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Regulation – a Science of its Own

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"Regulation – a Science of its Own"

Speech

by Felix Hufeld
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Financial regulation, ladies and gentlemen, is located at the intersection of different disciplines, in particular law, economics and finance. The Institute for Law and Finance (ILF) has been bridging the intellectual gap between these fields superbly for the past 15 years – unlike financial regulation, I fear. The latter can look back on a chequered history with many highs and lows, characterised by minor and major crises as well as by the current zeitgeist.

The zeitgeist changes, and as it does, so does legislation.[1] This is the way it has always been, and financial regulation is a prime example of it, even if its creators – including supervisors such as ourselves – may not always be fully aware of this dependence.[2]

Rudolph von Jhering captured this phenomenon back in the mid-19th century. As he put it so well,

"A legislator who issues a law in the full knowledge of his purposes and intentions necessarily believes that it is all his own work (...) and yet, without him being aware of it, its substance has been fed to him by the spirit of the age."[3]

That the spirit of the age is feeding substance to legislators and regulators is not necessarily a bad thing. On the contrary, there are innumerable examples of a changing zeitgeist having a positive influence on legislation and case law. But unfortunately, even the zeitgeist is not spared from trials and tribulations. Moreover, it seems to be extremely forgetful and, as Johann Gottfried Herder put it, "returns from the grave" over and over.[4]

Let's take a brief look back. The Great Depression at the end of the 1920s brought a banking crisis in its wake, including in Germany. When one of the four major German banks, Darmstädter und Nationalbank (Danatbank), got into difficulties and had to close its doors to customers, panic broke out and long queues formed outside the branches.

At that time, in 1931, the foundations were laid for a unified public supervision of *all* banks.[5] Before then, there had only been supervisory rules for individual groups of institutions[6] and individual types of banking business.[7]

[1] Cf. for example Würtenberger, Thomas: Zeitgeist und Recht, rev. 2nd edn, Tübingen, 1991, page 14.
[2] Würtenberger, *op. cit.*, page 15.
[3] Von Jhering, Rudolph: Der Geist des römischen Rechts, 3. Rev. Ausgabe 1873, Seite 45.
[4] Johann Gottfried Herder: Briefe zu Beförderung der Humanität - Kapitel 4, available at http://gutenberg.spiegel.de/buch/briefe-zu-beforderung-der-humanitat-6443/4 (only available in German).
[5] https://www.bafin.de/DE/DieBaFin/AufgabenGeschichte/Bankenaufsicht/bankenaufsicht_node.html;jsessionid=075BF02F0A4A8FFFA2FEB71F7B8B624B.2_cid363.
[6] The savings banks governed by public law in Prussia from 1838 onwards and the mortgage banks from 1899 onwards.
[7] For example, due to the Safe Custody Act (*Depotgesetz*) and Stock Exchange Act (*Börsengesetz*) of 1896.

Banks in the U.S. and elsewhere were also made subject to strict regulation around the same time. "The financial system became a little boring but much safer," as Paul Krugman noted.[8]

You would think that after these experiences, no one would ever doubt the point of effective regulation again – but perhaps you have heard the saying, "danger past, God forgotten"? If so, you will not be surprised to hear that as the years went on, there was a resurgence of the idea that we did not need any regulation, or at most regulation with kid gloves, because it was thought that the market regulated itself and only when it was freed from the shackles of the State could it grow and increase the welfare of all.

Economics provided the ideological basis in, for example, the efficient market hypothesis and *homo economicus,* the model of the man who acts rationally in economic and financial matters, who augments not only his own profit but also that of all.

Thus equipped, and borne along by the zeitgeist, legislators and regulators systematically and extensively relaxed financial regulation worldwide in the decades before 2007.

True, there was certainly a great deal of regulation before the major financial crisis, but much of it was inadequate and missed its target. And across the globe, there were supervisors who felt obliged to work according to the principle of "light touch supervision".

Yet the prosperity of the Western world seemed to prove the defenders of free markets right. *Anyone* warning of the consequences of overly lax regulation and excessive trust in the markets was not taken seriously. *Anyone* swimming against the tide of the zeitgeist and calling openly for greater state control was regarded as a spoilsport, a drag on progress and an enemy of economic growth and job creation.

The zeitgeist is a sort of burning glass which filters out those lessons and views which are not in tune with it, wrote Thomas Würtenberger. What is in tune with the zeitgeist is commonly regarded as "true".[9]

The effect of spectacular events changes the zeitgeist.[10] The financial crisis of 2007/2008 was such an event, as the crisis at the end of the 1920s and beginning of the 1930s had been. Please allow me to take another short look back:

It all started with a promising innovation. Banks started securitising risks which they had previously had to show on their balance sheets and selling them to third parties. This "originate-to-distribute"

[8] Krugman, Paul, „Die neue Weltwirtschaftskrise“, 2009, page 220.
[9] Würtenberger, Thomas, *op. cit.*, page 24.
[10] *op. cit.,* page 30.

model was revolutionary. In the U.S., in particular, banks granted loans on a large scale, to then send them immediately on their way, nicely packaged and with the kind support of various rating agencies, which did not just advise the institutions but honoured their products with top grades as well.

In the worldwide low interest rate era ushered in by Alan Greenspan following the September 11 attacks in 2001, investors all over the world were completely obsessed with these securities, as they promised comparatively high returns.

Fuelled by this demand, the originate-to-distribute carousel span faster and faster until it suddenly came to a halt when the U.S. real-estate bubble burst and it became clear that inside the pretty packaging, these securities had rather toxic content.

The underlying assets were mostly U.S mortgages on residential properties, largely from the subprime category. What had been ignored or even covered up for a long time was that most of the subprime borrowers of the years 2005 onwards were simply not creditworthy.

In spring 2007, it became evident that many of them were not going to be able to pay back their loans. At the same time, the excessive values of the homes on which the mortgages had been taken out crashed.

When subsequently, in September 2008, investment bank Lehman Brothers collapsed, the global capital markets were thrown into shock. The interbank market came to an almost complete standstill because the banks did not trust each other an inch anymore. *That*, ladies and gentlemen, is a greatly simplified sketch of the events of the financial crisis of 2007/2008.

Shock was followed by disillusionment. The crisis had revealed *homo economicus* as a fantasy. Behavioural economics found an audience, reminding us that even professional investors are only human and tend to herding instincts, panic and irrational exuberance.
Some may have followed the herd with eyes open, but in retrospect the crisis partly seems to have been the result of uncontrolled "animal spirits".
George Akerlof and Robert Shiller made this term the title of a famous book, but it was coined long before, by John Maynard Keynes, who took the view that it was man's *instincts* which drove economic activity.
Moreover, it was necessary for people to admit that they had fallen victim to a self-inflicted information asymmetry. Put off by the costs of conducting credit rating assessments themselves (or possibly not in the position to do so), they instead unthinkingly relied on the assessments of credit rating agencies. Such agencies, however, were evidently overwhelmed by this task – not to mention other possible motives they may have been driven by.

Furthermore, the crisis brought the world face to face with an old insight, namely, that financial stability is a public good which needs to be protected, and this protection needs to be provided by an independent state body without its own economic interests and on the basis of adequate regulation.

Regulation plays an important social role, helping our financial system to fulfil its functions reliably and sustainably. Regulation creates (legal) certainty on the financial market and thus establishes a framework for confidence, economic growth and prosperity. Pretty obvious, you might think – but that way of thinking was not in keeping with the zeitgeist. "What we're going to have to do, clearly, is relearn the lessons our grandfathers were taught by the Great Depression,"[11] wrote Krugman on the subject.

So what was the regulatory finding? International regulatory standards, for banks, for example, which many states had transposed into national law and thus made legally binding for supervisors and the supervised alike, were found to have serious weaknesses.

Basel I, the first global capital standard from the Basel Committee on Banking Supervision, was crudely designed with no sign of risk sensitivity. Moreover, it contained gaps in some areas, such as on short-term liabilities, and risk management was merely a side issue. This meant there was nothing to stop banks taking on risks which they could neither assess nor bear.

The more risk-sensitive-approach of Basel II – it often left unmentioned – was implemented almost simultaneously to the unfolding of the financial crisis. It was therefore by no means a cause of the crisis, but would not have been able to prevent it either.

The *old* agreement (Basel I) also woefully neglected liquidity risks. Outside the regulated sector, there were real regulatory wastelands, including the area often termed rather vaguely the "shadow banking sector". Getting a grip on these areas remains a particularly difficult task both conceptually and politically (especially at the global level), which we are applying ourselves to on the Financial Stability Board.

After the outbreak of the crisis, a massive army of supporters of regulation formed. Instead of regulatory kid gloves, the whole world was suddenly calling for boxing gloves. Tough regulation, tough action, no more crises. That was the expectation, and while it is understandable, it is not achievable.

[11] Krugman, Paul; *op. cit.*

Regulation is supposed to make order out of disorder, but order always has its limits. There will never be absolute security, there never can be, and excessive trust in the state is no better than excessive trust in the market. It is part of the regulatory mandate to give the market the necessary freedom for innovation and entrepreneurial activities – which includes, in extreme cases, allowing businesses to fail. What is more, regulation is supposed to minimise deadweight losses but without causing unnecessary costs. Regulation has to be appropriate, that is, proportionate.

The heads of state and government of the G20 must have had this in mind when they set their post-crisis regulatory target at the famous Washington Summit in November 2008, shortly after the Lehman collapse. Never again should the global economy come so close to the abyss, and never again must countries be forced to shore up huge banks with taxpayers' money.
A new, global-scale regulatory framework was therefore to be created. So the G20 made a far-reaching commitment:

“We pledge to strengthen our regulatory regimes, prudential oversight, and risk management, and ensure that all financial markets, products and participants are regulated or subject to oversight (…).”[12] But they also made a decisive addition: "as appropriate to their circumstances".

Then the great regulatory machine was started up. Within a short period of time, reforms in the banking sector, in securities and investments, and in the insurance sector were initiated, developed and to a large extent implemented – at the European and national level as well as globally.

To give you just a few examples, one of the first steps in banking regulation was to introduce stricter disclosure requirements for securitisations with the intention of increasing transparency (Basel II.5). Greater transparency was also the objective of numerous reforms in securities regulation.

In derivatives trading, structures were created to give supervisors a better overview of transactions and their risks (EMIR).
Rating agencies, which had recognised the risks of complex financial products either too late or not at all, also came into the regulatory focus. The stability of banks is increased by stricter capital requirements and new liquidity standards (Basel III and the CRD IV package), while institutions' remuneration systems may no longer reward short-term success but instead are to reinforce

[12] Leaders of the Group of Twenty, Declaration of the Summit on Financial Markets and the World Economy, Washington, 15 November 2008, page 2.

sustainable management. The overall aim was to significantly improve resilience and ensure better risk management.

Another lesson from the crisis was that regulation must focus not only on individual banks but on their systemic importance. States had become susceptible to something akin to structural blackmail during the crisis.

Again and again, they were forced to bail out institutions with taxpayers' money because letting them collapse was simply no alternative – the notorious "too big to fail" dilemma. As we all know, when the U.S. government wanted to make an example out of Lehman Brothers, it went very wrong. Global systemically important banks therefore have to fulfil particularly high capital requirements and are subject to especially strict supervision using a variety of other metrics.

This approach is ultimately just the upper end of the scale of proportionality. Additionally, in the event that a systemically important bank does in fact start to totter, instruments have been created to restructure it if need be or to wind it down without damaging the public interest.

At the global level, we still have a way to go as far as regulation is concerned. The EU Bank Recovery and Resolution Directive now holds first owners and then creditors of a bank liable – something which should really go without saying. Walter Eucken, the father of German ordoliberalism, said, "Those who reap the benefits must also bear the costs". This founding principle of the market economy was disregarded for far too long.

A series of real-world examples are currently showing us how the theoretically very convincing European concept of the bail-in is being put to the test and which challenges can arise, both in the grey area between supporting and bailing out a bank and its possible resolution, and various moral hazard problems caused by state intervention.

Another area of regulation where we can see the effect of the zeitgeist particularly clearly is conduct regulation. A huge amount has been going on in this area since the financial crisis, and further developments are coming up.

The experiences of the crisis and numerous scandals across the world have changed the image of consumers. The public now sees them as market participants who should enjoy a particularly high level of protection, with the result that we are moving toward regulation affecting the entire value chain of a financial product; you only have to think of MiFID II, for instance.

There have been some changes to the institutional framework of supervision as well. In the European Union, the European System of Financial Supervision got off the ground, consisting of the three authorities, the EBA, EIOPA and ESMA, whose primary function is to harmonise regulation and supervisory practices in the EU, and the macroprudential European Systemic Risk Board.

In Germany, too, we have set up a macroprudential supervisory body, the German Financial Stability Committee, which has representatives from the Federal Ministry of Finance, the Deutsche Bundesbank and BaFin.

The Single Supervisory Mechanism for eurozone banks was launched on 4 November 2014, becoming the first pillar of the famed banking union, and at the start of 2016 the second pillar, the Single Resolution Mechanism, became operational.

This overview, which is far from exhaustive, gives an idea of the regulatory feat of strength which has been achieved since the crisis. Crises are known for leading to such feats of strength. But, as we know, the zeitgeist is changeable.

What does that mean? Do we have to worry that the regulatory clock will be put back yet *again*? That is a risk. Crises are initially followed by the introduction of new, tougher rules and new authorities in the public interest, but over time, the public loses interest in regulation, even though this was actually developed to protect it. Political attention then also dwindles and with it support for stricter regulation and control.[13] Lobbyists have their finest hours in such phases. This is the point we are heading towards right now, ladies and gentlemen.

Will we continue to take the lessons of the past to heart, or will we mothball them? You will not be surprised to hear that we supervisors are not in favour of regulatory mothballing, that is, renewed deregulation. The course which we set out on after the outbreak of the financial crisis is the right one, in principle – but you know what it means when a lawyer says "in principle"!

In the regulatory community, we are currently looking at the thorny issue of whether the numerous reforms introduced since the outbreak of the crisis are having the desired effect, both individually and as a whole. I take the view that proportionality must be one of the issues at the centre of such considerations.

[13]See for example Bernstein, Marver, Regulating Business by Independent Commission, 1955, Princeton, New Jersey, page 72, page 74 et seq.

If you ask me whether the regulation of the post-crisis era is proportionate enough, as the G20 pledged in 2008, whether it takes proper account of the risk profiles of supervised entities, my answer is "not sufficiently".

The European Commission, in its evaluation of post-crisis regulation, also came to the conclusion that the EU has more work to do on the matter of proportionality. For example, in the planned amendment to the Capital Requirements Directive and the Capital Requirements Regulation, it wants to reduce the burden on smaller institutions. And rightly so!

We really have reached a level of regulation which is placing an excessive and, as far as the risk profile is concerned, unnecessary strain on smaller banks. We have to change that, and in a more extensive and nuanced way than Brussels is currently proposing, but under *no* circumstances should we compromise on stability. *All* institutions, even small ones, must have sufficient capital and liquidity.

Those who do not stick to this principle, confusing proportionality and deregulation, are laying the foundation stone for the next crisis.

There is also the risk of a step backward in the negotiations to finalise Basel III as well, as the principle of risk sensitivity is up for consideration. We want to limit it in a meaningful way, and we must do so, while maintaining it as a regulatory principle.
The design and calibration of an output floor for banks using internal models are still heavily debated, as you know.

The aim of the floor is to prevent risk-weighted assets, and thus the capital requirements of institutions, from diverging from each other without good reason. However, if we set the floor too high, we will crush any risk sensitivity, which from my point of view as a supervisor would be *extremely* damaging.

The principle of risk sensitivity is under attack from three fronts at the moment:

1) **Banks** would like to have the greatest possible freedom and individuality to apply internal models – and I assume, of course, that they have only the best of intentions. But this measure of freedom and individuality cannot be the goal of Basel III or regulation in general.

2) The **fraction of the regulatory sceptics** sees risk sensitivity largely as a metaphor for abuse, at least as far as it is based on banks' own calculations, and essentially want to get rid of it

altogether.

3) Finally, in the eyes of the **well-meaning academic simplifiers**, risk-sensitive regulation has reached such a high degree of complexity that it is not a safe enough model and thus bound to fail.

What the sceptics and the simplifiers have in common is that they both want to effectively eliminate risk sensitivity. They want to make blanket limits like the leverage ratio or the output floor the central supervisory tool for the managing of capital provisions, because this looks like a foolproof, uncheatable and simple solution. Welcome back to the world of Basel I!

The non-risk-sensitive leverage ratio or output floor make sense as a backstop and as a complement to risk-sensitive requirements and a functioning risk-management system, but blanket limits of this type are not suitable as the sole or primary instrument of capital management because they do not reduce risks.

They increase them, particularly if the limits are set extremely high. Even if the zeitgeist demands simplification, complex risks cannot be reduced to a number. Everything should be made as simple as possible, but not simpler, Einstein is supposed to have said.

A bank whose capital requirements are largely determined by high, non-risk-sensitive upper limits, can do nothing else but to recoup the resulting high capital costs with riskier business, without receiving regulatory punishment for it. We saw exactly that in the financial crisis.

The connection between risk and return cannot be broken, not even with the best of regulatory intentions. And even the representatives of the academic elite have not been able to prove otherwise so far either.

Risk sensitivity means that the actual risk is better represented in the capital requirements, so, put simply, higher risks need to be underlaid with more capital and lower ones with less. Risk sensitivity thus makes risks more manageable, but – of course – is more prone to rule bending as well.

So, when is the advanced approach – and thus also the internal model – preferable to the standardised approach?

Whenever banks have a significant informational advantage, based on their own meaningful data. In such cases, the internal model can better represent a risk than regulators can via the design of a standardised approach. It is not surprising that this applies particularly in the field of credit risk.

When the opposite is the case, that is, when there is not enough data, the current Basel III reform correctly envisages that some low-default portfolios, for example, be taken out of the scope of the advanced approach and the modelling of operational risk be discarded.

The sensible implementation of the principle of risk sensitivity outside the standardised approach is therefore based on three pillars: the application of internal models, their sensible limitation at the regulatory level and strong supervision.

For me, this trio is part of the crown jewels of contemporary banking regulation. Sure, they might need polishing from time to time, but apart from that they should be kept protected, well looked after and – if necessary - defended.

And coming back to conduct regulation: no deregulation, no regulatory step back, but rather a return to the primacy of proportionality: that is what we need here as well. I am certain that consumers and retail investors do require special protection because they are at a structural disadvantage to providers.

However, we may run the risk of creating a welter of rules and complexity in conduct regulation which could significantly impede the comprehensive and legally sound provision and distribution of financial products.

That cannot be a reasonable regulatory objective, because if it is no longer a paying proposition to offer financial products, or if this involved incalculable legal risks, eventually, there will not be any such products on offer any more. That would not help consumers either.

And the moral of the story? We have to break out of the eternal "pork cycle" consisting of crisis, regulation, deregulation, and another crisis. Regulation has to be less zeitgeisty.

The zeitgeist, which rises from the grave over and over, is forgetful and lurches between extremes. Legislators and regulators, on the other hand, need to weigh up the situation and keep striving anew to achieve proportionality, and to ensure that the impact of what they do is sound.

Regular exchanges with top-class academic institutions such as the ILF, which unites law and finance in a masterly fashion, helps us in this process. Exchanging views with those we supervise keeps our feet on the ground and helps us to assess the real impact of what we do as regulators. The ILF, too, has been maintaining close contacts with practitioners for years.

Both you and we thus make sure that we do not lose touch with reality. Because one thing is clear: regulation does not flourish in ivory towers – neither yours nor ours.

So let me again congratulate the ILF on its first 15 years, the hard work and the significant mark it has made thus far. We all know that many people have contributed to this success, but I would like to give particular recognition to the outstanding leadership Professor Cahn has provided for many years.

The concept of the ILF is in many ways highly innovative and therefore remains an adventure in the best sense of the word. And we are never going to suffer from a dearth of old and new challenges.

For the next 15 years I wish you all the very best and every success in your work.

Thank you for your attention.

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