

ARTICLES

INTERNATIONAL FINANCIAL STANDARDS IN THE GLOBAL LEGAL ORDER AND IN EU AND EAEU LAW

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The global financial crisis strengthened the role of international financial standards in global commercial architecture and outlined the specialization of standard-setting bodies. These standards may be transposed in international agreements or be implemented in the legal order of states and state communities (such as the European Union (EU) and the Eurasian Economic Union (EAEU)). The development of standard-setting bodies and the evolving process of soft law rulemaking have led to the establishment of a specific mechanism, which may be called “the soft law mechanism.” The authors argue that this mechanism includes several components: normative (IFS), institutional (SSBs), controlling (peer reviews), and assuring (implementing incentives) components. However, despite the rising influence of international financial standards, a strict boundary between soft and hard law should be established. This article outlines these boundaries and justifies the use of the term soft law. In post-crisis global financial regulation, the role of soft law has increased not only in the financial market but also in the field of monetary regulation. Along with the traditional mechanisms of financial support from the International Monetary Fund (IMF), states may use alternative bilateral and regional mechanisms. At the level of integration associations, soft law manifests in different ways. In the EU, despite the expansion of its field of action, soft law is purely an auxiliary element of the Union’s legal system. In EAEU law, the mechanism of soft-law regulation can be considered promising, given the peculiarities of the integration model.



Keywords: international financial standards; standard-setting bodies; global financial architecture; soft law; international financial institutions; peer reviews; monitoring of implementation; International Monetary Fund.

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Introduction

The development, adoption, and monitoring of the implementation in national legal systems of various kinds of recommendatory acts in the financial sphere are the core and primary method of harmonizing the influence exerted by international intergovernmental and non-governmental organizations. Such acts are called international financial standards;¹ they, according to some authors, represent the most crucial element of the so-called global financial architecture² or, in other words, the international economic, legal order. The implementation of international financial standards in national legal systems and the legal systems of integration associations (for example, the European Union (EU) and the Eurasian Economic Union (EAEU)) is one example of the impact of so-called *soft law* on the international financial system.³

¹ The Compendium of Standards, Financial Stability Board (Jun. 10, 2020), available at <http://www.financialstabilityboard.org/cos/index.htm>.

² *International Monetary and Financial Law: The Global Crisis* (M. Giovanoli & D. Devos (eds.), Oxford: Oxford University Press, 2010).

³ Christopher J. Brummer, *How International Financial Law Works (and How it Doesn't)*, 99(2) Georgetown Law Journal 257 (2011); Rolf H. Weber, *Does Financial Law Suffer from a Systemic Failure? A Study of the Fragmentation of Legal Sources in International Economic Law After the Global Crisis: A Tale of Fragmented Disciplines* 33 (C.L. Lim & B. Mercurio (eds.), Cambridge: Cambridge University Press, 2015); Friedl Weiss, *The Device of Soft Law: Some Theoretical Underpinnings in The Changing Landscape of Global Financial Governance and the Role of Soft Law* 47 (F. Weiss & A.J. Kammel (eds.), Leiden; Boston: Brill Nijhoff, 2015);



Most EU regulations and directives in the field of financial regulation refer in the preamble or text of the act to various international financial standards. These standards are highly respected and are the result of the consensus of the regulators of the leading countries of the world. Therefore, they give EU acts special significance and testify to the special quality of financial regulation in integration associations. For example, in paragraph 1 of the preamble of the basic EU Regulation establishing prudential requirements for banks and investment firms, there is a reference to the Basel standards approved by the Basel Committee on Banking Supervision.⁴

The EAEU legal acts contain multiple references to international financial standards and international best practice, which aim to synchronize projects in the EAEU financial market with the rules of the game established by global financial regulators. At the same time, it is assumed that Member States should take into account these soft-legal provisions when harmonizing national legislation.

Such inclusion of recommendatory norms in acts of secondary law of the EU is the most common way international financial organizations influence the legal orders of states and integration associations in the modern world. In international practice, the inclusion of provisions developed by international standard-setters in internal law and order is called “implementation,” although it is obvious that in this case, we are dealing with the phenomenon of the transformation of non-obligatory norms into mandatory rules (a kind of “hardening” of soft law norms), which has a certain specificity in comparison with the implementation of international treaty norms.

In the first section of the article, we will outline our position concerning the term soft law and show the relationship between soft law and the international legal order. In the second section, we will consider the composition of international financial lawmakers and the mechanism for the implementation of their acts, and in the third, we will reveal the incentives for such implementation. In the fourth section, we will demonstrate the importance of international financial standards in monetary affairs. The standards’ significance for EU and EAEU law will be considered in the fifth and sixth sections, respectively, and some results will be summarized in the conclusion.

Christian Tietje, *The Role of Law in Monetary Affairs: Taking Stock in The Rule of Law in Monetary Affairs: World Trade Forum* 11, 37–38 (T. Cottier et al. (eds.), Cambridge: Cambridge University Press, 2014); Коннов В.А. О роли «мягкого» международного права в регулировании межгосударственных отношений по предупреждению и преодолению финансово-экономических кризисов // Евразийская адвокатура. 2014. № 3(10). С. 78–83 [Valery A. Konnov, *On the Role of Soft International Law in the Regulation of Interstate Relations for the Prevention and Overcoming of Financial and Economic Crises*, 3(10) Eurasian Advocacy 78 (2014)]; Кудряшов В.В. Мягкое право как метод регулирования международных финансовых отношений в зарубежной доктрине международного финансового права // Финансовое право. 2013. № 4. С. 8–12 [Vladislav V. Kudriashov, *Soft Law as a Method of Regulating International Financial Relations in a Foreign Doctrine of International Financial Law*, 4 Financial Law 8 (2013)].

⁴ Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (Jun. 10, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0575>.



1. “Soft Law” Phenomenon

The term “soft law” is used to denote the entire array of norms that are not legally binding and do not impose international legal obligations on states. J. Klabbers considers this term to be misleading since it assumes that the law can have different levels of binding force (the author cites the properly concluded international treaty and the standards developed by the Basel Committee); in addition, according to the researcher, this term is useless since it does not say anything about why certain verbal expressions are perceived as law and require a level of compliance (possibly “soft”), while others are perceived differently.⁵

Nevertheless, we argue that the term “soft law” has the right to exist for several reasons. First, the term is very convenient for delimiting mandatory legal norms and those that are recommendations. The rules of an international treaty, say the GATS in terms of regulating financial services, impose obligations on states, but the Basel Committee on Banking Supervision standards do not. We can only talk about a certain influence of non-binding norms on the international legal order, about the use of soft law norms as models for regulation of the financial sphere in national legal systems, and about the use of the recommendations of international organizations as guidelines for consideration in international legal disputes.

Second, nothing prevents us from distinguishing between the so-called “soft law” in the science of international law and other non-binding norms of international behaviour from morality or political politeness (for example, using the criterion of the source of soft law norms) Finally, purely for pragmatic reasons, due to the widespread use of the term, it is more advisable to agree on its scope than to exclude it altogether.

Interestingly, J. Klabbers goes further in his reasoning and proposes to declare any rule as biding until proven otherwise, that is, to establish the presumption that any rule is legal.⁶ It is hardly possible to agree with such a proposal because the consent of states is a necessary condition for the formation of a norm of international law, and J. Klabbers’ proposal destroys this basis of international legal rule-making, based on the principle of sovereign equality. Additionally, about financial issues, the optionality of international financial standards is initially declared in the constituent documents developing institutions, for example, the Financial Stability Board⁷ or the Basel Committee,⁸ so the “Klabbers presumption” in this case is immediately

⁵ Jan Klabbers, *International Law* 41 (2nd ed., Cambridge: Cambridge University Press, 2017).

⁶ *Id.* at 42.

⁷ Financial Stability Board, Charter of the Financial Stability Board (June 2012), Art. 23 (Jun. 10, 2020), available at <https://www.fsb.org/wp-content/uploads/FSB-Charter-with-revised-Annex-FINAL.pdf>.

⁸ Clause 3 of the Basel Committee Charter states that it does not have any formal supranational powers, and its decisions have no legal force. See Basel Committee Charter, Bank for International Settlements (Jun. 10, 2020), available at <https://www.bis.org/bcbs/charter.htm>.



refuted. S. Donnelly notes that since various guidelines, principles, and standards are developed as soft law, they are outside the scope of international law.⁹ The same conclusion is reached by E. Milano and N. Zugliani regarding acts of soft law emanating from trans-agency networks such as the Basel Committee.¹⁰

G. Tunkin, describing the formation of norms in international law, indicates that there are so-called subsidiary processes, “which are certain stages of the formation of an international legal norm, but which, however, do not complete this process.”¹¹ The scientist, in particular, ascribes resolutions of the U.N. General Assembly and recommendations of specialized international organizations to subsidiary processes.¹²

We note that the provisions of international financial standards may not become international law at all; such provisions are initially aimed at changing domestic law, and in most cases, their purpose is not interstate relations. Thus, we contend that the phenomenon of international financial standards consists of the fact that by not being the norms of international law and representing recommendations, they seem to overleap the international legal level and find embodiment in national law.

2. Standard-Setting Bodies

The “parents” of international financial standards are various *international institutions* (organizations, associations, bodies, committees, etc.), united by the common name standard-setting bodies (SSB). The terms “transnational networks” and “multilayered governance” are also used in the literature.¹³ In the list of SSBs¹⁴ indicated on the website of the Financial Stability Board (FSB), 16 such institutions are shown. Some of these

⁹ Shawn Donnelly, *Financial Stability Board (FSB), Bank for International Settlements (BIS) and Financial Market Regulation Bodies in Research Handbook on the European Union and International Organizations* 360, 361 (R.A. Wessel & J. Odermatt (eds.), Cheltenham: Edward Elgar, 2019).

¹⁰ Enrico Milano & Niccolò Zugliani, *Capturing Commitment in Informal, Soft Law Instruments: A Case Study on the Basel Committee*, 22(2) *Journal of International Economic Law* 163 (2019).

¹¹ Тункин Г.И. Теория международного права [Gregory I. Tunkin, *Theory of International Law*] 75 (Moscow: Zertsalo, 2009).

¹² *Id.* at 143–159.

¹³ Joseph J. Norton, *Comment on the Developing Transnational Network(s) in the Area of International Financial Regulation: The Underpinnings of a New Bretton Woods II Global Financial System Framework*, 43(1) *International Lawyer* 175 (2009); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43(1) *Virginia Journal of International Law* 1 (2002); Kern Alexander, *Global Financial Standard Setting, the G10 Committees, and International Economic Law*, 34(3) *Brooklyn Journal of International Law* 861 (2009); Rolf H. Weber, *Multilayered Governance in International Financial Regulation and Supervision*, 13(3) *Journal of International Economic Law* 683 (2010); Annamaria Viterbo, *The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision*, 22(2) *Journal of International Economic Law* 205, 207 (2019).

¹⁴ For a complete list, see the Financial Stability Board website (Jun. 10, 2020), available at <http://www.financialstabilityboard.org/cos/wssb.htm>.



associations are called organizations: the International Organization of Securities Commissions (IOSCO), the Organization for Economic Co-operation and Development (OECD), and the International Organization of Pension Supervisors (IOPS). Some are called committees: the Basel Committee on Banking Supervision (BCBS), the Committee on Payments and Market Infrastructures (CPMI), and the Committee on the Global Financial System (CGFS). There are four boards: the International Accounting Standards Board (IASB), the FSB; the International Auditing and Assurance Standards Board (IAASB) and the Islamic Financial Services Board; there are also two associations: the International Association of Insurance Supervisors (IAIS) and the International Association of Deposit Insurers (IADI). The remaining four are the International Monetary Fund (IMF), the World Bank (WB), the Financial Action Task Force on Money Laundering (FATF), and the Joint Forum (JF), which addresses issues in three financial services sectors (banks, insurance companies, and securities markets).

The members of some of the listed institutions (OECD, IMF, WB, and FATF) are states, or national central banks (for example, the BCBS, CGFS, and CPMI) are declared as members, the latter can be supplemented by national government bodies with powers in the financial sector (in the Financial Stability Board, for example, the European Commission and the ECB represent the European Union).¹⁵ The members of some institutions include various professional associations (for example, in the IAASB¹⁶), and the IOSCO grants special “affiliate membership” status to certain exchanges and self-regulatory organizations of stock market participants (in the EU, the European Fund and the Asset Management Association have this status¹⁷). Such institutions are often members of each other.

Several of these institutions (IMF, OECD, and WB) are classic intergovernmental organizations that have all the attributes developed by the doctrine.¹⁸ Some of the “international financial rule-makers” may be classified as international non-governmental organizations (for example, the IAASB), and some institutions have mixed status. For example, it can be assumed that the FSB (like its legal predecessor, the Financial Stability Forum) was created based on an informal international agreement reached by the heads of state and government at the G20 forum¹⁹ (the FSF was created at the G7 forum).

¹⁵ See International Standard-Setting and Other Bodies, Financial Stability Board (Jun. 10, 2020), available at <http://www.fsb.org/about/fsb-members/#standard>.

¹⁶ See International Auditing and Assurance Standards Board, Responding to the Needs of an Interconnected World, 2012 IAASB Annual Report, at 21 (Jun. 10, 2020), available at <http://www.ifac.org/sites/default/files/publications/files/IAASB%20ANNUAL-2012-V10-SPREADS.pdf>.

¹⁷ See Affiliate Members of IOSCO, International Organization of Securities Commissions (Jun. 10, 2020), available at <http://www.iosco.org/about/?subsection=membership&memid=3>.

¹⁸ For the composition of these characteristics, see, e.g., Курс международного права: Понятие, предмет и система международного права: в 7 т. Т. 1 [Course of International Law: The Concept, Subject, and System of International Law. In 7 vols. Vol. 1] 175–176 (R.A. Mullerson & G.I. Tunkin (eds.), Moscow: Nauka, 1989).

¹⁹ Relevant examples have existed before. See *Id.* at 20, 42.



Since its members are government bodies and national banks with public authority, it can be said that this body serves as a tool for coordinating the will of states whose interests are represented by the relevant authorities. However, the deliberate non-binding provisions of the FSB charter²⁰ and its registration as an association in Swiss law²¹ hardly allow this institution to be called a full-fledged international intergovernmental organization.²² J. Wouters and J. Odermatt note that while the WTO, the World Bank, and the IMF are still important institutions in managing the global economy, there is a shift towards informal intergovernmental bodies, such as the G20 and the FSB.²³

The charters of individual IOs (for example, the IMF and IBRD) contain rules on the adoption of decisions by a majority vote and even on a weighted voting system. Separate international agreements on the establishment of IOs contain blatantly clear provisions on the binding force of decisions taken by their bodies (*see*, for example, cl. 5 of the Convention on the Organisation for Economic Co-operation and Development, 1960), while the binding force of the decisions of other IOs is implied. We note here that under the Vienna Convention on the Law of Treaties (Art. 5), the provisions of this Convention apply to international organizations without prejudice to the rules of such organizations, i.e. in the event of a conflict between the Vienna Convention and the rules of an international organization, the latter will apply. Furthermore, such rules refer to not only the constituent agreements of the international organization but also the acts it has developed.

In some cases, the “rule maker of standards” does not have the rights of a legal entity (Basel Committee on Banking Supervision). The participants in some “rule makers” may not be states or government bodies at all, for example, the IASB, whose members are national accounting associations and in the framework of which international financial reporting standards are developed and implemented in the EU²⁴ and in most countries of the world. Speaking on institutions integrating regulatory and supervisory bodies and central banks, A. Viterbo notes that such

²⁰ Article 23 of the Charter expressly states that it is not intended to create legal rights and obligations. *See* Charter of the Financial Stability Board, *supra* note 7.

²¹ *See* Financial Stability Board, Meeting of the Financial Stability Board in Zürich on 28 January, Press Release, 28 January 2013 (Jun. 10, 2020), available at http://www.financialstabilityboard.org/press/pr_130128.pdf.

²² We should note that the IOSCO was also registered as a non-profit private organization in Canada and then changed its location to Madrid, Spain. *See* International Organization of Securities Commissions, Annual Report 2012, at 72 (Jun. 10, 2020), available at http://www.iosco.org/annual_reports/2012/pdf/annualReport2012.pdf.

²³ Jan Wouters & Jed Odermatt, *Comparing the ‘Four Pillars’ of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank and WTO*, 17(1) *Journal of International Economic Law* 74 (2014).

²⁴ Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (Jun. 10, 2020), available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002R1606>.



organizations (the author calls them “networks”) enjoy a high level of independence from government directives and political influence.²⁵

All of these associations have a developed mechanism for monitoring the implementation of their recommendations in the national legislation of Member States. Such a mechanism has various names (peer reviews,²⁶ monitoring of implementation, financial system assessment program, report on compliance with standards and codes), but the essence of all these procedures is the same: an international organization, independently or with the involvement of representatives of Member States’ financial departments, reviews the implementation of the norms of the recommendations and publishes the corresponding report.

Under the provisions of the FSB Charter²⁷ and the FSB Framework for Strengthening Adherence to International Standards,²⁸ the FSB member countries periodically participate in the IMF–World Bank Financial Sector Assessment Program (FSAP), submit Reports on Observations of Standards and Codes (ROSC) and carry out the FSB country reviews (in the three years after completing the FSAP or ROSC), which assess the degree of implementation of international standards and principles in the financial sector.

The Financial Sector Assessment Program (FSAP), launched in 1999, is a comprehensive and in-depth assessment of a country’s financial sector. The FSAP analyses the sustainability of the financial sector, the quality of regulation and supervision, and the potential for managing and resolving financial crises. It develops micro- and macroprudential recommendations based on country specifics.

The FSAP is a key tool for IMF supervision, contributing to the Article IV consultations²⁹ under the IMF’s Articles of Agreement³⁰. In jurisdictions with systemically significant financial markets, an assessment of financial stability by FSAP is a mandatory measure under Article IV of the Fund’s Charter³¹ and should be carried out every five years; for other jurisdictions, participation in the program is voluntary.

²⁵ Viterbo 2019, at 207.

²⁶ Peer Reviews, Financial Stability Board (Jun. 10, 2020), available at http://www.fsb.org/what-we-do/implementation-monitoring/peer_reviews/.

²⁷ Charter of the Financial Stability Board, *supra* note 7.

²⁸ Financial Stability Board, FSB Framework for Strengthening Adherence to International Standards, 9 January 2010 (Jun. 10, 2020), available at https://www.fsb.org/wp-content/uploads/r_100109a.pdf?page_moved=1.

²⁹ International Monetary Fund, Guidance Note for Surveillance Under Article IV Consultations, 10 October 2012 (Jun. 10, 2020), available at <http://www.imf.org/external/np/pp/eng/2012/101012.pdf>.

³⁰ International Monetary Fund, Articles of Agreement (1944; reprinted, March 2020) (Jun. 10, 2020), available at <http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>.

³¹ On 6 December 2013, the Executive Board of the IMF reviewed the implementation of the decision of September, 2010 to integrate financial stability assessment under the FSAP into Article IV of the IMF’s Articles of Agreement for member countries with systemically important financial sectors. According to the IMF, the decision to make the FSAP financial stability assessment mandatory for these countries led to more complete implementation of a risk-based approach to financial sector supervision and better FSAP integration in the framework of Article IV consultations in jurisdictions.



In emerging market countries (which include Russia), the FSAP is conducted jointly with the World Bank. In these countries, the FSAP assessment has two components: the financial stability assessment, which is the responsibility of the IMF, and the financial development assessment, which is the responsibility of the World Bank.

The Reports on the Observance of Standards and Codes (ROSC) is the second IMF implementation monitoring program that summarizes the extent to which countries adhere to internationally recognized standards and codes. The IMF has identified 12 areas and related standards as useful for analysis by the IMF and the World Bank.³² Country compliance reports are prepared and published at the request of member countries.

The BCBS has its own Basel III implementation level monitoring program, the Regulatory Consistency Assessment Program (RCAP), which is supported by the Financial Stability Board. In 2012, the BCBS began to implement this program to monitor the progress of countries in implementing internal regulations, to assess the countries' compliance and to analyse the results of regulation.³³

RCAP and ROSC are complementary banking supervision programs. RCAP focuses on the implementation of Basel III components in terms of consistency and completeness, while the assessment of Core Principles for Effective Banking Supervision within ROSC takes into account the full range of supervising practices and is carried out within the broader context of financial stability risk analysis.

The goal of the BCBS is to ensure the consistent implementation of Basel III through RCAP and thus, ultimately, to contribute to global financial stability.³⁴

The monitoring program conducted by another committee of the Bank for International Settlements—the Committee on Payments and Market Infrastructures (CPMI)—is multi-level. The subject of the monitoring is the implementation level of the Principles for Financial Market Infrastructures (PFMI).³⁵

The FATF Recommendations provide for the need to monitor and evaluate national systems in accordance with FATF requirements. The organisation uses the methodology of mutual evaluation for assessing technical compliance with the FATF Recommendations and the effectiveness of the AML/CFT systems³⁶ of states.³⁷

³² These areas include the following: accounting; audit; AML/CFT; banking supervision; corporate governance; data dissemination; fiscal transparency; insolvency and protection of the rights of creditors; insurance supervision; transparency of monetary and financial policies; payment systems; and regulation of operations with securities.

³³ Basel Committee on Banking Supervision, Regulatory Consistency Assessment Programme (RCAP): Handbook for Jurisdictional Assessments (March 2016) (Jun. 10, 2020), available at <https://www.bis.org/bcbs/publ/d361.pdf>.

³⁴ *Id.*

³⁵ Committee on Payments and Market Infrastructures, Technical Committee of the International Organization of Securities Commissions, Principles for Financial Market Infrastructures (April 2012) (Jun. 10, 2020), available at <http://www.bis.org/cpmi/publ/d101a.pdf>.

³⁶ Official site of the FATF (Jun. 10, 2020), available at [http://www.fatfgafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatfgafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)).

³⁷ Financial Action Task Force, Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems (February 2013) (Jun. 10, 2020), available at



The monitoring of the compliance of national jurisdictions with global financial standards by the Group of Twenty and the FSB can be considered second-level monitoring, as it is carried out “on top” of SSB monitoring. Thus, in October 2019, the FSB issued the fifth consecutive Report on Implementation and Effects of the G20 Financial Regulatory Reforms.³⁸

The report contains a table showing the status of the FSB member countries implementing various international financial standards in FSB initiatives in “priority areas”: the Basel III standard, standard for the payment of remuneration to managers of financial institutions, provisions on over-the-counter derivatives, restoring financial stability, and non-bank financial mediation. Interestingly, the report is presented only for FSB Member States, including the EU Member States (France, Germany, Italy, the Netherlands, Spain, and the UK); the EU as a whole is not specified.

The objectives of the FSB reviews are to encourage cross-national and cross-sectoral implementation, assess (where possible) the extent to which standards and policies have achieved results, identify gaps and weaknesses in the addressed areas, and provide recommendations for potential monitoring (including the development of new standards) by FSB members.

To understand the structure of the financial market and the typology and risk distribution in its sectors, the FSB’s monitoring of the so-called “non-bank financial intermediation” sector has great significance. As part of this monitoring, the FSB annually publishes the global monitoring report on non-bank financial intermediation.³⁹

As stated above, the most popular mechanism for monitoring the implementation of recommendations is peer-review assessment. The peer-review procedure means that a professional assessment of an institution is carried out by peers, colleagues, and other participants. For example, an assessment of the implementation of U.S. international financial standards was carried out by a commission chaired by a representative of the Central Bank of Germany,⁴⁰ and an assessment of the state of macroprudential stability and disclosure of financial sector information in France was carried out by the Director of the Department of the Bank of Mexico.⁴¹ The IMF and World Bank assess financial compliance under the ROCS program⁴² and the FSAP.⁴³

<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatfissuesnewmechanismto strengthen the money laundering and terrorist financing compliance.html>.

³⁸ Financial Stability Board, *Implementation and Effects of the G20 Financial Regulatory Reforms, 5th Annual Report*, 16 October 2019 (Jun. 10, 2020), available at <https://www.fsb.org/wp-content/uploads/P161019.pdf>.

³⁹ Financial Stability Board, *Global Monitoring Report on Non-Bank Financial Intermediation 2018*, 4 February 2019 (Jun. 10, 2020), available at <https://www.fsb.org/wp-content/uploads/P040219.pdf>.

⁴⁰ Financial Stability Board, *Peer Review of the United States*, 27 August 2013 (Jun. 10, 2020), available at https://www.fsb.org/wp-content/uploads/r_130827.pdf.

⁴¹ Financial Stability Board, *Peer Review of France*, 20 July 2017 (Jun. 10, 2020), available at <https://www.fsb.org/2017/07/peer-review-of-france/>.

⁴² See *Reports on the Observance of Standards and Codes (ROSCs)*, International Monetary Fund (Jun. 10, 2020), available at <http://www.imf.org/external/NP/rosc/rosc.aspx>.

⁴³ See *Financial Sector Assessment Program (FSAP)*, International Monetary Fund (Jun. 10, 2020), available at <http://www.imf.org/external/np/fsap/fssa.aspx>.



One of the tools for implementing the IFS is to encourage IOSCO members to sign a Multilateral Memorandum of Understanding between national equity market regulators. This memorandum is not an international treaty by a direct indication in its text that

The provisions of this Memorandum of Understanding are not intended to create legally binding obligations or supersede domestic laws.⁴⁴

However, this document provides a detailed procedure for the exchange of information between national regulators of the equity market, and in case of refusal to sign such a memorandum, the rights of the respective IOSCO member are limited due to the “limited support that such IOSCO members can provide in the implementation of such measures.”⁴⁵ M. Giovanoli notes that the “blacklisting” of non-cooperative countries and the introduction of countermeasures against ‘tax havens’ are among the incentives for the implementation of standards.⁴⁶

Thus, these institutions, regardless of their status (intergovernmental, semi-intergovernmental, or non-governmental organization), fulfil the general task of harmonizing national legal systems to ensure financial stability.

Although global financial regulators lack a robust enforcement function, peer pressure coupled with market pressure effectively enforces governmental and individual compliance with global financial standards. The compliance mechanism is reinforced by aspects such as the “publicity of unjustified failures,” which is implemented in the “naming and shaming” approach promoted primarily by the FATF and OECD.

Despite the effectiveness of monitoring programs, their disadvantages should be highlighted. Thus, C. de Stefano points out that the institutions endowed with the most advanced monitoring mechanisms are the international financial organizations, namely, the IMF and the World Bank, to which the FATF can be added (in particular, these organizations can conduct on-site inspections), but the role of these organizations is currently quite limited. Therefore, the author suggests expanding the supervisory powers of the FSB, to be conducted in cooperation with the IMF.⁴⁷

The FSB has identified a group of so-called “Key Standards for Sound Financial Systems,” which are distributed in three areas. The first area, “Macroeconomic Policy and Information Transparency,” includes four IMF standards related to transparency of the

⁴⁴ International Organization of Securities Commissions, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (May 2002), Art. 6(a) (Jun. 10, 2020), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>.

⁴⁵ International Organization of Securities Commissions, Fact Sheet (February 2020), at 6 (Jun. 10, 2020), available at <http://www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf>.

⁴⁶ *International Monetary and Financial Law: The Global Crisis*, *supra* note 2, at 35.

⁴⁷ Carlo de Stefano, *Reforming the Governance of International Financial Law in the Era of Post-Globalization*, 20(3) *Journal of International Economic Law* 289 (2017).



monetary and financial sphere and the dissemination of data. The second area, “Financial Regulation and Supervision,” includes four documents on the subsectors of financial services (banks, insurance, and securities) and Islamic Finance Regulation, developed by the BCBS, IAIS, IOSCO and the Islamic Financial Services Board, respectively. The third area of “Institutional and Market Infrastructure” covers eight standards, including the Basic Principles of Effective Deposit Insurance Systems (developed by the IADI), a document on the Institute of Insolvency and Creditors Rights (World Bank), the restoration of financial stability of credit organizations (FSB), corporate governance principles (OECD), international financial reporting standards (IASB), audit standards (IAASB), a document regarding the regulation of the activities of financial market participants organizing payments and settlements in securities transactions (CPMI/IOSCO), and the FATF recommendations on combating money laundering.⁴⁸ The document, developed within the framework of the Financial Stability Forum (the predecessor of the FSB) and setting out the principles for the remuneration of employees in the financial sector of the economy (FSF Principles for Sound Compensation Practices), is not named a key document⁴⁹. International financial standards can have various names, and the most “popular” name is “principles” (for example, the Core Principles for Effective Banking Supervision⁵⁰ or the G20/OECD Principles of Corporate Governance⁵¹), which reflects the rather concise and generalized nature of the recommendations made. Names such as “codes” can be found (the IFS⁵² Code of Good Practice on Fiscal Transparency⁵³), as well as “standards” and “recommendations.”

As shown above, organizations with different legal statuses act as standard-setting bodies. These differences in no way affect the composition and content of the instruments used to ensure the implementation of international financial standards in national legislation,⁵⁴ and such an implementation is the goal of developing

⁴⁸ See Key Standards for Sound Financial Systems, Financial Stability Board (Jun. 10, 2020), available at http://www.fsb.org/what-we-do/about-the-compendium-of-standards/key_standards/.

⁴⁹ Financial Stability Forum, FSF Principles for Sound Compensation Practices, 2 April 2009 (Jun. 10, 2020), available at http://www.financialstabilityboard.org/publications/r_0904b.pdf.

⁵⁰ Basel Committee on Banking Supervision, Core Principles for Effective Banking Supervision (September 2012) (Jun. 10, 2020), available at <http://www.bis.org/publ/bcbs230.htm>.

⁵¹ Organisation for Economic Co-operation and Development, G20/OECD Principles of Corporate Governance (2015) (Jun. 10, 2020), available at <http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>.

⁵² L. Anufrieva provides information on the existence of the so-called code of bona fide currency behaviour developed based on the implementation of the principles enshrined in the IMF Treaty and other agreements. See *Международное публичное право: учебник* [International Public Law: Textbook] 521–522 (K.A. Bekiashev (ed.), Moscow: Prospekt, 2010).

⁵³ Fiscal Transparency Code (Jun. 10, 2020), available at <https://blog-pfm.imf.org/files/ft-code.pdf>.

⁵⁴ We note that the use of the term “implementation,” concerning the introduction into national legislation of advisory act rules in the financial sphere, does not mean that this concept is identical to the implementation of international legal norms.



and adopting standards. The subject of regulation of normative acts issued under standards in the domestic sphere will be the organization of activities of state bodies in the financial sector (for example, banking, insurance, or stock regulator), as well as the vertical power relations of the regulator and professional participants in the equity market. Moreover, the “verticality” of such relations remains in cases when normative acts issued under the standards establish rules governing what would seem to be relations of private individuals regarding private law categories (for example, the rules for paying remuneration to employees of financial institutions or maintaining bank capital at a certain level). The fulfilment of these rules is a condition for the admission of professional participants to the financial market by a regulator with public authority. The state regulator or the regulator of the integration association (for example, the European Central Bank) oversees the implementation of these rules and applies administrative forms of influence in case of violation. In this regard, it is difficult to agree with the opinion expressed in the literature that

The development of ... Basel Committee’s common standards for capital for banks of member countries is an example of private regulation.⁵⁵

3. IFS Implementation Incentives

Among the tools that provide an *implementation of international financial standards* are what researchers call market and official incentives.⁵⁶ This process falls under the influence of various circumstances. For example, the implementation of international standards affects the credit rating of the respective state, facilitates access to finance, and reduces the cost of borrowing. Moreover, the implementation of standards has a beneficial effect not only on the activities of the state as such but also on the activities of banks and financial companies originating from the relevant jurisdiction. Researchers call such incentives “market incentives.”

Among the motives that prompt the introduction of IFS into national legislation are the obligations arising from membership in international organizations, the custom of following the various recommendations. A significant role here is played by the process of monitoring the implementation of standards, discussed above. A. Viterbo writes that despite their non-binding nature, soft-law standards “give the impression” of being obligatory under the number of incentives: the threat of restricting access to the market for firms from non-cooperative jurisdictions,

⁵⁵ Коннов В.А. К вопросу о предмете, содержании и сущности института антикризисных мер в современном международном экономическом праве // Административное и муниципальное право. 2012. № 5. С. 70–78 [Valery A. Konnov, *On the Subject, Content, and Essence of the Institution of Anti-Crisis Measures in Modern International Economic Law*, 5 Administrative and Municipal Law 70 (2012)].

⁵⁶ *International Monetary and Financial Law: The Global Crisis*, *supra* note 2, at 31.



intra-organizational discipline, and reputation risks.⁵⁷ C.J. Brummer also notes that compliance with international standards is often a condition for granting loans of the IMF and IBRD.⁵⁸

The adoption of an international financial standard itself does not impose obligations on states to implement such a standard in the national system of law, and implementation is not an international legal obligation for a Member State of the organization (committee, association, or forum) and even less so for other states. Nevertheless, a number of the above circumstances, of both legal and, to a greater extent, non-legal character, provide incentives for implementation. That is why researchers note that the so-called “soft law” so widespread in the international financial system is tougher than might be expected, based on the traditional approach of international public law.⁵⁹ The term “hardening of soft law” is used to refer to the process of turning recommendatory norms into legal regulations. F. Weiss writes that states’ observance of soft law can form a customary norm or that the norm can become material for the development of international conventions. In addition, states’ implementation of soft law is the second way of “hardening.”⁶⁰

Russian scientists have repeatedly pointed out the widespread use of legal acts in international practice. Therefore, S. Marochkin indicates, relating to the Russian Federation, that

Recourse to international recommendatory acts has become a daily practice in all types of courts,⁶¹

while at the same time,

The courts do not apply them, but use them to clarify the concepts used, formulate and substantiate their position, confirm or strengthen legal argument.⁶²

⁵⁷ Viterbo 2019, at 209.

⁵⁸ Christopher J. Brummer, *Why Soft Law Dominates International Finance—and not Trade*, 13(3) *Journal of International Economic Law* 623 (2010) (Jun. 10, 2020), available at <https://ssrn.com/abstract=1742512>.

⁵⁹ *Id.*

⁶⁰ Weiss 2015, at 56.

⁶¹ Марочкин С.Ю. Действие и реализация норм международного права в правовой системе Российской Федерации [Sergey Iu. Marochkin, *The Action and Implementation of International Law in the Legal System of the Russian Federation*] 254 (Moscow: Infra-M, 2017).

⁶² *Id.* at 255.



References to non-legal international acts, resolutions of conferences or organizations are increasingly frequent because the continued reference to the provisions of these acts allows them to gain legal force, as I. Lukashuk noted.⁶³

States must respect the resolutions of international organizations. The ICJ indicated that the very fact of membership in an international organization “implies certain mutual obligations of cooperation and good faith,”⁶⁴ and the U.N. General Assembly noted that the ICJ to a certain extent could take into account the declarations and resolutions of the General Assembly.⁶⁵ In the financial sphere, domestic law is notable for “a high degree of internationalization,” as I. Lukashuk pointed out.⁶⁶

It should be emphasized that the implementation of international financial standards does not always have a beneficial effect on the economy of states. For example, the increasing regulation of the banking sector by introducing higher requirements for capital and liquidity through appropriate standards helps strengthen financial stability but limits the scope of operations and the profitability of banks. The spread of standards at a universal level not only contributes to strengthening the financial stability of the global banking system but also provides formally equal conditions for competition. Meanwhile, the documents of the Basel Committee emphasize that the goals of prudential regulation can be fully achieved only if the Basel standards are properly and consistently implemented by all members of the Committee.⁶⁷

4. The Role of “Soft Law” in International Regulation of Monetary Affairs

Modern international legal regulation of monetary affairs is more inclined towards the format of “soft law” (bringing it closer to an even “softer” standard for regulating the financial market) than towards the international legal regulation of trade.

Four of the sixteen key financial standards allocated by the FSB are developed and implemented by the IMF. Additionally, as mentioned above, the IMF oversees the FSAP and ROSC programs.

⁶³ Лукашук И.И. Нормы международного права в правовой системе России [Igor I. Lukashuk, *Norms of International Law in the Legal System of Russia*] 12 (Moscow: Spark, 1997).

⁶⁴ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* [1980] I.C.J. Rep. 3.

⁶⁵ Lukashuk 1997.

⁶⁶ *Id.* at 57.

⁶⁷ Basel Committee on Banking Supervision, Regulatory Consistency Assessment Programme (RCAP): Assessment of Basel III LCR Regulations – European Union (July 2017), at 2 (Jun. 10, 2020), available at <https://www.bis.org/bcbs/publ/d410.pdf>.



The specifics and key issues of modern international monetary law can be understood in comparison with those of international trade law, which are given special attention in the scientific literature.⁶⁸

The evolution of the two legal orders—trade and monetary—has led to the fact that today, they differ quite significantly in their regulatory tools, including the degree of rule formalization and the set of tools to ensure decision implementation. The mismatch of these two sectors of international law gives rise to negative effects in both areas.

The genesis of the trade and monetary legal order can be traced according to the example of the creation and development of the two major international organizations that provide them—the GATT/WTO and the IMF.

The GATT and the IMF Articles of Agreement have mutually corresponding provisions that emphasize the organic coherence of the two legal orders and the need for their correlation to support the successful development of world trade.

Thus, Article I of the IMF's Articles of Agreement contains the following phrases: "to facilitate the expansion and balanced growth of international trade," "avoid competitive exchange depreciation," and "elimination of foreign exchange restrictions which hamper the growth of world trade." Section 1(iii) of Article IV provides that states shall "avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members."

When the IMF and GATT were created, there was a strong link between the two legal systems. Article IV of the IMF Articles of the agreement initially imposed firm surveillance over exchange rates, determining that the exchange rates would not differ by more than 1% of the established nominal value and that members shall "collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members and to avoid competitive exchange alterations." Paragraph 4 of Article XV GATT, in turn, stipulated that

... by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

⁶⁸ Gregory Shaffer & Michael Waibel, *The Rise and Fall of Trade and Monetary Legal Orders: From the Interwar Period to Today's Global Imbalances in Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* 289 (G. Mallard & J. Sgard (eds.), New York: Cambridge University Press, 2016); Chien-Huei Wu, *Legal Aspects of the WTO/IMF Relationship Revisited in Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* 277 (M. Cremona et al. (eds.), Leiden: Brill, 2013); Chen Yu, *Currency Manipulation and WTO Laws: Should the Anti-Dumping Mechanism Be Entirely Dumped?*, 20(6) *Journal of World Investment & Trade* 891 (2019); Vera Thorstensen et al., *The 'Missing Link' Between the WTO and the IMF*, 16(2) *Journal of International Economic Law* 353 (2013); R. Michael Gadbaw, *Systemic Regulation of Global Trade and Finance: A Tale of Two Systems*, 13(3) *Journal of International Economic Law* 551 (2010); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54(3) *International Organization* 573 (2010); Daria Boklan & Ilya Lifshits, *Eurasian Economic Union Court and WTO Dispute Settlement Body: Two Housewives in One Kitchen*, 7(3) *Russian Law Journal* 169 (2019).

Thus, GATT Article XV and IMF Article IV formed the main link between the two legal systems, ensuring that exchange rates would not significantly affect international trade while there was a fixed exchange rate system.

However, since the creation of these organizations (the IMF and GATT/WTO), the processes that G. Shaffer and M. Waibel call the “judicialization” of the WTO law and the “de-legalization” of the IMF law and order have been steadily developing.⁶⁹ According to G. Shaffer and M. Waibel, such a mismatch between the two forms of supranational legal order can challenge the existing interdependencies between international organizations and add complexity and uncertainty to the management of the international economic system.

In their article “The ‘Missing Link’ between the WTO and the IMF,”⁷⁰ V. Torstensen, D. Ramos and C. Muller seek to explain why the WTO does not have an effective rule to neutralize the negative impact of manipulating exchange rates on trading instruments—in other words, the missing link between the WTO and the IMF in terms of the relationship between exchange rates and trade.

It is difficult to deny that today, the degree of legalization of policies is significantly different in trade and monetary affairs, migrating from using formal legal norms to “soft” or purely economic instruments.

The core of this issue is the weakness of the international legal regime for the counteraction of exchange rate manipulation (Art. IV of the IMF’s Articles of Agreement) and capital control requirements (Art. VIII of the IMF’s Articles of Agreement).

G. Shaffer and M. Waibel discuss the “delicacy” of the international standard for the counteraction of exchange rate manipulation,⁷¹ A.F. Lowenfeld argues that Article IV did not achieve the goals that its drafters had in mind,⁷² and V. Torstensen and co-authors write about the “fall of the Article IV.”

Revised in 1978, the IMF’s Articles of Agreement create only minimum legal requirements, which are difficult to apply and enforce in practice.⁷³

A.F. Lowenfeld believes that in Article IV, you can find what is called *legal soft law*. These are the first two obligations, (I) and (II), of Article IV of the IMF’s Articles of Agreement, among the responsibilities of Member States to cooperate with the Fund to ensure the ordering of exchange arrangements, namely, that to “endeavour to direct” and “seek to promote,” are “soft rights.”⁷⁴

One of the most respected IMF researchers, F. Gianviti, classifies the provisions of Article IV—provisions that are positive (para. 1(i), (ii), (iv) = goals) and those that

⁶⁹ Shaffer & Waibel 2016.

⁷⁰ Thorstensen et al. 2013.

⁷¹ Shaffer & Waibel 2016, at 308.

⁷² Andreas F. Lowenfeld, *International Economic Law* 582 (Oxford: Oxford University Press, 2008).

⁷³ Shaffer & Waibel 2016, at 308.

⁷⁴ Lowenfeld 2008, at 635.



are negative (para. 1(iii) = prohibition)—as well as formulates “soft” (cl. 1(i), (ii)) and “hard” (cl. 1(iii), (iv)) conditions.

The “soft” characterization refers to the fact that the relevant section does not impose a legal obligation to achieve a specific goal but only requires the implementation of reasonable efforts by Member States.

While paragraphs 1(i) and (ii) fall within the scope of domestic policy (the main aspect of monetary sovereignty), paragraphs 1(iii) and (iv) relate to foreign policy (the main jurisdiction of the IMF). In addition, effective monitoring is only possible if Member States cooperate and provide all the necessary information to complete this task. Therefore, Member States must provide the IMF with relevant information under paragraph 3(b) of Article IV and paragraph 5 of Article VIII of the IMF’s Articles of Agreement.⁷⁵

After the end of the fixed exchange rate system in the 1970s and the weakening of the IMF’s control over exchange rates, Article IV of the IMF gradually lost its influence as well as its central place in the Fund’s goals, breaking the link between the two global institutions. The IMF has gradually changed its main stabilizing function in the international monetary system from tight exchange rate control to a supervision system focused on a balance between payment stability and macroeconomic stability provided through financial support.

The Fund no longer controls the exchange rate value of Member States. According to its current agenda, the IMF sees exchange rates as one of many macroeconomic variables that it must control to guarantee national and global economic stability.

V. Thorstensen and co-authors write that the IMF has undergone a deep and significant “silent revolution” that has changed its fundamental role in the structure of global economic governance.⁷⁶

In parallel, after the creation of the WTO in 1995, trade law reached the height of its influence. The WTO system has become much more legalized than the original GATT and is based on a model of “hard” law. This movement towards legalization is reflected in the increasing percentage of lawyers among WTO staff compared with reverse trend in the IMF.⁷⁷

R.M. Gadbaw, agreeing with D. Jackson, believes that the central element of the WTO’s success is its normative approach (a “rule-based approach”), which focuses on the predictability and stability of the functioning of the international trading

⁷⁵ Charles Proctor, *Mann on the Legal Aspect of Money* 592 (7th ed., Oxford: Oxford University Press, 2012); Francois Gianviti, *Decision Making in the International Monetary Fund in Current Developments in Monetary and Financial Law*. Vol. 1 31, 46 (Washington: IMF, 1999).

⁷⁶ Thorstensen et al. 2013, at 357.

⁷⁷ As G. Shaffer and M. Waibel point out, in the IMF the proportion of lawyers working for the organization is approximately 3%, and it is clear that lawyers influence the process of policy determination more directly and more often in the WTO than in the IMF. In general, the IMF Legal Department is not centrally included in policy definition. In the IMF, economists play dominant roles in both policy definition and control missions.

system.⁷⁸ Even though, as R.M. Lastra writes, the control exercised by the IMF is no longer a “rule-based regime” but is a “discretion-based regime.”⁷⁹

In this regard, G. Shaffer and M. Waibel draw attention to the fact that the formal settlement of disputes does not play a significant role in the international monetary legal order. The IMF’s Articles of Agreement contain binding rules, and the IMF could theoretically impose sanctions to enforce these rules.⁸⁰ Some provisions of the Charter are officially “hard” but in practice are quite “soft,” especially because their enforcement depends on consultations.⁸¹

V. Torstensen and colleagues point out that the IMF system has not found a way to maintain its relationship with the multilateral trading system. At present, the effects of the decline in the original strength of Article IV, the termination of the fixed exchange rates system and the gradual weakening of control over the manipulation of the exchange rates are more severely felt in the WTO system.

Protectionist deterministic manipulation of the exchange rates by states is further complicated by the negative effects of currency devaluation for emerging market countries (EMEs). These effects were caused by the “quantitative easing” (QE) programs implemented by central banks in developed countries. Due to this, during the period of the global financial crisis, many of the EME countries stopped addressing the IMF as an “international lender of last resort” to overcome liquidity problems, preferring the mechanism of bilateral swaps with the central banks of the USA, China, and Japan.⁸²

5. The Role of “Soft Law” in the EU Financial System

Soft law has a purely supporting role in the EU legal order, but the strengthening of soft law in the regulation of the financial market at the Union level can be noted.

As K. Davis points out regarding EU law,

Rules which have no binding force, but which may nevertheless have practical effects.⁸³

⁷⁸ Gadbow 2010, at 568.

⁷⁹ Rosa M. Lastra, *Legal Foundations of International Monetary Stability* 400 (Oxford: Oxford University Press, 2006).

⁸⁰ Shaffer & Waibel 2016, at 290.

⁸¹ Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77(3) American Journal of International Law 443 (1983).

⁸² Camilla V. Duran, *The International Lender of Last Resort for Emerging Countries: A Bilateral Currency Swap?*, GEG Working Paper 2015/108 (July 2015) (Jun. 10, 2020), available at <https://modernmoneynetwork.org/sites/default/files/biblio/Duran%20-%20The%20International%20Lender%20of%20Last%20Resort%20for%20Emerging%20Countries.pdf>.

⁸³ Karen Davies, *Understanding European Union Law* xxv (Glossary) (3rd ed., London: Routledge-Cavendish, 2007) (Jun. 10, 2020), also available at <https://books.google.ru/books?id=fLuNAgAAQBAJ&pg=PR25&>



According to the Resolution of the European Parliament of 2007,⁸⁴ acts in the “soft” law category should include communications, white and green books, codes of conduct, resolutions, etc.

Although the term “soft law” has never been used in EU treaties or in court judgements, in the EU, the term “soft law” is generally used to refer to acts that are not binding but that nevertheless possess practical or legal significance. The source of their legitimacy in most cases is Article 288 of the Treaty on the Functioning of the EU (former Art. 249 of the EU Treaty), which provides for the adoption by EU bodies of regulations, directives, decisions (“hard law”), and non-binding documents: both recommendations and conclusions.

As the Court of Justice of the European Union ruled in the *Grimaldi* case, recommendations and opinions mentioned in the Article 249 of the TEU were non-binding; although based on persuasion, they must be taken into account by national courts.⁸⁵ Other sources of “soft law” may include guidelines or codes of conduct issued by Community institutions.⁸⁶

According to Professor S. Kashkin, the application of “soft law,” as well as the invention of “semi-soft law” (“soft law” = “hard + soft law”) gives special flexibility to EU law and makes it a fairly convenient policy tool.⁸⁷

The differences between the “recommendation” and the “opinions” are not fixed in Establishing Treaties. Experts strive, although without much success, to turn to an analysis of practice, noting that the opinions are in most cases formulated in response to a question. The specificity is also seen in the fact that recommendations are an indirect means of ensuring changes in the legislation, differing from the regulations only in the absence of legal force.⁸⁸

Analysing the internal policy of the EU, it is worth noting that the practice of applying “soft law” acts is quite clearly manifested in EU competition law as well as in the implementation of corporate governance principles.

lpg=PR25&dq=Karen+Davies,+Understanding+European+Union+Law+Glossary+xxv&source=bl&ots=XC5mjfODgi&sig=ACfU3U1SOIkgoYea4ruCv15gc-ojlfNzdg&hl=ru&sa=X&ved=2ahUKEwj8tvLBnqnrAhXDIlIsKHShnBd04ChDoATACegQICBAB#v=onepage&q=Karen%20Davies%2C%20Understanding%20European%20Union%20Law%20Glossary%20xxv&f=false.

⁸⁴ European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of “soft law” instruments (2007/2028(INI)) (Jun. 10, 2020), available at <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-366>.

⁸⁵ *Salvatore Grimaldi v. Fonds des maladies professionnelles*, Case C-322/88, Judgment of the Court (Second Chamber), 13 December 1989.

⁸⁶ Davies 2007.

⁸⁷ *Кашкин С.Ю., Четвериков А.Ю.* Основы интеграционного права [Sergey Iu. Kashkin & Artem O. Chetverikov, *Fundamentals of Integration Law*] 152 (Moscow: Prospekt, 2014).

⁸⁸ *Мухаева Н.Р.* Право Европейского союза [Nelly R. Mukhaeva, *Law of the European Union*] 78–79 (Moscow: Unity-Dana, 2006).



The “open method of coordination” has been widely used by European structures when it is necessary to resolve relations outside the competence of the EU, and therefore, it is impossible to enforce rules legally binding all countries—members of the EU.

In these cases, non-binding recommendations and standards are developed, and a body is created to monitor their implementation. Reports on the implementation of rules by the EU Member States are collected. Consequently based on these reports, work is performed, on the one hand to improve the relevant rules and on the other, to determine the reasons for non-compliance.

According to M. Prpic, the open coordination method (OMC) is a regulatory instrument initiated by the European Council in 2000. OMC is not included in EU legislation but is a “soft” management method that aims to disseminate best practices and achieve convergence in these areas. The author points out that OMC was not created as a universal method of coordination, but some provisions in the TFEU essentially refer to it in this manner without naming it as such (Art. 149: employment, 153 and 156: social policy, 168: health policy, 173: industry, 181: research and technology).⁸⁹

According to B. ter Haar, OMC is a combination of regulatory elements, such as fixed guidelines (indicators), indicators and specific targets on the one hand, and management methods on the other hand, including benchmarks, national action plans, monitoring, evaluation and peer review.

Unlike the Community Method, the OMC process does not end with the adoption of one single instrument to further European integration, for instance a directive or resolution. Conversely, the OMC creates an iterative cycle of sequential related modes of governance and normative elements. It is the creation of this iterative cycle that discerns the OMC as a new, third way of EU governance from both the traditional hard and soft law approaches.⁹⁰ At the same time, D.M. Trubek, D. Cottrell and M.T. Nance believe that the OMC is a kind of “soft law.”⁹¹

However, first, in the regulation of the EU financial market, we see an obvious increase in the role of soft law.

It has been in the field of financial regulation since 2010 that European financial regulators (ESFS) have been using the “soft-legal” approach, with “comply or explain”

⁸⁹ Martina Prpic, *The Open Method of Coordination*, European Parliamentary Research Service (October 2014) (Jun. 10, 2020), available at <https://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf>.

⁹⁰ Beryl ter Haar, *Soft Law or No Law: How to Determine the Legal Status of the Open Method of Coordination?*, ReflecT Lunch Seminar, Tilburg University, 19 March 2009 (Jun. 10, 2020), available at <https://ssrn.com/abstract=1436453>.

⁹¹ David M. Trubek et al., *“Soft Law,” “Hard Law,” and European Integration: Toward a Theory of Hybridity*, University of Wisconsin Legal Studies Research Paper No. 1002 (2005) (Jun. 10, 2020), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=855447.



as the base. The legal basis for this approach is the three regulations establishing the micro-prudential supervision bodies—EBA,⁹² ESMA,⁹³ EIOPA⁹⁴—as well as the regulation on the European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (ESRB).⁹⁵

Articles 16 in all three of the initial regulations contain a provision according to which the competent authorities and financial institutions of the EU states should make every effort to comply with the guidelines and recommendations issued by the EU microprudential regulator. Within two months after the issuance of such a guideline or recommendation, each competent authority must confirm whether it intends to comply with the guideline or recommendation or must inform the regulator of the reasons for non-compliance. The ESRB approach is similar—“act or explain.”

E. Osokina points to the Single Rule Book as the legal basis of the European Banking Union being a combination of legally binding acts and “soft law” acts. In particular, recommendations and guidelines developed and adopted by the EBA are included in the Single Rule Book as “soft law” rules. However, with the creation of the European Banking Union, the EU’s area of competence expanded significantly, and “soft” regulation was replaced by a system of legally binding and centralized EU law.⁹⁶

Considering that the other two micro-prudential regulators profess the same fundamentals as the EBA, it can be argued that the ESA’s regulatory tools are largely “soft legal” in nature. When the Capital Markets Union is created, as in the case of the EBA, the regulatory book of the ESMA will flow into the “hard law” of the European Union.

⁹² Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC (Jun. 10, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1093>.

⁹³ Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC (Jun. 10, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R1095>.

⁹⁴ Regulation (EU) No. 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC (Jun. 10, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1094>.

⁹⁵ Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (Jun. 10, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1092>.

⁹⁶ Осокина Е.Б. Правовые основы организации и функционирования Европейского банковского союза: дис. ... канд. юрид. наук [Elena B. Osokina, *Legal Foundations of the Organization and Functioning of the European Banking Union: Thesis for a Candidate Degree in Law Sciences*] 14, 59 (Moscow, 2019); Asen Lefterov, *The Single Rulebook: Legal Issues and Relevance in the SSM Context*, ECB Legal Working Paper No. 15 (October 2015) (Jun. 10, 2020), available at <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp15.en.pdf>.



It is worth recalling that the principles of “peer pressure” and as a special case of this, “naming and shaming,”⁹⁷ are widely applied by the OECD and the FATF. With the accelerated harmonization of EU anti-money laundering legislation (5 AMLD, 6 AMLD), we can say that by publishing lists on high-risk third countries,⁹⁸ the European Commission transfers the above FATF principle to the level of integration. It seems that “soft” law can be found in the new anti-money laundering architecture of the EU, because in 2021, the following are expected: a single EU rulebook; EU-level supervision; and a coordination and support mechanism for Member States’ Financial Intelligence Units.⁹⁹

6. The Role of “Soft Law” in the EAEU Financial Regulation

There are almost no scientific studies on the role of “soft law” in the financial integration mechanism in the EAEU. Therefore, we believe that it is advisable to focus directly on the legal framework of the Union.

In the quality of EAEU legal acts regulating issues of financial and monetary integration, the following sources of soft law are indicated:

1) International principles and standards: Article 67, p. 4, paragraph 1, Article 70 of the Treaty on the Eurasian Economic Union (TEEU); p. 21, 22, 23, 25, 26 of the Protocol on Financial Services; Article 5 of the Agreement on harmonization of legislation of the Member States of the EAEU in the financial market (AHLFM); four references to the Concept of the formation of the common financial market of the EAEU (the Concept);

2) The international best practice: p. 21, 22, 23, 25, 26 of the Protocol on Financial Services; Article 5 of the AHLFM; three references to the Concept.

Sometimes, both forms of “soft law” are referred to together and other times, they are referred to separately.

It is worth noting that the international principles mentioned together with the standards should be referred to as “soft law” and not as “generally accepted principles

⁹⁷ The “naming and shaming” approach is to publicly disclose states that do not execute or improperly execute OECD and FATF acts. See, e.g., Mark T. Nance, *Naming and Shaming in Financial Regulation: Explaining Variation in the Financial Action Task Force on Money Laundering in The Politics of Leverage in International Relations* 123 (H.R. Friman (ed.), London: Palgrave Macmillan, 2015).

⁹⁸ Based on Directive (EU) 2015/849, Article 9, the Commission is mandated to identify high-risk third countries having strategic deficiencies in their regime on anti-money laundering and counter-terrorist financing. The aim is to protect the integrity of the EU financial system. See Anti-Money Laundering and Counter Terrorist Financing, European Commission (Jun. 10, 2020), available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/anti-money-laundering-and-counter-terrorist-financing_en.

⁹⁹ Commission Steps up Fight Against Money Laundering and Terrorist Financing, European Commission, 7 May 2020 (Jun. 10, 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_800.



of international law” (which are mentioned in Article 3 of the EAEU Treaty and p. 50 of the Statute of the Court of the Eurasian Economic Union).

Sources of “international principles and standards” directly mentioned in the legal acts of the EAEU:

- 1) Core Principles for Effective Banking Supervision (mentioned in TEEU, AHLFM);
- 2) Core Principles of Insurance Supervision of the International Association of Insurance Supervisors (the current title of the document is “The Insurance Core Principles, Standards, Guidance and Assessment Methodology”) (TEEU, AHLFM);
- 3) Principles of the International Organization of Securities Commissions (the current name is “The Objectives and Principles of Securities Regulation”) (TEEU, AHLFM);
- 4) Principles of the Organisation for Economic Co-operation and Development (it is not clear what document is mentioned here but let us assume that it is G20/OECD Principles of Corporate Governance) (TEEU, AHLFM);
- 5) FATF Recommendations on Combating Money Laundering and the Financing of Terrorism & Proliferation (AHLFM);
- 6) International Standards on Auditing (TEEU);
- 7) International Financial Reporting Standards (TEEU).

Thus, in the legal framework of the EAEU financial regulation, 7 standards from the FSB compendium are mentioned.

We believe that in the EAEU law, it is necessary to develop a unified approach regarding the technical and legal rules for securing references to the provisions of international “soft” law.

We argue that it is not appropriate to indicate “international best practices” along with “international standards and principles,” speaking about the harmonization of EAEU members’ laws and regulations (p. 21, 22, 23, 25 of the Protocol on Financial Services).

At the same time, it seems controversial to give a direct name to the standards, given that they are highly variable. It may be more appropriate to indicate the bodies that set the standards (standard-setters) or refer to the FSB compendium. Additionally, there is heterogeneity in naming the standards—sometimes, a name is given exactly, sometimes a general name is given (“Principles of the IOSCO,” “Principles of the IAIS”) and other times, it is not at all clear to which specific standard the text is referring (“Principles of the OECD”).

Conclusion

The international financial legal order in the modern world is largely determined by the activities of several intergovernmental and non-governmental organizations that have become especially noticeable since the global financial crisis of 2007–2009. It seems that the international community has been unable to find an effective means to regulate the international financial system using “hard” legal instruments since the global crisis.



The cooperation of state authorities of various countries within the framework of international financial institutions is carried out by the development, adoption, and monitoring of the implementation of non-binding acts, called “international financial standards.” International financial institutions can be established in the form of intergovernmental organizations, non-governmental organizations, organizations with a transitional status, or para-organizations. The charters of these international rule-makers have deliberate non-binding character. The same character applies to international financial standards. These specific features as well as the set of measures to ensure the implementation of international financial standards facilitate the impact on international financial relations and the domestic law of states.

Since the beginning of the global financial crisis, the role of soft law has increased not only in the financial market but also in the field of monetary regulation. It can be stated that due to the weakening role of the IMF and the softening of the key provisions of its Charter, the contemporary monetary legal order is increasingly leaning towards the standard of “soft” law as well as to the alternative (without the intermediation of the IMF) forms of intergovernmental cooperation in monetary affairs: bilateral monetary swaps, regional financial support systems, and coordination mechanisms based on the BIS (international monetary policy coordination).

The status of “soft law” as a source of EU financial regulation is debatable. However, undoubtedly both at the global and EU levels, there are signs of an increasing role of “soft” law in the post-crisis paradigm of financial regulation.

In the EAEU legal acts, several forms of “soft law” are mentioned. However, from a technical and legal point of view, these “soft law” references are imperfect, and there is no doctrinal justification for their role in the EAEU law. At the same time, given that the EAEU law is characterized by the absence of mechanisms to force states to fulfil their obligations under the Union, EAEU law seems more amenable than EU law to the perception of “soft-law” mechanisms.

The choice of the soft legal form of international financial standards leads to the conclusion that in the modern world, such a model of influence on national legal systems, as well as on the legal systems of integration associations, including the EU, is preferable and, in most cases, the only possible model. The prevalence of this model allows us to argue that a new soft law mechanism of influence has formed in the financial sector, in which, nevertheless, one can hardly see signs of a new rule of law. According to some researchers, this situation makes us rethink the current rule of law based on the Westphalian model of state sovereignty.¹⁰⁰

The soft law mechanism has the following elements: a normative component that is formally non-binding recommendations; an institutional component that is norm-setting; a control component that is monitoring and peer reviews conducted

¹⁰⁰ Erzsébet Csatlós, *Public Administrative Law in a Globalized Concept: Legal Nature of the Collaboration of the EU and the Basel Committee*, 22(2) *Journal of International Economic Law* 229, 232 (2019).



by the institution; and a security component that is incentives encouraging the implementation of the international financial standards in national legal systems.

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