Session 4– Comparative Law

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I would like to give you some news which I found in the French press on Saturday. As Le Figaro reported, on Friday, the French minister of finance announced that Paris would start to compete with London in attracting IPOs - global IPOs - especially from China, India, and Russia. And how will they do so? They will create a new market segment specialising in foreign issuers, and the secret will be less regulation, and documents in English, which is quite a concession for the French, of course.

Unfortunately the timing for this announcement was bad, because it was too late for the organisers to invite a French speaker to this conference. But then we know from this little piece of further evidence that the law matters, and, of course, it's both the law on the books and the law in action. So what matters about the law on the books/ There is the issue of supervisor architecture: is it important whether you have an alphabet soup of regulators as in the US versus a single regulator as in the UK. What's better? We have already talked about, about Sarbanes-Oxley Act as a possible source of competitive disadvantage. Senator Sarbanes will know already, or perhaps he will be happy to know, that post-annual SOX-inspired reports were enacted almost everywhere, including in the UK.

And then you have the issue of whether regulatory standards matter, and here the cliché is that the US system is rule-based, while the UK has a principle-based approach. Is that true? This is an open question, I think. Then very quickly, the law in action, here the issue is about enforcement. Here we have an example of US exceptionalism, because US private enforcement basically only in the US. And despite this, some academics think that this is a plus, but in the US competitiveness debate, it is clearly a drawback in the US regulatory landscape.

And then you have public enforcement. Here again, the US is an outlier. It's a tough enforcement country within the SEC, and state prosecutors and the federal prosecutors, whereas, in the UK and elsewhere, you have lighter touch regulators. Whether this is really the case, we will discuss in this panel.

Now let me immediately give the floor to Howell Jackson from Harvard Law School for his presentation.

Briefing
Howell E. Jackson
James S. Reid, Jr. Professor of Law, Harvard Law School
I'd like to thank the ALI and also the ECGI for having us here today, and the Commission for hosting this event. I'm going to pick up where Luca [Enriques] left off, which is to talk about enforcement intensity or, as I say, regulatory intensity, in the context of something that I will refer to as selective substitute compliance, which is akin to mutual recognition and related to an issue that Chairman Cox was speaking about this morning. There have

been a number of examples of this selective substitute compliance being proposed here, and I will talk about that and how it relates to regulatory intensity in the international financial markets, and then say a little bit more about what the ALI, and maybe the ECGI, are doing on this agenda in the future.

But let me begin with this concept, or this issue, of substitute compliance. Since this is a dialogue about the transatlantic dialogue, let me show you a picture of the transatlantic and speak about the core conflict, at least from the securities side, of the transatlantic conflict, which is when a European issuer comes into the United States, typically to raise capital on the New York Stock Exchange. We were talking about these transactions this morning. One of the things that happens is the European issuer gets picked up traditionally by US law and has to comply with it to a certain degree in order to maintain access to US public markets. One of the things that the Commission has proposed, and was discussed this morning, was relaxing those rules at least with respect to accounting, but in the future, perhaps by the end of the year or next year, we will no longer have European issuers having to comply with US GAAP reconciliation.

You can think of the exit rules from New York Stock Exchange listing requirements as also a liberalisation on this dimension, and it's an important one. Less well-known in these conversations are problems of US corporate issuers going into Europe and what kind of regulatory environment they're subjected to. Interestingly, just last week, Portugal, Belgium, and, I think, France, perhaps as part of this initiative that Luca was referring to, have decided that compliance with SEC rules will be sufficient to list on the Portuguese stock exchange as well as, I believe, the Belgian and Paris exchanges. That means you will be in the Euronext system, so the Europeans have accepted full substitute compliance for US corporations in this context, which is an interesting development.

Another ongoing development that has been discussed a fair amount in academic circles and recently by the SEC senior staff has been the problem or the issue of remote screens for foreign exchanges. So the paradigm here is, a Frankfurt stock exchange has a remote screen in New York for a broker-dealer. If Frankfurt chooses to do that, it will become regulated as a US exchange, meaning that the rules governing exchanges, trading rules, and also listing requirements, would apply to it, which has discouraged European issuers from coming in. It's also the case if a European broker-dealer comes into the United States and attempts to do business with retail customers on any kind of robust basis, it will find itself regulated as a US broker-dealer and subject to a host of regulations under the 1934 Act.

Earlier this year, in a dramatic departure from SEC traditional practice, two senior SEC officials proposed in a law review article that perhaps the system of regulation for both broker-dealers and foreign exchanges should be modified to allow both forms of entrance without compliance with US regulatory requirements for the most part, provided appropriate determinations were made by the SEC, and these determinations are laid out there. There are two parts of the determinations. One part is a requirement that the government's regulatory structure be acceptable to the SEC, requiring an enquiry into whether the oversight is adequate, whether there is reciprocity, whether US entities can go into the foreign country, and whether an appropriate system of treaties and memoranda of understanding are in place. So that's a country-wide determination where a country is selected for acceptable substitute compliance, which is then again undertaken at the firm level: each individual firm or exchange that wants to come in would have to do a separate process.

Once in the United States, the authorisation would be fairly robust in terms of basic regulatory rules, although there would be some restrictions in the form of the proposal that was floated earlier this year. The US securities couldn't be brought back into the United States, so US issuers couldn't list overseas and come back in. There would be residual anti-fraud jurisdiction of the SEC for a fraudulent transactions, as opposed to net capital rules and other more technical requirements, trading rules on the exchanges. And at the end of 12, of five years, there would be a review by the Commission to determine whether alternative approach, which looks a lot like mutual recognition or passporting for those who are familiar with the EU structure, although it's different: it's done on an individualised country basis. There is more residual control retained by the US, which is the host country in this process; and there are more procedural steps than in the EU. And, of course, there is not the directive harmonisation in the background, which informs all the EU passporting. So, it's akin to but distinct from passporting, and it's a new approach, which is only been floated, but might be something you see moving forward in the next year or so.

The interesting thing about this proposal is part of the analysis is of whether the foreign jurisdiction has adequate oversight, including not just formal rules but also requirements for supervision and enforcement of those rules or compliance with those rules. And so one of the issues that the SEC is looking at right now is whether there is adequate oversight in foreign jurisdictions. This also goes to the IFRS rule - this is the accounting rule - because countries must have pure IFRS, not just country variants. That's one of the SEC requirements on the roadmap, and under the Tafara-Peterson proposal, it would be an analysis that would have to be undertaken for both exchanges and broker-dealers. That's where the issue of regulatory intensity comes in, which is the question of whether the regulatory oversight in foreign jurisdictions is sufficiently intensive to warrant our acceptance of them as a substitute for traditional US application of law. That's a subject on which several of us in the panel have worked on; you're going to hear a fair bit about it.

Let me say at the outset, just to tee up the discussion, there are a variety of ways to look at regulatory intensity, and I'm talking here about how the law is applied and enforced in practice, not what the law in the book says. We're assuming that there are laws in the books for insider trading disclosure, all the basic categories, and, in fact, that is the fact for most developed countries, but how is that law being enforced? And how can you tell if the law is being enforced? Well, one crude way that I began, when I was looking at the subject for the first time several years ago, was just to see how big the budgets of the regulatory agencies are around the world. Do they have any people? Are there any feet on the ground, to use the current metaphor? The interesting thing about it is there's a lot of variation in staffing around the world.

If you look at the major common law countries, like the United States, the UK, Australia, and Canada - I'll start here - they tend to have relatively high staffing levels. Other countries that are developed, but not with a common law tradition, like Japan, Germany, and France were the ones I tagged here, tend to have lower staffing levels. That might speak to regulatory intensity. It's not a perfect measure, as I'll say, but it's one interesting thing to look at, and actually, in recent work with Mark Roe, my colleague at Harvard, we've tried to explore the relationship between budgets and market outcomes, and just to give you a little flavour of the work, these are pictures like Luigi [Zingales] and René [Stulz] were putting up this morning, but there is a positive relationship between how big your budget is, given the size of the country you are, and how large your capital markets are. So it actually does seem that public budgets have some relationship to capital market development, and that's something that the SEC might look at to determine whether or not other countries are doing to adequate oversight.

Another area that one could look at - and you will hear more data about this - are regulatory outputs. We could look at, not how many regulators are there in a country, but what are they doing? Because we do have in the back of our head it's possible regulators are not doing anything. It's clear that Eddy [Wymeersch] is very busy, but other regulators may not be quite so busy, and you could look at it in a variety of ways. You could look at it the way we sometimes discuss the FSA in the UK, which is, they're doing an interesting job of regulation. They're doing principles as opposed to rules. There's much that's admirable about them and they have a good reputation. Or you could look at things that are a little bit more objective, like how many enforcement actions do they bring, what kind of sanctions do they impose, or other more objective criteria about regulatory outputs, and you're going to hear more about this from Jack [Coffee], but your intuition probably coming into this discussion today is borne out by the facts, which is the US, as Luca [Enriques] says, is exceptional. When you look at most measures, the US has more enforcement actions per trillion dollars of capitalisation, or market capitalisation, than most other jurisdictions and a good deal more. If you go around the world and look, they're usually nowhere.

There's movement around the world; there are countries like Japan that are slowly edging their way up on this dimension. There are countries like Canada who, in this survey, had a very good year in, I think it was 2005; they've dropped off a little bit since there, so there's a fair amount of movement going on. But it's fair to say that they are doing a lot less than the United States, and you might want to look at what countries are doing in terms of regulatory enforcement actions in order to judge their intensity. Another approach that one could take with respect to regulatory intensity is to look at market outcomes, and I think there's going to be much discussion of this today, but the ALI has commissioned a very interesting paper that's almost done on this subject looking at objective measures of financial performance that might be helpful. So there are lots of different kinds of objective measures.

One could look at measures like the fact that London is or is not getting more IPOs, or Luxembourg is getting more IPOs, or institutional investors are going to markets. That's an objective piece of information about how good the markets are. Or you could look at econometric measures of the sort that René [Stulz] and, and Luigi [Zingales] were talking about, about how good the quality of a market is, how good the bid spreads are, how narrow the bid spreads are, how well price is impounded into the markets. And you can get measures that the economists have put together. I don't want to go into them all, but here is an interesting chart that is basically measuring how much stock prices move together based on what the country's doing, as opposed to how much stock prices are moving based on company-specific information.

Economists think that the more company-specific information, the better the quality of information about companies in that market. So this might speak to the quality of disclosure. You can't read the print, but I'll tell you: the country at the bottom - it's good to be small - that's the United States. So, as you read up from the bottom, in terms of goodness here, United States, Ireland, Canada, UK, Australia. So, good countries have good qualitative measures here, and less-good countries - China and Poland are the top two. This conforms with our intuitions a bit, but it's an objective measure that might summarise what's going on in enforcement and other things. One can look at data about earnings manipulation; how much earnings management is going on in countries - there are technical measures for that. There are technical measures for a lot of things, so it's not looking at how many regulators there are, or what their actions are; it's what the bottom line market performance is. This might inform the SEC about which countries to accept for substitute compliance.

There are - I should just say at the outset - some serious complexities in making international comparisons. So, if the SEC does go down the path of accepting certain jurisdictions, they're going to be complexities, and I just want to flag a couple of them. You'll hear some examples in a few minutes in more detail. One important thing to recognise is, notwithstanding what Chairman Cox said this morning, there are differences in national goals and financial regulations. So, for example, we in the United States take money laundering and anti-terrorism efforts much more serious than in many other jurisdictions. Part of our regulatory budgets, part of our enforcement actions, are about goals that other countries may or may not share. If you're looking at regulatory inputs, it's often actually rather difficult to know exactly how many resources are being expended for regulation. Sometimes regulation is inside of a central bank - that makes it complicated - or a consolidated regulatory agency. Sometimes regulation is diffuse in a jurisdiction - you'll see an example of this later this afternoon - but when you look at the regulator, you don't get everything, because the ministry of finance or someone else is also involved seriously in the regulatory task. If you look at regulatory outputs, you also have a lot of complexity in understanding what regulatory outputs like enforcement means. Does a lot of enforcement mean that you're solving problems, or that you have a lot of problems?

So we in the United States, should we pride ourselves in having a lot of enforcement actions, or should we despair that we have a lot of crooks in the United States? The raw data on enforcement doesn't really answer that question, and it's a complexity. Different jurisdictions have different perspectives on enforcement and the desirability of enforcement. If you read the SEC annual report, which I would encourage you to do, it prides itself on successfully concluding 90% of its enforcement actions. If you have an enforcement action with the SEC, they're going to be successful 90% of the time. In the UK, they pride themselves in resolving 40-60% of their enforcement actions without formal actions. Their goal is to resolve things informally, and so you get different kinds of numbers. You also have different kinds of needs for enforcement based on corporate ownership, which is a fact that was mentioned this morning.

So context matters, and apologies to those of you sitting up here, because what I'm putting up now is a picture of the FSA. Those of you who have been in London, this is to give you an example how context can be different. The FSA is this little building over in the corner of the slide. That's, I think, City Bank. That's HSBC. That's Clifford Chance, or another one of the law firms, and that's Reuters, a news service. They're all right together, and the enforcement you need to do in Canary Wharf is quite different than what goes on in Washington. I tried to get a Google picture of the SEC. It's still a hole in the ground according to Google Earth, but if you look down at the SEC, you'd see the Thurgood Marshall judiciary building and Union Station right next to it. There are no financial firms anywhere near the SEC, and that definitely has an impact.

I think my time is limited here, so I won't get into the problems with technical measures of performance, but there are difficulties in using them. My own conclusion about this all is that there's no single metric that captures everything about regulatory intensity in other jurisdictions, and the way the SEC should proceed, if it goes down this path of selective substitute compliance, would be to be to look at a collection of these things, and I think together they do begin to give a reasonably good picture of what's important. The next step of the ALI, and I hope ECGI, agenda is to collect more data about the actual pictures of enforcement intensity in a host of jurisdictions, and then the second stage, which is a bit down the road, would be actually beginning to look at US laws and regulations in addition to the exchange and broker deals which are currently on the table. But there are a wide variety of other regulatory structures where we could look at the question of substitute compliance and think about whether we should begin to accept foreign jurisdictions either fully or, for certain kinds of investors in the United States, on a limited basis, or maybe with conditions, like some US rules would apply, but not others, if there were places where we didn't think the substitute compliance was wholly adequate. So, I think this is an area where we're going to see a lot of developments in the future. It's a new area for the US and the SEC, and it's an exciting place for the ALI and, I hope the ECGI, too, to be working in the years ahead. Thank you.

Panel
John C. Coffee
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Thank you very much, and I'm particularly happy to follow Howell Jackson, because he has done really trailblazing work in this field, and if I'm suggesting somewhat different dimensions for measuring enforcement intensity, it's still with respect for him as the person who made the first effort to get into this field. Now, a great deal of debate, and many studies, some of which I've been associated with, have recently examined whether the US is losing its capital market competitiveness. I think it's somewhat ironic that we've gotten to this point in the day and no one has tried to define what capital market competitiveness means, and there are different definitions that all could be reasonably advanced. One definition is the ability of a capital market to attract foreign listings and foreign offers. Another definition - because that's not self-evident - the ability of a capital market to offer its users the lowest cost of capital - particularly equity capital - or a valuation premium from listing there.

Right now I think it's quite obvious that different countries are pursuing different definitions of capital market competitiveness, and we have our very strange ways in which both countries, London and New York, right now are racing very fast, but probably towards different goal lines. And those different goal lines are really not congruent. If we take the definition of capital market competitiveness, then the beneficiaries of increased competitiveness will be chiefly market professionals - investment banks, exchanges, and other intermediaries - and ultimately that will create economic value and greater production. If we take the second definition - that is, lower cost to capital - then the beneficiaries are not only shareholders, but other citizens generally, because the lower cost to capital has macroeconomic impact and it implies a greater gross domestic product and lower unemployment, so there is a broader social wealth. Both approaches can create social wealth; the question is whether pursuing the goal of maximising foreign listings can erode the cost of equity capital, and that's the topic I want to get to today. The empirical evidence you heard this morning, so I'm going to give it slightly less attention.

If we look at the first definition, the competition for listings, you heard a long and very sophisticated debate which probably left you less than completely convinced, because there was evidence on both sides. But we've seen arguments made on both sides as to who's the winner. If we look instead at the competition for lower-cost capital, let me start with the work of Luzi Hail and Christian Leuz, who are professors, respectively, at Wharton and Chicago, and they find within non-US companies cross-listed in the US market, they gain a cost of capital reduction that averages 13% and ranges as high as 25%. This is consistent with the findings of Doidge, Karolyi, and Stulz, about the valuation premium. What's most important here is that there's been this consistent pattern of a valuation premium from cross-listing in New York, but no valuation premium - and sometimes even a discount - from cross-listing in London. What can explain all this is something of a mystery.

Again, I don't want to go into the bonding hypothesis in any depth, but the idea might be that, if by listing in the United States you subject yourself to the tighter, higher scrutiny of the SEC and the greater prospects of enforcement, and although that might be painful, it might give investors greater trust and confidence in the accuracy and reliability of financial results, and because they trust your results more, they give you a lower cost to capital. But if that's the case, there's a mystery. Why do so many companies spurn a US listing? The vast majority do.

I think the answer here is also fairly simple and cogent. Most foreign firms do not want to bond, because the cost to bonding falls on the controlling shareholders and controlling shareholders find that the foregone private benefits of control to them is a greater loss than the gain they share when the company receives a lower cost to capital. So, while there's a gain from a lower cost to capital, the gain comes primarily at their expense, and they're not willing to bond by foregoing private benefits of control. What that suggests is we make a separating equilibrium. Some companies - the companies with the greatest disposition to misappropriate private benefits of controls - would list in low disclosure, low enforcement intensity markets, whereas companies that want to do offerings - want to sell equity and need to - might come to New York because that will give them the requisite ability to get lower-cost capital, and companies go in both directions and there will be a fairly stable equilibrium.

Now, after that, there's still this bigger mystery, where I think there's no agreement. What characteristics of the US market could best explain the bonding hypothesis? Here the various theories run from Luigi Zingales this morning, who was telling you there was some irrational exuberance that is associated with US listing. That may cause him to forfeit his card to the Chicago School, because irrational exuberance is not a traditional neoclassical position, but it's certainly an understandable argument. Another position is that the US has better corporate governance. I don't think that you can say that, comparing the US to the UK; I actually think the UK has somewhat better corporate governance. But one theory that has some - some - validity would be that the US has higher disclosure standards. I think that was true once, but I'm not sure that it's true today as we converge increasingly towards common disclosure standards and common international financial reporting standards, and that may explain one of the reasons why this listing premium may, arguably, have eroded in recent times, because we have common financial reporting standards and no one country should have a marked premium.

Another possibility is that the US has a different infrastructure, with more analysts and better underwriters. Some people do take that position. I don't think you can really explain much, looking at London versus New York, because it's the same major underwriters employing analysts in both countries. It's that same triumvirate of Goldman Sachs, Morgan Stanley, Merrill Lynch, and I don't think they're that different whether they're in London or New York. That leaves, for me, the most likely explanation for this bonding premium, and I agree that all these explanations, including irrational exuberance, can explain some of it.

But one key factor may be enforcement intensity. The US here may stand alone, and the likelihood of the US changing dramatically in this area is fairly limited, unless we whole-heartedly adopt a system of substituted compliance that doesn't ask foreign issuers to comply with our rules. Now, if enforcement intensity thus could be a very important explanatory variable, how do we measure it? As Howell [Jackson] has just told you, we can look at inputs: that's the budget and staff size. We can look at outputs: the number of enforcement actions brought and the amount of penalties imposed, after adjusting in all these cases for relative size and market capitalisation. Or, lastly, we can look at regulatory staff. And here, I think, the critical variable is the proportion of the regulatory budget that goes to enforcement activities. We'll see really dramatic differences between similar countries here.

Looking first at intensity based on inputs, I've just taken some data that Howell originally calculated, and shifted the denominator from market capitalisation to gross domestic product. But you see the same pattern as he describes: the common law countries have vastly higher inputs - greater budgets, greater investment in regulation - than do the civil law countries. The civil law countries here are France, Germany, and Sweden, and they are a small fraction. The US here is not an outlier; it's slightly below the UK. That may really imply that there are real economies of scale, because both the US and the UK are much lower than smaller countries like Hong Kong, Australia, and Canada.

But we see some similarity among common law countries. If we move to enforcement intensity based on outputs - and again, this is Howell's data, not mine - here we see from 2000 and 2002 the annual averages in terms of number of enforcement actions brought, and here it's been adjusted to take both the US versus the UK and Germany, the actual numbers, and then adjusted for the difference in market capitalisation. So if we look at this enforcement action per dollar of market capitalisation, it would be the diagonally shaded numbers. The US still leads, but some of the gap is narrowed when you add in the factor of market capitalisation. Now let me update this. This is 2005 that I want you most to focus on. In 2005 the SEC brought 630 actions, and the FSA - the British agency - brought 269. Now that disparity understates, because the FSA covers banking, insurance, pensions - all financial services - whereas the SEC covers only securities. I don't have the data here to break down just the securities component, but it's probably less than half of that 269 number. Nonetheless, the disparity is already pronounced just looking at these aggregate numbers.

Now, shift to aggregate penalties. Again look at 2005. In 2005, the SEC imposed $1.8-billion in penalties. A big number. The FSA imposed 30-million. That is a 60-to-1 ratio. We're not talking about real differences in an enforcement intensity when you see a 60-to-1 ratio. And again, this disparity is understated, because the FSA is doing this across all financial services, and the SEC is just doing this for securities law. Enforcement intensity looks quite different.

Now we do it by market capitalisation. This takes the US and the UK, and let's look again at 2005. Now we're looking at them as if they had the same market capitalisation - the penalties imposed per dollar of market capitalisation - and you get a 10-to-1 ratio, again without downsizing the FSA numbers for the fact that they cover all financial services. A 10-to-1 ratio is a very big difference in intensity of enforcement.

Now a third variable: regulatory staff. This might be the most revealing, or at least it takes some explanation. If you look at the FSA, looking at their annual reports, between 2004 and 2007, they have devoted roughly 12.5% of their regulatory budget to enforcement. This just comes off the face of their annual reports. How much did they invest in enforcement? My numbers may even overstate, because in 2007 the UK's national audit office, which is the equivalent of our GAO, more or less, calculated that only 8% of the FSA's budget goes to the enforcement division. So only 8% of your budget goes to enforcement according to the internal audit office. Now, compare that with the SEC. The SEC over these years was running in the neighbourhood of 40% - 41, 39, 30.7. If you compare 40% in the US with either 8 or 12% at the FSA, that's a 4-to-1 or a 5-to-1 ratio in terms of how much of your budget are you putting into enforcement, leading me to the conclusion not that the FSA is bad, but that it is enforcement-averse, and enforcement-averse is a very different style to the US, which possibly can be described, as the SEC might be described by some, as an enforcement-led agency. But certainly there's a different attitude towards enforcement, and that has to be considered when we come back to this issue of substitutive compliance.

Now, the US is not actually unique. I just want to show you that Australia - running through its numbers - Australia has around 46% of its budget annually devoted to enforcement. Australia is very much like the US, because Australia also does have a securities class action. It doesn't yet have the fraud and market doctrine, but it does have securities class actions, and they do get settled, so they have private enforcement, they have public enforcement, and they make extensive use of criminal law. In some ways, Australia is more aggressive than the US, at least in terms of the amount of its budget and the amount of reliance's placed on criminal law in the past. But the difference here - these are all common law countries. This assertion that the civil law and the common law are characteristically different may mask the fact that among common law countries we have real variation, with Australia being even more aggressive than the US, and the UK being dramatically less - five times less, virtually, than Australia.

US versus Canada - I wanted clips on this, but Howell's data here is that over the 2002 to 2004 period - the sanctions imposed by US government agencies for securities law violations were 718 times greater than those imposed by all Canadian authorities. Now, there's market capitalisation differences, there's population differences, but they're not in a ratio of 718 to one; they'd be more like the ratio of about a dozen to one. And Canada has almost identical securities law to the US, which is why we have this common perspective system. Common law, totally different policy on enforcement. That does suggest again, the US does have a colder position, which only Australia seems to have a real correspondence with.

Now, enforcement intensity is not simply a product of public regulatory actions. If we look at private enforcement, now we see something that frankly may be frightening. The US rate of private enforcement between 1997 and 2005 increased hyperbolically. Look at this growth, and here I share some of Luigi Zinagales' concerns. This system might be somewhat out of control in terms of how it was increasing. I recognise that it may come to a sharp, screeching halt - and the number of securities class actions are now down - but we saw a tremendous growth and in 2005, $9.7-billion were collected in private securities class action settlements. That is a huge number. We're talking about that versus a total of about $30-million for public enforcement alone in the UK. Let's add these numbers up. If you aggregate public and private enforcement in the US in 2005, the SEC imposed $1.8-billion in penalties, and class action plaintiffs settled for - using the maximum number that includes Worldcom, which was a unique case - $9.7-billion, for a total of $11.5-billion.

Compare that with the UK, where there were public enforcement actions of 30-million, and because there's no securities class action in Great Britain, and because there is also a risk of fee shifting, I don't think you'll see any significant securities litigation producing multi-million dollar settlements in 2005. So we have a number of 11.5-billion to three million. That's real difference in enforcement intensity, and it's got to be taken into consideration. It doesn't mean - this is not a statement from me - that the US is optimal. It may be over-enforced. But there is a tremendous difference in enforcement intensity.

Now, criminal enforcement. Here's where the numbers get particularly interesting. Karpoff, Lee, and Martin have computed simply the rate of criminal sentences and criminal convictions for financial misrepresentation. That's, sort of, the bull's eye. Howell's quite right earlier talking about differences of what gets enforced. Many regulators in other countries spend most of their enforcement budget going after broker-dealers who steal money from widows and orphans and other kinds of crime that are essentially embezzlement. I want to focus on this bull's eye of financial misrepresentation, which is the world on Enron, accounting irregularities, companies that have cooked their books. Over the last 26 years - between 1978 and 2004 - these three authors found that some 755 individuals and 40 firms were indicted, and some 1230 years of prison time were imposed. Average sentence of 4.2 years. That's not a slap on the wrist.

Criminal enforcement, in contrast, is pretty rarely used in England or Canada for securities law violations, particularly in insider trade cases, which I'll come to in a moment, so we see a huge disparity from this third dimension, criminal enforcement. I've looked at public enforcement, private enforcement, criminal enforcement, and now I want to focus on a bull's eye, because there's always the danger that we're comparing apples to oranges, that we're over-aggregating. So let's take something that's the same behaviour. Inside trading: is it occurring? It occurs in New York and London, and there are measures about the rate of insider trading. Financial economists can give you a ballpark sense of what percentage of mergers are seeing unusual trading activity before. It is very prevalent in London. It's very prevalent in Canada. It's prevalent in New York as well. I won't try to estimate the relative differences, but we see it in all three of these countries. There is not a difference here in terms of total law compliance on one side of the Atlantic and total law violation on the other.

Now let's look at the rate of enforcement. Over the period from 2006 to 2001, the SEC has brought roughly 50 actions a year against roughly 100 individuals. That's just the SEC enforcement side. If we then turn to criminal cases, we've seen indictments based at least on FBI studies. This is only the FBI data; there's also some other agencies that bring these cases. But based on the principal source of this, the FBI, there have been roughly 18 indictments a year, and roughly 13 convictions a year, with that number increasing over recent periods. There is real criminal enforcement threat for insider trading in the US.

In contrast, I don't have up-to-the-minute data, but in May 2007 the Sunday Times reported that the Financial Services Agency had successfully brought just eight cases alleging insider trading, all of which were civil. England gave up some time ago on the criminal sanction or indictments for insider trading after a series of unsuccessful prosecutions. Canada's like this similarly. There's been never a single successful criminal prosecution for insider trading in Canada, and there have been some notorious cases, like Bre-X, where people had the case dismissed because the government couldn't meet the high standard of proof.

Now that doesn't mean insider trading is not enforced around the world. Here's where the evidence is quite inconsistent with the presumed rate of enforcement intensity of common law countries. In Germany, BaFin opened 54 new insider trading cases in 2005, 51 in 2006, and they referred a number of cases to criminal prosecutors. There were nine convictions in 2005, 11 convictions in 2006. Now that's against the US having roughly 13 convictions a year. It's not comparable, but in terms of market capitalisation, there is real prospect of criminal enforcement in Germany. Very little civil enforcement. BaFin has a small budget. But if you give it to the criminal prosecutors in Germany, they will prosecute. You will get enforcement. Elsewhere, there have been recent criminal prosecutions in Japan, like two-year sentence imposed there. Prosecutions in Norway, prosecutions in Australia. There are other countries that have real use of the criminal sanction for insider trading.

Let's finally deal with penalty levels. In the United States, the most important insider trading case this year was the one against Joseph Nacchio, the former CEO of Qwest, a very large corporation. After about a six-week trial, he was convicted this year, sentenced to six years in prison, and the total financial penalties came to $71-million: $19-million fine, $52-million restitution. United Kingdom, on the data I have, the largest fine to date has been £750,000, which is not trivial, but more typically the civil sanction has been between £10,000 and £20,000. In the US, that will pay your defence lawyer for about three weeks, maybe.

Now, in Japan, we've seen recent sentences in the “Livedoor” scandal for two years. Norway just sentenced the public relations executive to ten months in jail, which is a tough sentence in a Scandinavian country where light sentences are normally used. And there are other countries. We're seeing an increasing use of the criminal sanction, but we're still seeing that there are some enforcement-free zones for insider trading, and I think Canada and the UK, for different reasons, seem to fall within that category.

Conclusions, because I want to get to the area where we can debate most. Enforcement intensity differs radically among jurisdictions. I think I've demonstrated that much. Although common law jurisdictions tend to invest more in regulation at the input level - that seems to be fairly standard - than do civil law jurisdictions, this difference does not carry through consistently to the output level, where we find that Germany enforces insider trading seemingly more rigorously and more punitively than the UK. We also find significant variations, with Australia out investing more, proportionally, than the US. So, we have real differences among the common law countries, and I don't think there is a generalisation that deals adequately with the output side of this in terms of whether you're a civil law or common law jurisdiction.

Some regulators, most notably the FSA, appear to be enforcement-averse. Now this is not saying that they don't regulate. This is not saying that they don't monitor. I'm not saying anything like that. I'm saying that they may monitor through guidance, they may monitor through gentle persuasion. They may talk to you. They may make references to principles. But they don't use penalties. That may work for some kinds of misbehaviour. I believe that you can sit down with a broker-dealer or a financial institution and talk to it about their relative financial solvency and what their capital position looks like, and you can negotiate where you want them without turning to enforcement. But other kinds of misbehaviour, such as insider trading, where I think you have real predators involved, I don't think principled regulation and a general explanation of your policies achieves anything. You're going to have to catch people, draw them and quarter them, if you think you're going to successfully deter a very financially profitable crime.

Enforcement intensity appears to - it's not proven - but it seems to be positively correlated with cost to capital reductions and Tobin’s q valuations premium, which are associated with cross listing in the US. It could be at least a significant part of an explanation of this mystery of the cross listing premium. Now, the last point is most controversial. Next-to-last point. The definition of capital market competitiveness needs a little bit more focus, because there are some conflicts of interest here. The interests of investors and market professionals may diverge, with market professionals preferring a regulation-light approach that attracts more listings, and investors preferring a stronger policy that minimises the cost to capital, gives them greater protection, and also benefits the overall economy by reducing the cost to capital. That again is a possibility, not something that's been fully proven. Where does that leave us with regard to the topic of enforcement intensity and substituted compliance?

And by the way, I don't love the words substituted compliance. I would suggest that the wordsmiths working on this think about words like parallel compliance or, better yet, reciprocal compliance, all of which don't suggest using a second-best substitute. But proposals for substituted compliance may assume a condition contrary to fact, namely that there is meaningful enforcement of certain regulatory policies across jurisdictions. I think insider trading has strong enforcement in some jurisdictions; no enforcement in others. That's not to say that it's approved. I'm sure the FSA morally disapproves of insider traders. They are not, however, willing to invest the troops, or not yet have invested the troops, necessary to achieve any kind of meaningful results in that area.

This probability of disparity in enforcement intensity seems strongest in the case of misconducts, in the types of misconducts that are not easily detected, such as insider trading, or are very costly to prosecute, such as financial misrepresentation and accounting irregularity offences. In those areas, I don't think the SEC at this point can reasonably assume - reasonably assume - that it can delegate enforcement to other jurisdictions without finding that policies are simply going to go unenforced. Now that's not saying that all policies are going to be unenforced. I think there are other kinds of policies. I could use the example of broker-dealer capital regulation, but I think regulation without enforcement actions is quite viable and will work, but I think there are kinds of misconduct that we have to assume that in the absence of enforcement actions and penalties, the law will be systematically disobeyed. Where does this leave me? How should the SEC approach substituted compliance? I don't have a yes-or-no answer. I would suggest this: the SEC should approach substituted compliance in the same way that porcupines make love. As you're all aware, the answer to the question of how do porcupines make love is very, very carefully. I thank you.

Eilís Ferran
Professor of Company and Securities Law, University of Cambridge Law Faculty and Centre for Corporate and Commercial Law; ECGI Research Associate
I'm going to begin where Jack Coffee has left off.

As he's told us, and as the slides he's shown clearly demonstrate, there are very clear differences in levels of regulatory intensity or enforcement intensity around the world. Does that mean, therefore, that the idea of substitute compliance is one that we should perhaps regard as likely to be achieved, or only achieved after careful and impliedly, very, very long deliberation?

One point I will make at the start on this terminology of substitute - that may or may not be the right word - but it is substitute *compliance*, not substitute enforcement, and therefore the focus purely on enforcement perhaps may be open to question. Howell's introduced the concept of what substitute compliance is, and what it means in terms of how it will work - comparable rules and comparable supervision, oversight powers and philosophy regarding their use.

As we've heard already many times today, differences in supervision, however, are deep-rooted, and diversity persists, even between the member states of the European Union. So we have to focus with ways of living with diversity and managing it so it does not hold up practical progress and international corporate and securities regulation. Indeed, as Commissioner Cox made the point this morning, universal uniformity is not desirable in any event, and diversity should be accommodated.

So how do you accommodate this diversity and to consider whether substitute compliance really has some practical meaning? Jack said we had to move carefully, and clearly that is a statement of wise words. So we need to have a detailed understanding of how compliance, how supervision and oversight is organised and actually works in individual countries. We need to look beyond the surface. It's been emphasised already. And it is clearly illustrated by a glance at regional and cross-country comparisons of formal enforcement outcomes - actions brought, fines levied, and conviction rates.

Here I've given a slide that I've lifted from CESR's annual report published very recently, which gives some information on enforcement statistics in Europe with regard to market abuse. It, of course, includes insider dealing. As we can see there, investigations closed in the last year across the EU as a whole numbered some 84, and investigations closed by reference to the criminal authorities added to that another 138 action. So enforcement does take place in Europe; it is not wholly marginalised, but it is not at the levels that we see in the US.

So that leads, then, to the question, if what we're looking at is not simply enforcement, but at compliance, what does substitute for very heavy reliance on public and private enforcement in credible and effective systems of regulation and supervision outside the US.

I would like to focus on this question by looking briefly at the position in the UK. I need to explain the country focus, looking at a specific member state rather than the EU as a whole. One explanation is that even though the regulatory framework in this area is now mainly set at the EU level, and supervision arrangements and practices are converging towards a more common European norm, it is appropriate to take the discussion down to member state level, because it is there that oversight and enforcement takes place. So it's there that formal EC law becomes law in action. And the UK is perhaps an obvious choice of jurisdiction to look at, both because of its influence within Europe, and also because its overall approach to securities regulation and supervision, characterised by an emphasis on principles. A measured approach to the imposition of penalties and other formal sanctions has attracted considerable positive coverage in the recent debate on international competitiveness of rival capital markets.

Some points emerge, when you look at the UK, which emphasise the need to look beyond the superficial into the detail. The UK's well known as being a country that has adopted the single regulator model, but in fact, when you look at the detail, there is a degree of fragmentation and oversight of responsibilities in this area. Looking at financial and corporate governance disclosures, in these areas, the Financial Reporting Council plays a significant role; indeed, even the FSA describes it as the UK's independent regulator for corporate reporting and governance.

The Financial Reporting Council has a complicated internal structure. It's responsible for accounting, auditing, actuarial standards, and for oversight as well. I don't want to go into the details of the structure, but what I do want to focus briefly on is the role of the Financial Reporting Review panel. The Financial Reporting Review panel has oversight responsibilities in respect of the annual and periodic accounts of listed issuers, including some foreign companies, and it also has some formal enforcement powers.

This slide I think illustrates well the fact that regulatory and enforcement intensity differs very greatly around the world. This slide gives an indication of the number of reviews undertaken by the Financial Reporting Review panel in the UK in the last few years, the number of enquiries, the number of accounts that it has had changed, and, most strikingly of all, the number of cases that it has brought to court in order to force the correction of defective accounts. In each of those three years, the number of cases is obviously zero. So it has never brought a case to court. I chose the last three years because those are the three years when it's been most intensive, but the pattern is the same in previous years: there has never been an action by the oversight and enforcement body which has made its way to court.

The Financial Reporting Review Panel has responsibility for all UK-incorporated companies, plus foreign companies listed on the main market on the London Stock Exchange. So, in terms of the number of reviews, these are tiny compared to the number of companies that fall within its remit. The numbers there compare starkly with levels of enforcement activity in the US.

But when you compare the UK's position in this area to how other European countries operate, the differences are not so great. In Germany, for example, Germany has established its own financial review enforcement panel, and in 2006, it brought 158 examinations, roughly similar to the number brought in the UK in terms of the number of companies falling within its remit as well. And again, looking at Denmark, its review panel looks roughly at 20% and up of eligible issuers on an annual basis. It operates on a selective, risk-based review and random sampling approach.

So, the figures there look very difference to the US position, so it prompts the question: what's going on here? What are these figures not telling us? Well, it's not telling us about the style of these different bodies. The UK panel regards itself as a adopting a risk-based approach in selecting companies for review, and its style is consensual. Consistent with the principles-based, outcomes-focused approach, it seeks to work with business to improve the standards of corporate reporting, rather than raising standards through the deterrent effect of catching wrongdoers.

Now, there has been some independent review of how the Financial Reporting Review panel operates. Its consensual style has been said to provide different incentives for auditors to encourage them to be more vigorous in detecting non-compliance, and to negotiate with directors, and it has been said, by independent reviewers, that the Financial Reporting Review panel does have some credibility in terms of the sanctions that it can bring through taking court actions or naming and shaming individual companies, and there are mechanisms for imposing personal liability on individual directors as well. So, although those sanctions have never been actually used, they are seen by some commentators at least to have credibility and to be effective.

Certainly, when Germany was considering reviewing its structure here, it was very much influenced, it seems, by the approach in the UK, and certainly in terms of the model that it adopted, in terms of a review panel, at least the panel itself is of the view that it has had a useful impact in that it has led management, audit committees, supervisory boards to discuss accounting questions and accounting solutions more critically. Ireland, too, in it's recent review of its institutional arrangements has been strongly influenced by the consensual approach that the UK has adopted in this area. So a different style, which bears out, essentially, what we've heard already, but one that is regarded, at least in some quarters, as credible and effective.

Same story if we look at the FSA. I'm just looking at the FSA and its role in relation to issuer disclosure. Although it leaves a lot to the Financial Reporting Review panel, the FSA does have a role as well. But we do see a pretty similar story in terms of low levels of actually enforcement. Since 2002, the FSA has imposed sanctions in respect of issuer disclosure failures against only eight issuers, and it brought one successful criminal prosecution in another case. So, not much by way of actual enforcement.

This has actually been reviewed quite carefully recently in the UK by Professor Paul Davies of the London School of Economics. Professor Davies was reviewing whether civil standards - and I should perhaps mention that there's very little by way of civil enforcement, either, in the UK - whether civil standards should be adjusted so as to apply a negligence standard to issuers in respect of civil liability for disclosures, and also whether directors should be given new personal liabilities for disclosure. The answer that Professor Davies came to was that there was no need for a change in the law to be recommended to the government by him, and one of the factors that figured significantly in his coming to that conclusion was the fact that the FSA provided an oversight at the level of negligence in public enforcement, and that that was adequate. He noted that those he discussed the issues with took the view that FSA enforcement was effective.

Now, it's possible, of course, that confidence in the robustness of enforcement in the UK is misplaced, and it could all come to seem dangerously complacent should a major fraud come to light. But the alternative possibility cannot be discounted entirely. Maybe there is, in fact, enough enforcement in the system to achieve deterrence purposes when it is seen in context, in combination, with auditing standards, active institutional investors, stronger shareholder powers, and a principles-based, outcomes-focused approach to public oversight and enforcement.

The caution in relation to placing too much emphasis on formal enforcement is seen particularly in the context of corporate governance disclosure. As Eddy Wymeersch touched upon in his presentation, there is a very limited role for public oversight and enforcement in this area. In the UK, the FSA does have an enforcement responsibility under the comply-or-explain context. In circumstances where listed companies do not comply and do not explain, then they are potentially at risk of sanctions being imposed on them by the regulator. That has never happened. So, is this an enforcement gap that cannot be explained? Well, I would suggest that it can be explained.

The FSA's approach to enforcement is not enforcement-led. There's no secret about that: it says it itself. It has a measured approach to the use of enforcement, and that measured approach implies, to me at least, that it is quite unlikely for it to act in relation to a mere failure to explain a departure from the combined code. It's not for the FSA to monitor the quality of explanations, and, indeed, I'd suggest, nor should it be. Such monitoring should be left to shareholders and to the market generally, since they can provide a more flexible and more graduated response to a range of disclosure shortcomings than any regulator can.

And that view seems to me to be consistent with the European view more generally. For instance, the European Corporate Governance Forum cautioned against public regulatory authorities playing a large role, because it is primarily for shareholders to make their own evaluation. That European wariness with regard to giving regulators strong powers in the area of corporate governance is based on concern that it could lead to rigidity, destroying the flexibility that is meant to be inherent in the comply-or-explain approach.

So where does all this lead to in terms of implications for substitute compliance? Number one, I would suggest, and picking up what has been said already about the need for care and detailed examination here, there's a clear need for what CESR likes to call mapping exercises: investigations done on a country-by-country basis to understand better the responsibilities, resources, and legal instruments enjoyed by individual national supervisory bodies. Understanding seem to me to be a key, and a necessary preliminary step in providing a foundation for substitute compliance to become a reality. It also implies a need for empirical measurements such as the ones that have been touched upon in various presentations, and where Howell has really been leading the way in developing the thinking.

These mapping exercises and empirical measurement should provide a framework within which the practical collaboration that's already taking place in a variety of fields - in auditing, in accounting, to name but two - can be placed, and can assist in the development of those efforts.

And what I wanted then to say by way of a conclusion, and I hesitated quite a lot before coming to this conclusion, was to ask whether the European experience in this field is one that has a great deal of relevance to the broader international context. Europe has made very significant progress in streamlining cross-border supervision and making it more effective whilst at the same time living with diverse institutional models and supervisory styles that persist at national level.

That progress that has been made in Europe of course has to be seen in context against the background of the particular constitutional and institutional environment in which it takes place. So all of those contextual considerations need to be given due weight, but even so I think it is possible to look at the European experience, and to extract from it some rather positive predictions as to the development of substitute compliance from an idea to perhaps a practical reality. It seems reasonable to suggest, looking at the European experience, that as these various different initiatives take shape and develop, that some degree of bottom-up convergence, that is, gradual adaptation of institutional approaches in terms of practices and philosophies, is a likely outcome as regulators learn from each other and share experiences and styles and approach.

I would also suggest, finally, that whilst that convergence to some extent is something that can be reasonably predicted, it is not something that is going to lead to uniformity on a transatlantic or any other basis, but, as the European experience demonstrates, diversity - the continuing diversity - need not be an insurmountable barrier to significant progress. Thank you.

Questions & Answers

Luigi Zingales
Robert C. McCormack Professor of Entrepreneurship and Finance, University of Chicago Graduate School of Business
I think that the distinctions that Jack Coffee brought about different types of competitiveness are very important, and I think that we should all be interested, in this forum, to the second definition, which is to minimise the cost of capital.

I thought that the arguments that he brought about enforcement are very powerful and very useful, and I think that they lead naturally to some interesting implications. It seems that Australia, outside of the United States, should be really the country doing better in terms of enforcement. So, if that's true, we should observe a couple of things. Number one, that should be a location of a listing of other companies, so should be a destination desirable for people who want to bond. I don't know whether it's true or not, but it would be interesting to document whether that's the case. Two, that companies listed, or cross-listed, in Australia should have a premium not dissimilar from the United States. I don't think there is any sort of irrational exuberance about going to Australia, except for the wine! I think that that will be a good way to test which one of the two explanations for the premium is more important.

We should also have that Australian companies that list in the United States should have the smallest premium if the premium is leading to bonding, because they are very well bonded at home. Now again, relying on René's data, it seems that is the other way round. Australia has one of the highest bonding premium, which is a little bit in contradiction.

For the point of enforcement, I think that Howell said correctly, we should minimise crime, not maximise enforcement. The ultimate goal of the enforcement is to eliminate crime, not to allow for crime to take place and then to catch it. And I think that Jack was very smart and clever in using insider trading as a guideline, because the amount of insider trading should be roughly equal across countries, and so the fact that we catch many more here is a good indication that the system works better. But insider trading ultimately, or most of the time, is an individual time; it's not really a corporate crime.

So my question regarding England is the following. My impression - and maybe it's wrong - is that law enforcement in England is not only because the FSA is not so aggressive. Law enforcement is also because the level of corporate crime seems to be lower. We don't have in England scandals of the level on Enron, Worldcom, or Parmalat and so my question is, maybe there is substitution between corporate governance and enforcement, because we know that in England shareholders do have much more rights, and managers are more under control than they are in the United States, and maybe they have less discretion to do a lot of things, including fraud. So, at the end, the combination of better corporate governance and law enforcement is, is maybe more appealing than the combination of very high enforcement and terrible corporate governance.

Jack Coffee
If I may respond, as some of that was particularly directed to my comments.

I do make the argument, in the fuller article that I'm quoting from, that I do think that superior corporate governance can be a substitute for enforcement, and that the one possible explanation at the margin is that may be there is less enforcement intensity in the UK because there is superior governance. Some things the UK does very well. An example is its Takeover Panel, which seems to work much better at takeover regulation than anything the US does, and the US does use enforcement actions to enforce takeover rules.

So I think there is some substitution there. But there are kinds of behaviour. I'm not saying we shouldn't have some forms of substituted compliance. I have said that it doesn't work well for those kinds of behaviour that are particularly covert, high profit, and that would be very costly to prosecute. I do think that there are crooks in England as well. If you want to go back a few years, I'll give you the name Robert Maxwell, who was one of the bigger crooks that we've seen.

But it could well be that in some countries, reputational sanctions also work. I've argued that may explain the low private benefits of control in Scandinavia. But increasingly, the London market is becoming a way station for mini-transits from Eastern Europe, Russia, all of whom are capable of not worrying about their reputations at all, so I don't want to let them go beyond the range of enforcement on the grounds that somehow corporate governance will work.

I think that, in the absence of enforcement, I can't accept that penalties on the books work. That is the finding by Bhattacharya, and Dowd in their study of worldwide antitrust enforcement. The laws on the books had no meaning, but enforcement did seem to have an impact on the cost to capital.

Finally, as to Australia, which we're not going to resolve today. Australia may have high enforcement, but Australia has very low liquidity. And I don't say markets work simply based on a bonding process. You need liquidity. Liquidity attracts liquidity, and Australia, having always been a small country in a small market, doesn't have the kind of capital that will attract other countries in. If you want to cross-list, it's cheaper to go to New York than to go to Australia, and you'll get much more liquidity in New York. So they're out-competed if there's any market for cross-listings.

Eilís Ferran
I want to just add to that, but the first corporate governance code of the UK, the Cadbury Code, was partly a reaction to Robert Maxwell.

Howell E. Jackson
Let me add one point on this, just thinking about London and Jack's distinction between the listing competition and the cost of capital competition. Well, if that's true, which it may be, you have to recognise that American investors are in London in a very big way right now through institutional investors and pension funds and mutual funds, and so, if there's a problem, we're already quite exposed to that problem, and most of our intermediaries think it's worth going there and worth the investment.

Jack Coffee
At a higher premium.

Howell E. Jackson
Well, whatever premium the market is, is offering. And by, sort of, keeping our retail investors away from London, which is what the current system does - you can get there, but you have to try hard - you're denying diversification benefits for people who want to hold their stock directly, and that has a very real cost, because they're not internationally diversified the way they should be. So, in part, this debate about substitute compliance is trying to open up investment opportunities internationally for retail investors in the United States. And that's, that's something that hasn't been discussed here, but in the Tafara/ Peterson proposal, that clearly was motivating them, and I think we should keep in mind the need to enhance international diversification.

Luca Enriques
If I may make a small, silly point about Australia, Well, like language, time zones also matter a lot in the market for global IPOs, and Australia's stock is well located in terms of time zones, of course.

Guy Jubb Head Of Corporate Governance, Standard Life Investments
I'd like to add some further contextual comments following on from Luigi's question. In particular, so far as it relates to the role of investors and to the fact that one enforces rules, but one complies with principles. Professor Ferran very rightly pointed out that the investing institutions in London have an important role in terms of insuring that companies in a flexible way - and that is very important - in a flexible but respectful way comply with the principles that are set out in that code.

And that is important in giving the boards of the companies in which we invest that scope for demonstrating and exercising entrepreneurial leadership and generating the returns which our, and the other investors, expect.

That said, within the United Kingdom, it is also very important to bear in mind that we do have the right to appoint directors. We have the right to remove directors. And this is something which is, as I understand it, an emerging and important debate in the United States at the moment in relation to proxy access. In the United Kingdom, we have effective accountability, within the agency, of directors to shareholders. As things stand in the United States, it is less clear whether or not that is the case, and I should very much value the views of the panel as to where the proxy access debate should end up when the Commissioner pronounces. Thank you.

Howell E. Jackson

Well, I think the Commission should move towards greater access on directors, although I wouldn't predict that's going to happen any time soon, but I think the UK model here is a good one for us to consider following.

Jack Coffee
I've said several times today that I think the UK does have superior substantive corporate governance to the United States. If we got the proxy access proposal that was proposed, it would still be fairly weak, fairly pale. Howell and I signed the same petition, drafted by Lucian Bebchuck, to the SEC, saying neither proposal was satisfactory, but I'll go even farther than Howell and say I don't think they're going to adopt any new substantive reform; I think they're going to go back to the old position that you may not use the proxy statement to nominate candidates to the corporate board. And I think that that will make a change, but it will take a new administration before we see that issue seriously examined. And I'm not faulting Chairman Cox; I think he made a valuable and praiseworthy effort to find a statesman-like compromise, but it just couldn't be done in the current context.

David Schraa Director, Regulatory Affairs Department, Institute of International Finance
I think something that Chairman Cox said this morning maybe needs to be brought back. He said something to the effect that I would summarise as being that you have to have a compromise, or a balance, of both efficiency of regulation and effectiveness of regulation - efficiency to my mind meaning an assessment of burdens and the cost and the management friction of regulation. And I think that there has been a tendency, by focusing on the regulatory intensity concept, to look only at one side of that equation, and that it may actually be the wrong metric if you're looking forward to a highly efficient and much more integrated transatlantic or even global approach to the capital markets and to regulation to look only at the kinds of indications of regulatory intensity that we've seen today, without having, to use a horrible word, a holistic approach to it.

Jack Coffee
I'm not criticising the overall integrated UK approach, but I would suggest to you that the worst of all possible worlds would be the combination of weak US corporate governance, and weak UK enforcement. And you could get to that compromise of two worst-possible outcomes through an over-broad and over-facile application of substituted compliance.

Luca Enriques
Well, thank you very much for, to the panellists.