The ISDA and the containment of financial regulation in Europe

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ABSTRACT

This paper analyses the role of the International Swaps and Derivatives Association (ISDA) in the reform of financial market regulation in Europe. In particular, it explores how the ISDA positioned itself with regards to the goals expressed by global leaders during the G20 Pittsburgh summit in 2009, and how it tried to influence the reform of financial market regulation in Europe. In this effort, the paper departs from the question of whether the supranational regulation pursued in the aftermath of the global crisis was either a challenge to the ISDA's self-regulatory prerogatives or was actually a window of opportunity for pursuing its goal of having global standards in derivative contracts. By investigating this question, the paper also aims to speak to the broader question of how private associations such as the ISDA are either a force or a counterforce for regulatory centralization in the European Union.

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1- Introduction

The global financial crisis was the trigger to important changes in the regulation of finance across the world. Such changes constituted 'the latest significant turn in the public-private divide', representing a 'shift in the rule-making authority from private actors to public regulatory agencies' (Pagliari 2012: 44-45; Helleiner et al 2018). In parallel, and particularly within the European Union (EU), the post-crisis regulatory wave also constituted a shift of regulatory authority from the national to the supranational level, expanding and strengthening the competences of European institutions (Quaglia 2012; 2014). Therefore, the post-crisis regulatory framework constitutes an effort in strengthening EU authority both vis a vis transnational private interests as well as vis a vis member states. This, in turn, may signal a reconfiguration in the power balances between the public and private sphere, wherein the 'retreat of the state' of the 1980s and 1990s (Strange 1996) seems now to be compensated by a strengthening of supranational regulatory authorities (Genschel and Zangl 2014). Given this changing configuration, new questions emerge about where the new lines of conflict are between transnational private interests and supranational regulators.

In this paper I shall try to contribute to answering such questions by investigating how the International Swaps and Derivative Association (ISDA) – one of the most powerful private interest groups in international financial markets (Biggins and Scott 2012) – has tried to exert influence on recent regulatory changes in the EU with regards to the derivatives markets. The more specific question guiding this research is what the object of dispute is between private interests and public regulators in the current transnational setting. This question originates from the observation that a centralization of rule-making in Europe is both in contrast and in line with the preferences of transnational private interests. On the one hand, in fact, the growing regulatory competences of the EU constitute a challenge to the private self-regulatory that the ISDA has established between the 1980s and 2000s (Flanagan 2001). On the other, they constitute a solution to one of the traditional challenges faced by international traders of financial products, namely the uncertainty associated with the fragmentation of different legal jurisdictions. In other words, while on the one hand the lack of public regulations has favoured the development of private self-regulation, on the other the lack of global standards for contract enforcements has been a source of uncertainty for international traders. From the point of view of traders, therefore, the recent European regulatory changes can be seen either as a threatening legislation that must be counter-lobbied, or as a window-of-opportunity for achieving uniformity of standards across the whole of the EU's jurisdiction.

In this paper I will present an analysis of the positions that the ISDA has expressed on the legislative initiatives taken by the EU in the aftermath of the global financial crisis. By analysing the public exchanges with European authorities, I assess the association's positions regarding the EU's legislation on three dimensions: centralization, regulation and market uniformity. Through this analysis, it emerges that 1) the ISDA favoured the centralization of the EU's rule-making authority; 2) it had ambiguous positions regarding the strength of regulation; 3) it tried to shelter certain sections of the market from the EU's regulatory oversight. When contextualized against the successive pieces of EU legislation, the analysis reveals how exactly this latter point has constituted the point of dispute between EU-authorities and the ISDA, and until today raises uncertainty about the reach of public regulatory oversight[1].

The paper is structured as follows. First, I will clarify the role that the ISDA plays in international financial markets and describe the nature of its private authority. Subsequently, in Section 3 I will discuss the relevance of the regulatory initiatives that were undertaken since 2009, characterizing them as a turning point of the public-private divide in the history of financial regulation between the 1980s and today. Section 4 presents the empirical analysis, through which I explore the ISDA's position-statements in its official exchanges with European public authorities between 2009 and today. In Section 5, in turn, I discuss how EU legislation reflected or challenged such positions. In the conclusion I reflect on the role played by the ISDA in the reform of financial market regulation in Europe and on what this case study teaches us about the current dividing lines between the global financial private sector and supranational public regulators.

2- The ISDA as a transnational private authority

The ISDA belongs to the category of transnational financial associations (TFAs), i.e. *assemblages* of financial market actors from multiple countries operating at the global level (McKeen-Edwards and Porter 2013: 3-7). Due to the transnational nature of financial markets, the articulation of private sector preferences happens for a great extent through the activities of TFAs who, more than individual leading firms, are crucial for influencing financial regulation at the transnational level (Tsingou 2015). In the complex universe of financial markets, in fact, TFAs provide coordination among multiple actors and, through constant interaction with public regulators, they become leading participants in transnational public-private policy communities (e.g. Tsingou 2010). It is therefore through TFAs that the private sector succeeds in spreading its ideas about governance in financial markets (e.g. Helleiner 2009). In order to exert power and influence, TFAs can rely both on the material resources of their members as well as on the sectorial expertise that they represent.

The growing importance of TFAs is strongly connected to the globalization and expansion of financial markets. Since the 1980s, the role of finance in the economy grew both in terms of magnitude as well as in terms in complexity, largely because of widespread use of advanced

[1] See also: Steven Kennedy, ISDA Quarterly, Vol 3, Issue 3, November 2017

technologies, which contributed to the growing variety of financial products and the speed at which they could be traded (Helleiner et al 2018). The combination of globalization and the use of advanced technologies radically transformed the financial markets, to the extent that their regulation increasingly needed to rely on sectorial expertise, which was mainly available in the private sector (Porter 2003). In parallel, the expansion of the financial markets coincided historically with the advent and affirmation of the neoliberal ideology in the international political economy. Consequently, financial markets – and derivative markets in particular – became the flagship of the neoliberal 'new world order' (Slaughter 2005) wherein policy-networks of professionals increasingly started constructing their own modes of governance (Morgan 2008: 641).

The ISDA is a prominent example of such networks of professionals, as it contributes to the governance of the so-called over-the-counter (OTC) derivatives market, which between the 1980s and 2000s became the 'world's biggest market' (Helleiner et al 2018) while remaining largely sheltered from public regulation (Awrey 2010). The role and authority that the ISDA has come to gain in the international financial markets is strongly related to the nature of the OTC derivatives. These instruments constitute a particular sub-sector of the broader derivatives market and, due to their nature, they largely escape the control of public regulators. Derivatives, in fact, are legally and operationally divided into those being traded via exchanges and those being traded over-the-counter, i.e. directly between buyer and seller. In the former case, the trading of a derivative happens through the intermediation of a central clearing counterparty (CCP), which ensures the settlement of the contract and guarantees against the failure of both the buying and selling parties. OTC-derivatives, instead, are traded via ad hoc agreements between buyers and sellers. Consequently, they are typically more tailor-made for end-users and less standardized (Biggins and Scott 2012).

With the internationalization of the financial market in the 1980s and the growth in the use of advanced computer technologies, OTC derivatives became increasingly complex instruments involving multiple payment exchanges (Schinasi et al 2000: 3, 16). Because of their bespoke nature, however, OTC-derivatives lacked a common "language", a shortcoming that hampered the expansion of the market. Committed to overcoming this shortcoming, a group of banks dealing in these products founded the ISDA, with the specific aim to develop standardized contracts that would facilitate the trading and netting of OTC-derivatives across different national jurisdictions. The most important accomplishment in this effort has been the establishment of the Master Agreement, which since the 1990s has constituted the standard contract for trading in OTC-derivatives worldwide (Rauterberg and Verstein 2013).

The success of the Master Agreement allowed the ISDA to gain authority both towards public regulators as a guarantor for system stability as well as towards market participants as a facilitator in settling outstanding obligations. In addition, the success of the Master Agreement also helped spreading the idea that the OTC-derivative market would work best if privately self-regulated. On the wave of the success of the Master Agreement, during the 1990s the ISDA also actively engaged in lobbying national governments for ensuring that their legislation was in harmony with the standards of the Master Agreement (Morgan 2008). The ISDA has therefore also been a force in harmonizing different national legislations in order to prevent market hiccups.

The harmonization of public legislation with the standards of the Master Agreement consisted mainly in ensuring that OTC-derivatives transactions remained out of the realm of bankruptcy and gambling legislation (Biggins and Scott 2012) and that netting (i.e. the clearing of a contract by one single payment combining the various streams of payments) was conform to national legal codes (Morgan 2008: 647-651). Thereby, the association ensured that the parties to a derivative exchange would be able to net out their balances smoothly also in the case of the bankruptcy of one of the parties, without going through the legal procedures associated with the national legislation of bankruptcy.

The close interaction with public authorities, however, also reveals that the ISDA's private authority has never been fully self-sufficient but is instead dependent on the enforcing hand of public authorities. Aware of this dependence, in its public commentary the association has been very keen in emphasizing its support and commitment to broad values such as system stability and integrity (McKeen-Edwards and Porter 2013: 45). Similarly to other business associations, over the years the ISDA succeeded in promoting a narrative about the social and economic desirability of unregulated derivative markets (Engelen 2017; Bowman et al 2017). This success was also facilitated by the low salience that financial markets had in public debates before 2008. As research has shown, in fact, when public opinion is not interested in a certain issue, policy-makers have little incentives to go against the interests of powerful private business organizations (Culpepper 2011).

The power exercised by the ISDA was backed by an harmonious situation in which public authorities largely welcomed the expertise provided by the market participants, and policy makers had no electoral incentives in going against the business' interests. The close collaboration between the ISDA and public authorities, in turn, was reinforced by the shared idea that the derivative markets would work best if self-regulated.

This harmonious situation, however, changed abruptly in autumn 2008 when, in the aftermath of the collapse of the Lehman Brothers, derivative markets – and especially OTC-derivatives – came to stand at the centre of the spotlight of both public debate and policy-makers. Consequently, the interests of public regulators and the private sector came suddenly to stand in contrast with one another.

3- The post-crisis regulatory wave

The global financial meltdown of 2008 was a substantial blow to the authority the ISDA had gained until then in the eyes of public regulators, who in the context of growing public upheaval could no longer blindly support the idea that private self-regulation of derivative markets was in the public interest. The public reactions to the global financial crisis and the consequent stances taken by regulators worldwide can therefore be considered as a 'paradigm shift' in global financial regulation (Hall 1993; Pagliari 2012). While between the 1980s and 2000s – in shadow from public attention – private and public authorities had developed a common understanding about the benefits of a loosely regulated derivative-market, in 2008 the need for containing excessive rent-seeking behaviour was suddenly strongly on the agendas of public regulators on both sides of the Atlantic and beyond.

The official starting point of the new paradigm in global financial regulation can be identified in the G20 summit held in Pittsburgh in September 2009 (Quaglia 2012; Helleiner et al 2018), at which global leaders underlined their commitment to improve and expand the scope of public regulation and supervision in financial markets[2]. The G20 leaders agreed that excessive deregulation and supervision was at the heart of what went wrong in the run-up to the fall of the Lehman Brothers Bank, and that this excess led to 'reckless and irresponsible risk taking by banks and other financial institutions'. Therefore, in the G20 Pittsburgh statement, OTC derivatives were explicitly put under the spotlight, with the claim that a return to the pre-2008 unregulated regime was not an option.

[2] G20 Leaders Statement: The Pittsburgh Summit; September 24-25, 2009, Pittsburgh

Following the G20 held in Pittsburgh, the common concrete goal of public regulators became to standardize a growing share of the OTC-derivative market, by requiring the clearing of transactions through a central counter-party (CCP) and the registration thereof at trade repositories (TR). The central idea behind the regulatory turn was to somehow render the documentation of trades in the OTC-derivatives market obligatory, allowing thereby public supervisors to monitor the developments in financial markets. This would happen on the one hand by letting large parts of the derivative market pass through officially recognized CCPs and on the other through the registration of the gains and losses incurred during such trades at public TRs. The regulatory reform would thus mostly consist in enhancing the control and oversight of public authorities over the financial market. As we shall see below, the point of dispute with the private sector would exactly be about the reach of this enhanced public control.

In the EU, the commitment to standardize and regulate the OTC-derivative was formalized in 2012 with the entry into force of the European Market Infrastructure Regulation (EMIR)[3], which since January 2018 falls under the umbrella of MIFID II (Market of Financial Instruments Directive[4]). The measures contained in these regulatory packages reflect the European aim to curb the reach of unregulated capitalism (Quaglia 2012: 525) and can therefore be considered to be at the heart of the turn in the public-private divide in financial market regulation (Pagliari 2012).

Besides introducing the obligation of central clearing and registration for a vast share of OTC-derivatives, the new European rules also establish common rules for the whole EU jurisdiction, and more specifically they set EU-wide standards, regulating which derivatives need to be centrally cleared and which are eligible for exemption from the obligation. In addition, EMIR establishes that CCPs and TRs need to be legally recognized by the European Securities and Markets Authority (ESMA), which is the main interlocutor for the European Commission for ensuring that the Pittsburgh agenda is effectively implemented. Through these competences, ESMA acts as a central public authority in one of the world's largest financial market jurisdictions. In its function of implementing the Pittsburgh agenda, however, it needs to rely on the sectorial expertise provided by market actos.

[3] REGULATION (EU) No 648/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012
on OTC derivatives, central counterparties and trade repositories
[4] Markets in Financial Instruments (MiFID II) - Directive 2014/65/EU

Considering that the CCP obligations require an assessment of the eligibility of specific derivatives for central clearing, public regulators needed the advice of market insiders for establishing such eligibility criteria (Biggins and Scott 2012: 340). Consequently, the expertise of ISDA in the functioning of these markets allows it to remain a powerful interlocutor for governments and public authorities. In its public commentary between 2009 and 2018, the ISDA has largely welcomed the regulatory initiatives of the G20, and promoted itself as an interlocutor of the reform of the regulatory framework of the international financial system (Morgan 2009). Consequently, it has actively taken part in the supra-nationally coordinated action aimed bringing more transparency in the OTC-derivative market.

4- The ISDA's policy advocacy, 2009-2018

Probably aware of on the one hand the inevitable change in stance of public regulators towards derivative markets and on the other of the need for sectorial expertise in order to develop new regulation, in the year following the Lehman Brothers collapse, the ISDA publicly expressed strong support for regulatory reform in OTC-derivative market, and offered its sectorial expertise for drafting new legislation. As early as October 2008, in fact, the ISDA made the following statement in a letter to the Federal Reserve Bank of New York:

> (…) the end state across derivatives needs to include some form of these components to make OTC derivative processing more scalable, transparent and resilient. The seven goals are as follows: - Global use of central counterparty processing and clearing to significantly reduce counterparty credit risk and outstanding net notional positions (…). (ISDA, 31 October 2008[5])

This favourable position towards central clearing is maintained throughout all ISDA's policy documents of the following decade. The controversies with public regulators, as we shall see, emerged gradually in the scope and the modalities within which central clearing was going to be implemented.

Between 2009 and August 2018, the ISDA released around 30 policy documents expressing its position on the European legislative initiatives in the OTC-derivative markets. These documents are accessible on the ISDA's website, under the Section 'Public policy; Europe'. These documents include official responses to calls for consultation launched by the European Commission, official comments to the developments of European legislation, discussion papers

[5] Letter sent to Timothy Geithner, President of the Federal Reserve Bank of New York.

and policy reports. Therefore, these documents can be considered to (at least partially) reflect ISDA's efforts to influence the European decision-making process through official and public channels. By focusing on these documents it is thus possible to identify ISDA's positions regarding certain issues. What remains outside of the analysis, however, are the demands and agreements that the association and EU-regulators may have exchanged behind closed doors.

In order to have an overview of the positions that the ISDA has had during these exchanges, in these policy-documents I systemically analyzed the position-statements on three dimensions that I consider to be relevant for understanding the object of dispute between ISDA and public regulators in the effort of having a new European framework of regulation in OTC-derivative markets. The dimensions are:

1- Centralization, i.e. whether ISDA supports the development of a European common framework for legislation
2- Regulation, i.e. whether ISDA supports the new rules proposed by public regulators (which in practice means supporting the proposed clearing and registration requirements)
3- Market uniformity, i.e. whether ISDA supports that the new rules apply to all sections of the derivatives-market.

Focusing mostly on the parts of the document wherein the ISDA expressed its general views on the European legislative initiatives, I collected the core sentences expressing a position on these dimensions and assigned a score of +1 or -1 when the position was either positive or negative. The idea behind the coding method largely follows the logic behind the methodology for establishing political parties' positions during electoral campaigns (e.g. Kriesi et al 2012). Table 1 reports two examples of the method used.

Table 1 – Coding procedure

Original text	**Dimension and score**
ISDA supports the authority delegated to ESMA with respect to the identification of contracts subject to the clearing obligation and the roll-out of clearing to various categories of counterparty. ISDA believes this will allow CCPs to better manage operational risk and will also allow smaller counterparties to prepare operationally and financially[6].	Centralization: +1 Regulation: +1 Market uniformity: n/a
The purpose of trade transparency is for assisting the price discovery process in all financial markets. As MiFID's post trade transparency regime for cash equities demonstrates, mandatory transparency can damage market liquidity, especially for large trades. Therefore it is important that, in order to minimize the risk of losing market liquidity, transparency measures have to be tailored to meet the needs of each individual OTC market and to be meet the needs of market participants.[7]	Centralization: n/a Regulation: -1 Market uniformity: -1

In the first of the two examples, the ISDA expresses support for ESMA's authority, and therefore it receives a +1 code on centralization. It also expresses support for rules on central clearing, and therefore receives a +1 score on regulation as well. It expresses no position on whether the rules should apply to all sections of the market, and therefore receives no score on market uniformity.

In the second example, instead, the ISDA expresses no view on centralization, but criticizes mandatory transparency, and therefore in this case I assigned a -1 score on regulation. It also speaks of tailoring transparency measures to specific needs of the market, implying that certain sections of the market should be exempt from the regulation. Therefore, on market uniformity in this case I assigned the score of -1.

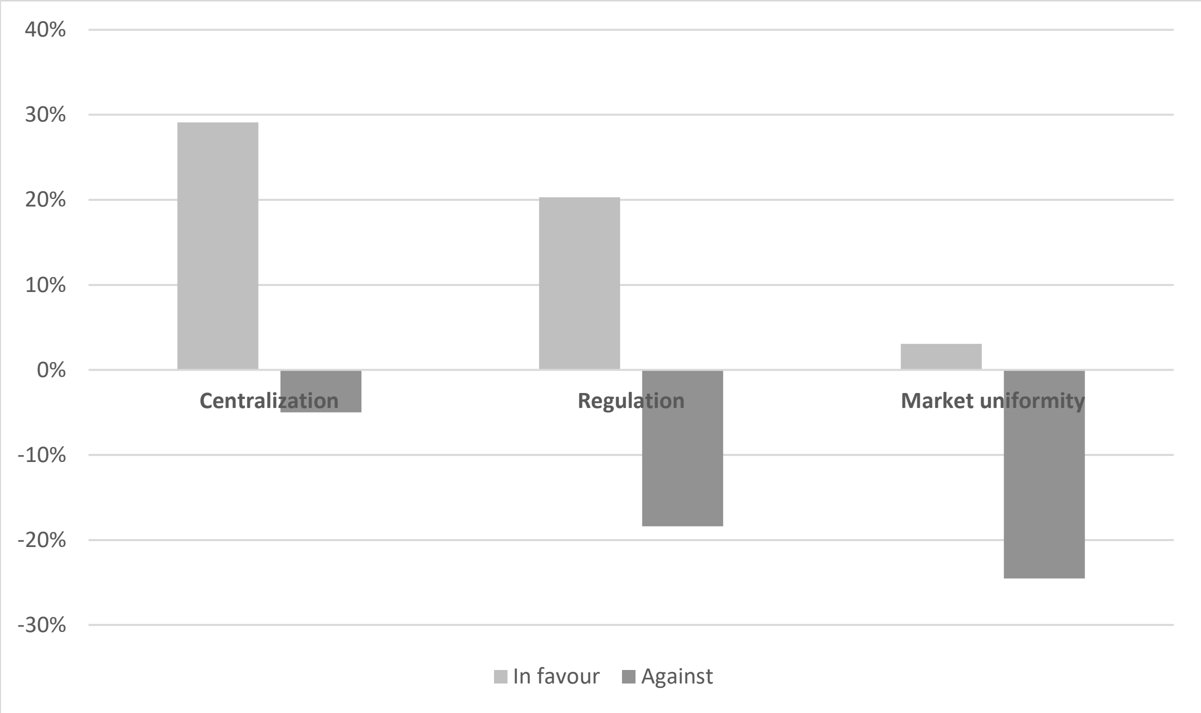
With this method I collected 261 position-statements. By aggregating the scores, it is possible to both see the relative salience of these three dimensions as well as the overall position that ISDA has had towards them during the last decade. The column in Figure 1 reports the

[6] ISDA Comments on the Agreement Reached on the European Markets Infrastructure Regulation (EMIR), 10 February 2012

[7] ISDA's response to EU Commission June 2009 consultation on OTC derivatives, 31 August 2009

percentages of statements in favour (above the 0% line) and those against (below the 0% line) the three dimensions.

Figure 1 – ISDA's policy advocacy



The graph shows that the ISDA is overall in favour of common European framework of legislation. At the same time, the ISDA also results to be against market uniformity, in the sense that it tries to shelter certain market sections from the new European rules. Consequently, it has ambiguous positions towards the new rules, being partially in favour and partially against. In terms of frequency – i.e. the share of statements pertaining to the three categories – regulation has the highest score with about 39% of the total statements, followed by centralization with 34% and market uniformity with 27%.

The support for centralization is in line with the ISDA's aim of achieving global standards in OTC-transactions. It is in this context that also the support for the Pittsburgh agenda is expressed. The following excerpt is taken from a commentary on the Commission's plans for the new rules on the markets of financial instruments:

> We underline again that derivatives business is the most global of financial businesses, and urge the European Supervisory Authorities and the European Commission to focus on creation of a regulatory regime in Europe that is both coherent and convergent, in terms of its interaction with other regimes[8].

The ISDA thus expresses its support for coherence and convergence at the global level, and is strongly in favour of the creation of a European regime. This support for a coherence across international standards is maintained throughout all the official publications of the association. However, these positions sometimes stride with other requests, which generally are about ad-hoc provisions. For instance, in the following passages taken from a response to the European Commission in 2018, the ISDA confirms its support for international convergence, but opposes measures that would touch upon the whole market:

> ISDA advocates that EMIR reporting be aligned with similar regimes globally, EMIR should establish a market-wide principle that derivatives transactions, which have been matched via confirmation and reconciliation processes, should only be reported once to supervisors, by one party, not twice.
>
> ISDA cautions against taking a one-size-fits-all approach in deciding on a standard which is to be used for many requirements across disparate product sets and by many different types of entities.[9]

These subsequent passages summarize ISDA's overall position of favouring a European legislative framework, but opposing a 'one-size-fits-all approach'. The percentages portrayed in Figure 1 portray this two-faced attitude, with a 29% of statements in favour of centralization, and almost 25% of statements against market uniformity.

This double-faced attitude, in turn, also results in ambiguous positions towards the new rules regarding central clearing and trade-registration. An example of this ambiguity is clearly present in a response to a technical paper by ESMA, which was written in preparation to the draft of EMIR in early 2012. In its response, the ISDA first expresses its support for extending clearing obligations, like for example in the following passage:

> We express broad support for CCP governance structures as set out in EMIR, which we believe should act as a further bulwark against any potential conflicts of interest at CCPs. We stress the importance of CCP transparency and provide detailed recommendations therein. CCP transparency is key to the ability of market participants to conduct their own due diligence (ISDA, 21 March 2012[10])

[8] ISDA, Understanding the role of the MiFID2/MiFIR 'OTC' category, 16 October 2012
[9] ISDA Responds to EC's Supervisory Reporting Requirements 'Fitness Check', 21 March 2018
[10] AFME-BBA-ISDA Response to 1st ESMA-DISCUSSION PAPER (dated 16 February 2012): Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories.

At the same time, other passages express the need for rule-flexibility, which is needed for meeting changing market conditions. The following passage is an example of this second type of position-statements:

> We believe that any clearing obligation must be transparent, clear and publicly disclosed. Furthermore, ESMA should have the flexibility to change the parameters around clearing obligations if required to quickly respond as a result of global discussions and/or market conditions. Again, these changes should be transparent, clear and publicly disclosed.

Interesting to note also is that, implicitly, in this passage the advocacy for rule-flexibility goes hand in hand with support for the authority that ESMA gains from the new legislation. The centralization of powers towards ESMA is thereby supported, but only to the extent that it remains flexible to meet market demands. Therefore, ISDA supports the European legislative initiatives, but only to the extent that they allow for flexibility in certain sections of the market. In a response to the European Commission from August 2009, this position is made clearly explicit, like for example in the following statements:

> Initiatives that would seek to standardise the terms of all OTC contracts are counterproductive. Such initiatives can lead to ineffective hedging and incomplete transfer of risk, leaving end users with unwanted and unmanageable basis, ie, a mismatch between the specific risks they face and non-specific, generic instruments that would be available in the market.
>
> We believe that the regulatory focus should therefore be on process uniformity, legal uniformity and standardization of documentation; not product uniformity. Non standardised products are not inherently more risky than plain vanilla products.[11]

Besides confirming the ambiguity that ISDA has towards the clearing obligation and the standardization of all OTC contracts, these passages also confirm ISDA's adversity for rules that would be applicable to the whole market. The focal point of ISDA's advocacy strategy can thus be identified in these efforts to curb the reach of the new European rules, and thereby to maintain its private authority on certain sections of the OTC-market. It is on this terrain that the dispute with European authorities has mainly been fought.

[11] ISDA's Response to European Commission consultation on OTC derivatives, 31 August 2009

5- The new European rules and the ISDA's policy positions

While, as we have seen above, one of the main concerns of the ISDA has been to shelter certain sections of the market from the reach of the new legislation, also the various European regulatory initiatives all seem to follow one underlying logic, namely to extend public authorities' control over financial markets. More precisely: the European regulatory initiatives are not aimed at prohibiting certain practices, but rather at introducing obligations of reporting the occurrence of such practices. The public exchange between EU authorities and the ISDA is thus covered *prima facie* by a shared understanding about the need for more regulation than in the pre-2008 era. At the same time, it contains a subtle political battle wherein the private sector tries to contain the expansion of the public regulators' control over the derivatives' market. In order to grasp the extent to which the ISDA succeeded or failed in influencing the outcome of the EU's regulatory initiatives, it is necessary to identify whether certain sections of the market – and in particular those advocated by ISDA – have actually been sheltered from the new legislation.

The 2012 regulation on OTC-derivatives (EMIR) presents two main sources of exemption from the clearing obligation: a) intragroup transactions and b) transactions that according to ESMA are not eligible for central clearing. Intragroup transactions consist in the OTC-contracts established between counterparties that are part of the same group. Under EMIR, these transactions still need to go through an appropriate centralised risk evaluation, measurement and control procedures. Yet, they are exempt from the obligation of exchanging collateral, which applies instead to the rest of the non-centrally cleared transactions.

The second source of exemption derives from the decisions that ESMA takes regarding clearing eligibility. Under EMIR, ESMA gains the authority to decide upon which class of derivatives should meet the clearing obligation. In taking its decisions, ESMA is required to act according to the overarching goal of mitigating systemic risk, and specifically to take into consideration:

- the degree of standardisation of the contractual terms and operational processes of the relevant class of OTC derivatives
- the volume and liquidity of the relevant class of OTC derivatives;
- the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivatives.

When financial and non-financial parties are exempt from the clearing obligation, in turn, they are required to take appropriate measures to monitor and mitigate operational risk and counterparty credit risk. The measures include timely reporting, timely exchanges of collateral, holding of a proportionate and appropriate amount of capital.

Both sources of exemption can be considered as successes of the ISDA's interactions with European authorities. The intragroup transactions, in fact, had been mentioned explicitly by the ISDA as one of the derivative-categories that should be exempt from EMIR. In the following passage from a discussion paper about the implementation of EMIR, for example, the ISDA underlines the importance of the intragroup transaction exemption for the functioning of the market, and urges ESMA to help market participants making use of that exemption:

> The intragroup transaction exemption (from clearing and/or bilateral margining) is vital to the industry. We appeal to ESMA to use the flexibility afforded it in the EMIR level 1 text to phase Regulatory Technical Standards addressing the exemption in such a way that market participants do not have to collateralise transactions while awaiting regulatory approval of exemptions[12].

In other words, with this passage the ISDA emphasizes the need for market participants to make transactions within their groups without necessarily moving large amounts capital.

The second source of exemption – i.e. the decisions taken by ESMA about eligibility for exemption – leaves the ISDA considerable leeway to exert influence on such decisions, given also privileged role that TFAs in providing assistance to public regulator in such decisions (McKeen-Edwards and Porter 2013). In other words, the second source of exemption is not a direct victory for the ISDA, but it leaves an important window open for continuing to exercise influence also when the legislation is already in force.

It is important to note, however, that despite these successes in influencing the content of the legislation, the ISDA does not seem to be any longer actor setting the narrative about derivative regulation, but resembles more an interest group taking part in the policy process, during which it may either win or lose some battles. In other words, in the post-crisis policy-paradigm, the ISDA does no longer seem to be the private self-regulator of OTC-derivative-markets, but is instead one of the (powerful) actors that may influence public regulation.

[12] AFME-BBA-ISDA Response to 1st ESMA-DISCUSSION PAPER (dated 16 February 2012): Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories.

6- Conclusion

The ISDA's favourable position towards jurisdictional uniformity on the one hand and unfavourable position towards market uniformity on the other, also emerged in its recent commentary on the entry into force of MiFID 2[13], which since January 2018 constitutes the main regulatory framework for financial markets in the EU. In the commentary, the ISDA essentially expressed two main concerns, one about jurisdictional uniformity across the EU and the other about the standards by which OTC-contracts are eligible for mandatory clearing.

The first concern regards the uncertainty that may emerge about the where the European standards end and where national rules begin. In particular, the association is concerned about the possibility of 'cross-border hiccups that exacerbate market fragmentation'. MiFID-2, in fact, introduces a broad framework wherein it defines the spheres of competences between the European and the member-state level in implementing the new rules. The division of tasks largely follows a scheme wherein ESMA defines the common standards, and each member state ensures that these are applied by the national competent authorities. The concern that the ISDA has is that, as each member state has different traditions in market surveillance, different ways of implementing EU rules may generate market fragmentation (see also Helleiner 2014).

The second concern regards the technical standards whereby OTC-contracts are considered as eligible or non-eligible for mandatory clearing, with specific reference to the capital requirements to which non centrally-cleared contracts must comply. The overall position of the ISDA is again against a one-size-fits-all approach, advocating therefore for flexibility in the adoption of the rules. This insistence of the ISDA in trying to shelter certain sections of the market from public oversight are indicative of how 'OTC derivatives regulation is highly political, deviating from its often assumed arcane, technical nature' (Biggins and Scott 2012: 311). The technical exchanges between the ISDA and European authorities analysed in this paper seem to hide some sort of an arm wrestling on who gets control over which section of the derivatives market.

In sum, in the reform of financial market regulation, the ISDA can be considered as a force stimulating the centralization of rule-making at the European level, but at the same time as a counterforce to the strength of public regulation. In the post-crisis paradigm, the ISDA's regulatory authority has partially been curbed, in the sense that today it is no longer the sole or

[13] ISDA Quarterly, Volume 3, Issue 3, November 2017

principal rule-maker in derivative-markets, but has instead been confined to the role of interlocutor of public regulators. At the same time, in its role of interlocutor it can fully exploit its sectorial expertise by influencing the decisions on the eligibility criteria for clearing obligation. The extent to which it can exploit this power to keep relevant sectors of the derivative market sheltered from market control is a question to be further explored.

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