11 (providing that the scope of cooperation under the MOU could be expanded in the future in the event of alterations in the increased integration of NYSE Euronext markets). For example, it is an open question whether regulators from jurisdictions to which Euronext expands in the future will prefer to join the SEC-Euronext College MOU, or the Euronext Regulatory MOU, or both.

271. *See supra* notes 134-50 and accompanying text (comparing and contrasting various SEC MOUs).

272. *Compare* Euronext Regulatory MOU, *supra* note 12, pmbl., *with* NYSE EURONEXT PROSPECTUS, *supra* note 51, at 114.

B. CESR SHOULD ADOPT A MULTILATERAL MOU THAT WILL FACILITATE THE ESTABLISHMENT OF COOPERATIVE ARRANGEMENTS AMONG REGULATORS FOR FUTURE MERGERS OF EUROPEAN STOCK EXCHANGES

Euronext's experience in collaborating with the Euronext College to harmonize trading markets rules has shown that, while the benefits to be achieved from an integrated market are substantial,[273] the process of harmonization itself is time-consuming and costly.[274] Euronext has incurred much of this cost on its own because of the significant competitive advantage that it stands to gain from a harmonized regulatory structure.[275] But other market participants may not arrive at the same conclusion when evaluating the costs and benefits of pushing for regulatory convergence in the E.U. jurisdictions in which they operate.[276]

The obvious question that this poses is who should bear the cost of harmonizing national rules among E.U. Member States. Luckily, this question also has an obvious answer: the E.U. should bear this

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273. *See Final Lamfalussy Report*, *supra* note 7, at 9 (describing the potential benefits from market integration and the attendant opportunity cost of foregoing such integration).

274. *Cf.* Raustiala, *supra* note 80, at 58-60 (discussing the cost of establishing regulatory institutions in less developed economies). The adoption of pre-existing regulatory regimes, as opposed to setting out to develop new ones, mitigates the problem of developing a corpus of law to interpret the new rules. *See id.* at 59.

275. *See* EURONEXT ANNUAL REPORT, *supra* note 42, at i-ii (discussing "regulatory risks" and warning that Euronext's trading market integration efforts run the risk of late implementation because of the time-consuming approval and consultation process in the Euronext College).

276. *See* Vincent Boland & Francesco Guerrera, *FSA Staff Brand iX Plan 'A Nightmare'*, FIN. TIMES, Sept. 8, 2000, at 1 (stating that the plan for merging the LSE and Deutsche Borse was doomed because of the difficulty of harmonizing trading rules in the U.K. and Germany). The example of the failure of iX demonstrates that regulators must be willing to exert additional effort to harmonize regulation, while market participants must be willing to take the risk that those efforts will not achieve a level of harmonization sufficient to make their endeavor a success. *See* Poser, *supra* note 28, at 502-04 (stating that the iX project failed partly because of the "incompatibility" of U.K. and German exchange regulation). The question, however, is not whether the regulation of Member States is compatible, but rather, how to harmonize that legislation in accordance with EC directives. *See After iX*, FIN. TIMES, Sept. 11, 2000, at 24 (stating that the U.K. and Germany established six working parties to examine the issue of harmonizing trading rules). Although the iX plan was defeated by shareholders, the harmonization work should have proceeded. *See id.*

cost.[277] The difficulty is creating a mechanism to transfer to the E.U. the cost that market participants incur while collaborating with the national regulatory authorities that are leading the harmonization effort.[278] It must be borne in mind that market participants do incur substantial costs—ultimately, regulation seeks to change the behavior of industry on the premise that such regulation enhances social welfare. In changing the regulatory structure of the market, the authorities create and withdraw business opportunities and thereby reward and punish participants in the market.

In light of this relative lack of clarity as to who bears the cost of harmonization efforts, CESR's proposed standardized MOU for the supervision of trans-European market participants[279] appears to be a worthwhile initiative. A standardized regulatory MOU would ease the doubts of market participants as to the feasibility of new ventures that are heavily dependent on the harmonization of regulation.[280] It would create more certainty in the market regarding regulators' commitment to harmonization.[281] The MOU should employ the bifurcated Committee mechanism of the Euronext Regulatory MOU and arm's length[282] collaboration with the regulated entity.

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277. *See Final Lamfalussy Report*, *supra* note 7, at 104 (arguing that the E.U. legislation needs to be updated and revised to promote greater harmonization without "additional unreasonable costs").

278. *See* IIMG Third Report, *supra* note 229, at 24-25 (calling for a mandatory cost-benefit analysis of proposed internal market legislation in conjunction with consultations with market participants). *Cf. Himalaya Report*, *supra* note 41, at 21 (citing the absence of provisions that permit a home authority to delegate a supervisory responsibility to a host authority in instances where such delegation would be more cost-effective than abiding by the home country control principle).

279. *See Himalaya Report*, *supra* note 41, at 14 (listing such a standardized MOU as a potential tool for supervisory convergence that CESR would study at a future date).

280. *Cf. supra* note 276 and accompanying text (discussing the failure of the iX venture due to doubts about the possibility of successfully harmonizing German and U.K. trading rules).

281. *See id.*

282. *See* Euronext Regulatory MOU, *supra* note 12, arts. I-III, paras. 1.3, 2.2, 3.2 (describing the manner in which the College obtains information from Euronext regarding proposed measures that are subject to prior approval and non-opposition by the College).

C. EUROPEAN REGULATORS SHOULD EXPLOIT THE CONSULTATIVE FRAMEWORK OF COOPERATIVE ARRANGEMENTS SUCH AS THE EURONEXT REGULATORY MOU TO ASSIST IN THE DEVELOPMENT OF ADMINISTRATIVE CAPACITY IN E.U. MEMBER STATES

The popularity of the SEC's International Institutes[283] demonstrates the importance of cross-pollination in international securities regulation.[284] In EC securities regulation, CESR serves as a forum for E.U. Member State securities authorities to advise the European Commission on proposed securities legislation and to collaborate on the consistent implementation of such legislation.[285] CESR thus provides an indispensable venue for regulator "networking."[286] But arrangements such as the Euronext Regulatory MOU provide a mechanism for the actual implementation of the changes that must be made to the existing national legislation to achieve the harmonization outlined in EC directives.[287]

One can see the indirect benefits of the collaborative rule harmonization efforts of the Euronext College in the increased understanding of regulators of the divergences among national regulatory regimes and increased awareness of the role of important

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283. *See* Raustiala, *supra* note 80, at 32-35 (stating that in the year 2000 approximately 460 staff members from securities authorities throughout the world had received training through SEC programs).

284. *See* Slaughter, *supra* note 132, at 293 ("Information networks promote convergence through technical assistance and training, depending on how they are created and who their most powerful members are. Indeed, some regulatory information networks have an explicit agenda of convergence on one particular regulatory model."). The SEC's International Institutes are indeed framed with the explicit agenda of convergence on the U.S. model of securities regulation. *See id.*

285. *See Final Lamfalussy Report*, *supra* note 7, at 31 (describing the "two hats" of the proposed committee). The Lamfalussy Committee proposed the creation of CESR on the basis of the then-existing FESCO. *See id.*

286. *Cf.* Raustiala, *supra* note 80, at 24-26 (describing the advantages to regulators of loose networks, as opposed to formal international organizations, as a forum for developing regulatory capacity because the members of the network generally share common interests).

287. *Cf.* Mogg, *supra* note 154, at 78-79 (stating that CESR has a secretariat and convenes every three months). The Euronext College, on the other hand, conducts harmonization efforts on an ongoing basis through working parties that are established to assess the changes in law that are necessary in each Member State to achieve a harmonized trading market regime among the Euronext jurisdictions. *See supra* notes 159-69 and accompanying text (discussing the Euronext College Chairmen's Committee, Steering Committee, and Working Parties).

market participants in other Member States.[288] Further, where regulators work closely with market participants on the harmonization of regulation, as in the harmonization of Euronext trading market rules, the bifurcated Committee mechanism of the Euronext College functions to prevent regulatory "capture"[289] and, thus, minimizes the problem of "race to the bottom."[290] Thus, fora such as the Euronext College serve a indispensable role. The E.U. should encourage Member States to exploit such arrangements to facilitate the development of administrative capacity in E.U. Member States with a less developed securities regulation regime.

CONCLUSION

Euronext merged the stock exchanges of Amsterdam, Brussels, and Paris in 2000 to take advantage of the increasingly harmonized regulatory regime for securities markets in E.U. Member States. But at the time of this merger there were gaps in EC securities legislation, particularly with respect to the harmonization of securities trading markets regulation. The Euronext College responded to this regulatory challenge by creating a mechanism for the harmonization of trading markets rules in the jurisdictions in which Euronext operates. The mechanism employed in the Euronext Regulatory MOU parallels the harmonization framework of existing EC securities directives. As an instrument for cooperation the

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288. *See* Speech by Michael Foot, *supra* note 83 (remarking on the importance of the bilateral MOU in fomenting a closer relationship between regulators). The Director of the FSA suggests that the "existence of such a document means that there has been at least some due diligence done on both sides about each other's system and that the results have been broadly satisfactory. It often means that it will be easier to pass regulatory information without challenge. It generally means that . . . the regulators from the two sides get together[,] and discuss the performance of each other's economy and of their major financial institutions. Over time, regulators can and do start to build up the personal relationships that really make a difference when a difficult live case comes along." *Id.*

289. *See* Di Giorgio & Di Noia, *supra* note 36, at 479-80 (discussing how the adoption of a single E.U. financial market regulator might increase the risk of regulatory "capture"). Regulatory capture occurs when a government regulatory authority becomes beholden to the business interests of the market participants that it is charged with regulating. *See id.*

290. *Cf.* Raustiala, *supra* note 80, at 60 (suggesting that regulators feel more secure in their approach to regulation when other successful regulators utilize a similar approach).

Euronext Regulatory MOU thus represents a significant evolution beyond the non-binding MOUs of the SEC and IOSCO. The arrangement also serves as an excellent example of successful reregulation in the wake of deregulation and increased competition.