EBI Conference
Regulating and Supervising Capital Markets in the EU – Trends and Challenges

The International Dimension of Capital Markets Regulation and Supervision

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Overview

1. The Architecture of International Capital Markets Regulation and Supervision
2. An Institutional Economic Analysis

1. The Architecture of International Capital Markets Regulation and Supervision

Conflict Between Global & National

Globally Integrated Financial Markets

National Regulation and Supervision

The Reaction by Markets and States

regulatory arbitrage

- market actors locate in state with most attractive regime

regulatory competition

- states adapt their laws to attract market actors to their territory

Dangers

- regulatory arbitrage and regulatory competition create
  1. externalities (‘spill-over effects’) for other countries
  2. uneven competitive playing field
  3. dangers for global financial stability

2nd Order Reactions by States

- in order to avoid externalities and even the playing field, state react in two ways:

- results in market fragmentation

Countering Market Fragmentation

1. world-trade law (WTO/GATS)
   - largely toothless because of prudential carve-out

GATS, Annex on Fin'l Services, para 2(a)
"Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. [...]"

Countering Market Fragmentation

2. regional integration
   - in principle can overcome market barriers
   - e.g. passporting (EU)
   - can also work backwards (Brexit!)

Countering Market Fragmentation

3. deference ("substituted compliance", "equivalence")
   - decentralised market opening
   - avoids double regulation and supervision
   - but weaknesses:
     - unilateral
     - temporary
     - potentially political

Safeguarding Financial Stability

Coordination of Regulation

- **Agenda setters**
  - G20
  - FSB
- **Sectoral institutions / fora**
  - BCBS
  - IOSCO
  - IAIS
  - FATF
- **Method**
  - soft law

Cooperation in Supervision

- **Legal basis**
  - MoU
- **Institutional setting**
  - Supervisory colleges
  - Crisis management groups
- **Method**
  - information exchange

2. An Institutional Economics Analysis

The Subsidiarity Principle

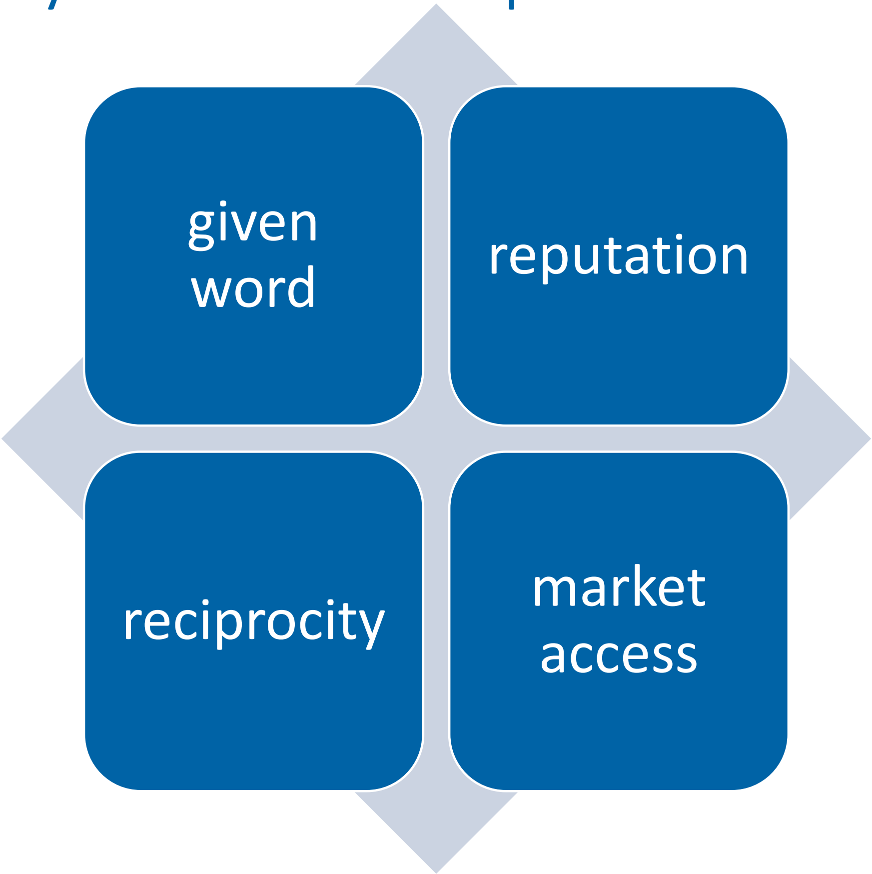
- Which is the right level of regulation?

subsidiarity principle: higher level should not fulfill a task if it can better be dealt with at the lower level

- relevant for all systems of multi-level governance
- Which subjects necessarily have to be dealt with on a global level?
  - financial stability issues
  - green finance
  - global technologies (blockchain)

The Incentives Structure

Why should states implement soft law?



Need for More Integrated Approach

- different institutions and legal texts should be brought together
  1. WTO/FSB: only regulation in line with global soft law can be considered as a justified obstacle to market access
  2. BCBS/IOSCO/IAIS/FATF: more coordination
  3. Deference/IOSCO: preliminary assessment of substituted compliance/deference by international bodies

     see Matthias Lehmann and Jonas Schürger, 'Multilateralizing Deference – A Proposal for Reforming Global Financial Law', EBI working paper 107.
  4. More place for private law: cooperation with UNCITRAL, UNIDROIT and HCCH

Thank you for your attention!