

The Futility of Excess, or The Displaced World of Rules and Regulations

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Basel II is the name of an international framework of banking regulation. The framework is taken as an opportunity to reflect on the possibilities of regulating excess in hyperreal markets from two perspectives. Basel II represents both, the attempt to tame the excesses of markets by excessive controlling, and an attempt to shift the regulation to an understanding of risk management beyond pure quantification. On this background the insights of a leading supervisor are confronted with a poststructuralist interpretation of rules and rule following to support a view of setting rules and regulations which cannot fix the intended result beforehand. A rule's meaning is (re-)constructed when it is applied.

Key words: Basel II; Hyperreality; Différance; Excess; Rules; Regulation

INTRODUCTION

The call for papers for the conference 'Excess in Organisation' was published at a time when I worked in a project for a bank on the consequences of the revised framework Basel II, the international regulation of the banking industry. 'Everywhere that there is more than something than is absolutely needed, there is excess', the organisers reminded the potential participants of the conference in the call for papers. Knowing about the development of the markets and working with the framework, the topic 'excess' immediately brought a paradox to my mind. Given the enormous sums traded in the financial markets and the huge profits and losses gained with these, excess can be argued a valid description for this. McGoun (1997: 98) observes, 'the seemingly endless proliferation of financial assets and institutions, limitless growth of transaction volumes, boundless volatility of prices, countless mergers, acquisitions, and divestitures of businesses, and relentless pursuit of greater and greater wealth'. One answer of the regulation in order to prevent the markets from collapsing as a result of too high losses leading to bankruptcy of banks with possible domino effects on the global financial markets, is a massive collection of data for each deal and a detailed calculation of potential risks inherent in the deal. As a starting point for this article, I interpreted this as the attempt of curing the consequences of potential losses of an excess with an excess of data collection and processing. The responsibility for enforcing the regulation nationally is either the task of central banks or of national financial authorities. Therefore a paper given by Helmut Bauer, the first director of BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht) and head of the banking supervision in Germany and member of the Basel Committee on Banking Supervision, attracted my interest. The analyses of his paper provides an insight into the fact that the authors of the framework were very conscious of the problems regarding setting and enforcing rules and tried to introduce a different approach. Excess to control

excess is futile, seems to be the insight. Using Derridean terminology the subtle effects and reactions to rules are examined and Bauer's approach evaluated.

LIFE IN THE TIME AFTER THE ORGY: THE ATTEMPT TO TAME EXCESS BY REGULATION

When talking about excess in economic terms, the phenomenon of 'bubbles' easily comes to mind. To remind people who took part in or just watched the dot.com hype that these kinds of bubbles are by no means recent developments, commentators often referred to the Tulip Mania in the early 17th century in Holland (Mackay, 1995). First a fashion among the wealthy people in Amsterdam collecting rare varieties of tulips became a matter of speculation. It had a very slow beginning as long as it was restricted to the collectors. However, the demand grew and soon was higher than the production. The market expanded further when the popularity of the flower expanded to the middle class. The explosive growth that ensued made tulip bulbs an item of professional exchanges where market participants were only interested in trading and not in the beauty of the flowers. The prices increased steadily and created a confidence in this development as natural. More people of every class were attracted and traded bulbs by entering the market with selling most of their properties. This resulted in ridiculously high prices at the climax of the speculation. In 1636 tulip bulbs were officially quoted at the Amsterdam Stock Exchange, but only a year later the bubble crashed. As soon as the conviction spread that this price inflation could not go on forever, the market collapsed. Those who had borrowed money and sold their property for taking part in the speculation went bankrupt when the prices fell to ten percent of the climax.

The Tulip Mania is an early example of what can go wrong when trading becomes an aim in itself. The logic of buying for purchasing goods was broken in favour of immediate or later re-selling. In the world of exchanges traders talk about exchange value rather than use value or, in the case of tulip bulbs, the beauty of the grown flower. In the logic of the exchanges, buying a bulb to plant it in the garden means to waste an opportunity to earn money by re-selling at a higher price. Financial markets are not concerned with production and distribution to clients but with trade of currencies and financial instruments not designed for consumption. Financial market transactions are second-order trading arrangements related to the first order economy only very indirectly by the profits generated (Knorr-Cetina and Bruegger, 2002: 913).

Looking just about 30 years back, the increase in value of business in the global financial markets is breathtaking. One of the most important markets today, the financial derivatives¹ were so unimportant and in fact most of them illegal in the early seventies that no reliable figures about their volumes exist (MacKenzie and Millo, 2003: 109). According to the Triennial Central Bank Survey on foreign exchange and derivative market, the global daily turnover in derivative contracts rose to \$2.4 trillion in 2004. The amounts of all deals concluded and still open rose to \$221 trillion, i.e., \$221,000,000,000,000. This means a rise by 121% to 2001, the time of the last Triennial Survey (BIS, 2005: 4). The underlying of these deals is always a concrete commodity or security. The markets, however, soon discovered that these instruments can also be used to speculate on the future prices of the underlyings without possessing them or intending to buy or sell them. It is possible to settle them without delivery of the underlying. Profit or loss is made with the changes of prices of the instrument. The value of all the financial instruments like futures, forwards, options, swaps, etc., which were once created as a form of risk management in volatile commodity and exchange markets nowadays exceed the physical deliveries of the underlyings many times over. The market works, one may conclude, devoid of its original meaning. It works

while its idea has been lost. A crucial boundary has been transgressed here. To characterise the current state of development, Baudrillard describes it as the state after the orgy. The orgy is the explosive moment of modernity in which everything, politically, sexually, economically, is liberated. Everything, the women, the kids, the unconscious, the destructive forces, the arts, etc., have been liberated. We moved along all ways of production and virtual overproduction, of objects, of signs, messages, ideologies and entertainments. When everything is liberated, we have to face the question: What to do after the orgy? (Baudrillard, 1992: 9). For derivative instruments there was only a short step to transgress the boundary, to liberate them from the original meaning. Without being bound directly to the availability of the underlying, they are freed to be used on their own market. They have become hyperreal, to use Baudrillard's term (*ibid.*: 10). The figures may serve as an illustration of how well things go on working while their original idea has been lost.

McGoun (1997) uses Baudrillardian terminology to describe financial markets. Commodities have a use value, a real value which is the basis for a price, or a symbolic value, as the good represents something for which it can be exchanged. In contrast to this:

...hyperreal money is exchange value without use value or even symbolic value. It doesn't stand for any *thing*. It is a pure sign. The hyperreal economy is an economy of signs, detached from real things, but nonetheless having the ability to affect real things. It need not be electronically mediated, although that certainly adds to the effect. (*ibid.*: 108, original emphasis)

Despite the fact that this is trading for the sake of trading, the actors in these markets may be affected by the failures of trading. Basel II can also be interpreted as the attempt to prevent the spill over of the negative consequences of losses in the hyperreal markets to the real markets via the collapse of banks involved in both.

Already in the 1980s Susan Strange coined the development of the international financial markets as 'Casino Capitalism' (Strange, 1986). She analysed the transformation of the markets after the Bretton-Woods agreement with stable currencies had been abolished. Within not much more than a decade the volumes in the financial markets already rose to an amount hard to imagine for the observer: 'Every day games are played in this casino that involve sums of money so large that they cannot be imagined' (*ibid.*: 1). Since then the average *daily* turnover in foreign exchange markets amounted to \$1.9 trillion, i.e., \$1,900,000,000,000, in April 2004 (BIS, 2005: 1). In contrast to the derivatives, the foreign exchange markets were already a substantial market in the sixties of the last century. It was in this market where the failure of a bank initiated the first attempts to regulate the financial markets on an international level. In 1974 German supervisors withdrew the banking license for Herstatt bank. This signalled the largest bankruptcy in the banking industry in Germany after World War II. The reason for the bank's failure lay in the uncontrolled and almost unlimited engagement in huge deals in international foreign exchange markets. The owner and CEO of the bank was proud of the enormous profits for several years, did not set adequate limits and didn't employ an adequate risk management. In the end, it was tried to cover up the foreseeable losses with balance sheet manipulation (Brors and Knüwer, 2004). As a consequence the first Basel concordat was agreed upon in 1975. It attempted to regulate the responsibilities for the foreign operations of international banks. This did not turn out to be sufficient, as there were too many grey areas where the national authorities relied on the other so that practically no thorough supervision was achieved. This was replaced by an agreement on common rules that banks should apply. The basic idea of this regulation, known as Basel I, was the capital adequacy, i.e., that each bank must have sufficient capital for their assets in case these lose value or are lost completely (Strange, 1998).

Basel, with the Roman numbers indicating the edition, now serves as a synonym for an international framework of regulating the financial markets. The Swiss town of Basel is the seat of the Bank for International Settlements (BIS), an international organisation which

fosters cooperation among central banks and other agencies in pursuit of monetary and financial stability. It hosts the central secretariat of the committee on banking supervisions called the Basel Committee. The committee has no legislative power and no supervisory authority but its recommendations are followed by national legislation and regulation on financial markets almost worldwide.

The development took up speed and became excessive as expressed in the figures quoted above. There is more of everything and not just the volume of deals. Strange lists the points at the end of the nineties: ‘The sheer size of these markets, the volumes traded, the variety of possible deals to be done, the number of new financial centres, the men and women employed directly or indirectly in the business of international finance, including the victims, the involuntary gamblers in the casino’ (Strange, 1998: 9). She also states enormous and very fast innovations in operations, i.e., the ability of banks to process ever more business on a globalised scale.

In 1995 Barings Bank collapsed. It was an individual trader who was able to hide his increasing portfolio imbalances and tried to balance them with ever higher deals. The market did not develop according to the dealer’s expectation and the level of exposure became too high to be fulfilled by the bank. Basically Barings, like Herstatt, failed because of a lack of effective risk management (Azarmi, 2005). Ruining excesses could not be prevented. Barings was an example of the effects of market risks. They were not sufficiently covered by Basel I. Despite the fact that these risks were included it turned out that the rules were not sufficient (Crockett, 1997). In 1999 the first consultational paper for Basel II, the ‘International Convergence of Capital Measurement and Capital Standards’, was published, heavily discussed, revised and finally passed in June 2004 (BIS, 2004).

Pillar 1 of the Basel II Framework fixes the generally accepted outcomes of the attempts of capturing a bank’s risk situation in a quantitative way as minimum requirements on the one

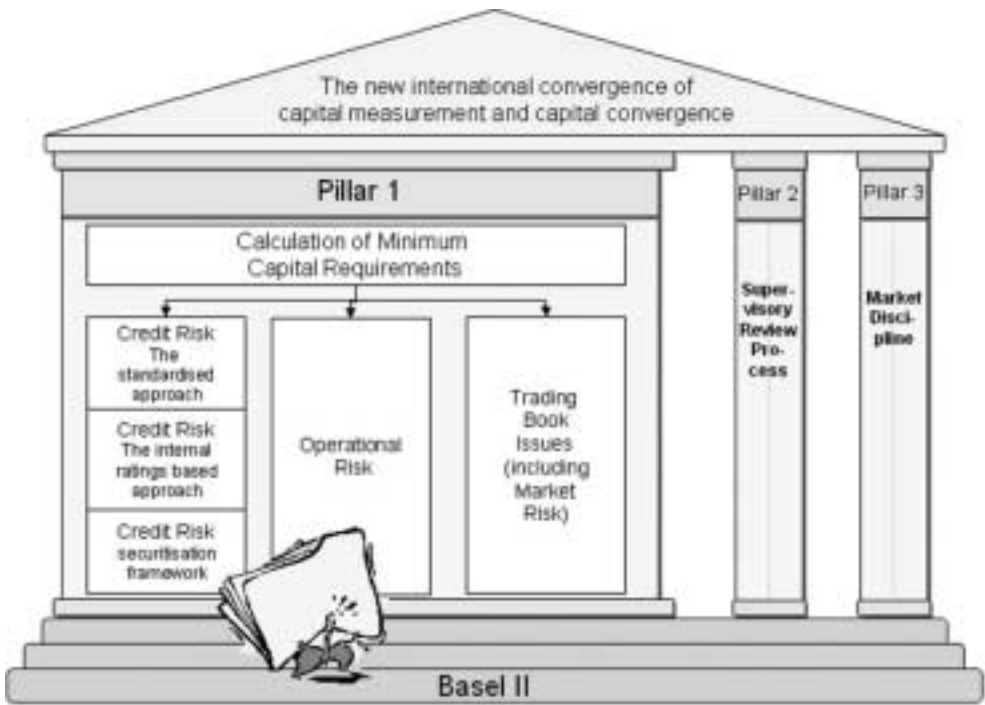


Figure 1. Basel II: The framework’s topics and chapters²

hand and the conditions of use for more advanced models on the other hand. Pillar 1 is about the calculation of minimum capital requirements for meeting the financial consequences of realised risks. This sounds mathematical and it is to a very large extent.

The figure in the foreground is not drawn in the official statement. It was added by me. It symbolises the outcome of a certain imbalance of the whole structure. If one expects three pillars to carry a construction, these different sizes surprise and indicate an excess of reliance on the left one. Pillar 1 is not only drawn in that size because the wording needs the space in the image. It also indicates the space the wording of Pillar 1 occupies in the framework. The explanations of mathematical models and different approaches for risk assessment, evaluation and reporting in Pillar 1 take about 90% of the official document's length. This symbolises the longer history of mathematical models in risk management and that the first pillar is a development and inclusion of models already introduced by banks. The models include evaluations for credit and market risk with several aspects under these more general designations like counterparty, liquidity, foreign exchange, commodity, share and interest risk, and operational risk as the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events. These include internal and external fraud, workplace safety, business disruption, system failures, damage to physical assets, etc. All of these are quantified by mathematical models. The other two pillars share the rest of the document's space. With the supervisory review process and market discipline Pillars 2 and 3 describe new dimensions of regulations. They were not part of Basel I.

Basically Pillar 1 intends to give an answer to the questions of how valid indicators can be extracted to judge the risks inherent in the banking business, and how the risk for the bank resulting from losses can be controlled. The answer to the first question is a massive data collection and quantification of each business involved. As to be expected in an environment which is based on figures the initial solution of dealing with the complexity of factors lay in the creation of figures indicating the risk level. It is a combination of several instruments like setting limits for types of business or the volume of exposure with single counterparts; simulations to give an overview of the bank's overall exposure day by day and the possible development of the credit and trading book; stress tests to answer the 'What-If' question: what is the effect on the profit and loss situation of the bank, if the prices of the underlyings or collaterals rise/fall by x%?

Several figures developed like Value at Risk (VaR) or the Monte Carlo Simulation.³ These figures soon gained broad recognition and were established as a market standard. However, it has always been consensus among banks that these standardised figures and models were not sufficient to capture the peculiarities of individual banks or national markets (Crockett, 1997). Therefore the banks, especially those acting globally and in diverse markets, went on adapting these models to their special situation and at the same time tried to achieve more sophisticated models. The result is a heterogeneous landscape of risk management built on a commonly accepted basis of de facto standard approaches.

The Basel II accord acknowledges this fact. Its intention is not to prevent further developments with binding the industry to a fixed number of methods. Instead, it defines minimum requirements which can be refined and adapted to special markets. To acknowledge the different ambitions and states of development, a difference between standard and advanced approaches has been made. The standard approach is set as minimum requirement for every bank, an individual approach which operates with advanced methods can be used. Adaptation and further development usually mean the move from generalised assumptions and evaluations about a market segment or a group of products to an individualised, customer or counterpart based approach. It is the move to a rating based approach. Each counterpart shall be evaluated according to the special risks involved. One consequence will of course be a risk

adequate pricing, i.e., the higher the risk, the higher the interest or collateral. Or: it is the striving for ever more data.

The answer to the question about controlling the effects of realised risks also leads to an increase in data and calculation. It is now international standard that banks are required to hold a total capital equivalent of at least 8% of the risk weighted assets. This means that their business is restricted by their base capital. To capture the individual situation of a bank due to its market and its business structure these assets are weighted and subject to questions of netting (e.g., the potential results of several contracts with the same counterpart which have buyer and seller positions for both sides can be netted) and what is counted as capital in the bank's balance sheet is subject to complicated rules as well.

The detailed collection of the adequate data and the development and maintenance of the systems needed for these tasks require a very high effort. Banks which invest in more advanced risk management as defined in the framework should therefore be rewarded with a reduced capital adequacy. The risk management procedure, systems and mathematical models have to be accepted by the national supervisory authorities. Rules and time frames for the preceding data collection are given in the Basel II accord. When accepted, the capital adequacy can be reduced down to 80% of the basic value stipulated for the respective risk. In other words: once accepted, the bank can make more business with the same amount of capital. The striving for ever more data is rewarded.

The crucial factor becomes data collection and data processing. Even if we consider that the individualisation does not cover the complete business—e.g., consumer credits can well be standardised—but corporate business and securities of any kind, the amount of data required of markets, balance sheet figures, or performance in the past is enormous. The result of all these figures is a complex internal and external reporting. The internal reporting on a daily basis shall give the management the possibility to control the keeping of the limits but also to provide them with adequate data to perceive potential threats in the future. The external reporting to the national bank and the national regulatory authority is, depending on the topic, on a daily, monthly, quarterly or annual basis. It includes data for capital adequacy in a very detailed form as well as every single security business. All these data are processed into new results: daily balance sheets, P&Ls, risk reports, exposures, external reporting, etc. which again increase the amount of available information.

As a result of the enormous and fast innovations in banking operations there is enough IT-power to handle incredible masses of data, not only to store them but to process them along complicated models. The potential excess of the markets is met by an excess of controlling. In Baudrillardian terms it can be claimed that risk management is in danger of entering the realm of simulation. We face an excess of almost unlimited collection of data to prevent the risks of the orgy, the unlimited expansion of financial markets and the number and size of the market participants, the still growing speed of development of products in almost every combination conceivable. Poor supervisors then, always coming late and only capable of recording the damage and perhaps identifying the guilty? Basel II provides an interesting attempt to deal with this problem. The following will therefore be an interpretation of the supervisors' reaction. The description of the Pillars 2 and 3 is included in this discussion.

BASEL II—THE SUPERVISOR'S INTERPRETATION

Now the excessive amount of data waits to be handled and the reaction of the Basel committee demonstrates that there is a clear consciousness about the dimension of risks in the international banking industry and also the conviction that controlling and excessive data collection alone do not solve the problem. Therefore Pillar 2, the supervisory review process,

and Pillar 3, market discipline, are introduced. Both add to the models a very interesting perspective. They are a first step to broaden the regulator's burden. The supervisors intend to integrate the bank's internal auditors and the market via the obligation of a wider disclosure of information regarding the risk management approach taken by the banks. Helmut Bauer, first director of BaFin, the German financial markets supervisory authority, and within BaFin responsible for the supervision of more than 2,000 banks and the decision on basic questions of banking supervision, described his view of the role of pillars 2 and 3 and his expectations publicly at the internal auditors' annual meeting (Bauer, 2004). His characterisation of Pillar 1 supports the critical view of the belief in quantities: 'Here the authorities mainly act in the mode of quantities. It rests on the—unfortunately only seemingly—reliable ground of definite risk measurement' (*ibid.*: 7).⁴ What follows is an open attack on the blind belief in figures and the vote for the importance of the qualitative factors.

The figure and the almost overwhelming size of the files represented in the drawing depict a situation of 'blindness'. He cannot see the way and is in danger of stumbling, almost falling down the steps. There is no help for handling the files. If this would be the situation in a bank, the probability of loss occurrence will be high and impossible to manage. The extensive discussion around the measurements and their profoundly increased sophistication has made one point very clear: the increased need to interpret the data. This represents the acknowledgement of the futility of data collection for its own sake on a new level. Bauer makes the paradigm shift astonishingly clear:

In view of this the meticulous pushing through of complex regulations in each and every detail comes second. This has become even more true since Basel II. (*ibid.*: 11)

This scepticism against the pure reliance of quantification results in the acceptance of the fact that advanced internal risk measurement is a necessary but by no means sufficient element of risk management (*ibid.*: 8). Therefore Pillar 2 draws on the internal management and steering processes, the internal control processes and the risk management. Pillar 2 expresses the conviction that only these qualitative 'soft factors' decide about the effectiveness of the risk measurements in Pillar 1. Thus Bauer's (*ibid.*: 7) statement: 'Pillar 2 is placed in the middle. And that's exactly where it belongs'. Supervision has to become a qualitative supervision with a focus on the quality of these processes. This approach is not completely new. Parallel to the efforts of refining the risk models by banks in the time before Basel II, qualitative measures which were only briefly mentioned in laws concerning the soundness of the banking business were already detailed and set into practice via regulations by national regulatory authorities. These so-called 'minimum requirements' are rules for the organisation like the segregation of duties, rules for checks in processes, or rules for internal auditing. These rules set standards which have to be fulfilled by a bank within the areas credit business, trading and internal auditing.⁵

The Basel II Framework is another step into this direction. It is part of the 'audit explosion' (Power, 1994). It describes bureaucratic procedures which can be used for internal and external verification. The point is not that risks are discovered and met with adequate action but that there are procedures which describe the necessary action. An audit will check if these procedures are in place and if they are documented in a way that externals can understand but the audit will not judge the success or failure of the procedures, i.e., if the bank's judgements about the risk situation is correct or not. This remains the bank's sole responsibility. 'A pervasive feature of audits is that they work not on primary activities but rather on other systems of control' (*ibid.*: 6). Without using the terminology Power describes the creation of another hyperreal activity. Auditing can operate completely detached from primary activities. For risk management it can be claimed that Pillar 2, placed in the middle, 'exactly where it belongs', as Bauer (2004: 7) states, liberated the audit from risk management's original idea. The auditing of risk management processes aims less at real dangers, the original risks in the

banking business, but more on good organisation. The banks are obliged to show how they organise risk management, and this is evaluated.

Market discipline shall complement the minimum capital requirements and the supervisory process. It tries to give the answer to the question how the heterogeneous landscape of risk management, which will emerge from the regulation, and the obvious imbalance to the controlling abilities of the authorities can be matched. The Committee's answer is market discipline. With a set of disclosure requirements market participants shall be able to assess key pieces of information on the scope of application, capital, risk exposures, risk assessment processes, and hence the capital adequacy of the institution. The pressure to behave according to standards in risk management is transferred to the market participants in the conviction that they have the deepest interest in the stability of their counterparts. 'The Committee believes that providing disclosures that are based on this common framework is an effective means of informing the market about a bank's exposure to those risks and provides a consistent and understandable disclosure framework that enhances comparability' (BIS, 2004: no. 810). Pillar 3 rests on the assumption that market participants evaluate their deals with counterparts in the financial markets by the same risk management preferences as with other counterparts or customers. Counterparts are rated and the conditions of the deals are dependent on the rating. Disclosure of information on risk handling then means the possibility for counterparts to judge each other according to sound risk management. A bad rating makes business more expensive and the bank will be less competitive. This, so is the logic of disclosure, will be avoided by market participants.

The supervisor is the groundkeeper who looks after the disclosure of the banks but he does not judge the information published. Market discipline shall help the supervisor via the counterpart's reaction on the information published regarding the conditions of deals made between the market's participants. Bauer admits that the complexity of the markets becomes too much for the national supervisors. The supervisor may answer with accordingly complex regulations but is immediately faced with enormous difficulties of enforcement. His answer is: 'Create a team-mate. Pillar three is about the external team-mate, the market. It is armed by the disclosure of information demanded by the regulations to punish high risks, unconvincing business models, or bad management by the means of the market' (Bauer, 2004: 10).

The supervisor's discomfort can clearly be seen. Afraid of the risks from the excesses in business, perfectly aware of their own limits in meeting these excesses with controlling on the same level, they look for limits which work. To paraphrase Baudrillard (1992) Basel II can be interpreted as the attempt to find new limits in the life after the orgy while accepting the euphoria of ever increasing business. Basel II avoids the prohibition which always only creates a black market. It is more the tentative attempt of orientation in a self created environment which continuously develops and may show unpredicted effects like new bubbles. Looking from the outside into the ever faster developing financial markets the message could be understood as: 'If you want to go on making business as you are used to, you have to create and maintain the conditions of the possibility of the market's existence yourself'. This is not possible any more by a heroic act of legislation by a supervisory authority. A law would be overtaken before it is passed. Basel II recalls and simulates the economic logic of the system. It is, to put it into an excessive wording, the feedback of the liver function reading into binge-drinking to encourage the mates to turn the tap if one of them can't get enough.

THE DISPLACED WORLD OF RISKS AND RULES

Another interpretation rests on less obvious considerations, at least when judged from the claim which laws, rules and regulations have, namely, that they should be followed or obeyed

and if not, there will be serious consequences in the form of persecution and punishment, or what is called 'appropriate supervisory action' (BIS, 2004: 162) in the Basel II terminology. That this is an ideal belongs to our common knowledge: before persecution somebody has to notice the rule's violation, the one who notices has to be concerned about it and to report it to the authorities and the authorities must be able to prove the violation. Above that we all perfectly know that rules are being broken, either because of ignorance about their existence, insufficient training of their implications, or consciously because it is the easiest way in a certain situation and probably no one will notice, or for gaining a personal advantage. Rules may contradict each other so that the person who should follow them has to decide which one to break to fulfil the task. Rules need exceptions, but what is counted as an acceptable exception can only be decided on the concrete case. As the rule usually has to be used in diverse contexts and changing environments, it is impossible to define the actual use and the exceptions beforehand.

These few remarks already indicate that the realm of rules and regulations is not as easy to conquer as an idea of order would like to have it. 'Paradoxes of social order' is the telling subtitle of Günther Ortmann's (2003) book 'Rule and Exception' (Regel und Ausnahme) where he intensively looks at the role of rules in an organisational context. He explores the very different modes in which the relationship between rule and exception can be interpreted to develop a more adequate understanding for the complexities involved in rule following.

Ortmann uses Derrida's concept of *différance* (Derrida, 1990) to argue that a rule can at the same time be followed and violated, that the validity is at the same time assumed but only in its application finally defined and changed or deferred (Ortmann, 2003: 25). Applying the rule always changes its meaning. The supervisor cannot finally determine the rule's use. It is always dependent on how the user understands the rule and how s/he is able to use it and how the context has to be interpreted when the rule is applied. The rule will always be supplemented in Derrida's sense of *supplément*. Any use of the rule supplements the user's interpretation qua applying the rule. Applying the rule means slightly altering its contents. Let it be to keep the rule's original intention in a changed environment, let it be a faulty application, there will be a mediation between the rule and the situation and each application will supplement to the rule in a slightly different way. Or: a violation of the rule is inherently part of every use of that rule. What we consider as rule conformity in everyday practice is a practice of repealing plus preserving in which the repealing is the tacit acceptance of the necessary alterations to achieve the intention of the issue on which the rule is to be applied (Ortmann, 2003). The supplements give meaning to what they displace. This is the solution for the fact that there is no such thing as the original situation, or, in other words, an origin. There is no immediate presence, no original perception. All immediacy is derivative. Everything starts with the mediated (Derrida, 1983: 272). A rule starts in the middle, is an intervention in an ever changing environment.

Ortmann notices the paradoxes involved here: 'Laws, institutions, rules contain imperatives which shall orient our actions, but what they explicitly mean will in a strange way only be decided during these actions, by these actions which the rules shall guide' (Ortmann, 2004: 42). Rules follow actors: Ortmann calls this reversal of the usual view that actors follow rules to the retrospective view that rules also follow actors upsetting, almost Kafkaesque, but nevertheless an inevitable ambiguity. Accepting this, the basic fictionality of organisational rules and rule following comes into sight, the paradox goes on. Organisational rules do not help because they work but because they do not work, but we, deceived or deceiving ourselves, believe in their effectiveness and make them work; or, if we do not believe in the effectiveness of the rules, we deceive others with pretending that we believe in the effectiveness and make them work in this way, performatively; or take refuge to informal, subversive means to achieve the intended goals (Ortmann, 2003: 127).

Ortmann's view about rules mirrors the enormous uncertainty in the social world. In his recent books (Ortmann, 2003, 2004) this uncertainty, fluidity, multi-perspective is not only acknowledged and taken as a topic of research to achieve a better understanding and with this achieve more order conquered from an overpowering disorder, but understood as the basic condition which will remain the point of departure for all attempts to organise or to set rules. It is the unavoidable acceptance that order and disorder are mutually dependent, that order defines itself by drawing a boundary to disorder and in this way is determined by disorder (Cooper, 1990), that a rule defines a territory in which it claims validity and the validity has always to be enforced. Order and rules are not objective facts but processes which, in absence of an objective, stable fundament, reproduce themselves. Nevertheless the result of these processes is a sufficiently reliable environment.

Replacing the term 'deceit' mentioned earlier in the context of rule following with 'as if' points into the direction Ortmann moves. He is working with the metaphor of 'bootstrapping' to illustrate his view on organisations. Bootstrapping is the fiction that we can walk over shaky ground and leave dangerous situations pulling oneself up by one's own bootstraps and lift the feet over the critical ground. When organising or writing rules we do something similar. We have an idea in mind how to proceed, how to solve a problem. However, before actually acting we do not know if that what we plan will effectively lead to the intended target. We can only judge if it was successful with hindsight. In other words: we have to act as if we are certain that we act correctly and with this fiction we are able to start and interpret the rule according to the difficulties and opportunities which emerge during our actions. We create the ground on which we stay ourselves with no foundation beyond the belief that this ground will carry us.

THE CONSEQUENCE: HYPERREAL RULE FOLLOWING?

Macintosh et al reflect about the hyperreal quality of accounting figures. For many of today's pressing accounting issues there is no underlying reality to which accounting signs refer (Macintosh *et al.*, 2000: 16). They are arbitrary, but that does not render them meaningless. Financial hyperrealities should be considered as results of extensive institutionalisations regulating the use of financial numbers in social situations. Accounting numbers are observable and verifiable *ex post* (Macintosh *et al.*, 2000). Once figures like Value at Risk are accepted in a community and above that also find acceptance in official contexts like a worldwide regulation, their definition provides a basis for using and understanding the overall risk situation without further reality testing. Numbers become social resources through their self-referential significance in institutionalised standards, they are signs within an institutionalised system of their circulation and within the system trigger specified activities. VaR is reliable not because it represents the reality but because everybody using this figure in the context of banking can be expected to use it according to the expectations of other participants. Stability of and by simulacra achieved in hyperreality: 'People who understand this see institutional information as an arbitrary but essential feature of a hyperreal world' (*ibid.*: 42). Rules and regulations may be arbitrary. Nevertheless they provide a degree of reliability on which market participants can act.

Basel II provides such a reliability despite the paradox involved in the construction. There is a telling ambiguity in Basel II's dealing with quantification. On the one hand Bauer (2004) warned of the blind belief in figures and insisted on a judgement of the whole risk management process instead of checking each and every detail. This is a refusal of fighting an excess of unlimited markets with an excess of controlling on the same level. On the other hand the supervisors produce exactly that excess which goes along with the development from

standardised to individualised approaches. The amount of data increases on two sides. Each bank is faced with rising amounts of data due to a look at the individual customer. The landscape of different risk management approaches in the banks becomes heterogeneous. The regulation co-produces the situation of which a leading supervisor warns.

Baudrillard would comment on this negatively. The show must go on paroxysmically. He would analyse the financial markets as being in the state of crisis shortly before the end which does not occur. This is how he defines paroxysm (Baudrillard, 2002). The Framework reproduces the excesses of what it intends to frame. Seen in this light it would be an instrument which prevents the end from taking place and therefore it is an instrument of simulation which keeps the financial markets in hyperreality. It guarantees the stagnation of ever faster orbital moves without meaning. The authors of the Framework of course will not accept this interpretation. Ensuring stability offers the chance of development which they want to enable but not to determine. The zest in taking the very serious world of international banking supervision as an example for the slightly frivolous statement of the French philosopher lies in the collapse of imagined and taken for granted boundaries between them. Both are aware of the fact that excesses have taken place. While Baudrillard doesn't see a solution except one that countenances the ever faster circulation of simulation, the supervisors believe in the possibility of creating new boundaries while the system, the globalised financial market, is in orbital move.

Looking at this situation with Ortmann's view of rules the precarious foundation of the regulation becomes apparent and the supervisors' attempt to alter their way of supervision is justified. Bauer's comment makes clear that the authors of the Basel II Framework realised that a traditional understanding of supervision is no longer capable of meeting the increased requirements of the markets on both sides—neither on the supervisors' side nor on the banks' side. The increased requirements of the capital markets regarding complexity, speed, volume, development of new segments and the risk deriving from these factors cannot be met any more by individuals. They can only be fulfilled by procedures which are inevitably carried out by multiple actors. Any regulation which does not consider the flexibility and quick changes of the markets and tries to cope with the risks with rigid rules will inevitably fail due to massive ignorance of these rules—either overtly by publicly fighting the inadequacy or covertly in the way of reinterpreting while applying the rules. However, the challenge reaches further. The necessary complexity of the regulation has reached a degree where no strict rule following can be expected even if the insights of *différance* and *supplément* do not belong to the background of supervisors. Considering the situation of the Basel II Framework on the background of the remarks on rule following and the somewhat swampy ground on which they are built we can notice that the regulators' situation is even more treacherous. The national supervisors have power as they have the ultimate means to enforce their interpretation: the withdrawal of the banking licence, and they are ready to take action: 'Supervisors should take appropriate supervisory action if they are not satisfied with the result of the process' (BIS, 2004: 162). However, with the definition of Pillar 3 and the judgements of competitors on the disclosed information another rather diverse interpreter appears. The supervisors will have difficulties to enforce an interpretation against the will of the market expressed by the acceptance of the risk management of the bank in question. The Framework's rules will also be developed, i.e., repealed and preserved by the generally accepted behaviour of market participants.

A more traditional view would interpret this understanding as an additional source of uncertainty, perhaps even as an invitation to corruption. In a world where rules are seen as a fixed set of actions or behaviour, instructions as outside of the scope of the actors, and clear criteria can be given if the rule had been followed or not, this understanding of rule following must be a nightmare. Understanding rules as dependent on their application and subject to

repealing plus preserving opens the view for another handling of unstable environments: a co-existence of a further development of methods in the regulated world and a Framework acknowledging that it is not able to cover these developments adequately in due time but providing room for future enhancements, a supervisor judging the whole procedure of risk management instead of every detail of the rules, and participants judging each other.

The ongoing ambivalence can be demonstrated by the fact that despite the authors' consciousness of the regulation's necessary own limits as described above the striving after completeness is still expressed in the regulation's expansive mode. The number of risks to be quantified and controlled has been largely expanded. To beat that the second pillar explicitly asks for the treatment of risks not fully or not at all included in the first pillar (BIS, 2004: no. 724). This is a striving for completeness and perfection which can well be seen as a final excess itself. Seel (2004) suggests a deconstruction in Derrida's sense as a chance to overcome the neurosis of transparency, completeness and perfection. Neurosis shall indicate that we might be driven to achieve waterproof theories and, as I would add, waterproof regulations, but that this is in vain facing an ever changing, uncertain environment. Deconstruction made us aware that all our notions, definitions and theories are bound to time and the immense variety of human practices and therefore we can only achieve more or less satisfying and ever newly to be acquired explications of our actions. Connecting this with the metaphor of bootstrapping again we can state that the supervisors create a fiction on how to achieve the intended target of stability despite the uncertainties and intransparencies. We can only judge if the approach taken is successful *ex post*, with hindsight after the rules are used for some time and should not be surprised by the differences to the written text. The supervisors have to act as *if* they are certain that their proceeding is correct. Bootstrapping as exit for excesses in hyperreality: the supervisors have gone a longer way than they probably had imagined.

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NOTES

1. A derivative, e.g., a future or an option, is a financial instrument whose value depends on the price of another asset, the 'underlying'.
2. The naming of the regulation's chapters as pillars and an image on Bundesbank's homepage (see http://www.bundesbank.de/bankenaufsicht/bankenaufsicht_basel.php) resembling a temple inspired me for this drawing.
3. Given the reference made to Strange's (1986) term 'Casino Capitalism', the naming of a simulation model after a city famous for its casinos by professionals hints at least to a solid sense of irony, if not a clear consciousness of what they are actually doing: playing games on a global level. The origin of risk management and the calculation of probabilities in gambling is well researched (Hacking, 1975).
4. All direct quotes from German originals have been translated by the author.
5. In Germany the requirement of soundness is part of the German Banking Act (KWG—Kreditwesengesetz) and for trading of WpHG (Wertpapierhandelsgesetz) and are detailed in the minimum requirements.

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