Towards European Accounting Law*

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1. INTRODUCTION

Ten years ago, in 2002, the European Union Member States made the daring choice to implement the International Financial Reporting Standards (hereinafter ‘IFRS’1) in the European Union. Since 2005 it has been compulsory for listed companies based in the European Member States to apply these reporting standards in their consolidated annual accounts.2

The IFRS are drawn up by the International Accounting Standards Board (hereinafter ‘IASB’).3 The IASB is a private organization.4 The standards issued by this organization do not directly apply to listed companies. The obligation to apply the standards does not arise until after ‘adoption’ of the standards by the European Commission based on the endorsement mechanism as set forth in the European IAS Regulation. The IFRS adopted by the European Commission in a regulation are published in the Official Journal of the European Union, after which they have direct effect.5 Consequently, the adopted IFRS which I will hereinafter refer to as ‘EU IFRS’ form an integral part of the European legal structure and are directly binding on listed companies based in the European Member States. The implementation of the IFRS in the European Union may be considered jumping in at the deep end, and was not effected without a struggle, as may also be shown by the following quote, dating back to 2006 but of surprisingly present interest:

‘The implementation of IFRS for listed companies in the EU has been a true ‘accounting revolution’. This always meets with resistance. It can, however, not be denied that maintaining the status quo, where each country made its own rules, was an obstacle in European movement of capital and the development of internal European accounting standards was not a real option, given the fact that this had been tried unsuccessfully for forty years. Undoing this decision in a couple of years will, however, be as impossible and undesirable as undoing the decision to implement the euro.’

Below I will address the question as to why the decision to implement the EU IFRS was so daring and why the decision to implement the rules should, in some ways, be seen as jumping in at the deep end. The emphasis will be on the drafting process of the EU IFRS and the shaping of the supervision and enforcement thereof. In this respect I will first outline the development of accounting law for listed companies in the European Union over the past few decades (section 2) and the drafting of the IAS Regulation (section 3). Furthermore, I will briefly address the more legal philosophical and constitutional question as to when, in fact, rules can be deemed to constitute law (section 4). Along these elaborations I will then discuss the question as to whether the EU IFRS, given the drafting process and the shaping of the supervision and enforcement thereof, should be deemed to constitute European accounting law (sections 5 and 6).

Finally, I will give an outline of several building blocks that may contribute to the solution of the problems identified (section 7) and a brief conclusion (section 8).

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* This is the abridged text forming the basis for the speech given upon acceptance of the office of Professor of Financial Reporting Law at Erasmus School of Law, Erasmus University Rotterdam, on Jan. 13, 2012. For the full version I refer to J.B.S. Hijink, Naar een Europese jaarrekeningsvoorschrift (Kluwer 2012).

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1 Required by Regulation (EC) no. 1606/2002 of the European Parliament and of the Council of July 19, 2002 on the application of international accounting standards (OJ 2002, L 244) hereinafter (‘IAS Regulation’). Strictly speaking, compulsory application regards financial years starting on or after Jan. 1, 2005. In this article the term (EU) IFRS also includes the accounting standards that were still published as International Accounting Standards (‘IAS’).

2 The IAS Regulation refers to ‘companies the securities of which are admitted to trading on a regulated market’. According to a communication from the European Commission dated November 2003 these should be companies within the meaning of, currently, Article 54 of the Treaty on the functioning of the European Union. See p. 6 of the said communication (www.europa.eu.int/internal_market/accounting/docs/ias/200311-comments/ias-200311-comments nl.pdf). I interpret the term ‘listed companies’ as each company the securities of which are admitted to trading on a regulated market.


4 The members of the IASB are appointed by the Trustees of the IFRS Foundation. In this respect, see also the website of both-organizations (www.ifrs.org).


6 According to L. van der Tas, Voorwaarden van IFRS in de EU zachtregen, karşısında en oplagingen 581 (Implementation of IFRS in the EU: background, opportunities and threats) (MAB 2006).
2. A SMALL HISTORY OF ACCOUNTING LAW IN THE EUROPEAN UNION

2.1. The Period Until 2002

Since the 1960s the European Economic Community at the time has influenced the substance of company law of the European Member States. Particularly relevant are the Fourth and Seventh Company Law Directives.6 These directives were adopted in 1978 and 1983, respectively, and led to some degree of harmonization of the substantive requirements of both the company and consolidated annual accounts. The Fourth and Seventh Company Law Directives not only apply to listed companies based in the European Union, but also to all other types of companies referred to in those directives, including in any event (other) public and private companies with limited liability.7 In the mid 1990s, however, the European legislator became increasingly interested in adopting substantive requirements on consolidated annual accounts applicable exclusively to listed companies. One of the explanations was the increased relevance of the international capital market for listed companies based in the European Member States as a source of financing of business activities.8 Moreover, an increasing number of these listed companies became listed in the United States of America, in addition to their listings in the European Union.

2.2. How to Continue Harmonization of Accounting Law in the European Union?

Although the Fourth and Seventh Company Law Directives harmonized the substantive requirements of the consolidated annual accounts of European listed companies to some extent, the options to compare annual accounts of such European listed companies were still very limited.9 One of the reasons, as the European Commission itself noted in 1995, was the large number of ‘options for Member States or for companies, which permit different accounting treatments’.10 As a result, companies from various Member States treated economically similar transactions differently in their annual accounts. Furthermore, according to the European Commission, “[t]he adoption and implementation of the Fourth and Seventh Directives (…) were only achieved with difficulty and no further progress has been made at EU level in harmonizing the basic rules on accounting and financial reporting. There is disagreement between Member States about the usefulness of the Directive as an instrument for accounting harmonization.”11

Another important and expensive consequence of the limited extent of harmonization of annual accounts of European listed companies was the fact that the US Securities and Exchange Commission (SEC) imposed an obligation on those companies that were also listed in the United States to ‘reconcile’ their financial reporting.12 This meant that these companies were, to a certain extent, to conform their annual accounts to, and present them subject to, US accounting standards. Furthermore, investors insisted on improvement of the mutual comparability of annual accounts of European listed companies.

As the Fourth and Seventh Company Law Directives proved inadequate for further harmonisation of the accounting principles, as is shown by the communications of the European Commission quoted above, in the mid 1990s the European Commission decided to take a different approach.13 Formally, this approach was taken in 1995, when the European Commission published a communication announcing the possibilities for further harmonisation of the accounting principles for European listed companies and linking up to international reporting standards.14 In its communication the European Commission suggested to investigate if and how the existing accounting standards according to the European Commission: the IFRS would be brought and maintained in line with the European guidelines.15 After this first communication, in 2000 the European Commission published a progress communication.16

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7 As referred to in Article 54 of the Treaty on the functioning of the European Union.
9 In this respect also K. van Hulle, “Geharmoniseerd en evenwichtig jaarrekeningsrecht in de EU: een moeilijk houdbaar?”, in: Verantwoording aan Hans Beckman 240 (Kluwer 2006).
11 Communication from the European Commission, p. 3. In this respect see also H. Beckman, European jaarrekeningsrecht, in: Evenwichtig beheerrecht: realiteit of utopia? 97 (Boons Juridische uitgaven 2006). He notes, inter alia, that it did not impose the obligation to apply the regulations to the regulations of the Fourth and Seventh Company Law Directives until the financial year 1993. For a description of the causes preventing the effectiveness of further harmonization by means of directives, see also K. van Hulle, Prem Accounting Directives to International Accounting Standards, in: The Economics and Politics of Accounting 352–355 (Oxford 2004).
12 In the words of K. van Hulle: Geharmoniseerd en evenwichtig jaarrekeningsrecht in de EU: een moeilijk houdbaar? in: Verantwoording aan Hans Beckman 255 (Kluwer 2006). “The real problem for European global players was access to the US capital market.” In this respect, see also L.G. van der Tas, Internationale jaarrekeningsgroepen Nederland (International accounting standards consortia the Netherlands) 374–375 (Onderwezingsrecht 2000). About abandoning this obligation on Dec 21, 2007: J.B.S. Huisink, Publikationsverpflichtungen für beweiswürdigkeiten (Publication requirements for hearsay evidence) (diss. UvA) 2010, pp. 66 et seq. and further references.
14 The Communication from the European Commission, supra n. 11.
15 Communication from the European Commission, infra n. 17, at 2, 7 et seq.
important element of that progress communication was the announcement of the implementation of the endorsement mechanism based on which the European Commission could 'adopt' the standards issued by the IASB. In early 2001 the communication was followed by the proposal for the IAS Regulation, which included this mechanism.\(^{18}\) This regulation was subsequently adopted on 19 July 2002.\(^{19}\)

3. IMPLEMENTATION OF THE EU IFRS: A SUBSTANTIAL LEAP FORWARD, WHILE AT THE SAME TIME JUMPING IN AT THE DEEP END

3.1. The Difficult Run Up to the IAS Regulation

The steps outlined above as taken by the European Commission may create the impression that the European Commission took seven league strides to decide to implement the EU IFRS. After all, the period between the first formal deliberations on application of the IFRS in the European Union and the realization of the IAS Regulation was a relatively short one, of seven years. The reality, however, shows more hurdles. For a long time there was resistance within the European Commission against implementation of the IFRS. For example, in the 1980s the European Commission kept its distance from the IASC, the predecessor of the IASB, by rejecting invitations to participate in certain bodies of the IASC.\(^{20}\) The background of this ambivalent attitude of the European Commission, as well as a substantial number of Member States, towards the IFRS is found in the strong Anglo Saxon orientation of the IASB and the focus of the IFRS on the capital markets.

The former is expressed by the background of the members of the IASB. The majority of the now 15 members of the IASB come from an Anglo Saxon background.\(^{21}\) The focus on the capital markets is expressed, inter alia, in the strong emphasis placed by the IFRS on the valuation of assets and liabilities at 'fair value'. In this method of valuation the value of an asset or liability in a possible transaction on the market plays an important role. This is relevant information for capital providers who always want to buy or sell shares in the companies on the stock exchange. The prognosis for the future is relevant here. This is, however, difficult to reconcile with the objective for the annual account also to serve as accountability by the management of the company on the performance of the company and its bodies. In this respect particularly information on the past is relevant. The (EU) IFRS increasingly fail to link up to this objective.

Eventually, as described above, in July 2002, the IAS Regulation was adopted. That was rather fast, keeping in mind that the proposal for that regulation was announced in February 2001.\(^{22}\)

3.2. The Endorsement Mechanism at the Core of the IAS Regulation...

The core of the IAS Regulation consists of several procedural provisions on which the European Commission can 'adopt' the IFRS issued by the IASB.\(^{23}\) The IAS Regulation sets forth in further detail the parties from which the European Commission is to seek advice in this respect. Based on the regulation, for example, advice is to be sought, prior to adoption, from the Accounting Regulatory Committee, a committee in which representatives of the Member States participate. In actual practice, the European Commission is also advised by the European Financial Reporting Advisory Group (hereinafter 'EFRAG'), a private European organization in which interest groups of auditors and business and industry participate. Particularly the contents of the EFRAG recommendations seem to play an important role in the final determination of the European Commission's position.\(^{24}\) The role of the European Parliament in the adoption process has been reinforced since 10 April 2008.\(^{25}\) Since that date the amended Article 6(2) of the IAS Regulation has referred to Article 58f of the 'Comitology Decision' as implemented in 2006.\(^{26}\) Based on that decision the European Parliament can object to a decision proposed by the European Commission to 'adopt' an IFRS. Finally, the IAS Regulation requires that the IFRS be 'adopted' satisfy the basic principle of 'a true and fair view', 'understandability, relevance, reliability and comparability, and 'conducive to the European public good'.\(^{27}\)

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\(^{19}\) For more detailed information on the IAS Regulation, see J. B. van Hul, Publikationserplichtingen voor beursnoteringen (diss. UvA) 2010, pp. 20–23, and further references.

\(^{20}\) A nice discussion and description of the examples showing this resistance can be found at Kees Campferman & Stephen A. Zeiff, Financial Reporting and Global Capital Markets 418 et seq. (Oxford University Press 2006).

\(^{21}\) Incidentally, the current chairman is the Dutchman Hans Hoogervorst.

\(^{22}\) At "muted speed", according to K. van Hul, Gebouwd en onvermijdelijk: "norwegian sagen... en de EU: een moeilijk bouwmeester", in Vereniging van Hern Bijlen 241 (Kluwer 2006), and from the same author, K. van Hul, From Accounting Directives to International Accounting Standards in The Economics and Politics of Accounting 366 et seq. (Oxford University Press 2004).

\(^{23}\) The basis is found in Article 3 of the IAS Regulation. In this respect, see also J. B. van Hul, Publikationserplichtingen voor beursnoteringen (diss. UvA) 2010, pp. 22–23, and further references.

\(^{24}\) In itself, this is rather striking, as the IAS Regulation does not confer any formal role on EFRAG.


\(^{27}\) Pursuant to Article 3 (2) of the IAS Regulation.
3.3. But No Attention for Enforcement and Supervision of the EU IFRS

So, where the IAS Regulation pays a great deal of attention to the procedure for adopting the IFRS, there is much less attention for supervision and enforcement of compliance with the EU IFRS. Seen in that light, it is striking that the binding provisions of the IAS Regulation do not contain any guarantees for unambiguous interpretation and application of the EU IFRS by listed companies in various Member States. Only two paragraphs of the non-binding recitals to the IAS Regulation paragraphs 11 and 16 pay attention to this subject. Paragraph 16 of the recitals to the IAS Regulation, however, provides hardly any more than the fact that the Member States are required 'to take appropriate measures to ensure compliance with international accounting standards.' Furthermore, this recital provides that 'the Commission intends to liaise with Member States, notably through the Committee of European Securities Regulators (CESR), to develop a common approach to enforcement'. It is the wording of the endorsement mechanism described in the foregoing paragraph and the lack of enforcement and supervision referred to above that give rise to the question as to whether the EU IFRS could also be deemed to constitute European accounting law. Before discussing this question in further detail, I will first take a side step: what is 'law'?


Although the exact meaning of ‘law’ could be debated in depth from a legal philosophical and rule of law point of view, in which the views may be far and wide apart there seems to be a great extent of unanimity as to the minimum requirements set for being a democratic state under the rule of law. Following from the above, this unanimity also exists for the drafting of regulations within a legal system that qualify as ‘law’. An example is the requirement that rules must be known and properly published. Another example is that the rules must be clear, consistent, and sufficiently stable. That means: no too swift or too frequent amendments. Furthermore, the principle of legality - the principle that government actions, including setting rules, must have a legal basis - plays a role. Another category of requirements that is decisive for the question as to whether rules constitute law is the possibility to enforce the law. This not only means that a state under the rule of law must have an independent judiciary, but also that access to the court must be guaranteed and actually possible for anyone in order to enforce compliance with rights in court.

It should be kept in mind that the fundamental characteristics of a democratic state under the rule of law apply not only to the level of the national State of the Netherlands, but also to the European Union, and its bodies. For the principle of legality this means that the legal basis for government actions can be found not only in Nether lands law, but also in European regulations. Enforcement of the law also has a European dimension. For example, the European Court of Justice has repeatedly emphasized the importance of the principle of effectiveness. This principle means that anyone should have access to the court to enforce his or her rights, and that the Member States are to ensure that this is the case. The fact that this is not purely a theoretical principle became clear in the Netherlands with the ruling of the Supreme Court in 2009, in which World Online was held liable for the prospectus published by it. The principle of effectiveness played an important role in that case.

5. THE DRAFTING PROCESS OF EU IFRS TESTED AGAINST THE CONSTITUTIONAL FRAMEWORK

5.1. The European Influence on the IASB and the IFRS in the Year 2012

If the drafting process of the EU IFRS is tested against the constitutional framework, where does that lead us? First and foremost, there are two questions at hand here that are closely connected. On the one hand, there is the question as to whether the substance of the EU IFRS meets the requirement of ‘law’. Are they for example known, clear, consistent, and relatively stable? And on the other hand, there is the question as to whether the drafting process of the EU IFRS by which I mean the adoption procedure - to be followed satisfies the principle of legality. Let me start by discussing the substance of the EU IFRS. Although they are adopted by the European Commission, the
underlying author is still the IASB. Therefore, it is relevant to review the possibilities of the European Commission to exercise influence on the IASB and the substance of the IFRS. The European Commission itself noted in the past that it expected that its influence on the activities of the IASB would gradually increase.39 This was an important advantage over allowing the possibility for European listed companies to apply the US accounting standards the substance and drafting of which, after all, were beyond the control of the European Union.40 Meanwhile, it has been established in literature and in actual practice that the influence of the European Commission on the IASB is much smaller than expected.41 In actual practice, the European Commission seems to be able to exercise indirect influence, by threatening not to adopt an IFRS. Non adoption of an IFRS actually occurred in 2004, when the European Commission decided not to adopt certain elements of IAS 39 on certain elements. This is usually considered undesirable, as this creates different tastes in IFRS.42 The IASB, in fact, intends to have a single global and identical set of accounting standards. Note that in literature and in actual practice IASB’s interpretation of that intention has been criticized. The criticism is, inter alia, that under the guise of globalization and convergence, the substance of the IFRS has strongly shifted towards the US accounting standards, which was characterized by one way traffic.43 Whether this shift has resulted in clear and consistent accounting standards is generally doubted. And there has also been criticism regarding the stability of the IFRS, or rather: the IASB’s thirst for change. For example, the scope of the IFRS, expressed in number of pages, has substantially increased over the past ten years.44 All in all, this leads to a picture that is not too rosy.

5.2. The Democratic Legitimacy of the Adoption Process Weighted

A second question, relating to the adoption procedure, is whether that procedure satisfies the principle of legality. According to the European Parliament that may be questioned. In a resolution dated 2008 the Parliament noted that the IAS Regulation had ‘in fact elevated the IASB to the level of a legislative body’, while in that regulation the ‘the EU agencies did not adopt the associated procedures and practices for consultation and democratic decision making that are common for their own legislative procedures’.46 Relevant in this respect is the fact that since 2008 the IAS Regulation has provided with respect to the authority of the Commission to adopt accounting standards that this regarded ‘measures constituting non essential elements’ of the IAS Regulation.47 This gives rise to an interesting question: Can elements be non essential if an IFRS to be adopted leads to fundamental changes, or to a fundamentally different economic outcome, as compared to the situation before adoption? This is not purely a theoretical question. For where the accounting standards initially mainly intended to give a transparent view of the outcome of professional decisions in the annual accounts, today entrepreneurial decisions increasingly seem to be driven by the desired outcome in the annual accounts. An example is the way in which listed companies are to recognize pension commitments in their annual accounts. The accounting standards ‘increase the pressure to shift the risk entirely to the employees’, as Financiële Dagblad newspaper observed in September 2011.48 Although the reality is slightly less clear cut, fact is that in the past companies expressly relied on the IFRS to make, or try to make, amendments to pension schemes.49 The increasing use of the fair value method also has social consequences, as the financial crisis has taught us. Although it would be going too far to argue that fair value should be seen as one

39 See, e.g., p. 7 of the Communication from the European Commission, which states that communicating "an agreed Union position on Exposure Drafts can thus be conveyed to the IASC (as predecessor of IASB). This will allow the Union progressively to gain a position of greater influence on the IASC’s work, including the determination of its agenda, so that its output will increasingly reflect the Union’s viewpoint.”
40 According to the European Commission on p. 7 of the Progress Communication.
41 In this respect, see, inter alia, C.J.A. van Goffen, De aangemelde herziening van de EU-jaarrekeningrecht(n)is: het spreek van de harmonisatie van het EU-jaarrekeningrecht (The announced revision of the EU accounting directives: is EU accounting law being harmonized or de-harmonized?) in Vereniging jaarrekeningkundigen, vol. 2010/2011 84-85 (Boon Juridische uitgevers), and K. van Hulze, Geharmoniseerd en conserverend jaarrekeningrecht in de EU: een noodzakelijkheid in Veraantwoording van Han van Brummelen 253 (Kluwer 2006).
43 In this respect, e.g., M. Hoogendoorn, De waarde van normen 510 (The value of standards) (MAB 2007).
44 In this respect, L. van der Zee, Invloed van IFRS in de EU – achtergronden, kansen en beperkingen 540 (MAB 2006). See also the criticism by M. Hoogendoorn, De waarde van normen 510 (MAB 2007).
45 In his 2004 exiation M. Hoogendoorn counted an increase by near 300 pages in the period between 2001 and 2004 (see M.N. Hoogendoorn, Regel over regels. Het effectief is de International Accounting Standards Board? (Rules about rules. How effective is the International Accounting Standards Board?) (3rd ed.) 17-19 (Kluwer 2004). Also in the following period the number of pages gradually continued to increase.
47 See Article 5 (1), second sentence, of the IAS Regulation as it has read since 2008 as a result of the Regulation (EC) no. 297/2008 taking effect. Note that the exact scope of the new Article 3 is not quite clear.
48 Front page of Het Financiële Dagblad newspaper, Sept. 20, 2011.
49 See, e.g., the references by Swinkels to press releases from Aker–Nobel, DSM, and SMS Royal Group, in L. Swinkels, Zijn pensioenregelingen gewijzigd als gevolg van de introductie of IFRS 654 et seq. (Have pension schemes changed as a result of the introduction of IFRS) (MAB 2006).
50 In respect of this basis – and the increasing use thereof in the (EU) IFRS – see the articles in MAB 9-2003 on "fair value and financial reporting."
of the causes of the financial crisis, as the use of fair value reinforces economic trends, it has contributed to deepening of the crisis rather than to prevention or solution thereof.\textsuperscript{51}

This paradigm shift of the accounting standards – the ‘tail wiggles dog’ effect – has increased the social relevance of the accounting standards. This reinforces the desirability of EU IFRS that meet the requirement of ‘law’ in terms of substance and drafting process, in light of the principle of legality. Whether the EU IFRS, given the foregoing, can be regarded as accounting law, is at least open to doubt, in my opinion. Although according to the letter they may be considered law, as the drafting of the IAS Regulation and its endorsement mechanism have been democratic, according to the spirit it seems desirable to make some improvements to the drafting process of the EU IFRS.

6. THE DARK AT THE DEEP END: SUPERVISION AND ENFORCEMENT OF COMPLIANCE WITH EU IFRS

6.1. The Loose End in the IAS Regulation

A striking aspect of the IFRS note that here I mean the IFRS as drafted by the IASB, not the EU IFRS as adopted by the European Commission in that there is no authority supervising or enforcing compliance with the IFRS. The IASB itself has repeatedly communi cated that it did not feel that this was its job.\textsuperscript{52} For the EU IFRS as stated above the IAS Regulation hardly provides any points of reference for enforcement. Only paragraph 16 of the recitals to the IAS Regulation contains any provisions on the subject. Based on that recital the then partnership of European Securities Regulators (CESR) developed a variety of activities. Meanwhile, as a result of the financial crisis, in November 2010 the European Securities and Markets Authority (ESMA) was set up.\textsuperscript{53} ESMA has taken over the duties from CESR in respect of numerous European securities law directives.

6.2. National Enforcement Laws

As a result of the absence of a harmonized European framework for enforcement of EU IFRS the European Member States have created or maintained a variety of forms of supervision of compliance with the EU IFRS. For example, in the Netherlands the Enterprise Chamber of the Amsterdam Court of Appeal the ‘OK’ is responsible for supervision and enforcement of compliance with the EU IFRS by Dutch listed companies\textsuperscript{54} in the ‘annual accounts procedure’.\textsuperscript{55} Any interested party may in that procedure request that the OK order the revision of, inter alia, the annual accounts. Since 31 December 2006 the AFM the Netherlands Authority for the Financial Markets has also had the possibility to initiate an annual accounts procedure pursuant to the Netherlands Financial Reporting Supervision Act (Wet toezicht financiële verslaggeving).\textsuperscript{56} In actual practice, other European Member States have a variety of supervisory or enforce ment bodies that are responsible for supervision of compliance with the EU IFRS. For example, in the United Kingdom the ‘Financial Reporting Review Panel’ plays an important role, and Germany has assigned important duties to ‘die Deutsche Prüfstelle für Rechnung sichtigung’. Both are private law bodies, but also the securities regulators play a role in supervision. Other Member States assign duties to central banks.\textsuperscript{57} Whether in the Dutch model the AFM has sufficient possibilities to enforce compliance with the EU IFRS in the annual accounts procedure before the OK is a question that I will not discuss in further detail here.\textsuperscript{58} Another question is whether the Dutch model will, in time, prove tenable. Various environmental factors play a role in this respect, one of which is the way in which ESMA will develop.

6.3. The Gradually Increasing Influence of ESMA

Above I wrote that ESMA has been given duties and powers in numerous European securities law directives. ESMA has, however, not been granted the express power to enforce compliance with accounting standards. The European regulation establishing ESMA does, however, contain the, not very clear, passage that ESMA can ‘act’ in relation to issues in the field of financial reporting.\textsuperscript{59} It is assumed that the relevant actions cannot extend beyond giving recommendations.\textsuperscript{60} Note that the absence of a clear legal basis for

\textsuperscript{51} According to the Netherlands Central Bank in the report \textit{In het spaar van de crisis} (Tracking the crisis) 128 Amsterdam 2010. See, however, for comments on this conclusion: B-J Bout, R. ter Horst & H. Lengernick, \textit{Fair-value-accounting. Inactieve markten en procyclicititeit} 14 et seq. Fair-value accounting, inactive markets, and procyclicality (MAB 2011).

\textsuperscript{52} In this respect, see L.G. van der Tax, De revisering van internationaal rechts voor financiële verslaggeving (The introduction of international financial reporting rules) 277 (ToCh 2004–6) and by the same author: \textit{Internationale \textit{Financial Reporting Standards: een taal van verschillende dialetten} (Interpretation of International Financial Reporting Standards: one language or various dialects), in Venantweking aan Hans Beckman 529 (Elswier 2006).


\textsuperscript{54} More precisely: securities issuing institutions within the meaning of section 1 (1) of the Financial Reporting (Supervision) Act ("Wvif")

\textsuperscript{55} Pursuant to Articles 2440 et seq. of Book 2 of the Netherlands Civil Code (Book 2 BW).

\textsuperscript{56} The Wvif is the pivoting point between AFM supervision and the annual accounts procedure. Section 4(2) Wvif provides – in sum – that AFM can make the request for revision of financial reporting referred to in Article 2440 BW subject to the provisions of the Wvif.

\textsuperscript{57} For further details on this subject, see H.K.O. Reimers, Een verkeerd rechtsvergelijking na de het recht op verslaggeving in Nederland, Duitsland en het Verenigd Koninkrijk (An exploration of comparative law regarding supervision of reporting in the Netherlands, Germany, and the United Kingdom), in Reimkens jaarbeheerrecht, vol. 2010/2011 167-179 (Boom Juridische uitgevers 2011), and for a discussion of some models: J.B.S. Hijjik, Publicatieverplichtingen voor beursnemingschappen 54 et seq. (diss. UvA) 2010, and further references.

\textsuperscript{58} In this respect, see also my comments in J.B.S. Hijjik, \textit{Publikatieverplichtingen voor beursnemingschappen} 663 et seq. (diss. UvA) 2010.

\textsuperscript{59} Cf. Article 1 (5) ESMA Regulation. In this respect, see also T.M.L. Arons, Future of European Financial Supervision: Towards a European System of Financial Supervisors 72 (Tey 2010).

\textsuperscript{60} In this respect, C.M. Greindlmann-van de Krol, Eerst van de Wijk op het financiële verslag (4th ed., Boom Juridische uitgevers 2012).
enforcement activities on the part of ESMA has not prevented the IASB from writing a letter to ESMA which leaked in August 2011 about the alleged incorrect application of the IFRS by a number of European banks in the valuation of Greek government bonds. The answer to this remarkable letter from a standard setter that claims not to be willing or able to be involved in enforcement of the IFRS to an authority that does not have the power to do so (unfortunately) did not leak.

6.4. A Role for the European Court of Justice?

Finally, there is also a formal role to be played by the European Court of Justice in Luxembourg, since the EU IFRS form part of the European legal structure. Incidentally, it is still very doubtful whether the ECJ will often have to rule on the interpretation of the EU IFRS. In this respect the number of cases ‘fed’ to the ECJ by national courts that can submit requests for preliminary rulings to it will be decisive. Given the limited number of rulings of the ECJ in the field of accounting law in the past, expectations should not be too high. An interesting aspect of the power of the European Court of Justice to rule on the substance of the EU IFRS is that this could create a possibility of a specific European interpretation of the IFRS that is generally deemed undesirable being embedded in the system, as it were. After all, if the European Court of Justice rules on the EU IFRS, that would be the final decision even if that decision would, for example, not be acceptable to the IASB.

6.5. Enforcement of EU IFRS Weighted

All in all, the final picture of the system of supervision and enforcement of the EU IFRS is rather fragmented. There is no, or at least no clear, European institutional framework. Enforcement and supervision are based on national models that may vary from one Member State to the next. This means that, also on the point of enforcement of the EU IFRS, there is quite some room for improvement.

7. BUILDING BLOCKS TOWARDS SOLUTIONS

7.1. Towards an Increase of the Democratic Legitimacy in Drafting EU IFRS

Before outlining several building blocks towards solutions, I note that these are ‘merely’ schools of thought. I do not pretend to offer any ready made solutions, but will, on the other hand, not shy away from advancing some far reaching thoughts below. As for the possibility of increasing the democratic legitimacy of the EU IFRS, in the opinion of particularly the European Parliament, pressure should be put on the IASB to become a more democratic organization. I do not see that happening. In the past the IASB has always chosen not to represent one or a few countries. Given the objective of the IASB to develop a global set of accounting standards, that choice, from the IASB’s perspective, is understandable. Making the IASB more democratic will, moreover, still not lead to accounting standards that are drafted subject to the principle of legality. At best, it will lead to a less defective democratic legitimacy of the EU IFRS. Consequently, if the European Union should decide to require compliance with standards drafted by the IASB, there should continue to be some kind of endorsement mechanism. In that new and improved endorsement mechanism the influence of the European Parliament, and ideally also that of the national parliaments of the Member States, should be increased. I realize that this will most likely lead to a slower and less predictable endorsement process. The question is, however, if that is a bad thing. In fact: a large number of market parties have recently requested the IASB to create a period of calm in respect of the issue of new standards. Some delay, and more discussion, in the drafting of new EU IFRS should, therefore, not necessarily be problematic.

Another, even more far reaching, possibility is the formation of a new European agency to draw up accounting standards fully subject to the principle of legality. In that situation the current EU IFRS structure can be maintained and extended in the direction deemed desirable by the European Member States. Although this would mean jumping in at the deep end again, this drastic idea should not be dismissed offhand. After all, the original objective of implementation of the EU IFRS has substantially been accomplished. There is much more harmonization of accounting standards in the European Union now than was possible based on the accounting directives. And the underlying objective has been realized as well. Since late 2007 European listed companies with listings in the US have no longer been under the obligation to reconcile their annual accounts. As a criticism opposing the idea just unfolded it may be argued that this is not in line with the final objective at least that of the IASB to realize one single global accounting standard. The
desirability of this objective should, however, not be exaggerated. For example, market parties have recently emphasized that global convergence of the accounting standards should not be the primary driver for drafting new standards. The most important criterion should be improvement of quality. Convergence of the accounting standards is a derivative.

In this respect an interesting parallel can be drawn with other elements of company law. In company law for a long time the objective was to realize as great an extent of harmonization of company law systems as possible. Meanwhile, in literature there seems to be wide agreement that, within certain parameters, a com petition between company law systems is not necessarily undesirable. Competition can lead to modernization and improvement of company law. Now, there may be good reasons why this is fundamentally different for accounting law. For example, because the benefits of implementation of a single global standard even a poor one outweigh maintenance of various systems of accounting standards. I am, however, not immediately convinced that this is the case. Especially not where those systems have already been harmonized to some extent, and the basic level of those various systems meets the minimum requirements. To a certain extent, this will also guarantee the mutual comparability. Seen in this light, for substantive reasons the creation of specific European IFRS is not necessarily inconvenient beforehand. I am well aware that the foregoing is a far reaching step with political and practical obstacles. Furthermore, it will not be easy to ensure that such a European agency has sufficient expertise to draft good, new accounting standards. It should particularly be guaranteed that also the new and improved European IFRS continue to be accepted by other jurisdictions. In this respect it is highly important, especially in respect of the United States, that enforcement of the new and improved European IFRS is well regulated.

7.2. Thoughts on Enforcement

As the reader may have noted, I have not yet paid any attention to the role of the auditor in supervision of compliance with the EU IFRS. There is a reason for that. Aside from the discussion as to how auditors interpret that role which could be the subject of an entire oration, given the huge amount of regulatory initiatives and plans of action to redevelop the auditing profession auditor’s supervision cannot be equated with enforcement by and before an independent court. In literature it has repeatedly been noted that as far as enforcement of the EU IFRS is concerned, it would be obvious in time to set up a central European supervisory body. It will not come as a surprise that in the European Union ESMA seems to be developing into that central supervisory body. It is, however, more interesting to see what powers ESMA will be given in that respect, what the extent of influence on individual listed companies will be, and how legal protection will be shaped. These are still open questions, although the ESMA Regulation already gives direction on this point to some extent. At least as important is the question as to what the remaining role of the court will be in the Dutch context: the role of the OK. This question is closely connected with the possibility for concerned parties to enforce compliance with the EU IFRS. Although this is not used very often in the Netherlands, ruling out that possibility altogether is not a desirable idea. Because of the role also played by the annual accounts in the accountability process of the management board of a company, concerned parties or at least shareholders should continue to have access to the court to enforce compliance with accounting standards.

8. CONCLUSION

The drafting and enforcement of accounting standards lead to questions that cannot be isolated from other legal issues. For example, there is a close connection between compliance with the accounting standards and civil law liability for annual accounts that do not satisfy those standards. There are large differences among the various Member States of the European Union on this point. Given those differences, it was recently noted in literature and correctly so that it is surprising that there has been so little comparative law study in the field of accounting law. There is a lot to be gained here. This brings me to the final conclusion that the answer to the question as to whether all these rules constitute European accounting law is that we are firmly on course, but a substantial leap is still to be made.