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Transatlantic Corporate Governance Reform:
Brussels Sprouts or Washington Soup?

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Transatlantic Corporate Governance Reform: Brussels Sprouts or Washington Soup?*

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Abstract:

In light of increased and unprecedented integration of transatlantic economies, this article explores transatlantic regulatory challenges against the background of the latest spate of the European Commission's proposals on reforming corporate governance in the EU and the US Sarbanes-Oxley Act. These challenges stem in part from the corporate fallouts across both sides of the Atlantic and the subsequent regulatory responses, and more comprehensively from the ambition to design an international regulatory and supervisory system of cooperation in accounting and auditing. Furthermore, specific challenges related to internal control standards, auditing and accounting standards, international regulatory and supervisory cooperation are briefly outlined. The paper concludes by sketching a transatlantic regulatory road-map.

* This policy brief has been prepared for the EU-US 2005 summit and further published as a book chapter. For full reference, see A. Khachaturyan & J. McCahery, *Transatlantic Corporate Governance Reform: Brussels Sprouts or Washington Soup?* in DEEP INTEGRATION: HOW TRANSATLANTIC MARKETS ARE LEADING GLOBALIZATION pp.193-204, D. Hamilton & J. Quinlan eds., 2005.

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Introduction

The reduction in barriers to trade and the liberalization of financial markets, transportation and telecommunications have created the basis for the increase in flows of factors of production between jurisdictions. With the prospect of more capital mobility, it becomes conventional wisdom that national governments are prompted to perform their economic policy functions more efficiently. Indeed, the EU and US have developed successful policy strategies over time to encourage more competitive capital, product and labor markets while erecting few barriers that could deter substantial benefits. Nevertheless, many scholars view current efforts with a mixture of skepticism and optimism, arguing that the system of rules and institutions has insufficient incentives and capacity to foster equilibrium levels of efficient investments. At the same time, most serious proponents of liberalization accept that the separate interests within each country may lead to divergences in the optimal outcome with respect to standards. Consequently, much of the debate over finding agreement on the level of optimal standards is thought to turn on whether, all things considered, regulators can press for agreement on the level of standards to set. Underlying this fundamental policy question is the concern that the capacity to come to agreement on higher standards will lead to substantial benefits.

The EU and the US are enjoying increased and unprecedented integration of their economies. Together they account for the largest share of international capital and banking flows, levels of trade, investments and securities transactions. If anything, this transatlantic economic partnership reflects the common will and commitment to strengthen transatlantic relations by upgrading the institutional framework of dialogue, identifying specific challenges, reducing transatlantic trade barriers and promoting bilateral trade. The US-EU summit of 2004 further confirmed the common commitment toward the establishment of a multilateral trading system governed by rules, as well as policies to produce strong and sustained economic growth and to create the cooperative means and best practices to reinforce the underlying basis of the transatlantic economic partnership.

While there are a number of financial and regulatory difficulties that are sufficient to pose a threat to increased transatlantic trade and efficient transatlantic capital markets, the EU and the US launched the Regulatory Cooperation and the Financial Markets Regulatory Dialogue in 2002. The initiative is designed to promote transatlantic trade through establishing better quality regulation and minimize the divergences in the laws and policies of the two jurisdictions. A similar function is also served by the establishment of the Regulatory Dialogue as a forum for discussion of issues

of bilateral corporate governance and financial market regulation, which have recently been given increased preference in national regulatory policies.

The high-profile corporate fallouts of recent years have underscored the interconnection and interdependency of transatlantic economies and the need for regulators to work cooperatively to create timely and effective solutions to improve transatlantic auditing and governance policies. Whereas corporate governance failures usually occur at the national level, there is no denying that the recent financial scandals at Enron and Parmalat involved questionable dealings (SPEs, improper swap arrangements and flaws in financial disclosure) that took on a global dimension. These scandals provoked a variety of responses and brought the issue of transatlantic governance and accountability to the attention of law-makers and the public. Responding rapidly to the corporate scandals, the US Congress enacted the Sarbanes-Oxley Act (hereafter referred to as SOXA) in 2002, the most comprehensive legislative package in the history of US corporate regulation since the Securities Acts of 1933 and 1934.

The SOXA introduced sweeping reforms in corporate governance systems of publicly traded companies aimed at increasing the disciplinary systems of managers and gatekeepers. In an attempt to restore public trust and confidence in corporate accounting and reporting, the SOXA was designed to improve the governance and accountability of boards, managers and gatekeepers by inducing increased oversight and monitoring of US-listed companies and reputational intermediaries. In addition to the audit reforms, the SOXA put in place a number of measures specifically designed to counter the governance failures. These include requiring CEOs and CFOs to certify, on pain of criminal penalties, their firms' periodic reports and the effectiveness of internal controls; the imposition of obligations on corporate lawyers to report any evidence of suspected violations of securities law; the prohibition of corporate loans to managers or directors; restrictions on stock sales by executives during 'blackout periods'; and requiring firms to establish an independent audit committee, of which at least one member must be a financial expert. At the same time, the NYSE and NASDAQ quickly proposed new corporate governance guidelines.

The wave of US regulatory reform that followed the collapse of Enron has spilled over into Europe. Most directly, the SOXA applies to non-US firms that are listed on a US exchange and obliges EU audit firms to register with the United States Public Accounting Oversight Board (PCAOB). This extraterritorial application has triggered widespread criticism in Europe. An indirect effect of the events in the US has been to provoke a host of parallel reforms in the EU. Interestingly, EU policy-makers quickly responded to the US scandals by accelerating their own company law modernization and

corporate governance reform program that was earlier instituted by the Commission through the High Level Working Group, chaired by Professor Jaap Winter. EU regulators were motivated by a concern to ensure that US collapses are not replicated in Europe, a desire to ensure that domestic and EU legislation reflect best practice and the need to give credibility to claims of regulatory parity for the purposes of negotiations over the extraterritorial impact of US law.

In their second report, the Group recommended strengthening mandatory disclosure obligations for listed companies, granting special investigation rights to minority investors and considering the introduction of a disqualification sanction for directors associated with misleading disclosures. Besides these reforms, the Group suggested the development by EU member states of UK-style codes of best practice, primarily enforced by markets through ‘comply or explain’ mechanisms, improved investor access to corporate information through the use of electronic dissemination facilities and the strengthening of shareholders’ rights to vote via electronic means.

Taking up the recommendations of the High Level Group to establish a new framework for corporate governance, the EU launched its Action Plan in May 2003.¹ The Action Plan is intended to give a fresh and ambitious impetus to EU company law harmonization and is meant to meet three challenges in the area of corporate governance: i) improving the integrity and accountability of board members, ii) restoring the auditors’ credibility and iii) promoting fair presentation of the company through sound and reliable accounting and hence, restoring investor confidence and fostering efficiency and competitiveness of businesses in the EU.

This chapter examines the major transatlantic regulatory challenges posed by the latest spate of regulation promulgated on both sides of the Atlantic. While some question whether the reforms are optimally designed to limit future financial frauds or whether they pose excessive burdens for small businesses, EU and US policy-makers, in contrast, contend that it is important to work out cooperative solutions for improving governance performance overall. The development of a ‘transatlantic practice’ is underway and regulators, lawyers and other parties in the fields of accounting, corporate law and securities regulation are influencing its development, leading to the adoption of common standards and convergence in legal techniques to solve similar problems.

¹ EC Commission Communication, “Modernizing Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward”, COM(2003)284 final, May 21, 2003.

Despite these substantive reforms, corporate law remains a domestic matter. Interestingly, securities regulators, who have been developing the recent regulatory innovations, have been a significant influence on the developments that have taken place in EU company law. Similar incursions into the terrain of US corporate law were not significant until legal changes were introduced by the SOXA in 2002. To be sure, impediments remain on both sides of the Atlantic, and questions remain as to whether and how adoption of common standards and convergent measures will influence transatlantic market developments. This policy brief concludes by arguing that regulatory diversity rather than harmonization will be more conducive toward the establishment of a truly transatlantic marketplace. See Table 1 for an overview of the main characteristics of the principal actors on the corporate governance stage of the United States and selected EU member states.

Transatlantic Regulatory Challenges

In the post-scandal era, the EU and US have continued to face increased transatlantic regulatory challenges. These challenges stem in part from the corporate fallouts and the subsequent regulatory responses, and more comprehensively from the ambition to design an international regulatory and supervisory system of cooperation in accounting and auditing.

Whereas the EU's reform moves remain nascent and have been treated with indifference in the US, the cross-border implications of the SOXA and its 'moral DNA' for US-listed European companies have raised apprehensions and objections in the EU for creating 'unnecessary extraterritorial consequences' and 'unnecessary difficulties'. EU policy-makers and businesses alike have expressed growing discontent that the extension of SOXA requirements to US-listed European companies is costly and might possibly oblige these European companies to de-list from major US markets such as NYSE and NASDAQ. Moreover, the SOXA has been perceived as an attempt to export US corporate governance rules with disregard to the distinct legal and institutional framework in the EU and the very virtue of the EU's approach to regulatory reform. Against this background, a number of pending transatlantic regulatory challenges remain high on the agenda of policy-makers on both sides of the Atlantic. We turn next to the most significant reform measure that has emerged from the governance crises.

Table 1. Main Characteristics of Transatlantic Corporate Governance Players

Country	United States	UK	Germany	France	Italy
Employees	*Flexible labor *Low unionization *Employment at will	*Flexible labor market	*Work councils *Co-determination *High skills *Non-flexible labor market	*Work councils *Low unionization *Short-term contracts	*Long-term contracts *Rigid labor market *Medium skills
Shareholders	*Institutional investors and individuals *Dispersed	*Institutional investors *Dispersed	*Other non-financial companies *Banks	*Foreign investors *State	*State *Families
Government	*Liberal policies *Arms-length *Weak takeover barriers	*Liberal policies *Arms-length *Weak takeover barriers	*Protectionist policies *Medium takeover barriers	*Protectionist policies *Interventionist *Medium takeover barriers	*Protectionist policies *Interventionist *Strong takeover barriers
Boards of Directors	*High activism *High % of outsiders due to investor pressure	*High activism *High % of outsiders determined by law	*Moderate activism *Stakeholders as a significant minority *Medium size	*Moderate activism *Minority outsiders *Medium size	*Low activism *Large % of insiders *Medium size
Top Management Team	*Professional (finance/MBA) background *Some foreign-born management *Open labor markets	*Semi-professional background *Some foreign-born management *Open labor markets	*Technical background *Few foreign-born managers *Closed labor markets (long-term)	*Common educational backgrounds *State links *Few foreign-born managers *Closed labor markets (long-term)	*Non-professional management *No foreign-born management *Closed labor markets (long term)

Source: "Mastering Corporate Governance", *Financial Times*, May 27, 2005.

Internal Controls

The first transatlantic regulatory challenge relates to compliance with SOXA's internal controls standards. According to the SOXA, management of a US-listed company is required to file a report that should state: i) management's responsibilities for establishing and maintaining adequate internal controls and procedures over financial reporting; ii) management's assessment about the effectiveness of the company's internal controls as of the end of the company's most recent fiscal year, including a statement as to whether the controls are effective; iii) any 'material weaknesses' in internal controls that management has identified; iv) the framework used by management to evaluate the effectiveness of the company's internal controls; and v) an outside auditor's attestation to and report on management's evaluation of the company's internal controls and procedures for financial reporting.²

Moreover, managers are responsible for creating, maintaining and regularly evaluating the effectiveness of a system of 'disclosure controls and procedures'. As noted above, the CEO and CFO are accountable for reliability and accuracy of both the financial and non-financial information contained in their periodic reports and internal accounting controls. They must personally certify for compliance and take personal responsibility (criminal penalties) for non-compliance.³

Whereas the SEC states that such internal controls standards and compliance measures are necessary to enhance US investor confidence and promote deep and liquid capital markets, critics note that the new reporting demands of SOXA Section 404 are perceived in the EU as imposing unjustified costs and time-consuming transitions on all US-listed EU companies. For many types of firms, these regulations impose costs but bring few benefits to investors.

Following intense lobbying efforts from the EU and European businesses and faced with possible delisting of European companies from the US capital markets, the SEC has recently granted a year-long reprieve to non-US listed companies from SOXA's internal controls standards. As a result, European companies have to implement US internal controls standards by July 15, 2006.

² For more details, see SOXA Section 404: Management Assessment of Internal Controls.

³ For more details, see SOXA Sections 302 and 906: Corporate Responsibility for Financial Reports.

Auditing Standards

The second transatlantic regulatory challenge concerns the recent shift in auditing standards. In an effort to create a more independent and accountable audit environment, the SOXA puts significant emphasis on the regulation of not only accounting and auditing practices of a registered public accounting firm but also that of any Certified Public Accountant (CPA) associated therewith, and any CPA working as an auditor of a publicly traded company. The SOXA establishes a direct reporting responsibility between the auditor and the audit committee of the issuer, subjects audit and non-audit services to pre-approval by the audit committee, limits non-audit services to be provided by an auditor to the issuer, clearly defines rules for audit and non-audit service fees, regulates the conflict of interest between the auditor and the issuer, and requires more frequent rotation of lead and review audit partners.

Moreover, following the SOXA's enactment, the SEC ended a long era of self-regulation and established PCAOB as a regulator. Subject to SEC oversight and aimed at protecting public interest in "informative, accurate, and independent audit reports" for publicly traded companies, the function of PCAOB is to: i) register public accounting firms; ii) establish, or adopt, by rule, "auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers"; iii) conduct inspections of accounting firms; iv) conduct investigations and disciplinary proceedings, and impose appropriate sanctions; v) perform such other duties or functions as necessary or appropriate; vi) enforce compliance with the Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto.⁴

As we have already seen, the fact that PCAOB authority extends to any non-US accounting firm that 'prepares and furnishes' audit and accounting services to any US-listed company has further sharpened the focus of transatlantic regulatory dialogue and became one of the major points of contention between the US and the EU.⁵ EU policy-makers and industry groups have expressed their discontent that any European accounting firm that provides material services to publicly traded companies in the US should supply its work papers upon the request of the PCAOB or the SEC and be subject to their controls. Moreover, the fact that European accounting companies that do not issue audit reports but are still substantially involved

⁴ For more details see Section 103 of the SOXA: Auditing, Quality Control, and Independence Standards and Rules.

⁵ For more details see Section 106 of the SOXA: Foreign Public Accounting Firms.

in the process of their preparation are treated as a public accounting firms, for SOXA purposes, is likely to cause continued irritation in the EU until convergence or equivalence has been achieved.

Even though EU policy-makers and European businesses have insisted on mutual recognition of equivalent systems of auditing, the SEC remains skeptical of European audit practices, which may impede progress in this area. The SEC takes the view that EU standards, which are largely national and rely on enforcement by national-level regulators, are not adequate in most respects and contrast poorly to the level of regulation in place in the US. While the SEC acknowledges that there may be some variation in standards, the US investor is nevertheless entitled to the same level of protection no matter whether the party invests in a domestic or foreign company publicly traded in the US.

Accounting Standards

The third challenge in the transatlantic regulatory dialogue relates to the introduction of a single set of global accounting standards. As of January 1, 2005, all listed European companies have to comply with reporting requirements of the International Financial Reporting Standards (IFRS). EU-listed US companies publish their financial statements according to the US Generally Accepted Accounting Principles (GAAP). Whereas EU policy-makers have expressed their willingness to extend the mutual recognition principle to EU-listed US companies reporting in US GAAP, and hence, granting equivalence to US GAAP with the IFRS, the SEC has been so far reluctant to judge the equivalence of IFRS with US GAAP.

The SEC requires that all US-listed companies, including European ones, have to reconcile accounting differences arising from IFRS with US GAAP. This virtually means that US-listed European companies should report according to US GAAP. The position of the SEC reflects the fact that despite the markedly improved quality of transparency and disclosure in the EU since the introduction of more stringent listing rules on national stock exchanges and the enforcement of the IFRS, enforcement of accounting rules in the EU is still national and there is no EU enforcement body. In some new member states there is very weak enforcement of accounting rules. Moreover, even though the Committee of European Securities Regulators (CESR) plays an important role, it does not have 'EU enforcement leverages' or the necessary authority to allow for accounting standards across both sides of the Atlantic offering equivalence.

Nevertheless, the transatlantic regulatory dialogue has already produced positive results with regard to accounting standards. Taking into consideration the transition to IFRS, the SEC has already eased disclosure of

historical results by US-listed European companies. Finally, the SEC and EU policy-makers have recently announced a road map that would eliminate the reconciliation requirement for US-listed European companies by 2009.

De-Listing and Deregistration

As a consequence of sweeping changes in corporate governance, accounting and auditing practices in the US and their across-the-board application to all US-listed companies, the cost of regulatory compliance, possible delisting and deregistration from the US markets by European companies became yet another challenge on the EU and US regulatory agenda. EU policy-makers and business groups alike have warned that they might decide to de-list and deregister because of high regulatory costs and costly transitions that US-listed EU companies will face. Nevertheless, de-listing is not a simple task for European companies with more than 300 shareholders. Indeed, such companies are unable to deregister pursuant to Rule 12(e) and consequently must remain listed on the exchange.

Even though most EU listed companies would not rush to de-list if the barriers were dropped, EU policy-makers have long argued that the SEC should take actions to ease the process of deregistration from the SEC for European companies with more than 300 shareholders. Currently, the SEC is examining ways whether such European companies can be exempted from some corporate governance requirements. It may be an argument to recommend that EU listed companies may opt out of the US measures if the SEC, having assessed all details, is satisfied that the parallel EU measures are sufficient.

International Regulatory and Supervisory Cooperation

The next challenge in the transatlantic regulatory dialogue refers to the long-running dispute as to greater EU representation and participation in international standards-setting bodies. The EU is keen to have more involvement in the International Accounting Standards Board (IASB) and in the International Auditing and Assurance Standards Board (IAASB) to be able to influence governance thereof as well as the reform process in accounting and auditing initiated by these bodies.

The fact that the PCAOB might 'overrule' the IAASB by extending its system of inspections and investigations to US-listed foreign companies and issue standards independently from those developed by the IAASB as evidenced by the PCAOB Release 2003-023 on "Proposed Auditing Standard on Audit Documentation and Proposed Amendment to Interim

Standards on Auditing”,⁶ elevated concerns in the EU as to the future of global standards setting in accounting and auditing.

The debate in this area is heating up, but ‘the fight’ moves into another round with no concrete results so far.

A Transatlantic Road Map

The new US audit and accounting regulatory environment (particularly by limiting the role of the profession) will probably have a major influence on future efforts to establish a convergence model for a global auditing and accounting profession. While the EU’s approach offers different regulatory menus, we should expect substantial convergence in the area of governance and disclosure.

Turning our attention to the introduction of new regulatory frameworks, it is important to keep in mind that measures should be left sufficiently flexible in order to accommodate the wide range of firms and corporate law regimes. The more innovative and adaptable a legal system is, the more likely it will be able to supply firms with measures that they require while ensuring an adequate level of investor protection.

In this context, the US legislative reforms introduced in wake of the 2002 governance scandals impose a number of new statutory measures that seek to improve the level of transparency of accounts, ensure auditor independence and limit the abusive actions taken by boards and officers. While such measures have surely taken away some of the shortcomings of the original corporate law regime governing listed firms in the US, they may suffer from several shortcomings as we have seen. In this context, EU listed firms do not have the possibility of opting out of the EU regime. Those who support the introduction of a lower regulatory regime can cite the benefit of allowing investors and firms to enjoy different levels of protection, which is likely to correspond to the diverse needs of investors for information and legal protection. In this respect, the issue of flexibility and reliability of different measures should be examined and assessed.

For the EU, the emphasis on increased use of recommendations by regulators can provide a coherent foundation for reform. Another beneficial aspect might be the use of less intrusive self-regulatory measures which could speed up the process of reform while taking into account the dynamic changes in the market. From this perspective, the role of the EU would be to ensure a certain level of coordination between the member states, and make it possible

⁶ For more details see http://www.pcaobus.org/Rules_of_the_Board/Documents/BriefingPaper2003-023.pdf.

to provide for certain minimum standards. Either way, focusing solely on directives and other hard law measures, as opposed to flexibility and national level decision-making, is to ignore arguably the key policy issues for firms for years to come.

Finally, the transatlantic dimension of corporate governance reform represents a unique experiment in corporate law reform. While it is unclear whether EU-US cooperation has made it easier for firms to comply with regulation, made it more attractive for new investment or protected the interests of minority shareholders sufficiently, there may be good reasons to support more extensive cooperation between the EU and US since it may eventually affect capital mobility, and hence, drive product and labor market reforms, leading in turn to lower costs of capital. In this respect, some level of regulatory competition may be necessary to ensure the high rate of flexibility and innovation necessary to create an effective system of corporate law. On the other hand, the increasing trend toward adoption of similar techniques and institutions, accompanied by extensive interest group pressures, may create additional incentives for directors and managers to adopt internal organizational forms that are more efficient. Whether the EU and US will create an effective transatlantic regulatory environment in the various areas of corporate law will depend on how successful the parties are in striking a balance between fostering regulatory competition in some areas to favor heterogeneity of issuers, investors, creditors and to allow them to choose between possible governance structures, while introducing limited harmonization in other areas.