THE LIMITS OF FLEXIBLE REGULATION: MANAGERS' PERCEPTIONS OF CORPORATE GOVERNANCE CODES AND 'COMPLY-OR-EXPLAIN'

Centre for Business Research, University of Cambridge
Working Paper No. 439

by

Paul Sanderson
Centre for Business Research
University of Cambridge
ps238@cam.ac.uk

David Seidl
Institut für Organisation & Unternehmenstheorien
University of Zürich
david.seidl@business.uzh.ch

John Roberts
Faculty of Economics & Business
University of Sydney
john.roberts@sydney.edu.au

March 2013

This working paper forms part of the CBR research programme on Corporate Governance

Abstract

Over the past few years regulatory regimes have become more flexible, adopting risk-based approaches and shifting from rules to principles where regulatees are given a degree of discretion in how they comply. In this way 'one size fits all'. Flexibility such as this is however under threat. The current financial crisis has given rise to calls for more and stronger regulation. Policymakers have to respond but are well aware there are limits - lack of flexibility can hinder innovation and economic growth. So, when does flexible regulation work and when does it not? In what circumstances are regulatees likely to strive to comply with underlying regulatory principles and when are they not? What factors affect regulatee 'buy-in?' To address these questions we examined the use of comply-or-explain in corporate governance. This mechanism can be considered the ultimate in flexible regulation. It allows noncompliance, but only where regulatees provide a convincing explanation acceptable to shareholders. Previously we analysed the compliance records of 260 of the largest UK and German companies (Seidl et al. 2012). For this paper we analyse the accompanying interviews with selected senior managers and directors. We conclude the lessons for policymakers are that successful application of flexible regulation mechanisms such as this is contingent on the presence of powerful and influential monitors and that regulatee buy-in to flexible regulation depends primarily on the extent to which (i) 'soft' regulation is understood as a traditional means of control and, (ii) regulatees are involved in the design, implementation and evaluation of regulation. However, whatever the conditions or circumstances, large companies tend to believe they are under considerable pressure to be seen to fully comply which may ultimately render any in-built operational flexibility redundant. This is more likely to be the case under conditions of uncertainty.

Keywords: Comply-or-explain, Compliance, Corporate governance, Flexible regulation, Legitimacy, Soft law

JEL Codes: G18; G34; G38

Acknowledgements
This paper draws on data collected for 'Soft Regulation? Conforming with the Principle of 'Comply or Explain,' a project funded by the UK Economic and Social Research Council (RES-000-23-1501). (The authors wish to thank the ESRC and the practitioners who took part in interviews for the project.)

Further information about the Centre for Business Research can be found at the following address: www.cbr.cam.ac.uk

Introduction

Approaches to regulating have changed significantly over the past few decades in response to changes in perceptions of what risks should be regulated, and how they should be regulated. Of particular significance are: (i) the volume of risks that the public expects to be regulated has risen and continues to increase beyond, some have argued, the capacity of governments to respond, leading potentially to a 'legitimation crisis' (Beck 1992, Habermas and McCarthy 1976); (ii) relatedly, pressure on national budgets has increased which has contributed to the rise of risk based regulatory regimes that enable regulators to focus their efforts on those organisations and actions where the magnitude of potential harms is greatest (Black 2005, Hood et al. 2001); (iii) the notion that intervention in markets should be kept to a minimum if economic growth is to be maximised has led to policy preferences in favour of principle-based rather than rule-based forms of regulation in order to maximise compliance without significantly inhibiting innovation (Black 2008, Financial Services Authority 2007). These changes broadly fall within the rubric of flexible regulation (Bennear and Coglianese 2013). They have been explored in some detail, particularly the turn to risk based regulation where, for example, writers have examined the conduct of regulation from an institutional perspective or proffered regulators strategic frameworks for risk assessment (see Black 2005, Black and Baldwin 2012a, Black and Baldwin 2012b, Rothstein et al. 2006). It is noticeable however that most address the issues from the perspective of the regulator seeking to regulate effectively. Few consider the impact on a regulated organisation seeking to demonstrate its actions are legitimate and compliant.

Yet the reach of the regulatory state (Majone 1994) extends with each new 'crisis' bringing with it new or at least different regulatory requirements for regulatees. Moreover acceptable means of compliance become more difficult for regulatees to discern as assessments of risk and the meaning of regulatory principles (and thus how to operationalize them in a compliant manner) can change rapidly in response to such crises. In this way regulatory regimes are arguably becoming less predictable from the perspective of the regulatee. If, in addition, regulatees are granted flexibility by regulators in the way they comply, then it becomes clear that successful regulation is in no small part dependent on regulatees' perceptions of how to respond, both to uncertainty in the regulatory environment and in using the discretion accorded to them in how to comply. While compliance *per se* has of course received much attention over the years in a host of different contexts (see for example Fairman and Yapp 2005, Hooghiemstra and van Ees 2011, Murphy et al. 2009, Seidl et al. 2012, von Werder et al. 2005) the views of regulatees themselves in respect of the use of particular flexible regulatory mechanisms have received less attention. To address this we examine how regulatees perceive the flexibility offered by codes of corporate governance and the extent to which they consider such codes and their operation legitimate. In this way we offer some preliminary insights into the conditions for successful application of flexible regulation.

1. Codes of Corporate Governance

It is perhaps inevitable that crises leads to calls for better regulation of the actors involved, as can be witnessed in the debate over the effectiveness of banking regulation following the global financial crisis. Such systemic crises are thankfully rare. On the other hand, corporate failure as the result of persistent wrongdoing of one sort of another is a much more common event. Consider for example the historic examples of Polly Peck, BCCI, and Maxwell in the UK, Enron and World Com in the US, and Holzmann, Metallgesellschaft and Bayerische Hypo- und Vereinsbank in Germany. It was corporate scandals such as these that gave rise to the instatement and later refining of codes of governance to regulate corporate behaviour. Most of these codes have voluntaristic elements where, in certain circumstances, rather than complying with code requirements companies are allowed to explain why they have not complied – what may be described as the ultimate in flexible regulation. From the outset some have questioned or indeed argued against allowing such discretion (Arcot et al. 2010, MacNeil and Xiao 2006) and, to the extent that it can be classed as wrongdoing, the billions in funding required by the banks reinforces their case. To inform the debate on the issue we provide evidence here on the way company decision-makers perceive the flexibility provided by corporate governance codes. This builds in part on previous work we carried out examining the written explanations for not complying given by companies in their corporate governance statements (Seidl et al. 2012). Proponents of forms of soft law such as voluntaristic codes argue they offer essential flexibility that hard law lacks and that pressure to conform to social norms produces genuine compliance. Soft laws have been described as ‘rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects’ (Snyder 1993: 2). Although formally regulatees may choose to conform or not conform with soft law there is an assumption that behaviour is more likely to be consistent with codified guidance and statements of best practice than if such guidance and statements are not stated within the framework of a code. In this way non-binding rules can have the same political and social effects and benefits as hard law (Borchardt and Wellens 1989: 268). However, while Cini (2001) asserts that ‘soft law is not legally binding, implementation must rest solely on the goodwill of those agreeing to and affected by it,’ in fact most codes are produced by an organisation such as a trade body that can nonetheless levy a penalty for noncompliance such as expulsion that may have serious implications for the regulatee.

Perhaps because of the flexibility inherent in such codes a single code can with a few adaptations be applied across domains where the detail of hard law would be inappropriate or even unworkable in some cases. One size can thus be perceived to fit all. The extent to which in reality it does or does not we consider below. Nonetheless, since 1992 when the first comprehensive code of corporate governance was published following the report of the Cadbury Committee in the UK (Cadbury 1992), more than ninety countries and transnational organisations have introduced codes of corporate governance (see http://www.ecgi.org/codes/all_codes.php). Content varies from country to country but there are many commonalities (see for example van den Berghe and de Ridder 1999, Aguilera and Cuervo-Cazurra 2004, Iskander and Chamlou 2000, Weil and Manges 2002). Most draw on elements of the original Cadbury Code and/or the OECD 'Principles of Corporate Governance,' which provide guidelines for both OECD and non OECD countries (OECD 2004). The resultant national codes are remarkably similar. Indeed, in Europe the High Level Group of Company Law Experts (2002) found sufficient commonalities to recommend the EU did not need to establish its own code of corporate governance but could instead rely on those established in the individual member states. Codes of corporate governance are typically issued by stock-exchange-related bodies, associations of directors, various types of investor groups, business and industry associations, or governmental commissions (Aguilera and Cuervo-Cazurra 2004, Wymeersch 2005) and have been defined as 'non-binding set of principles, standards or best practices, issued by a collective body and relating to the internal governance of corporations' (Weil and Manges 2003) but while, like its predecessors, the current UK Corporate Governance Code (Financial Reporting Council 2012) may appear voluntaristic - in that compliance is not a legal requirement - it is a condition of listing on the London Stock Exchange so for the overwhelming majority of larger companies it is, in essence, compulsory. This differs from, for example, the German approach where compliance is required under German corporate law (*Aktiengesetz*). The German 'Cromme Code' (Regierungskommission 2010) separates voluntary from compulsory elements, containing as it does statute law, voluntaristic regulation and regulatory 'guidance.' These differences arise out of different legal traditions, which prompt questions about the extent to which perceptions of codes vary and thus the extent to which soft law is considered legitimate by regulatees.

However, notwithstanding differences in legal tradition and regulatory form, regulatees in the UK, Germany and elsewhere, have the option for some or all of the rules of either complying absolutely or declaring and if required explaining their noncompliance. As this form of noncompliance is in fact compliant we refer for preference herein to *conformance* with a code rule rather than compliance. In most cases *non-conformance* also requires an explanation to be given. This requirement gives rise to the term *comply-or-explain* - although perhaps the Dutch formulation *apply-or-explain* is more accurate (Commissie Tabaksblat 2003, Ross Goobey 2005) or indeed our preference: *conform-or-explain*. Regulatees may determine that compliance with the principle underpinning a particular rule will, in their particular circumstances, be best served by non-conformance.

> *'While it is expected that listed companies will comply with the Code's provisions most of the time, it is recognized that departure from the provisions of the code may be justified in particular circumstances. Every company must review each provision carefully and give a considered explanation if it departs from the Code provisions'* (Financial Reporting Council 2006: 5).

Compliance as generally understood is, in these circumstances, achieved by following the rules set down in the code on how to proceed when taking such alternative course of action. As Seidl et al (2012) note 'theoretically, the comply-or-explain mechanism provides both flexibility in the application of the code and a means by which to assess compliance. In this way a code can be both universal - 'one size fits all' and particularistic – customized to suit a regulatee's particular circumstances.' The concern of course is that the decision not to conform is made for narrow self-interested reasons that conflict with the principle underpinning the rule, rather than supporting it, so such decisions must be monitored and a determination made on whether the regulatee's action is indeed consistent with the regulatory objective. Monitors, particularly those with the potential to impose some sort of sanctions such as institutional investors and their advisors or statutory oversight bodies, assess the quality of the explanation given and in so doing confer legitimacy on the explanation and the underlying action and to an extent on the organization itself (Ruef and Scott 1998). For this reason legitimacy theory, with its institutional roots (Deephouse and Suchman 2008, Suchman 1995) provides a useful lens through which to study the ways in which organizations respond to the opportunity to comply-or-explain. Indeed comply-or-explain has become so embedded within the design of corporate governance codes that Seidl et al (2012) characterize the mechanism as a 'meta-institution,' because of the way it serves to organize the relations of a subordinate institution. In this case, perhaps counter-intuitively, the code as a whole is the subordinate. By extension it can be argued that comply-or-explain can also be considered a meta-legitimation mechanism in that it invites monitors to make judgments, not only on the legitimacy of regulatee action but also on the overall legitimacy of the underlying code and its provisions. They do this either simplistically (and inappropriately) by counting deviations or in a more nuanced way by examining the quality of explanations given for deviating.

Statements of the extent of conformance with the code of governance and the reasons for any non-conformance are given in a corporate governance statement, which is contained, in some domains, within the annual report, or in others, published separately. These statements can then be monitored and assessed for validity by the various stakeholders who by communicating their assessments (or not) raise or lower the extent to which the company and its actions are deemed to be legitimate. In the case of larger public companies such monitoring tends to be carried out by their major investors, typically financial institutions, and by specialist ratings agencies, who supply advice to medium sized investors such as individual pension funds and local government bodies. It may be expected that one impact of such monitoring is that there is considerable isomorphic pressure to conform. Nonetheless , surveying compliance with codes of corporate governance, Seidl et al (2012) found that only just over half of the 30 largest companies in the UK, and 40% of the 30 largest in Germany fully conformed with every aspect of the code. This raises an interesting question: to what extent do regulatees consider it legitimate to explain rather than comply?

It should be noted that comply-or-explain is not an especially common regulatory mechanism. It works in the context of corporate governance, particularly in the UK, because regulatees are relatively high profile and their actions are often monitored by powerful financial institutions that have both the resources and interest to scrutinize boards' decisions. They also have sufficient leverage to ensure their concerns are heard. The mechanism is notably less effective in domains where monitoring is less intensive. In the Netherlands, for example, the government had to establish a formal monitoring commission to examine explanations of non-conformance with their corporate governance code – recognition that monitoring by the market was insufficient.

> *'The function of the Corporate Governance Code Monitoring Committee is to ensure that the Code is up-to-date and practicable and to monitor compliance with it by Dutch listed companies. To this end the Monitoring Committee undertakes various activities, including an annual survey to ascertain how and to what extent the Code is complied with, the monitoring of the latest developments in the corporate governance field and the identification of gaps or ambiguities in the text of the Code.'* (Corporate Governance Code Monitoring Committee 2010)

'Comply' or 'explain' can take a number of forms. Conformance can mean strict adherence to the *letter* of the code or to the underlying principle, or both. For example, the iteration of the German Cromme code in force when the empirical evidence was being collected for the research on which this paper draws requires formation of a *Prüfungsausschuss* (an audit committee) to oversee the audit process (Regierungskommission 2005). This committee should contain fewer members than the supervisory board, but where that board is already small, for example in the case of a small company, this makes no sense. The underlying principle is already being met by the whole board overseeing auditing. On the other hand where age limits are required to be set by a code, setting a limit at 99 years (as suggested by one sceptical German interviewee) would appear somewhat disingenuous. Thus explanations may be to a greater or lesser extent considered logical and justifiable or not and so further the code's claim to legitimacy – or not. An example of a less than full explanation can be found in the 2005 compliance statement in the Annual Report of Camelot plc in which four incidents of non-conformance were explained thus: 'The exceptions are not viewed by the board to impact the quality of corporate governance, and arise from the unique nature of the company.' While it may be that key shareholders had sought fuller explanations elsewhere the company did not perceive any need to elaborate in their report. Yet legitimacy is clearly in part discursively constructed in texts, as stressed in the institutional literature (Lounsbury and Glynn 2001, Phillips et al. 2004, Vaara et al. 2006) and failure to provide an adequate explanation increases the risk not only of the company being perceived as acting illegitimately but also of the code being seen as lacking legitimacy.

2. Methodology

Legitimacy at its simplest can be said to be a state attained by being seen to comply with a rule. While rules endure, at least for a period, legitimacy may be contingent, even though assessed in part in relation to compliance with relatively fixed reference points, such as a code. What is perceived to be a legitimate act on one occasion for one regulatee may not be so considered for another. For example, an explanation for non-conformance may be perceived by monitors as legitimate for profitable company A but not for loss-making company B. At the extremes (i.e. consistent profit or loss) the likely reaction of shareholders to non-conformance may be easy for companies to predict, but in other circumstances where performance is less certain or in high velocity environments, decisions on whether and when non-conformance is likely to be acceptable to monitors is far more difficult to gauge. For this reason we sought the views of company directors and their senior legal advisors on discretionary codes of corporate governance in general and the use of comply-or-explain in particular. Our interviewees came from amongst the 130 largest listed firms in the UK and Germany, drawn from the FTSE250 in the UK and from the DAX30, MDAX and SDAX in Germany. Most were larger companies. Of our two domains the UK is a common law liberal democracy while Germany is perhaps best characterized as a corporatist or social democratic state within the civil law tradition. These different traditions and histories are associated with different capital market structures and different legal conceptions of the responsibilities of the corporation. The UK has widely dispersed share ownership, outsider control and a unitary board. Germany has concentrated ownership, control by insider block-holders and a dual board structure which includes employee representatives. As a consequence the former emphasizes a company's responsibilities to its shareholders while the latter recognizes that a company has a duty to consider the interests of a broader set of stakeholders. The two countries do however have broadly similar codes of corporate governance and many of the largest companies in both countries trade globally so these structural differences may not in practice be quite as significant as they appear at first sight. Perhaps of equal or even greater significance is the fact that the UK code was established in 1992, a decade before the German code, providing some insights into how perceptions and the legitimacy of discretionary rule mechanisms such as comply-or-explain change over time.

The impact of these differences in respect of comply-or-explain was explored in a series of 48 interviews held in both countries. The interviews were semi-structured to allow for local variations in practice but followed common guidelines. The transcripts of the interviews were then analysed and codified. The coding was carried out by two of the project team and a third researcher who was not associated with the project - all working independently. Anomalies and discrepancies were then discussed and resolved. While a majority of the German interviewees were employed by their companies as internal corporate lawyers and legal advisors (*syndikus*) interviews were also held with senior directors. Similarly, a majority of the British interviewees were employed as company secretaries while the balance was mainly board directors. Our core data are thus the perceptions of those advising on and making decisions on their respective codes of corporate governance in general and the comply-or-explain mechanism in particular. To familiarize themselves with the issues the interviewers also met with a number of investment managers and corporate governance advisors - including some of the key figures in the two countries involved in drafting their respective codes including the original committee chairs. The supporting extracts in this paper have been anonymized in accordance with assurances given to interviewees. The source country is in most cases obvious from the surrounding text but to ensure clarity the letters G for Germany or U for UK have been appended. Note also that the UK interviews were conducted in English and most of the German interviews in German. Extracts in this paper from the latter are therefore translations. Code conformance was assessed with reference to the relevant version of the code in force at the time of the interviews: The Combined Code (2006) and the Cromme Code (Regierungskommission 2005).

3. Legitimacy Theory

> *'Legitimacy matters from a normative and practical perspective. All institutions that establish norms, whether those norms develop into soft law, hard law, or no law at all, face legitimacy challenges. Legitimacy engenders compliance: it may transform soft law into hard law, spur the internalization of norms, or simply justify the norm-development process itself.'* (Kelly 2011)

Legitimacy is central to the viability of codes of corporate governance and indeed to decisions about whether to comply or explain. Within organizational sociology legitimacy has been described as *a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions* (Suchman 1995: 574). At the level of the organization, legitimacy can be said to concern the alignment of values between an organization and its audiences:

> *'Organizations seek to establish congruence between the social values associated with or implied by their activities and the norms of acceptable behaviour in the larger social system in which they are a part. In so far as these two value systems are congruent we can speak of organizational legitimacy. When an actual or potential disparity exists between the two value systems there will exist a threat to organizational legitimacy' (Mathews 1993).*

It is thus not the structures or actions alone of companies which grant them legitimacy. The context is critical. Indeed, an organisation that is structurally legitimate may not only survive making illegitimate acts but may employ them to enhance its overall legitimacy (Elsbach and Sutton 1992). While legitimacy is to an extent contingent it is founded partly on norms and thus has a degree of persistence (Scott and Marshall 2009). As Suchman (1995: 584) puts it, legitimacy is both 'episodic and continual.' At the heart of legitimacy is a particular relationship with the relevant legitimacy-conferring audience (Suchman 1995: 594). In respect of this relationship, note that Mathews (1993) is careful to speak of 'congruent' rather than identical values. Legitimacy is dependent on the values and norms exhibited by an organization or its actions, whether enduring or contingent, being compatible in the first instance with those of the monitors. From the political studies arena Stillman (1974:41) concurs:

> *'The results of governmental output must be "compatible with" the value pattern of society. Compatibility assures the maintenance and*

continuation of the society, by preventing value schizophrenia, value contradictions, and self-destruction. "Compatible with" does not require that the results of governmental output be exactly congruent with the value pattern of the society; but "compatible with" does imply that the results must be within a certain range of deviance from the existing societal value pattern.'

The importance for us of this definition, and indeed for any assessment of comply-or-explain, is to confirm that deviation can be legitimate – *within a certain range*. That range is a construct that serves to limit the possibilities for action and is defined by the monitors. Of course the monitors themselves are diverse. They do not form a homogeneous group. This can provide companies with the opportunity to promote the views of those conferring legitimacy and seek to mitigate the views of those withholding legitimacy, so maintaining a positive position overall (Pfeffer and Salancik 1978), although such actions can rebound if the result is to strengthen support for the latter group, of course (Elsbach and Sutton 1992). To demonstrate and preserve their legitimacy companies employ a variety of strategies and deploy a variety of tactics (Suchman 1995) such as promising reform if deviance is unacceptable or if the responses of legitimacy-conferring agents to their actions are uncertain (Meyer and Rowan 1977), or if they are engaging in dialogue with agents in order to convince them about the desirability or indeed superiority of an alternative course of action (Deephouse and Suchman 2008, Oliver 1991, Suchman 1995). These strategies are essentially discursive and rely on effective and convincing communications (Elsbach 1994, Lounsbury and Glynn 2001, Phillips et al. 2004, Suchman 1995). The discursive nature of legitimation can be seen in the language employed in the UK and German code documents which speak of 'general expectations', 'justifications', 'considered explanations' etc. (Seidl 2007, Weil and Manges 2002), which serves both to limit the instances of deviation and define how explanations of deviations are to be rendered.

Given legitimacy is based both on enduring norms and, to an extent, transient circumstances, it cannot be considered one-dimensional. Assessments of legitimacy are made by viewing the object or action to be assessed through a compound lens comprising a number of different types of legitimacy where 'each type of legitimacy rests on a somewhat different behavioural dynamic' (Suchman 1995: 577). Various types are identified in the literature which can be categorized broadly as:

(i) *moral legitimacy,* bestowed on actions which mirror the most cherished values, norms and beliefs of a society. Acceptance that an act reflects these values, norms and beliefs provides external validation for it (Middleton Stone and Greer Brush 1996). Organizations can be legitimated by the perceived moral value of their end-products, their processes (the way the end products are produced), organizational structures, or through the values demonstrated by the leadership skills of those directing the organization's actions (Bourne 2011, Suchman 1995: 581). Importantly, with this type of legitimacy, the basis for evaluation is not the extent to which a rule has been followed but is simply the rightness of the end result (see for example Breton and Côté 2006 on 'excessive' banking profits). Of course this is in essence a consequentialist approach to morality as 'rightness' depends upon general agreement of the relevant monitors that the outcome of the action being evaluated will be or has been generally beneficial – or not;

(ii) *pragmatic legitimacy*, where legitimacy arises from a specific private benefit being accorded to the group or organization conferring legitimacy (Suchman 1995). It is gained by addressing primarily the interests of key legitimating stakeholders such as shareholders and meeting their needs or demands;

(iii) *cultural legitimacy*, which at its broadest overlaps with other dimensions of legitimacy containing as it does connotations of shared understandings of knowledge, belief and behaviour. The critical factor here is how we know and understand a self-contained set of practices and their meaning (i.e. a culture). Archibald (2004: 188) emphasizes the way professionals such as doctors act as cultural mediators to 'generate cultural or constitutive legitimacy, based on normative and cognitive/cultural schema.' For example, within such professions, a good understanding of the core practices and the knowledge on which they draw, enables members to progress - a form of upwards social mobility (Parsons 1964). The extent to which those practices and effects such as career progression through the acquisition and application of knowledge reflect wider social norms and values, and are aligned with wider patterns of social practices, determines the extent to which that culture is held to be legitimate. When jazz musicians began performing in concert halls rather than exclusively in night clubs they were embracing or at least displaying adherence to the values, norms and practices of their classical music colleagues. They were identifying themselves as practitioners of 'high art' and as a consequence jazz culture began to be accepted as 'legitimate' (Lopes 2002). It follows that for organizations, cultural legitimacy rests on the way in which their practices and explicit or implied underlying norms are presented to, understood and consistent with those of society as a whole - but most importantly by key monitors. For businesses those monitors are their shareholders and mediators such as the press who form a core legitimation group by confirming or

> disconfirming the alignment of norms, values and related practices to a wider audience.
>
> (iv) Finally we turn to *cognitive legitimacy*, which depends in part on familiarity. It is determined by the extent to which we ‘understand’ and so empathize with an entity. Those conferring cognitive legitimacy both approve of the action taken by an entity and are able to explain that action. Conferment of legitimacy in this instance depends to an extent on alignment of moral and cultural belief systems between evaluator and evaluatee so there is some overlap with cultural legitimacy but in this case legitimacy can be developed over time. We become familiar with the way an entity acts and begin to understand why it acts that way to the point where we would act similarly, given similar circumstances. Such sympathy can mean occasional transgressions may be committed without adversely affecting overall legitimacy (Suchman 1995).

Illustrations of the way these types of legitimacy have been applied analytically may perhaps be helpful. For example, with widespread legitimacy comes improved access to resources. Capital is less likely to attract a risk premium if a company’s norms, values and practices are aligned with those of the wider society – the company’s business model is more likely to be widely understood (Zimmerman and Zeitz 2002) but equally familiarity with why a company acts in a particular way may be learned, assuming there is some degree of alignment of its norms and values with those of its monitors. On the other hand unfamiliarity - lack of understanding and empathy - can limit opportunities for a company to deviate as monitors will be more inclined to question its actions. From the broader literature, an analysis by Wallner (2008) of the implementation of an identical policy in two locations, where one gained legitimacy and the other did not, found the failure was both cultural and moral. In the location where the policy failed to gain legitimacy discrete groups had been blamed for the necessity to introduce the measure. This was considered discriminatory by those conferring or withholding legitimacy and led to questioning of other aspects of the policy such as whether implementation needed to be quite so bureaucratic and hierarchical and whether it was right to use public resources in this way. Doak and O’Mahoney (2011) reach similar conclusions in their analysis of policy implementation but in addition found legitimacy could be withheld due to lack of a sense of ownership by those determining legitimacy, a point made by some in our study. Beisham and Dingworth (2008: 13), addressing similar issues, suggest sense of ownership is in turn a product of cognitive and cultural legitimacy, but in addition, ‘procedural legitimacy,’ in which legitimacy is evaluated with reference to the extent to which procedures and processes reflect ‘inclusiveness, fairness and representativeness; deliberation; transparency and accountability.’

4. Empirical Analysis

We now examine the extent to which the evidence from our research suggests this particular form of flexible regulatory regime (codes of corporate governance in general and comply-or-explain as a meta-institution in particular) is perceived by regulatees to be legitimate, i.e. it encourages the 'right' behaviours (by embodying accepted best practice), and/or confers benefits, embodies or promotes practices that are consistent with the expectations of the wider society, and are familiar and thus understood. Our starting point is the extent to which companies perceive the means employed to assess their behaviour , i.e. the relevant code, embodies shared or at least congruent norms, values and practices – in other words that the codes are themselves legitimate. Most in the UK were content that they were, in that the UK code embodied best practice:

> *'I don't think the Code sets best practice, I think that would be wrong. I think the beauty of the Code is it does follow best practice. Who on earth is going to actually prescribe to us what best practice is?' (U)*

> *'In many ways the Code came about from experienced City operators collaborating over what were the sort of elements that made companies operate well and effectively, trying to capture what until that time had actually been complicit in good management, and saying what are the signs of good management and how can we encapsulate that in a best practice guide as to how you should do something? […] So it was built out of current best practice as opposed to being driven by a particularly political agenda or some other element extraneous to business itself. It came from within rather than from outside.' (U)*

The latter point is telling. If the code itself were not considered legitimate it would be problematic to use as a resource when seeking to establish legitimacy because, as Deephouse and Suchman (2008) point out, legitimacy-conferring stakeholders typically will only acknowledge and seek to negotiate with organizations whose actions they consider legitimate. For regulatees to deny the legitimacy of the means by which legitimacy is assessed could suggest to monitors that companies are less likely to positively engage with the spirit of the code and use responsibly any flexibility granted therein. Most in the UK and Germany agreed that the underlying code principles were consistent with best practice:

> *'The recommendations … make perfect sense. And companies have the possibility of deviating if they announce this and explain in the [compliance] statement. I think this is very reasonable. From my*

> *perspective there is no reason for a company not to accept the code and apply it using comply-or-explain. This is the reason why we have this sensible book of rules in Germany. It is written in a way that every company can apply it.' (G)*

However, critically, a substantial minority of German interviewees disagreed:

> *'[The Code is] … absolute, without democratic control, without any feedback from companies ... by some professors of whom you don't know whether they ever have seen a company from the inside.' (G)*

> *'At some point these 'best practices' will cause so much increase in administration, documentation and other costs for companies that people will turn around and say, this is insane!' (G)*

One reason for this is the difference in origins of the two codes which gives UK practitioners a far greater sense of ownership. The perception in the UK that the rules were derived endogenously contrasts markedly with the responses of many of our German interviewees:

> *'The topic of corporate governance started earlier in the Anglo-Saxon sphere: the Cadbury report and all the rest of it. And then one had the impression in Germany that one had to catch up […] but you have to take into account that the legal context in diverse countries is quite different. In Germany matters of corporate governance are much more regulated than in the Anglo-Saxon world. Insofar as there was a need for more regulation it was in the Anglo-Saxon world rather than us.' (G)*

German respondents thus were less familiar with the underlying values, norms and practices than their UK counterparts. They thus found the process of engaging with the code easier, both in terms of compliance and registering dissent:

> *'My own experience of codes has been that it is actually very easy to get to the people who draft them so if you want to understand the spirit of them it is actually quite easy. In previous times I have been heavily involved in the drafting of the Banking Code and I found them very accessible. If you want to actually make changes, where you find parts of a code that don't work so well, because they tend to have a review every 3 years, you can normally get things changed more easily. Somehow they feel more tangible'. (U)*

By contrast, the process in Germany has been dominated by committees that, while including some industry representation, could appear somewhat detached from the businesses to which the rules applied. Yet the successful creation of legitimacy is a discursive and thus iterative process in which ideas and the language with which they are expressed are clarified and re-clarified until a consensus is reached that satisfies key legitimating actors, and represents the values to which they subscribe and the norms that guide their behaviour. The outcome is agreement around the ‘objects’ and ‘patterns’ (Hurrelmann et al. 2005) - broadly the ends and means of the code. The necessary consensus was clearly achieved to a greater extent in the UK than in Germany. Some German interviewees felt totally alienated. They considered they had been excluded completely from the process of code development, especially those working for smaller capitalised companies - from the mid to lower end of the MDAX and SDAX.

However, even those German interviewees who thought the code had been externally imposed rather than discursively coproduced did concede there could be private benefits accruing from the introduction of the code, which gave it, and by extension compliant regulatees, a form of pragmatic legitimacy:

> *‘The real purpose of the German corporate governance code is to advertise Germany as a capital market. And the two-tier board system is hard to explain to the Americans and English. I think the code has fulfilled this task very, very well for our corporate governance system.’ (G)*

So, although seen as an imposition, an unnecessary imposition at that, the code does have the benefit of promoting inward investment. It also reassures investors, particularly in the US and UK, that German forms of corporate control are comparable with or equivalent to their own, an example of ‘exchange legitimacy’ (Suchman 1995):

> *‘This corporate governance code is a bureaucratic monster. The only good aspect – from my perspective – is that it explains very well the corporate legal structure of German publicly listed companies... the interaction between the annual general meeting, the executive board and the supervisory board - something like corporate law for dummies - corporate law and German employees’ participation for dummies. They achieved this and it is something worthwhile in order not to have to take on board every idiocy from the Anglo-Saxons, such as the one tier board structure. (G)*

This did not imbue it with a great deal of cultural legitimacy in Germany though. Cultural legitimacy in respect of regulatory regimes means that the rules and associated regulatory practices embody shared understandings of knowledge, belief, and behaviour. While hard law is universal , monitored by a state authorised institution with compliance backed by a range of enforcement penalties set out in statutes, softer forms of law such as (nominally) voluntary codes or codes containing voluntary elements, have more varied forms of monitoring, compliance and enforcement penalties and legitimacy is dependent on those shared understandings. They may contain uncertainties. In this case legitimacy is conditioned either by the extent to which such uncertainty is consistent with social norms (arguably the case in the UK) or, in societies that value standardization and conformity (arguably the case in Germany) where actors expect the values, norms and procedures laid down by the code will reduce unpredictability (see House et al. 2002, Thomas and Lamm 2012). Moreover if comply-or-explain is used, the degree to which a company is deemed to have complied with a code rule is itself contingent. It depends on the extent to which the monitors consider an explanation for deviation to be satisfactory. Such assessments can depend on factors such as company profitability, reputation of the key directors, and support for the company's strategy. There can therefore be much uncertainty for companies considering non-conformance, but this uncertainty is reduced where directors have some confidence that the underlying rationale for their action will be understood by the monitors - the institutional shareholders and in some cases the wider society – based on shared values. This shared understanding in the first instance arises from within informal networks linking companies and their shareholders but also depends on wider acceptance of the values inherent in the rules and the associated practices.

Most UK interviewees seemed confident they understood the concept of codes in general and the comply-or-explain mechanism in particular. The way the code enabled a one size fits all approach was seen as a significant benefit. The discursive practices associated with creating consensus around corporate decisions and ensuring those decisions are seen in turn to reflect the consensus demonstrates the code and comply-or-explain do have a degree of cultural legitimacy in the UK:

> *'[I]f you have hard law in an area then you are effectively supposing that the same model fits every company and of course even a hard law can have exceptions built into it. But if you use hard law and you put exceptions in, either the exceptions are so wide and discretionary as to negate the point of having the hard law or you have to be sufficiently detailed in your exemptions that you try to cover every particular case - which is equally difficult I think. Having seen it from the outside and now*

> *from the inside, I think the soft law actually works much better in this area. It is not like health and safety legislation. It is not like criminal law where something is obviously wrong and something is obviously right. It is a consensus as to this is the way we think things should be done but we are prepared to accept that for some companies it may be different and provided your explanation is adequate then you know you can carry your shareholders with you as it were.' (U)*

The reference to the importance of context is significant. Although soft regulation can be found in various settings throughout the world, comply-or-explain is relatively uncommon. It works in the context of UK corporate governance because of the perceived congruence of values and norms of behaviour between the monitors - senior fund managers, the regulatees - the boards of the companies in which they invest, and the wider business community, not least in attitudes to dealing with uncertainty. Note again, these core drivers for action and its rationalisation are congruent, not identical – there are plenty of examples of clashes between UK companies and their major investors – but most of the larger UK companies and their institutional investors are from similar social backgrounds, are closely connected via the capital markets and even by geography - most are based in London. They share understandings to a critical extent of what constitutes knowledge in their world and belief in the financial system through which they are interlinked. This shared habitus means that for the most part, the code and its inherent flexibility are considered not only culturally legitimate but also effective in the UK context:

> *"If you look at the way the City has operated since the '60s when the takeover panel was first really constituted, you know, a uniquely British institution if you like, it is a non-statutory body, there is no law that says it can do this, there is no regulation that says it can do this, but everyone among the great and the good got together and said something must be done. So in our British way we all agreed that this is what we would do and anyone who didn't want to play by the rules, we wouldn't play with them." (U)*

However, not all UK companies considered the code culturally legitimate. Some noted that a considerable number of those outside the mainstream corporate and investor worlds, some of whom serve critically as monitors in the UK (corporate governance ratings agencies, proxy voting organisations), contest the whole concept of voluntaristic soft law elements in corporate governance and simply treat non-conformance as non-compliance:

> *"You are never going to get the box tickers who have now got departments full of people box ticking [to agree], they can't take a view. They are incapable of reading the explanation and applying it. You haven't got intelligent people doing these jobs who are able to say, ah in [this company]'s case, I have read the blurb, yes I agree with that. They are going to come from their position all the time." (U)*

As Kelly (2011) notes, *"monitoring requires both information and expertise. Monitors need to understand the data and all its implications."* Where such understanding is missing, monitoring can also cause regulated companies to increase their monitoring of the monitors, with attendant increased compliance costs. *"It is an industry in its own right - I am not sure it adds on a lot of value" (U).* Faced with competing legitimation logics the options for those seeking to establish and maintain legitimacy are to either *conform* to the expectations of their critics, or seek to isolate the impact of the critics by either *selecting* replacements from existing legitimating agents, in this context other monitors such as the media or government, or manipulating the environment to the point where the critical agents are no longer relevant and entirely new agents of legitimation are brought into play (see Suchman 1995: 587). An example of the latter could be the Dutch case where weak legitimating agents were replaced entirely by a government commission.

Nonetheless most in the UK were positive. Those able to compare systems, companies with dual listing status in London and New York, expressed a preference for the soft law approach found in the UK compared to the statutory approach adopted by the US, especially since the advent of 'Sarbanes-Oxley':

> *"I do think the comply or explain piece is a really valuable valve and I think, as I say, living with both sets of rules, the US rules and the comply or explain premise of the Combined Code, Boards get quite cross about having to comply with rules that are senseless in their view. So to have a best practice world that you can see that investors and others are expecting you to adhere to but having the flexibility to explain why an aspect might not be appropriate for you, I think is a really good place to be." (U)*

In Germany however, with much less of a self-regulatory tradition than the UK, the cultural practices associated with discursively negotiated compliance seemed completely alien to some:

> *"The fact is that if the lawmakers want something done they should make a law – they do anyway - there is enough law around. And if they do not want this, they should stay clear of it. But these recommendations –*

"should", "could" – what do I get out of it? Nothing! […] Either there is law or there is no law.' (G)

'You cannot say one has to comply with the code – otherwise it is law. Go and pass your law - yes or no. You can spare us this show of pretence that companies have discretion. Just be a bit more honest. Either politicians have the guts or they do not. To be honest, I think these intermediate forms [of law] are not fit for purpose.' (G)

Finally we turn to cognitive legitimacy, which is dependent on familiarity as well as shared understanding and empathy. With 20 years' experience familiarity levels in the UK with flexible regulatory forms such as codes and mechanisms such as comply-or-explain, are high:

'I think the [UK] Code has been very successful, from a number of perspectives I think. Perhaps at the outset it was looked on as being the standard to aspire towards but now I think it is very much more looked on as being a framework and, if you like, in some sense a minimum that people then operate to. But I think there is much greater recognition that good governance doesn't spontaneously happen and therefore you need to have an approach which through time, through experience of operating with the Combined Code, has meant that most Boards and Directors and Chairmen now are starting from a much better position than they were before the first version of the Code came out' (U)

The UK code is considered both plausible and predictive as well as necessary and permanent (Suchman 1995: 584). It can be characterised as bringing discipline to a previously disordered landscape where there were few of the constraints on boards' actions that exist today. At the same time it standardises corporate behaviour around the values and norms underpinning the code. The same cannot be said of the German experience. Family dominated public companies are something of a rarity in the UK but are relatively common in Germany. For such companies corporate governance is not a priority, let alone compliance with a code of corporate governance, and may be treated more or less as an irrelevance as one member of a family dominated firm listed on the SDAX recounted:

'We look at the deviations, formulate them, give the statement to the supervisory board who then decide upon it. We spend five minutes on it in the meeting of the supervisory board. We spend another hour drafting it. As I said already, I have to admit that this is pretty pointless for us. [... The head of the majority shareholding family] hates this kind of stuff: "I

do not think much of this body of regulations and I don't see why I should stick to these rules."' (G)

For some then the Cromme Code is neither plausible nor predictive and certainly not considered necessary. There is a distinct disconnect between some board members in Germany and the code that is simply not found in the UK. Lack of understanding of the purpose of the code or lack of belief that the purpose it served had any utility was voiced by a number of interviewees. Some refused to take the issue of code compliance seriously at all:

"I do not think Mr Cromme is completely honest. You just have to look at what happened within Volkswagen. There is no mention in the code that the board is not allowed to visit a brothel with the employees' representatives!"(G)

This is in stark contrast to the way the code is treated by most of the UK interviewees. As the code becomes more embedded and more familiar there is however increasing pressure towards standardisation (Hooghiemstra and van Ees 2011). In both countries companies feel under pressure to fully conform, notwithstanding the inherent flexibility of comply-or-explain:

'No, you might get away with minor omissions on a comply-or-explain basis like you have forgotten to have a meeting of the Non-Execs without the Chairman. Something relatively trivial you could get away with but most of it is I think actually pretty hard law, I don't think it is a Code at all. (...) We don't regard it as Code; we regard it as something we have to comply with. (...) I think it has evolved from kind of soft law to hard law for people like us.' (U)

'The [Cromme] commission runs around and claims that 97% fulfil all points. And I ask myself what is the point? Cromme is even proud of this. There might be lots of good reasons for many companies to not comply with specific points. And the stockholders seem to want that … otherwise they would complain which they don't do. […] Comply-or-explain in Germany is immediately changed into 'comply and don't bother us with explanations'. In my opinion this is wrong. This is no longer a voluntary regulation.' (G)

In effect, while most UK and some German interviewees understood and valued comply-or-explain and considered it's use legitimate, a significant number in both countries were not convinced that the mechanism was, in Suchman's terms, 'desirable, proper, or appropriate' (1995: 574) either because of a misalignment with their own values, norms and practices, or those of critical monitors.

5. Conclusion

While overall legitimacy of the code and of the comply-or-explain mechanism in particular is greater amongst regulatees in the UK than in Germany, there are significant variations. In the UK the code is deemed to have moral legitimacy. It is considered to embody best practice and indeed evolves as necessary to reflect best practice. German interviewees were less convinced of this but did accept it had pragmatic legitimacy by improving access to foreign capital. The biggest difference is in cultural legitimacy. Unsurprisingly those familiar with soft forms of regulation in the UK, and especially in the City of London, found the uncertainty associated with compliance with flexible regulatory codes far less burdensome than their German counterparts. Similarly cognitive legitimacy, based in part in familiarity was higher amongst UK regulatees. Again this is unsurprising - given the earlier inception of the code in the UK. However, in both countries, as the code has become embedded there has been pressure to reach full conformance – to avoid deviating wherever possible and thus exposing the company to a potentially harmful debate over its explanation(s), damaging its reputation (as Hooghiemstra and van Ees 2011 point out) and threatening its legitimacy. In some cases this arises from a misunderstanding of the position of institutional investors but for the most part is due to pressure from the media, the public and thus government who may have different understandings of the purpose of a code of corporate governance and its capacity to prevent sub-optimal corporate decisions being made at best, or negligence and criminality at worst. It can be argued that if this form of flexible regulation is to survive its limitations need to be better explained and understood. Indeed, as our research focused solely on the perceptions of regulatees in respect of the legitimacy of codes of corporate governance and the comply-or-explain mechanism, it may be of some use for further research to be carried out to examine the perceptions of other stakeholders on this matter.

For regulators considering the uses of flexible regulation some of the lessons are obvious and relatively easy to address, others less so. Any devolved form of regulation requires effective monitoring. Identifying regulatory monitors is not a difficult task but assessing their leverage and more importantly how they will choose to exercise that leverage is less certain. Regulatee buy-in is critical. Involving regulatees in the design, implementation and evaluation of regulatory codes is clearly essential and many regulators would no doubt respond they do this already. However, the critical factor in terms of sustaining legitimacy is persuading regulatees that their involvement is meaningful, as well as maintaining their confidence in the code, its associated processes and the regime as a whole. Where issues arose, primarily in Germany, but also in the UK on occasions, they centred essentially around uncertainty. On the one hand how will a company's various monitoring stakeholders view their use of the flexibility inherent in comply-or-explain based codes while on the other hand, how can regulators optimise compliance in conditions where noncompliance with a rule may nonetheless be formally compliant - something the regulator's stakeholders may or may not appreciate? In neither case can legitimacy be taken for granted nor a strategy developed for attaining legitimacy with any degree of certainty, contingent as it is on the perceptions of the monitoring stakeholders. And those perceptions may not be consistent. Action may be considered legitimate by one legitimacy conferring group but not by another.

The literature on the use of discretion under uncertain conditions can perhaps offer some clues for both regulators and regulatees. Fixed (inflexible) rules of course reduce decision uncertainty for regulatees and compliance uncertainty for regulators but do not necessarily lead to optimal outcomes in changing environments. What one might term Keynesian rules versus neo-classical discretion (to hugely over-simplify) has long been a core theme in econometric modelling of responses to uncertainty about future government monetary policy (e.g. Arestis and Mihailov 2009, Barro and Gordon 1983, Stokey 2002, Taylor 1993). The relevant conclusion one might draw from this extensive literature is that much depends on the quality of the rules – in our terms the rules should both optimally reflect best practice and achieve the regulatory goals. For various aspects of legitimation this is true but one must be careful not to conflate legitimacy with outcome optimality. There is no direct correlation between outcomes and the four types of legitimacy used to inform our analysis, except to the extent that attaining legitimacy could be an outcome.

However, where uncertainty exists around determinations of legitimacy, procedural fairness has been shown to be influential (Blader 2007, van den Bos and Lind 2002, Herian et al. 2012). While interesting these justice-based studies tend to deal with uncertainty amongst legitimacy conferring monitors (typically the public). However, regulatees, it is argued, may simply attempt to conform, partly for pragmatic reasons but also to defend the legitimacy of the existing system (see Vainio 2011). This is interesting as, far from full conformance being a threat to maintaining the flexibility offered by comply-or-explain as some of our UK interviewees feared, it could under conditions of uncertainty serve to increase the legitimacy of the code regime. In this way flexible, potentially outcome-optimising mechanisms such as comply-or-explain could be preserved into the future to be drawn upon again when conditions are more certain - and attaining and maintaining legitimacy is less problematic.

References

Aguilera, R. V. and Cuervo-Cazurra, A. (2004) 'Codes of good governance worldwide: What is the trigger?', *Organization Studies,* 25(3), 415-443.

Archibald, M. E. (2004) 'Between isomorphism and market partitioning: How organizational competencies and resources foster cultural and sociopolitical legitimacy, and promote organizational survival' in Johnson, C., ed. *Research in the Sociology of Organizations,* Amsterdam: Elsevier JAI, 171-211.

Arcot, S., Bruno, V. and Faure-Grimaud, A. (2010) 'Corporate governance in the UK: Is the comply or explain approach working?', *International Review of Law and Economics,* 30(2), 193-201.

Arestis, P. and Mihailov, A. (2009) 'Flexible Rules cum Constrained Discretion: A New Consensus in Monetary Policy', *Economic Issues,* 14(2), 27-54.

Barro, R. J. and Gordon, D. B. (1983) 'Rules, discretion and reputation in a model of monetary policy', *Journal of Monetary Economics,* 12(1), 101-121.

Beck, U. (1992) *Risk Society: Towards a New Modernity,* Newbury Park: Sage.

Beisham, M. and Dingworth, K. (2008) *Procedural Legitimacy and Private Transnational Governance: Are the Good Ones Doing Better?*, SFB Governance Working Paper Series, Nr. 14, Berlin: DFG Research Center (SFB) 700.

Bennear, L. S. and Coglianese, C. (2013) 'Flexible Environmental Regulation' in Kamieniecki, S. and Kraft, M. E., eds., *The Oxford handbook of U.S. environmental policy,* Oxford; New York: Oxford University Press.

Black, J. (2005) 'The emergence of risk based regulation and the new public management in the UK', *Public law,* 2005(Autumn), 512-549.

Black, J. (2008) ‘Forms and paradoxes of principles-based regulation’, *Capital Markets Law Journal,* 3(4), 425-457.

Black, J. and Baldwin, R. (2012a) ‘When risk-based regulation aims low: A strategic framework’, *Regulation & Governance,* 6(2), 131-148.

Black, J. and Baldwin, R. (2012b) ‘When risk-based regulation aims low: Approaches and challenges’, *Regulation & Governance*.

Blader, S. L. (2007) ‘What determines people’s fairness judgments? Identification and outcomes influence procedural justice evaluations under uncertainty’, *Journal of Experimental Social Psychology,* 43(6), 986-994.

Borchardt, G. M. and Wellens, K. C. (1989) ‘Soft law in European Community law’, *European Law Review,* 14(5), 267-321.

Bourne, L. (2011) ‘Advising upwards: managing the perceptions and expectations of senior management stakeholders’, *Management Decision,* 49(6), 1001-1023.

Breton, G. and Côté, L. (2006) ‘Profit and the legitimacy of the Canadian banking industry’, *Accounting, Auditing & Accountability Journal,* 19(4), 512-539.

Cadbury, A. (1992) *Report of the Committee on the Financial Aspects of Corporate Governance*, London: Gee and Co.

Cini, M. (2001) ‘The soft law approach: Commission rule-making in the EU’s state aid regime’, *Journal of European Public Policy,* 8(2), 192-207.

Commissie Tabaksblat (2003) *De Nederlandse Corporate Governance Code: Beginselen van deugdelijk ondernemingsbestuur en best practice bepalingen*, The Netherlands: Commissie Corporate Governance.

Cornwall, A. (2008) *Democratising Engagement*, London: Demos.

Corporate Governance Code Monitoring Committee (2010) *Second report on compliance with the Dutch Corporate Governance Code*, The Hague, Netherlands.

Deephouse, D. and Suchman, M. (2008) ‘Legitimacy in Organizational Institutionalism’ in *The Sage Handbook of Organizational Institutionalism*, London: Sage Publications Ltd.

Doak, J. and O’Mahoney, D. (2011) ‘In search of legitimacy: restorative youth conferencing in Northern Ireland’, *Legal Studies*, 31(2), 305-305-325.

Elsbach, K. D. (1994) ‘Managing organizational legitimacy in the California cattle industry: The construction and effectiveness of verbal accounts’, *Administrative Science Quarterly*, 39(1), 57-88.

Elsbach, K. D. and Sutton, R. I. (1992) ‘Acquiring Organizational Legitimacy through Illegitimate Actions: A Marriage of Institutional and Impression Management Theories’, *Academy of Management Journal*, 35(4), 699-738.

Fairman, R. and Yapp, C. (2005) ‘Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement’, *Law & Policy*, 27(4), 491-519.

Financial Reporting Council (2006) *The Combined Code on Corporate Governance*, London: Financial Reporting Council.

Financial Reporting Council (2012) *The UK Corporate Governance Code*, London: FRC.

Financial Services Authority (2007) *Principles-based regulation: Focusing on the outcomes that matter*, London: FSA.

Habermas, J. and McCarthy, T. (1976) *Legitimation crisis*, London: Heinemann Educational.

Herian, M. N., Hamm, J. A., Tomkins, A. J. and Pytlik Zillig, L. M. (2012) ‘Public Participation, Procedural Fairness, and Evaluations of Local Governance: The Moderating Role of Uncertainty’, *Journal of Public Administration Research & Theory,* 22(4), 815-840.

High Level Group of Company Law Experts (2002) *A Modern Regulatory Framework for Company Law in Europe,* Brussels: European Commission.

Hood, C., Rothstein, H. and Baldwin, R. (2001) *The Government of Risk,* Oxford: Osford University Press.

Hooghiemstra, R. and van Ees, H. (2011) ‘Uniformity as response to soft law: Evidence from compliance and non-compliance with the Dutch corporate governance code’, *Regulation & Governance,* 5(4), 480-498.

House, R., Javidan, M., Hanges, P. and Dorfman, P. (2002) ‘Understanding cultures and implicit leadership theories across the globe: an introduction to project GLOBE’, *Journal of World Business,* 37(1), 3-10.

Hurrelmann, A., Krell-Laluhová, Z., Lhotta, R., Nullmeier, F. and Schneider, S. (2005) ‘Is there a legitimation crisis of the nation-state?’, *European Review,* 13(SupplementS1), 119-137.

Iskander, M. and Chamlou, N. (2000) *Corporate governance: A framework for implementation,* Washington DC: World Bank.

Kelly, C. R. (2011) ‘Financial Crises and Civil Society’, *Chicago journal of international law,* 11(2), 505.

Lopes, P. (2002) *The Rise of a Jazz Art World,* Cambridge: Cambridge University Press.

Lounsbury, M. and Glynn, M. A. (2001) ‘Cultural entrepreneurship: Stories, legitimacy, and the acquisition of resources’, *Strategic Management Journal*, 22(6-7), 545-564.

MacNeil, I. and Xiao, L. (2006) '"Comply or Explain": market discipline and non-compliance with the Combined Code', *Corporate Governance: An International Review,* 14(5), 486-496.

Majone, G. (1994) 'The rise of the regulatory state in Europe', *West European Politics,* 17(3), 77-101.

Mathews, M. R. (1993) *Socially Responsible Accounting,* London: Chapman & Hall.

Meyer, J. and Rowan, B. (1977) 'Institutionalized Organizations: Formal Structure as Myth and Ceremony', *American Journal of Sociolgy*, 83(2), 340-340-363.

Middleton Stone, M. and Greer Brush, C. (1996) 'Planning in Ambiguous Contexts: The Dilemma of Meeting Needs for Commitment and Demands for Legitimacy', *Strategic Management Journal*, 17(8), 633-633-652.

Murphy, K., Tyler, T. R. and Curtis, A. (2009) 'Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?', *Regulation & Governance,* 3(1), 1-26.

OECD (2004) *Principles of Corporate Governance*, Paris: OECD.

Oliver, C. (1991) 'Strategic Responses to Institutional Processes', *Academy of Management Review*, 16(1), 145-179.

Parsons, T. (1964) 'Evolutionary Universals in Society' in Turner, B., ed. *The Talcott Parsons Reader,* Oxford: Blackwell Publishers Inc., 157-157-181.

Pfeffer, J. and Salancik, G. R. (1978) *The external control of organizations: a resource dependence perspective*, New York: Harper & Row.

Phillips, N., Lawrence, T. B. and Hardy, C. (2004) 'Discourse and institutions', *The Academy of Management Review,* 29(4), 635-652.

Regierungskommission (2010) *Deutscher Corporate Governance Kodex*, Dusseldorf: Regierungskommission Deutscher Corporate Governance Kodex.

Ross Goobey, A. (2005) *Speech to the London Stock Exchange Corporate Governance Conference*, translated by London: International Corporate Governance Network.

Rothstein, H., Huber, M. and Gaskell, G. (2006) 'A theory of risk colonization: The spiralling regulatory logics of societal and institutional risk', *Economy and Society*, 35(1), 91-112.

Ruef, M. and Scott, W. R. (1998) 'A multidimensional model of organizational legitimacy: Hospital survival in changing institutional environments', *Administrative Science Quarterly*, 43(4), 877-904.

Scott, J. and Marshall, G. (2009) *Oxford Dictionary of Sociology, 3rd Ed*, Oxford: Oxford University Press.

Seidl, D. (2007) 'Standard setting and following in corporate governance: an observation-theoretical study of the effectiveness of governance codes', *Organization*, 14(5), 705-727.

Seidl, D., Sanderson, P. and Roberts, J. (2012) 'Applying the 'comply-or-explain' principle: discursive legitimacy tactics with regard to codes of corporate governance', *Journal of Management & Governance*, 1-36.

Snyder, F. (1993) *Soft Law and Institutional Practice in the European Community*, Law Working Paper 93/5, Florence: European University Institute.

Stillman, P. G. (1974) 'The Concept of Legitimacy', *Polity*, 7(1), 32-56.

Stokey, N. L. (2002) '"Rules vs. Discretion" after Twenty-Five Years', *NBER Macroeconomics Annual*, 17, 9-45.

Suchman, M. C. (1995) ‘Managing Legitimacy: Strategic and Institutional Approaches’, *The Academy of Management Review,* 20(3), 571-610.

Taylor, J. B. (1993) ‘Discretion versus policy rules in practice’, *Carnegie-Rochester Conference Series on Public Policy,* 39(0), 195-214.

Thomas, T. and Lamm, E. (2012) ‘Legitimacy and Organizational Sustainability’, *Journal of Business Ethics,* 110(2), 191-203.

Vaara, E., Tienari, J. and Laurila, J. (2006) ‘Pulp and paper fiction: On the discursive legitimation of global industrial restructuring’, *Organization Studies,* 27(6), 789-810.

Vainio, A. (2011) ‘Why are Forest Owners Satisfied with Forest Policy Decisions? Legitimacy, Procedural Justice, and Perceived Uncertainty’, *Social Justice Research,* 24(3), 239-254.

van den Berghe, L. and de Ridder, L. (1999) *International Standardisation of Good Corporate Governance: Best Practices for the Board of Directors,* The Netherlands: Kluwer Academic Publishers.

van den Bos, K. and Lind, E. A. (2002) ‘Uncertainty management by means of fairness judgments’ in Mark, P. Z., ed. *Advances in Experimental Social Psychology,* Academic Press, 1-60.

von Werder, A., Talaulicar, T. and Kolat, G. L. (2005) ‘Compliance with the German Corporate Governance Code: an empirical analysis of the compliance statements by German listed companies’, *Corporate Governance: An International Review,* 13(2), 178-187.

Weil, G. and Manges, L. L. P. (2002) *Comparative Study of Corporate Governace Codes Relevant to the European Union and its Member States,* Brussels: European Commission - Internal Market Directorate General.

Weil, G. and Manges, L. L. P. (2003) *International comparison of selected corporate governance guidelines and codes of best practice*, New York: Weil, Gotshal and Manges, LLP.

Wymeersch, E. (2005) *Enforcement of Corporate Governance Codes*, Law Working Paper 46/2005, Ghent: European Corporate Governance Institute.

Zimmerman, M. A. and Zeitz, G. J. (2002) 'Beyond Survival: Achieving New Venture Growth by Building Legitimacy', *Academy of Management Review*, 27(3), 414-431.