

5. Safeguarding public interests in financial markets

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Introduction

National, European and international policy makers, regulators and (informal) standard setting bodies trust private actors with the pursue of public interests. This trend, which can be observed for some time, has not been (altogether) broken by the regulatory response to the recent global financial crisis. In this context the notion of public interest does not only embrace broadly formulated public goods, such as financial stability and integrity, but also more concrete facets, such as consumer protection.

The role of private actors in financial market regulation and supervision

The transfer of ownership for the observance of public interests onto private actors takes different shapes. One prominent example is the introduction of open norms geared towards the protecting of public interests the implementation/application of which is largely left to the market actors themselves, albeit at times guided by policy makers or supervisors. Private actors are moreover relied upon to optimize certain market functions, such as in the case of financial analysts, accountants and credit rating agencies. Another example is the introduction of internal governance requirements for financial market actors, inter alia relating to compliance, audit and risk management, that also have as an objective to monitor compliance with laws and regulations

Securing public interests as a major societal challenge

Against the backdrop of the major technologization wave (Fintech), the changing approach to the notion of the rational market participants (the emergence of the 'nudge movement') and a general sentiment that a new wind should blow through the financial sector (a culture of service and sustainability), securing public interests in financial markets faces major challenges and raises important questions both of a general and more specific nature, including inter alia:

- How feasible is a structural role of private actors in the implementation of essential financial regulatory and supervisory standards in the light of the public interest objectives pursued with the latter?
- Which alternative institutional and procedural arrangements or instruments can or should be utilized to create a structural role of private actors or government agencies in securing public interest objectives?
- What is the impact of the increased utilization of digital technology in banking and financial services, on the safeguarding of public interests, such as with regard to securing the principle of fairness in self-learning algorithms?
- To what extent should financial institutions and thus, private actors, be obliged to act in the interest of consumer protection, such as by influencing the financial decisions of consumers as part of a general private and/or public law duty of care ('nudging')?

- Should banks and other financial institutions fully embrace the promotion of specific public interests in their strategy, such as sustainable finance, or at least take certain public interests, such as climate related risks, into account in their risk management?
- What exactly is the mandate of national, European and international supervisory authorities in steering market participants towards an active role in promoting financial stability and other societal interests?
- How do financial market participants such as banks, insurance companies and pension funds relate to the current corporate law movement which critically discusses the role of the corporation in contemporary society?

The scientific and societal relevance of the research to be carried out by researchers linked to this project does not only derive from the fact that in the wake of the recent global financial crisis, next to the facilitation of market processes and market operation, the (better) safeguarding of public interests is a main driver of financial market regulation and supervision, but also from the contemporary societal developments that can be observed and that call for a constant reassessment of the existing financial market regulatory and supervisory systems.

PhD project

Situated in the above described research area will be a PhD research project that focuses on one particular public interest in financial markets, that is consumer protection.

The financial crisis of 2008 severely shook the faith in efficient and rational markets and the ability of financial markets to regulate themselves. It also unmasked the rational person as the standard for consumer protection pursuant to financial supervision law. Studies examining how decisions are taken and choices are made highlight not only that rationality is limited by cognitive ability, such as the ability to perform mathematical calculations, but also that rationality is often limited due to intuitive thought processes. European policy makers and regulators are increasingly seeking inspiration from the insights of behavioral sciences, as limited rational behavior and the consequences resulting from it is understood as a specific form of market failure. In order to prevent this market failure, policy makers and regulators encourage financial market actors to consider the limited rationality of financial consumers when dealing with them. At the same time however, it appears that rules of financial supervision law, such as regarding the provision of information, continue to assume that the average financial consumer is, essentially and as a rule, a rational decision-maker.

The basic question at the heart of the PhD research project with the working title '*Towards a New Consumer Concept in National And European Financial Market Law*' is how the gap between what policy makers and regulators expect of financial market actors and the rationale that forms the fundament of today's national and European financial market regulatory and supervisory framework can be bridged in order to ensure that financial market actors observe the societal interests at hand. The envisaged PhD research will take both an interdisciplinary and comparative approach, as insights from behavioral sciences and a study of several relevant national regulatory systems, next to that at the European Union level, form an integral part of the project.