THIRD COUNTRY CCP SUPERVISION AS A CATALYST FOR MORE CENTRALIZED EU CCP SUPERVISION?

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ABSTRACT

In early 2022, a UK CCP canceled some $4 billion of transactions in the war-affected nickel market, triggering outrage from market participants that were in the money. The 'nickel debacle' illustrates that CCP risk management and loss absorption mechanisms may result in value redistribution among stakeholders. With CCP stakeholders located in multiple jurisdictions, crisis management decisions from a single-jurisdiction CCP supervisor may not pursue multi-jurisdictional financial stability or a fair balance of stakeholder interests across jurisdictions. Although the case for centralized supervision of EU CCPs thus appears strong, national concerns have persistently blocked increased centralization. This paper re-examines decentralized EU CCP supervision in light of the much-debated post-Brexit centralized EU supervisory regime for systemically important third country CCPs. Two new arguments emerge from this juxtaposition, revealing a dichotomy between the named supervisory regimes that appears hard to justify. First, a decentralized supervisory regime for EU CCPs is difficult to logically square with the policy arguments underpinning the post-Brexit EU supervisory system for systemically important third country CCPs. Secondly, the controversial location policy for 'too systemically important' third country CCPs could be more justifiable if the EU were to adopt centralized EU supervision of systemically important EU CCPs.

§ 1. INTRODUCTION

A. REGULATION AND SUPERVISION OF CCPS

Central counterparties (CCPs) have rightfully been labeled as the nuclear powerhouses of modern financial markets.[2] Trillions of euros now change hands through these institutions every year.[3] In its essence, a CCP is a legal entity that interposes itself between the initial counterparties to the contracts traded on (financial) markets, becoming the buyer to every seller and the seller to every buyer.[4] This means that, after CCP interposition, two mirroring legally binding contracts come into existence between the CCP and the respective entities on both sides of the transaction. If a CCP interposes itself into a financial transaction, the initial counterparties to the contract are shielded from the direct repercussions of their initial counterparty's failure to meet its contractual

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[2] N. MOLONEY, "Brexit and Financial Services: (Yet) Another Re-Ordering of Institutional Governance for the EU Financial System?", *Common Market Law Review* 2018, vol. 55, (175) 181.

[3] See *e.g.,* BIS, *Global OTC derivatives market*, table D5.1, available via https://stats.bis.org/statx/srs/table/d5.1.

[4] From a legal perspective, CCP interposition either occurs through novation or open offer. With novation, existing contracts that are submitted to the CCP will be novated into two novel contracts, with each of the initial counterparties facing the CCP on the two new contracts. With open offer, the CCP issues a public statement in which it asserts that it aims to be contractually bound if two eligible counterparties come to an agreement about the terms of a transaction. See *e.g.,* C. CHAMORRO-COURTLAND, "Counterparty Substitution in Central Counterparty (CCP) Systems", *Banking and Finance Law Review* 2010, vol. 26, 519-542.

obligations, *i.e.,* they are protected against the counterparty risk *vis-à-vis* their initial counterparty.[5]

Naturally, the CCP will only be successful in protecting the non-defaulting market participants from the direct repercussions of a market participant's default to the extent that it does not fail itself, *e.g.,* as a result of the default of a market participant or the materialization of operational risk. To guarantee its safety and reliability, the CCP has various mechanisms in place to facilitate its role as institutionalized risk manager and loss absorber, meaning that stringent conditions are imposed upon the market participants who directly interact with the CCP (the 'clearing members'[6]). Among other things, the CCP will apply risk mitigation mechanisms to minimize losses arising from clearing member default (*e.g.,* margin requirements)[7] and devise a multi-layered defensive mechanism for loss absorption (the 'default waterfall'). A vital element of the CCP default waterfall is the 'default fund', which is financed by contributions from the clearing members, forcing surviving clearing members to foot part of the bill that may arise from clearing member default.[8] Hence, from an economic point of view, central clearing through a CCP may under certain conditions function as a risk mutualization mechanism.[9]

To protect CCPs from failure and in line with the Principles for Financial Market Infrastructures (PFMIs) from the Committee on Payments and Market Infrastructures (CPMI)[10] and the International Organization of Securities Commissions (IOSCO),[11] major financial market jurisdictions have subjected CCPs to extensive sets of legislative, regulatory, and supervisory requirements. In the EU, these requirements mainly follow from the 2012 European Market Infrastructure Regulation (EMIR)[12]—which has been amended on multiple occasions, but most substantively by the EMIR Refit (May 2019)[13] and EMIR 2.2 (December 2019)[14]—and the 2021

[5] From an economic perspective, a CCP may thus be regarded as a 'commitment mechanism' seeking to assure performance of contractual obligations. See R. T. COX, R. S. STEIGERWALD, *A CCP is a CCP is a CCP*, Policy Discussion Paper Federal Reserve Bank of Chicago no. 2017-01, April 2017, 2, available via https://www.chicagofed.org/publications/policy-discussion-papers/2017/pdp-1.

[6] Market participants that are not recognized as clearing members by the CCP because they cannot—or do not want to—meet the CCP access requirements may still have their contracts cleared through a CCP. To that end, these so-called 'clients' (in US terminology: 'customers') have to establish a contractual relationship with a clearing member of a CCP, who in turn has access to the CCP.

[7] Margin requirements oblige clearing members to provide collateral (*i.e.,* cash or highly liquid financial assets) as a security against the counterparty risk that the CCP faces *vis-à-vis* the clearing members, *i.e.,* the costs that may arise upon clearing member default.

[8] *Cf. e.g.,* M. WEBER, "Central Counterparties in the OTC Derivatives Market from the Perspective of the Legal Theory of Finance, Financial Market Stability and the Public Good", *European Business Organization Law Review* 2016, vol. 17, (71) 83; Y. YADAV, "Clearinghouses and Regulation by Proxy", *Georgia Journal of International and Comparative Law* 2014, vol. 43, (161) 169.

[9] *Cf. e.g.,* H. PEIRCE, "Derivatives Clearinghouses: Clearing the Way to Failure", *Cleveland State Law Review* 2016, vol. 64, (589) 602; C. PIRRONG, "The Clearinghouse Cure", *Regulation* 2008, vol. 31, (44) 45.

[10] At the time of the adoption of the principles, the CPMI was known as the Committee on Payment and Settlement Systems (CPSS).

[11] CPSS-IOSCO, *Principles for financial market infrastructures*, April 2012, available via https://www.bis.org/cpmi/publ/d101a.pdf, 182 p.

[12] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, *OJ L* 201, 27 July 2012, 1.

[13] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, *OJ L* 141, 28 May 2019, 42.

[14] Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third country CCPs, *OJ L* 322, 12 December 2019, 1.

CCP Recovery and Resolution Regulation (CCPRRR)[15]. The necessity of an adequate normative framework for CCPs has soared over the last decade in parallel with the increased usage of CCPs in the aftermath of the 2008 financial crisis, which was partly induced by a consensus among international policymakers to push for increased CCP usage, especially in the over-the-counter (OTC) derivatives markets.[16] Together with an increased market demand for central clearing after the 2008 financial crisis,[17] this policy push for a wider adoption of central clearing has turned CCPs into systemically important risk nexuses. As Ben BERNANKE, former Chairman of the Board of Governors of the US Federal Reserve System, once stated with respect to CCP safety: "*if you put all your eggs in one basket, you better watch that basket*".[18]

In light of the pivotal role that CCPs play in modern financial markets and the impact that the malfunctioning of CCPs could produce for financial markets and the real economy, all major financial markets jurisdictions have designed rules to determine under what conditions domestic and foreign CCPs may obtain and retain access to the market for clearing services in a given jurisdiction, *i.e.,* under what conditions CCPs may provide clearing services to the entities established (or persons residing) in that jurisdiction. Initial and ongoing compliance with the applicable set of conditions is verified by the relevant supervisors, who may penalize a CCP for non-compliance or, ultimately, withdraw the CCP's license to operate within the jurisdiction. The precise characterization of the market access conditions for CCPs is highly controversial among legislators and regulators. For example, with the largest CCPs for euro-denominated contracts and EU market participants being located in the UK, Brexit has pushed the matter of CCP market access and supervision to political center stage in the EU.[19] This could be seen in 2019 when EU and US regulators heavily collided on the EU-criteria to be employed for determining whether CCPs established outside of the EU should be subjected to EU regulation and supervision.[20]

B. THESIS AND CONTENTS OF THE PAPER

Impelled by extreme market volatility at the outset of the war in Ukraine, a UK-based central counterparty (CCP) cancelled some $4 billion in centrally cleared nickel transactions, triggering outrage and lawsuits from the market participants that stood to make money on the annulled transactions. Although CCPs provide services that are critical to large segments of modern financial markets, the 'nickel debacle' illustrates that risk management and loss absorption mechanisms employed by CCPs may in times of crisis result in value redistribution among

[15] Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132, *OJ L* 22, 22 January 2021, 1.

[16] See most prominently: G20, *Leaders' Statement: The Pittsburgh Summit,* 24-25 September 2009, recital 13, bullet 3, available via https://g20.org/en/g20/Documents/2009-Pittsburgh_Declaration.pdf.

[17] P. NORMAN, *The Risk Controllers: Central Counterparty Clearing in Globalised Financial Markets*, Chichester, Wiley, 2011, 298 and 313. *Cf.* CPSS, *Market structure developments in the clearing industry: implications for financial stability*, November 2010, 20, available via https://www.bis.org/cpmi/publ/d92.htm.

[18] B. S. BERNANKE, *Clearinghouses, Financial Stability, and Financial Reform*, remarks at the 2011 Federal Reserve Bank of Atlanta Financial Markets Conference, Stone Mountain, Georgia, 4 April 2011, 9, available via https://www.federalreserve.gov/newsevents/speech/files/bernanke20110404a.pdf.

[19] *Cf. e.g.,* H. JONES, D. MILLIKEN, "UK will resist 'dubious' EU pressure on banks, says BoE's Bailey", *Reuters*, 24 February 2021, available via https://www.reuters.com/article/britain-eu-bailey/update-1-uk-will-resist-eu-pressure-on-banks-over-clearing-boes-bailey-idUSL1N2KU1N9; H. JONES, "Brussels says it won't be rushed on City of London access to EU", *Reuters*, 19 January 2021, available via https://www.reuters.com/article/idUSL8N2JU5DX.

[20] See *e.g.,* CFTC, Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, Notice of proposed rulemaking, 84 FR 34819 (July 19, 2019), at 34835 (statement by CFTC Commissioner QUINTENZ). *Cf.* P. STAFFORD, "US lawmakers called EU derivatives markets plans 'retribution'", *Financial Times* 26 June 2019, available via https://www.ft.com/content/f720b74e-982c-11e9-8cfb-30c211dcd229.

stakeholders. With CCP stakeholders located in multiple jurisdictions, crisis management decisions from a single-jurisdiction CCP supervisor may not pursue multi-jurisdictional financial stability or a fair balance of stakeholder interests across jurisdictions. Although the case for centralized supervision of EU CCPs thus appears strong, national concerns have persistently blocked increased centralization. Nevertheless, despite multiple attempts to centralize supervision of EU CCPs at the EU-level, EU CCP supervision has remained primarily a competence of the national supervisors in the member states, mainly to keep supervisory powers aligned with fiscal responsibilities in case of CCP failure. This paper re-examines decentralized EU CCP supervision in light of the much-debated post-Brexit centralized EU supervisory regime for systemically important third country CCPs. Two new arguments emerge from this juxtaposition, revealing a dichotomy between the named supervisory regimes that appears hard to justify. First, a decentralized supervisory regime for EU CCPs is difficult to logically square with the policy arguments underpinning the post-Brexit EU supervisory system for systemically important third country CCPs. Secondly, the controversial location policy for 'too systemically important' third country CCPs could be more justifiable if the EU were to adopt centralized EU supervision of systemically important EU CCPs. Building upon these two arguments, the paper hypothesizes that the post-Brexit system of third country CCP supervision may serve as a catalyst for more centralized EU CCP supervision.

The remainder of this manuscript is structured as follows. First, a second section will identify how supervision of EU CCPs is currently structured in the EU. Secondly, a third section will examine the EU-framework for the supervision of third country CCPs, with a focus on the post-Brexit developments in relation to third country CCPs that are considered to be systemically important for the financial stability of the EU or the member states. Thirdly, a fourth section will assess the merits and drawbacks of a potentially more centralized EU system for EU CCP supervision. Fourthly, a fifth section will submit that the current system for EU CCP supervision is difficult to logically square with the post-Brexit EU regime for third country CCP supervision and that the post-Brexit regime for third country CCP supervision could serve as a catalyst for a system of more centralized EU CCP supervision. Finally, a last section will conclude.

§ 2. AUTHORIZATION AND ONGOING SUPERVISION OF EU CCPS

A. AUTHORIZATION

Any legal person established in the EU aiming to provide clearing services as a CCP has to apply for authorization to the national competent authority (NCA) of the member state where it is established.[21] When an applicant CCP applies for authorization, its NCA must verify whether the applicant meets all the EMIR-requirements for CCPs.[22] The EMIR-prescriptions for CCPs mainly consist of prudential requirements, conduct of business rules, and organizational requirements.[23] If the NCA is satisfied that there is full compliance with the relevant EMIR-requirements and if a notification has been sent to the European Securities and Markets Authority (ESMA) about the inclusion of the applicant as a 'system' in the scope of the Settlement Finality Directive (SFD),[24] it

[21] Art. 14(1) EMIR. See more in detail on the scope of the CCP authorization requirement under EMIR: E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 403-407.
[22] Art. 17(4)(1) EMIR.
[23] See title IV EMIR.
[24] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, *OJ L* 166, 11 June 1998, 45.

shall in principle grant CCP authorization to the applicant.[25] At the time of writing, only fourteen CCPs were authorized under EMIR.[26] This means that not all EU member states have a CCP that has been established within their territory and that some NCAs are currently not involved in supervising CCPs established in their jurisdiction.[27] As will be seen in the remainder of this paper, the sparsely populated market for clearing services has important implications for the political viability of a more centralized supervisory system for EU CCPs.

Although a CCP authorization granted by the relevant NCA functions as a union-wide 'passport',[28] allowing the concerned CCP to provide clearing services as a CCP throughout the EU, the ultimate power to grant authorization has not been bestowed upon an actor at the EU-level. Accordingly, the power to authorize EU CCPs is a competence that has remained largely decentralized at the level of the member states. However, as a counterbalance to the primacy of the NCA in the CCP authorization process, EMIR requires NCAs to establish a CCP supervisory college for each legal entity that applies for CCP authorization ('EMIR college').[29] EMIR colleges, which sometimes count up to twenty members,[30] consist of the NCA of the CCP (chairing the college), other relevant competent authorities (*e.g.,* the competent authorities supervising the clearing members of the CCP)[31], relevant central banks (*e.g.,* the central banks of issue of the Union currencies of the financial instruments cleared by the CCP), and the ESMA CCP Supervisory Committee[32] (on a non-voting basis)[33].[34] For what regards the CCP authorization procedure, the baseline scenario is that the EMIR college shall in principle adopt a non-binding opinion on whether the applicant CCP indeed complies with all relevant EMIR-requirements.[35] In case of a negative opinion from the EMIR college, two exceptions exist to the non-binding character of the opinion. First, if all members of the EMIR college, excluding the authorities from the member state in which the CCP is established, reach a joint opinion by mutual agreement that the CCP should not be authorized because it does not comply with all relevant EMIR-requirements, the NCA is not allowed to grant

[25] Art. 17(4)(1) EMIR.
[26] See ESMA, *List of Central Counterparties authorised to offer services and activities in the Union*, last updated on 10 November 2022, available via https://www.esma.europa.eu/sites/default/files/library/ccps_authorised_under_emir.pdf.
[27] In Belgium, for example, the Financial Services and Markets Authority (FSMA) and the National Bank of Belgium (NBB) were co-designated as NCAs, but no CCP has been established in Belgium so far.
[28] Art. 14(2) EMIR. See in this context also art. 15(2) EMIR.
[29] Art. 18(1) EMIR. In addition to the EMIR colleges and in line with good international practice, the lead supervisors of certain regionally or globally active CCPs have also established 'global CCP colleges', which seek to unite all relevant supervisors within a single college. *Cf*. IOSCO, *Lessons Learned from the Use of Global Supervisory Colleges*, January 2022, available via https://www.iosco.org/library/pubdocs/pdf/IOSCOPD696.pdf.
[30] EUROPEAN COMMISSION, *Commission Staff Working Document: Impact assessment accompanying EMIR 2.2*, 13 June 2017, SWD(2017) 246 final, 10.
[31] For the banks that are subject to ECB supervision, this will be the ECB. If the ECB is also part of the CCP college in its capacity of central bank of issue, it will have two votes (art. 19(3)(3) EMIR).
[32] The CCP Supervisory Committee is a permanent internal ESMA committee that is responsible for certain CCP-related matters and which is structurally separated from the other functions of ESMA (art. 24a EMIR). Ex art. 41 ESMA Regulation, the Board of Supervisors of ESMA may establish internal committees to which it may delegate specific tasks that are attributed to the Board. The ESMA Regulation refers to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ L* 331, 15 December 2010, 84. Voting powers within the CCP Supervisory Committee are divided between three full-time independent members that have been appointed by ESMA's Board of Supervisors and the NCAs of the member states that have an authorized CCP within their jurisdiction. See on the CCP Supervisory Committee also: ESMA, *Terms of Reference for the CCP Supervisory Committee*, 13 November 2019, ESMA22-328-271, available via https://www.esma.europa.eu/sites/default/files/library/esma22-328-271_terms_of_reference_ccp_supervisory_committee.pdf.
[33] See art. 19(3)(4) EMIR.
[34] See more in detail: art. 18(2) EMIR.
[35] Art. 19 EMIR.

authorization.[36] Secondly, a negative college opinion delivered with a majority of at least two-thirds of the college enables any involved competent authority to refer the matter to ESMA in accordance with art. 19 ESMA Regulation.[37] Pursuant to art. 19 ESMA Regulation,[38] ESMA shall mediate between the involved authorities or, if reconciliation attempts fail, issue a binding decision to be implemented by the NCA.[39]

As all supervisory colleges, the EMIR college seeks to unite home and host country authorities within a single supervisory body.[40] The combination of supervision by the home jurisdiction supervisor and a more multi-jurisdictional supervisory perspective through the involvement of host country supervisors in the college may be viewed as practical yet incomplete solution for the supervision of internationally active financial institutions for which full centralization of supervisory powers at the international or supranational level is politically unfeasible. However, since the different national supervisors within a CCP college can be expected to protect the interests of the constituents from their respective jurisdictions and because the interaction within a college creates procedural complexity, coordination through supervisory colleges is no substitute for a truly centralized supervisory mechanism.[41]

B. Ongoing Supervision

As with CCP authorization, the EU system for ongoing supervision of EU CCPs is primarily decentralized at the level of the member states, rendering the NCA responsible for the periodic review of the CCP's compliance with EMIR and the evaluation of the risks to which the CCP might be exposed.[42] However, different from the detailed provisions on the distribution of powers (and associated complex coordination procedures) in the CCP authorization stage, EMIR contains less prescriptions with respect to ongoing supervision and associated administrative sanctions. Arguably, this leaves more room to NCAs to swiftly respond to crisis situations, with fewer formal requirements on coordination with the EMIR colleges and ESMA.

Indeed, EMIR does not generally elaborate on the supervisory and investigatory powers that should be bestowed by the member states upon the NCAs. In contrast to *e.g.,* the extensive list of supervisory and investigatory powers that the Markets in Financial Instruments Directive (MiFID II)[43] requires member states to bestow upon NCAs,[44] EMIR in principle only requires each member state to "*ensure that the competent authority has the supervisory and investigatory powers necessary for the exercise of its functions.*"[45] Similarly, EMIR requires that member states ensure that pursuant to national law appropriate administrative measures can be taken or imposed

[36] Art. 17(4) EMIR. See also arts. 32(1)(4), 35(1)(2), and 49(1)(2) EMIR. If the NCA disagrees with the veto from the EMIR college, it may refer the matter to ESMA in accordance with art. 19 ESMA Regulation (art. 17(4)(6) EMIR). See below for full reference to the ESMA Regulation.
[37] Art. 17(4)(4) EMIR.
[38] The ESMA Regulation refers to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ L* 331, 15 December 2010, 84.
[39] See, ultimately, also: art. 19(4) ESMA Regulation.
[40] See also: art. 21 ESMA Regulation.
[41] *Cf*. D. E. ALFORD, "Supervisory Colleges: The Global Financial Crisis and Improving International Supervisory Coordination", *Emory International Law Review* 2010, vol. 24, (57) 58.
[42] Art. 21 EMIR.
[43] MiFID II refers to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJ L* 173, 12 June 2014, 349.
[44] Art. 69 MiFID II.
[45] Art. 22(2) EMIR. See, however, on the withdrawal of authorization: art. 20 EMIR.

against the persons responsible for non-compliance with EMIR.[46] As an exception to this baseline approach, EMIR contains an explicit legal basis for the supervisory review of alterations to risk models and parameters (art. 49 EMIR). Since risk management is the core business of CCPs, scrutiny of risk models is a pivotal tool for effective CCP supervision. Prior to implementation, all significant adjustments to the risk models and parameters employed by a CCP have to be validated by the NCA and ESMA.[47] This means that the NCA and ESMA both have a veto right to block significant risk model alterations.[48] The veto right of ESMA puts an important check on the role of the NCAs in the ongoing supervision of EU CCPs.[49] In sum, whereas the day-to-day supervision of EU CCPs is still the competence of the NCA, supervisory control of risk models and parameters is a shared responsibility of the NCA and ESMA.

In addition to hard powers with respect to risk model validations, ESMA also fulfils a coordinating role between competent authorities and across EMIR colleges with a view to building a common supervisory culture and consistent supervisory practices, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact.[50] This role is executed through, among other things, providing opinions on draft authorization decisions, monitoring the convergence and coherence in the application of EMIR among the relevant supervisory authorities in member states (and third countries), conducting peer review analyses of the supervisory activities of all NCAs, and initiating EU-wide assessments of CCP resilience to adverse scenarios.[51] Viewed together, these responsibilities allow ESMA to actively foster convergence and coherence with respect to the application of EMIR.

§ 3. RECOGNITION AND ONGOING SUPERVISION OF THIRD COUNTRY CCPS

A. RECOGNITION

CCPs established in third countries aiming to offer clearing services to clearing members or trading venues established in the EU cannot make use of the authorization procedure describe above. Instead, they must apply for 'recognition' by ESMA.[52] In contrast to the primarily decentralized authorization regime for EU CCPs, the market access regime for third country CCPs is thus fully centralized at the EU-level. Since the adoption of EMIR 2.2, the conditions pursuant to which ESMA may grant recognition differ depending on whether the applicant third country CCP has been categorized by ESMA as a CCP that is non-systemically important (tier one CCP (T1 CCP)) or a CCP that is systemically important or likely to become systemically important for the financial stability of the EU or one of its member states (tier two CCP (T2 CCP)).[53] At the time of writing, ESMA had categorized two (UK-based) third country CCPs as T2 CCPs: LCH Ltd. and ICE Clear

[46] Art. 22(3) EMIR.
[47] Art. 49(1)(1) EMIR.
[48] Art. 49(1e) EMIR.
[49] ESMA also holds autonomous powers that may function as a second counterbalance to the supervisory primacy of the NCA. That is, ESMA has the power to request a formal opinion from the European Commission requiring an NCA that has incorrectly applied EMIR to take all actions necessary to rectify the situation and comply with EMIR. See art. 17(5)(1) EMIR in conjunction with art. 17 ESMA Regulation.
[50] Art. 23a(1) EMIR.
[51] See arts. 23a and 24a EMIR.
[52] Art. 25 EMIR.
[53] Art. 25 EMIR; Commission Delegated Regulation (EU) 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, *OJ L* 305, 21 September 2020, 7.

Europe Ltd.[54] All other recognized third country CCPs have been placed in the T1-bucket by ESMA.[55]

For T1 CCPs, the two most important recognition criteria are that (i) an equivalence decision from the European Commission must be in place with respect to the relevant third country regulatory framework for CCPs; and (ii) the CCP must have been authorized and be subject to effective supervision and enforcement in its home jurisdiction.[56] In addition to the recognition requirements that T1 CCPs have to satisfy, T2 CCPs must meet supplementary requirements to be able to obtain recognition by ESMA.[57] Most importantly, T2 CCPs shall only receive recognition if they comply on an ongoing basis with virtually all material EMIR-requirements for CCPs.[58]

However, even if a T2 CCP complies with EMIR, EMIR 2.2 has empowered ESMA to conclude, on the basis of a fully reasoned assessment and commensurate with the degree of systemic importance of the CCP, that a third country CCP or some of its clearing services are of such substantial systemic importance that that CCP should not be recognized to provide these clearing services (T2+ CCP).[59] In its assessment of the 'too systemically important' nature of a third country CCP or its clearing services, ESMA must *inter alia* explain how compliance with the 'regular' conditions for T2 CCPs would not sufficiently address the financial stability risk for the EU or its member states and provide a quantitative technical cost-benefit analysis of a decision not to recognize, or limit the scope of the recognition of, a third country CCP.[60] On the basis of its assessment, ESMA shall then recommend that the European Commission adopt an implementing act confirming that that CCP should not be recognized to provide certain clearing services or activities.[61] At the end of 2021, ESMA published an assessment report in the sense of art. 25(2c) EMIR in relation to two UK CCPs (LCH Ltd. and ICE Clear Europe Ltd.), concluding that the costs of a decision to not recognize the examined clearing services of the involved CCPs would for the time being outweigh the benefits, *inter alia* because of the market and liquidity fragmentation that would occur in case UK CCPs were to be barred from providing certain clearing services.[62] Such fragmentation could jeopardize effective risk and clearing member default management at CCPs,

[54] ESMA, *List of third-country central counterparties recognized to offer services and activities in the Union*, last updated on 4 January 2021, ESMA70-152-348, available via https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf.

[55] ESMA, *List of third-country central counterparties recognized to offer services and activities in the Union*, last updated on 4 January 2021, ESMA70-152-348, available via https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf.

[56] Art. 25(2) and (6) EMIR.

[57] Art. 25(2b) EMIR.

[58] Art. 25(2b)(a) EMIR. These provisions consist of arts. 16 and 26-54 EMIR. Only art. 7 EMIR regarding non-discriminatory CCP access requirements is exempted. It must be noted that for the assessment of T2 CCP compliance with EMIR, ESMA shall consider the extent to which a CCP's compliance with those requirements may be deemed satisfied by its compliance with comparable requirements applicable in its home jurisdiction ('comparable compliance'). Arts. 25(2b)(a) and 25a EMIR. See more in detail: Commission Delegated Regulation (EU) 2020/1304 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the minimum elements to be assessed by ESMA when assessing third-country CCPs' requests for comparable compliance and the modalities and conditions of that assessment, *OJ L* 305, 21 September 2020, 13.

[59] Art. 25(2c)(1) EMIR.

[60] Art. 25(2c)(1) EMIR.

[61] Art. 25(2c)(2) EMIR.

[62] ESMA, *Assessment Report under Article 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd*, 16 December 2021, ESMA91-372-1945, 141, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_1of2.pdf (part one) and https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_2of2.pdf (part two).

which could in turn produce financial stability risks.[63] In line with its conclusion, ESMA did not issue a recommendation to the Commission to adopt an implementing act specifying that the involved CCPs should not be recognized to provide the identified clearing services.[64]

If ESMA were to issue a recommendation for derecognition to the Commission in the future, the Commission may, as a measure of last resort, adopt an implementing act specifying that some or all of the clearing services of the concerned third country CCP can only be provided to EU clearing members and trading venues after the CCP has been authorized under EMIR.[65] Since only legal persons established in the EU can apply for authorization under EMIR, this provision effectively establishes a 'location policy',[66] which means that the concerned CCP would have to relocate and provide its clearing services from within the EU if it wants continued access the EU market for clearing services. The EU legislative and regulatory framework does not contain quantitative or detailed qualitative criteria to determine whether a third country CCP can be deemed too systemically important.[67] Needless to say, the CCP location policy introduced by EMIR 2.2 has been ill-received by third country regulators and supervisors.[68]

B. Ongoing Supervision

EMIR 2.2 has made ESMA responsible for the supervision of T2 CCPs for what regards their compliance with the relevant EMIR-requirements.[69] In line with the centralized recognition regime, the system for ongoing EU supervision of T2 CCPs is thus also fully centralized at the EU-level. As T2 CCPs remain subject to home country regulation and supervision, the EU-regime for T2 CCPs has resulted in a 'shared control' model of supervision.[70] In order to allow ESMA to carry out its supervisory duties under EMIR with regard to T2 CCPs, EMIR has bestowed investigatory

[63] E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 502 *et seq*.

[64] ESMA, *Assessment Report under Article 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd*, 16 December 2021, ESMA91-372-1945, 141, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_1of2.pdf (part one) and https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_2of2.pdf (part two).

[65] Art. 25(2c)(4)(a) and (6) EMIR.

[66] Prior to EMIR 2.2, the European Central Bank (ECB) had already tried to establish a form of CCP location policy, requiring CCPs with an average daily net exposure of more than five billion euros in euro-denominated derivatives to be incorporated in the euro area (ECB, *Eurosystem Oversight Policy Framework*, July 2011, 10, available via https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework2011en.pdf). However, the attempt from the ECB to establish this location policy failed because the policy was successfully challenged by the UK and annulled by the General Court of the EU in 2015 for lack of clear legal basis. See Case T-496/11, *UK* v. *ECB*, EU:T:2015:133. See for comments on the decision, *e.g.*: E. ANANIADIS-BASSIAS, "The ECB's 'location policy' for central counterparties: is the General Court drawing a line, or taking one step back to take two steps forward?", *European Law Review* 2016, vol. 41, 122-130; H. MARJOSOLA, "Missing Pieces in the Patchwork of EU Financial Stability Regime? The Case of Central Counterparties", *Common Market Law Review* 2015, vol. 52, 1491-1528. For the updated version of the Eurosystem oversight policy framework, see: ECB, *Eurosystem oversight policy framework: Revised version*, July 2016, available via https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework201607.en.pdf.

[67] See, however: ESMA, *Methodology for assessing a Third Country CCP under Article 25(2c) of EMIR, 12 July 2021*, ESMA91-372-1436, available via https://www.esma.europa.eu/sites/default/files/library/methodology_for_assessing_a_tc_ccp_under_article_252c_of_emir_.pdf, 14 p.

[68] See *e.g.,* D. D. STUMP, "We must rethink our clearing house rules: The EU and US should drop duplicative registration requirements", *Financial Times* 24 January 2019, available via https://www.ft.com/content/ebed650e-1fbc-11e9-a46f-08f9738d6b2b. STUMP is a CFTC Commissioner.

[69] Art. 25b(1)(1) EMIR. See also art. 25b(1)(2) and 25b(2) EMIR.

[70] M. LEHMANN, "Brexit and CCP Supervision: From Extraterritoriality to a Model of Shared Control", *European Banking Institute Working Paper Series* 2021 - no. 101, available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3904130.

powers upon ESMA in relation to these CCPs, facilitating *e.g.*, on-site inspections and interrogations of CCP staff.[71]

In the same vein, Annex III to EMIR outlines a list of all EMIR-infringements that may be penalized by ESMA if they are committed by a recognized third country CCP. This approach differs from the regime for EU CCPs, which does not list the violations that must be regarded as infringements of EMIR. The large majority of the provisions on third country CCP infringements pertain to the material EMIR-provisions that recognized T2 CCPs are obliged to observe. If ESMA finds that a T2 CCP has committed one of the infringements listed in Annex III to EMIR, it may issue a decision with one or more of the following supervisory measures: (i) require the CCP to terminate the infringement; (ii) impose an administrative fine on the CCP; (iii) issue a public notice; or (iv) as a measure of last resort, (partially) withdraw the recognition of the CCP.[72] ESMA may also employ periodic penalty payments to induce T2 CCPs to comply with EMIR.[73]

§ 4. CENTRALIZATION OF EU CCP SUPERVISION?

A. PROS AND CONS

Compelling arguments exist in favor of a more centralized supervisory system for EU CCPs. Since the pivotal elements of the EU-rulebook for CCPs have been harmonized at the EU-level, the primarily decentralized nature of the EU CCP supervision regime may indeed come as surprise. As has been pointed out by private sector stakeholders in financial markets, full centralization of supervision of EU CCPs would lead to a uniform application throughout the EU of the harmonized EU-rulebook for CCPs, establishing a level playing field and preempting regulatory arbitrage.[74] Realizing a level playing field is in line with one of the major premises on which the EMIR-framework has been built and would promote fair competition across jurisdictions, which could in turn work to the benefit of CCPs and market participants (*e.g.,* clearing members). The European Commission and the IMF also see this a sufficient reason to bestow direct supervisory powers over EU CCPs upon ESMA.[75] As reported by ESMA, supervisory approaches under the current supervisory regime for EU CCPs indeed appear to differ among different NCAs,[76] illustrating the potential benefits that could be produced by a more integrated supervisory approach.

[71] Arts. 25g and 25h EMIR.

[72] Art. 25q EMIR. See also: art. 25i EMIR; art. 25j EMIR; art. 25l EMIR; art. 25p(1)(1)(c) EMIR; art. 25b(2) EMIR; Commission Delegated Regulation (EU) 2021/731 of 26 January 2021 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on third-country central counterparties or related third parties by the European Securities and Markets Authority, *OJ L* 158, 6 May 2021, 1.

[73] Art. 25k(1)(a) and (c) EMIR.

[74] EUROPEAN COMMISSION, *Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017*, 20 June 2017, 14, available via https://ec.europa.eu/info/sites/info/files/2017-esas-operations-summary-of-responses_en.pdf. *Cf. e.g.*, K. E. SØRENSEN, "Enforcement of Harmonization Relying on the Country of Origin Principle", *European Public Law* 2019, vol. 25, (381) 386 *et seq*.

[75] IMF, *Euro Area Policies: Financial Sector Assessment Program. Technical Note—Supervision and Oversight of Central Counterparties and Central Securities Depositories*, IMF Country Report no. 18/227, July 2018, 12, available via http://www.astrid-online.it/static/upload/imf_/imf_ue_18-227.pdf; EUROPEAN COMMISSION, *Commission Staff Working Document: Impact assessment accompanying EMIR 2.2*, 13 June 2017, SWD(2017) 246 final, 10.

[76] ESMA, *Peer Review under EMIR Art. 21: Supervisory activities on CCPs' Margin and Collateral requirements*, 22 December 2016, ESMA/2016/1683, available via https://www.esma.europa.eu/sites/default/files/library/2016-1683_ccp_peer_review_report.pdf.

More importantly, in addition to the establishment of a level playing field, fully centralized supervision of EU CCPs would in a crisis situation provide more guarantees that the interests of the (stakeholders in the) member state in which the CCP is established would be appropriately balanced against the—potentially directly opposed—stakes of the (stakeholders established in) other member states (*e.g.,* CCPs, clearing members, clients, and taxpayers) and the stability of the EU financial and economic system at large.[77] As was painfully illustrated by the 'nickel debacle' (*infra*), risk management and loss absorption mechanisms employed by CCPs may in times of crisis result in value redistribution among stakeholders. This could occur through *e.g.,* the "tear-up of contracts" prior to clearing member default, institutionalized risk mutualization mechanisms upon clearing member default (*e.g.,* loss absorption through the CCP default fund), or even the application of recovery and resolution tools under the CCPRRR. As a result of this potential for value redistribution through CCPs, crisis management decisions from CCP supervisors may heavily affect the interests of stakeholders. If these stakeholders are located in multiple jurisdictions—as is the case in many centrally cleared markets—it cannot be safely assumed that a CCP supervisor mandated to safeguard the interests of a single jurisdiction will pursue a fair balance of stakeholder interests or a value distribution that is optimal to overall financial stability or society. Indeed, a CCP supervisor may be expected to prioritize the interests of its jurisdiction over the interests of other jurisdictions.[78] Prioritization of domestic interests by national authorities has been witnessed in past crises, *e.g.,* during the banking crisis in Iceland.[79] In the case of the 'nickel debacle',[80] the UK-based London Metal Exchange (LME) and its CCP, the UK-based LME Clear, were concerned that the large margin calls resulting from the extreme volatility in the nickel market after the start of the war in Ukraine would lead to multiple defaults and impair the orderly functioning of the markets.[81] This culminated in the suspension[82] of trading in nickel contracts and the cancelation of all trades executed on 8 March 2022,[83] with apparently at the time no immediate objection from the Financial Conduct Authority (FCA) or the Bank of

[77] *Cf*. IMF, *Euro Area Policies: Financial Sector Assessment Program. Technical Note—Supervision and Oversight of Central Counterparties and Central Securities Depositories*, IMF Country Report no. 18/227, July 2018, 12, available via http://www.astrid-online.it/static/upload/imf_/imf_ue_18-227.pdf; A. UNTERMAN, "Regulating Global FMIs: Achieving Stability and Efficiency across Borders" in M. DIEHL, B. ALEXANDROVA-KABADJOVA, R. HEUVER, S. MARTÍNEZ-JARAMILLO (eds.), *Analyzing the Economics of Financial Market Infrastructures*, Hershey, IGI Global, 2016, (41) 46; F. WENDT, "Central Counterparties: Addressing their Too Important to Fail Nature", *IMF Working Paper* 15/21, 2015, 12, available via https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Central-Counterparties-Addressing-their-Too-Important-to-Fail-Nature-42637.

[78] M. LEHMANN, "Brexit and CCP Supervision: From Extraterritoriality to a Model of Shared Control", *European Banking Institute Working Paper Series* 2021 - no. 101, 9, available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3904130.

[79] During the banking crisis in Iceland, resolution authorities carved out domestic activities of failing banks and transferred them to a 'new' bank. See P. BAUDINO, J. T. STURLUSON, J.-P. SVORONOS, "The banking crisis in Iceland", *FSI Crisis Management Series*, no 1, March 2020, 15 et seq. (no. 39 et seq.), available via https://www.bis.org/fsi/fsicms1.pdf.

[80] See for a good overview of the events during the nickel debacle: IMF, *Global Financial Stability Report: Shockwaves from the War in Ukraine Test the Financial System's Resilience*, April 2022, 38-39, available via https://www.imf.org/en/Publications/GFSR/Issues/2022/04/19/global-financial-stability-report-april-2022.

[81] LME, *Notice 22/057: Nickel Market Update*, 10 March 2022, available via https://www.lme.com/-/media/Files/News/Notices/2022/03/TRADING-22-057-NICKEL-MARKET-UPDATE_.pdf.

[82] See on the power to suspend trading: LME, *London Metal Exchange: Rules and Regulations*, pt. 3, no. 1.3, 1 June 2022, available via https://www.lme.com/Company/Market-Regulation/Rules/Rule-book.

[83] LME, *Notice 22/052: Suspension of LME Nickel Market*, 8 March 2022, available via https://www.isda.org/a/em0gE/Trading-22-052-Suspensino-of-LME-Nickel-Market.pdf; LME, *Notice 22/053: Nickel Suspension – Further Information: Delivery Deferral and Trade Cancellation*, 8 March 2022, available via https://www.lme.com/api/sitecore/MemberNoticesSearchApi/Download?id=11ffba2e-b241-462d-b430-79be927c300f.

England (BoE) as competent supervisors of respectively LME and LME Clear.[84] It is quite common for CCP rulebooks to grant CCPs the power to cancel centrally cleared contracts under certain conditions, *e.g.,* if the orderly functioning of markets may become impaired in absence of tear-up.[85] This was no different for the LME Clear rulebook,[86] resulting in some $4 billion of cancelled nickel transactions and triggering lawsuits from the market participants that stood to make money on the annulled transactions but were now forced to pick up the bill.[87]

In light of the above and especially given the systemically important nature of some CCPs,[88] it seems appropriate to establish a supervisory regime for EU CCPs—or at least for systemically important EU CCPs—that allows to appropriately balance interests in different jurisdictions, rather than a system which could potentially work in favor of the interests of a single member state (*infra*). Although EMIR requires NCAs to consider the potential implications of their actions on the financial stability in all other member states when exercising their supervisory powers,[89] it is unlikely that such generic obligation may suffice to effectively curb the primacy of national interest in a crisis. Viewed from this angle, the case for centralization of supervisory powers over EU CCPs can be viewed as an application of the 'financial trilemma'.[90] This trilemma posits that financial stability, financial integration, and national financial policies cannot exist simultaneously: only two of the three can coexist.[91] Although the financial trilemma must not be seen as prescribing absolute choices,[92] financial stability in internationally integrated centrally cleared financial markets is inversely related to local regulation and supervision of CCPs.

Evidently, a more centralized supervisory system for EU CCPs would not be without downsides. A first drawback of such system could be that existing local expertise in supervision and access to

[84] In early April, the FCA and BoE jointly announced that they would be reviewing what had happened during the nickel debacle. See: FCA, BOE, *Joint statement from UK Financial Regulation Authorities on London Metal Exchange and LME Clear*, 4 April 2022, available via https://www.fca.org.uk/news/statements/uk-financial-regulation-authorities-london-metal-exchange-lme-clear.

[85] See *e.g.*, LCH, *General Regulations of LCH Limited*, April 2022, regulation 37(d), available via https://www.lch.com/system/files/media_root/220425_General%20Regulations_Overnight%20Funding%20Account%20%2B%20Collateral%20%2B%20Standard%20Collateral%20Definitions_CLEAN.pdf.

[86] LME Clear, *LME Clear Limited: Rules and Procedures*, 19 July 2021, rule 6.15, available via https://www.lme.com/en/clearing/rules-and-regulations. See also: LME, *London Metal Exchange: Rules and Regulations*, pt. 3, no. 17.1, 1 June 2022, available via https://www.lme.com/Company/Market-Regulation/Rules/Rule-book.

[87] See *e.g.,* S. LI, E. ONSTAD, "Hedge fund Elliott sues LME for $456 million over nickel trading halt", *Reuters*, 6 June 2022, available via https://www.reuters.com/markets/commodities/elliott-associates-sues-lme-456-mln-over-nickel-trading-halt-hkex-2022-06-06/; P. DESAI, H. JONES, "Explainer: LME under the regulatory spotlight after nickel debacle", *Reuters*, 11 April 2022, available via https://www.reuters.com/world/uk/lme-under-regulatory-spotlight-after-nickel-debacle-2022-04-11/; J. WALLACE, "Inside the Nickel Market Failure: Massive Trades the Exchange Didn't See", *Wall Street Journal*, 18 March 2022, available via https://www.wsj.com/articles/inside-the-nickel-market-failure-massive-trades-the-exchange-didnt-see-11647598557.

[88] *Cf.* C. P. BUTTIGIEG, "Governance of Securities Regulation and Supervision: Quo Vadis Europa", *Columbia Journal of European Law* 2015, vol. 21, (411) 445 (arguing that large cross-border financial institutions should be subject to centralized supervision while other institutions can remain subject to national supervision).

[89] Art. 23(1) EMIR.

[90] H. MARJOSOLA, "Missing Pieces in the Patchwork of EU Financial Stability Regime? The Case of Central Counterparties", *Common Market Law Review* 2015, vol. 52, (1491) 1511.

[91] D. SCHOENMAKER, "The financial trilemma", *Economics Letters* 2011, vol. 111, 57-59. *Cf.* generally: F. LUPO-PASINI, "Economic Stability and Economic Governance in the Euro Area: What the European Crisis Can Teach on the Limits of Economic Integration", *Journal of International Economic Law* 2013, vol. 16, 211-256.

[92] The three components of the financial trilemma can all be measured along a sliding scale. See F. LUPO-PASINI, R. P. BUCKLEY, "Global Systemic Risk and International Regulatory Coordination: Squaring Sovereignty and Financial Stability", *American University International Law Review* 2015, vol. 30, (665) 719.

information may be lost, *e.g.*, with respect to the assessment of local risks.[93] Although still real, this downside was perhaps more problematic prior to the adoption of the various EU regulatory reporting obligations (*e.g.*, most importantly for centrally cleared markets, the EMIR reporting obligation for derivatives), which have to some extent increased the availability of data on a subset of potential local risks. Furthermore, to my understanding, the named drawback could be largely be mitigated by (i) allowing NCAs to provide input to the centralized supervisory authority on risk assessments; and/or (ii) letting the centralized supervisory authority absorb existing national knowhow and practices, including the present NCA practice of real-time supervision. In light of these mitigating factors, potential losses in local supervisory expertise do in my view not outweigh the benefits of centralization of EU CCP supervision sketched above.

Other drawbacks that may come to mind in this context relate to the arguments that are traditionally formulated against projects envisioning regionally or globally harmonized *rulebooks* (*e.g.,* EU harmonization of laws). The traditional arguments against harmonization of rulebooks are the following: (i) one size may not fit all in a world with varying regional and social market and social conditions;[94] (ii) harmonization renders the uniform system vulnerable to a single risk if the system fails to adequately account for that type of risk ('systematic risk');[95] and (iii) competition among regulators or supervisors is entirely eliminated, which may take away an incentive to improve regulation or supervision as well as hamper regulatory or supervisory innovation or experimentation[96]. Importantly, these arguments against the harmonization of rulebooks operate at the level of the rulemaking. Generally transposing them to the context of the application of the developed rulebook to individual cases, *i.e.,* supervision, would frustrate the equal execution of EU law in the different member states.[97] That is, although valid arguments may exist against EU harmonization in general or the harmonization of the legislative and regulatory framework for CCPs, a rulebook that has already been effectively harmonized through EU regulations should be consistently applied in order to provide for the equal execution of EU law in the different member states. It would appear difficult to argue that supervisory divergence and

[93] C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 42; N. MOLONEY, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action", *European Business Organization Law Review* 2011, vol. 12, 177-225.

[94] P.-H. VERDIER, "Mutual Recognition in International Finance", *Harvard International Law Journal* 2011, vol. 52, (55) 65; T. WEI, "The Equivalence Approach to Securities Regulation", *Northwestern Journal of International Law and Business* 2007, vol. 27, (255) 256.

[95] N. MOLONEY, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making", *European Business Organization Law Review* 2011, vol. 12, (41) 70-71; R. ROMANO, "For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture", *Yale Journal on Regulation* 2014, vol. 31, 1-76; S. J. GRIFFITH, "Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation", *Minnesota Law Review* 2014, vol. 98, (1291) 1349; R. ROMANO, "Against Financial Regulation Harmonization: A Comment", *Yale Law and Economics Research Paper* no. 414, 2010, 17, available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697348.

[96] P.-H. VERDIER, "Mutual Recognition in International Finance", *Harvard International Law Journal* 2011, vol. 52, (55) 65; S. GADINIS, "The Politics of Competition in International Financial Regulation", *Harvard International Law Journal* 2008, vol. 49, (447) 456; T. WEI, "The Equivalence Approach to Securities Regulation", *Northwestern Journal of International Law and Business* 2007, vol. 27, (255) 287-288; P. B. GRIFFIN, "The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services", *Columbia Journal of European Law* 2001, vol. 7, (337) 338; R. ROMANO, "The Need for Competition in International Securities Regulation", *Theoretical Inquiries in Law* 2001, vol. 2, (387) 388. Competition among regulators or supervisors is often understood to lead to a 'race to the bottom' with a degradation of norms applicable to market participants. This risk should be balances against the potential benefit of regulatory or supervisory innovation or experimentation.

[97] *Cf*. EUROPEAN COMMISSION, *Enforcing EU law for a Europe that delivers*, 13 October 2022, COM(2022) 518 final, 1, available via https://commission.europa.eu/system/files/2022-10/com_2022_518_1_en.pdf (stating that provisions of EU law should have the same meaning and are to be applied in the same way in all member states).

an unlevel playing field should be pursued against the background of a fully harmonized legislative and regulatory framework of EU law. That being said, given that the rulebook may leave some discretion to CCP supervisors—especially during crises—the three named arguments may remain relevant in the context of supervision too and should be balanced against the benefits of centralized supervision outlined above.[98]

B. FISCAL CONSTRAINT

Already in the preparatory stage of EMIR, the European Parliament contemplated the idea of establishing a centralized supervisory regime for EU CCPs by providing direct supervisory powers to ESMA.[99] The most important reason why this initiative has failed—and why centralized supervision of EU CCPs has thus far remained politically unfeasible—is that member states in which CCPs have been established are not willing to give up CCP supervision powers because, upon CCP failure, there could exist a significant fiscal cost for the CCP's member state and its taxpayers, potentially also indirectly via the provision of central bank liquidity.[100] The current framework with supervisory powers for NCAs can be viewed as reflecting the deliberate political choice to align supervisory and fiscal responsibilities.[101] The member states retain supervisory powers for the CCPs that are established in their jurisdiction because they would be on the hook in case of a CCP bailout. The problem with this unidimensional approach is that, although it is true that CCP failure may present a large fiscal cost for the country in which the CCP is established, much of the financial and economic fallout may materialize outside of the jurisdiction of the CCP supervisor, *e.g.,* through loss absorption via clearing members.

Nevertheless, as long as there is no common EU fiscal backstop for CCP failure—which would take the potential cost of bailout out of the hands of the member state in which the CCP is established—centralization of EU CCP supervision is unlikely to become politically feasible.[102] Although the establishment of a common fiscal backstop for CCP failure would be fiscally beneficial from the perspective of the member states in which (large) CCPs have been established (*e.g.,* France (LCH SA) and Germany (Eurex Clearing AG)), it should be recalled that there are currently only fourteen CCPs established in EU member states, meaning that many member states have no CCP established within their jurisdiction. For these member states, the establishment of a common

[98] See for a more positive take on the potential of supervisory diversity as a counterweight against regulatory homogeneity: N. MOLONEY, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action", *European Business Organization Law Review* 2011, vol. 12, (177) 186-187.

[99] EUROPEAN PARLIAMENT, *Resolution on derivatives markets: future policy actions*, 15 June 2010, P7_TA(2010)0206, no. 16, available via https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010IP0206.

[100] N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets*, Oxford, Hart Publishing, 2018, 298; P. NORMAN, *The Risk Controllers: Central Counterparty Clearing in Globalised Financial Markets*, Chichester, Wiley, 2011, 342. *Cf.* generally C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 44-45; N. MOLONEY, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making", *European Business Organization Law Review* 2011, vol. 12, (41) 79. *Cf.* EUROPEAN COMMISSION, *Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017*, 20 June 2017, 14, available via https://ec.europa.eu/info/sites/info/files/2017-esas-operations-summary-of-responses_en.pdf.

[101] EUROPEAN COMMISSION, *Commission Staff Working Document: Impact assessment accompanying EMIR 2.2*, 13 June 2017, SWD(2017) 246 final, 26.

[102] J. FRIEDRICH, M. THIEMANN, *A new governance architecture for European financial markets? Towards a European supervision of CCPs*, SAFE White Paper no. 53, June 2018, 3, available via https://www.econstor.eu/bitstream/10419/181874/1/1029469415.pdf. *Cf.* N. MOLONEY, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action", *European Business Organization Law Review* 2011, vol. 12, (177) 210.

fiscal backstop to CCP failure would mean opening the door to potential future fiscal transfers to member states in which CCPs have been established. Along a similar line, EU CCPs differ significantly in size and potential impact on financial stability, meaning that a common fiscal backstop could imply fiscal transfers from member states in which small CCPs have been established to member states in which large CCPs have been established. Although any common fiscal backstop implies some degree of solidarity, the CCP market constellation in the EU would thus create a setting that could facilitate large fiscal transfers. Therefore, the conception of a common fiscal backstop for EU CCP failure is politically most likely unpalatable or, at least, much less likely than for *e.g.,* bank failures. The recent adoption of the CCPRRR, which has introduced a harmonized EU-framework for CCP recovery and resolution but has left the fiscal responsibilities and autonomy of the member states untouched,[103] is indicative for insufficient political momentum for the establishment of a common EU fiscal backstop for CCP failure. It should be noted that the conception of a CCP resolution fund at the EU-level has also been opposed by the European Association of CCP Clearing Houses (EACH)—the organization representing the CCP industry in Europe—because such fund would allegedly incite moral hazard for the clearing members in the default management or recovery process.[104] Naturally, CCPs may have an incentive to oppose the establishment of a CCP resolution fund because they fear that they would be called upon by the EU co-legislators to finance the fund, comparable to eurozone banks being responsible for the financing of the Single Resolution Fund (SRF).[105]

In the preparatory phase of EMIR 2.2, the centralization of supervisory competences over CCPs established in the EU was reconsidered.[106] It was asserted that direct supervisory powers could be granted to ESMA, the ECB, or an agency that would have to be newly established. Ultimately, however, it was concluded that full centralization would be a presumably inferior policy solution in comparison to the mere establishment of an EU supervisory mechanism for the coordination of national and EU supervisory objectives.[107] According to the European Commission, in comparison to full centralization, the latter approach mainly has the advantage that supervisory and fiscal responsibilities remain aligned.[108] Although EMIR 2.2 has reinforced the role of ESMA in the authorization process of EU CCPs (and has given ESMA a central role in the recognition and supervision of third country CCPs), it has failed to turn ESMA into a single EU supervisor for

[103] See arts. 7(g), 27(2), and 45 CCPRRR. The two largest EU CCPs (LCH SA (established in France) and Eurex Clearing AG (established in Germany)) also have banking licenses and fall within scope of EU banking legislation. However, CCPs authorized under EMIR have been excluded from the scope of the Single Resolution Mechanism (SRM) Regulation (art. 94 CCPRRR). The SRM Regulation refers to Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, *OJ L* 225, 30 July 2014, 1.

[104] EACH, *An effective recovery and resolution regime for CCPs: Additional subjects to be considered*, June 2015, 10-11, available via https://www.eachccp.eu/wp-content/uploads/2015/07/EACH-paper-Additional-subjects-An-effective-Recovery-and-Resolution-Regime-for-CCPs-Jun15.pdf.

[105] Art. 67(4) SRM Regulation.

[106] EUROPEAN COMMISSION, *Commission Staff Working Document: Impact assessment accompanying EMIR 2.2*, 13 June 2017, SWD(2017) 246 final, 60. *Cf.* R. CANINI, "Central Counterparties are Too Big for the European Securities and Markets Authority (Alone): Constructive Critique of the 2019 CCP Supervision Regulation", *European Business Organization Law Review* 2021, vol. 22, 673-717.

[107] EUROPEAN COMMISSION, *Commission Staff Working Document: Impact assessment accompanying EMIR 2.2*, 13 June 2017, SWD(2017) 246 final, 60.

[108] EUROPEAN COMMISSION, *Commission Staff Working Document: Impact assessment accompanying EMIR 2.2*, 13 June 2017, SWD(2017) 246 final, 60.

CCPs.[109] Hence, it seems that also after the adoption of EMIR 2.2, the fiscal argument against centralization of supervisory responsibilities over EU CCPs continues to operate.

C. OTHER NATIONAL SENSITIVITIES

In addition to considerations about fiscal responsibilities, there are other national political sensitivities that for the time being appear to create an environment of division rather than unity among the EU member states on the matter of EU CCP supervision. As already stressed in the so-called *de Larosière Report* from the High-Level Group on Financial Supervision in the EU,[110] supervisory convergence in the EU is hampered by desires in the member states to protect national champions, restrict competition, or maintain supposedly superior supervisory practices or capabilities.[111] Specifically in the context of CCP supervision, national governments may be cautious in relinquishing supervisory powers over CCPs because they fear that the exercise of reallocated or centralized supervisory powers over CCPs may hurt the interests of the CCPs or clearing members established in their territory.[112] Even if the standoff over fiscal responsibility for CCP failure could be resolved, other national sensitivities in the member states in which CCPs have been established could thus still bar the establishment of fully centralized EU CCP supervision. Furthermore, member states that see Brexit as an opportunity to attract business from London to continental financial centers (*e.g.,* Frankfurt, Paris, or Amsterdam) may have an incentive to stay away from initiatives that could culminate into a 'common solution', *i.e.,* centralization of supervisory powers at the EU-level could be viewed as working against the interests of member states that are trying to build national champions.[113]

D. MERONI CONSTRAINTS?

Under the assumption that EU CCP supervision were to be centralized by providing direct supervisory powers to an EU agency such as ESMA, scholars have noted that such agency would most likely be forced to make policy choices and, therefore, be in violation of the '*Meroni* doctrine'.[114] This doctrine is based on long-standing EU case law and in its essence states that the delegation of discretionary powers implying a wide margin of discretion—allowing for the execution of actual economic policy—is not allowed to bodies other than those established by the Treaties.[115] This means that only clearly defined executive powers, entirely subject to scrutiny in light of objective criteria established by the delegating authority, may be delegated to bodies other than those established by the Treaties.[116] Although many authors have criticized the *Meroni*

[109] *Cf.* N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets*, Oxford, Hart Publishing, 2018, 296.
[110] DE LAROSIÈRE GROUP, *Report from the High-Level Group on Financial Supervision in the EU,* February 2009, available via http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf, 85 p.
[111] DE LAROSIÈRE GROUP, *Report from the High-Level Group on Financial Supervision in the EU,* February 2009, 75, available via http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf.
[112] For the member states in which NCAs do currently not hold supervisory powers over (large) CCPs, on the other hand, this point may exactly be a reason to support centralized CCP supervision at the EU-level.
[113] *Cf.* D. HOWARTH, L. QUAGLIA, "Brexit and the battle for financial services", *Journal of European Public Policy* 2018, vol. 25, (1118) 1128.
[114] N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets*, Oxford, Hart Publishing, 2018, 297.
[115] Case 9-56, *Meroni* v. *High Authority of the European Coal and Steel Community*, EU:C:1958:7, at p. 152. See generally *e.g.,* the seminal paper of GRILLER and ORATOR: S. GRILLER, A. ORATOR, "Everything under control? The 'way forward' for European agencies in the footsteps of the Meroni Doctrine", *European Law Review* 2010, vol. 35, 3-35.
[116] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and others* v. *Secretary of State for Health and National Assembly Wales*, EU:C:2005:449, at para. 90; Case 9-56, *Meroni* v. *High Authority of the European Coal and Steel Community*, EU:C:1958:7. *Cf.* N. MOLONEY, *EU Securities and Financial Markets Regulation*, Oxford, Oxford University Press, 2014, 909.

doctrine,[117] *inter alia* for hampering further EU integration, it is generally accepted that the current state of the law only allows to delegate 'real' rule-making powers to the European Commission, but not further down to EU agencies.[118] This also follows from the wording of art. 291(2) TFEU, which stipulates that the implementation of EU legislative acts may be delegated to the European Commission,[119] but makes no mention of EU agencies.[120] In 2014, the European Court of Justice (ECJ) explicitly confirmed that the *Meroni* doctrine remains valid in the so-called 'short selling case'.[121] In a decision reviewing the legality of art. 28 of the Short Selling Regulation (SSR),[122] which bestows the power upon ESMA to impose limitations on short selling if financial stability is at stake, the ECJ found that the *Meroni* doctrine remains valid yet that the contested powers bestowed upon ESMA were precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority and, hence, in compliance with the *Meroni* doctrine.[123]

Importantly, the *Meroni* doctrine puts a restraint on the delegation of rule-making powers, not on the delegation of supervisory powers.[124] Regulation refers to normative acts, while supervision refers to the application of normative acts to individual cases (and, possibly, administrative sanctions).[125] From a theoretical perspective, the notion that centralization of CCP supervisory powers at an EU agency could constitute a violation of the *Meroni* doctrine thus appears

[117] E. CHITI, "In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum" in CELS (ed.), *Cambridge Yearbook of European Legal Studies* 2015, vol. 17, Cambridge, Cambridge University Press, 2015, (311) 317; C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 40 *et seq*.; E. WYMEERSCH, "The European Financial Supervisory Authorities or ESAs" in E. WYMEERSCH, K. J. HOPT, G. FERRARINI (eds.), *Financial Regulation and Supervision: A Post-Crisis Analysis*, Oxford, Oxford University Press, 2012, (232) 238; M. CHAMON, "EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea", *Common Market Law Review* 2011, vol. 48, 1055-1075; N. MOLONEY, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action", *European Business Organization Law Review* 2011, vol. 12, (177) 221; M. CHAMON, "EU Agencies: Does the Meroni Doctrine Make Sense?", *Maastricht Journal of European and Comparative Law* 2010, vol. 17, 281-305.

[118] M. SIMONCINI, "The Erosion of the *Meroni* Doctrine: The Case of the European Aviation Safety Agency", *European Public Law* 2015, vol. 21, (309) 310; C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 31-32; E. WYMEERSCH, "The European Financial Supervisory Authorities or ESAs" in E. WYMEERSCH, K. J. HOPT, G. FERRARINI (eds.), *Financial Regulation and Supervision: A Post-Crisis Analysis*, Oxford, Oxford University Press, 2012, (232) 238. See, however: E. CHITI, "In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum" in CELS (ed.), *Cambridge Yearbook of European Legal Studies* 2015, vol. 17, Cambridge, Cambridge University Press, 2015, (311) 316-317 (arguing that EU agencies may be granted powers implying a degree of discretion to the extent that this discretion has been previously framed by a EU legislative act so that arbitrary exercise of the discretionary power is impossible).

[119] Or, in duly justified specific cases and in the cases provided for in arts. 24 and 26 TEU to the Council of the EU.

[120] See also Case 98/80, *Romano* v. *Institut national d'assurance maladie-invalidité*, EU:C:1981:104.

[121] Case C-270/12, *UK* v. *European Parliament and Council of the EU*, EU:C:2014:18, para. 41 *et seq*. *Cf*. G. LO SCHIAVO, A. TÜRK, "The Institutional Architecture of EU Financial Regulation: The Case of the European Supervisory Authorities in the Aftermath of the European Crisis" in L. S. TALANI (ed.), *Europe in Crisis: A Structural Analysis*, London, Palgrave Macmillan, 2016, (89) 98.

[122] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, *OJ L* 086, 24 March 2012, 1.

[123] Case C-270/12, *UK* v. *European Parliament and Council of the EU*, EU:C:2014:18, para. 53. See more in detail on the "short selling case": G. LO SCHIAVO, "A Judicial Re-Thinking on the Delegation of Powers to European Agencies under EU Law? Comment on Case C-270/12 UK v. Council and Parliament", *German Law Journal* 2015, vol. 16, 315-335; C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, 1-57.

[124] C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 15.

[125] E. WYMEERSCH, "The Future of Financial Regulation and Supervision in Europe", *Common Market Law Review* 2005, vol. 42, (987) 988.

unjustified. In practice, however, it may be difficult to clearly distinguish regulation from supervision, *e.g.,* because supervisory interventions concerning multiple market participants may be similar in effect to normative acts.[126]

However, even if we were to assume that some of the supervisory powers over CCPs could under certain conditions be viewed as regulatory powers, there are ways of conceptualizing fully centralized CCP supervision at an EU agency without violating *Meroni*. For instance, contrary to the primarily decentralized supervisory regime for EU CCPs, the supervisory regime for trade repositories is fully centralized at the EU-level, with registration and ongoing supervision by ESMA.[127] Similarly, credit rating agencies are subject to centralized registration and supervision by ESMA under the Credit Rating Agency (CRA) Regulation.[128] The fact that the registration and supervision regimes for trade repositories and credit rating agencies have been centralized with ESMA, can be seen as evidence that the perceived legal barriers derived from the *Meroni* doctrine are by themselves insufficient to obstruct centralization of supervisory powers at an EU agency. Hence, to the extent that supervisory decisions in relation to CCPs would in practice amount to regulatory intervention, it appears possible to conceive the centralized supervisory regime in such way that it does not exist in violation of the *Meroni* doctrine, *i.e.,* assure that there is no delegation to the EU agency of discretionary powers implying a wide margin of discretion that would allow for the execution of actual economic policy. To this end, if an act were to introduce a centralized EU CCP supervision regime, it should entail a detailed list of possible infringements and criteria for selecting the applicable administrative sanctions—as is the case in the Credit Rating Agency Regulation and EMIR for respectively credit rating agencies and trade repositories.[129] Consequently, there would only be marginal discretionary power left to the EU agency with respect to the application of the harmonized EU legislative framework.[130]

§ 5. THIRD COUNTRY CCP SUPERVISION AS A CATALYST FOR MORE CENTRALIZED EU CCP SUPERVISION?

A. SWIMMING AGAINST THE TIDE IN THE WAKE OF BREXIT

From a practical perspective, it is highly unlikely that fully harmonized financial legislation could be achieved at the international level, *inter alia* because it would be politically unfeasible for national or regional legislators and regulators to resign from rulemaking power.[131] As a result,

[126] C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 14; J.-P. SCHNEIDER, "A Common Framework for Decentralized EU Agencies and the Meroni Doctrine", *Administrative Law Review* 2009, vol. 61, special issue, 2009, (29) 30; E. WYMEERSCH, "The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors", *European Business Organization Law Review* 2007, vol. 8, (237) 242.

[127] Art. 55 *et seq*. EMIR.

[128] Art. 14 *et seq*. Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, *OJ L* 302, 17 November 2009, 1.

[129] Art. 14 *et seq*. CRA Regulation; art. 55 *et seq.* EMIR.

[130] *Cf*. C. DI NOIA, M. GARGANTINI, "Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)", *European Business Organization Law Review* 2014, vol. 15, (1) 30-31.

[131] *Cf*. T. WEI, "The Equivalence Approach to Securities Regulation", *Northwestern Journal of International Law and Business* 2007, vol. 27, (255) 259. See also: SEC, *Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market*, 4 December 2012, available via https://www.sec.gov/news/press-release/2012-2012-251htm; S. GADINIS, "The Politics of Competition in International Financial Regulation", *Harvard International Law Journal* 2008, vol. 49, (447) 459.

international centralization of supervisory powers appears a fortiori unattainable.[132] Outside of the idiosyncratic political contours of the EU, harmonization of rulebooks or centralization of rulemaking or supervisory powers would most likely meet insurmountable opposition: "*Like the Holy Grail, international consensus is more sought than discovered, and the quest might continue indefinitely*."[133] Especially in a world where all major financial market jurisdictions have now developed elaborate sets of rules—as is the case for CCP legislation and regulation—full international harmonization or centralization seems highly implausible.[134] The presently existing regulatory and supervisory frameworks may reflect different regulatory beliefs or philosophies (potentially also typifying regional peculiarities), which cannot necessarily be categorized as clearly superior or inferior to each other and of which any movement away from the national or regional status quo implies adjustment costs for the market participants, CCPs, policymakers, and supervisors in the affected jurisdiction.[135]

Against the backdrop of the unfeasibility of international legislative harmonization, the 'Leaders' of the G20 agreed at the September 2013 Saint Petersburg summit that "*jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.*"[136] This paradigm of 'deference', *i.e.,* the conditional submission or referral to a foreign legal and supervisory system that is deemed

[132] See for—thus far largely unsuccessful—academic proposals that envision more centralized supervision in international finance: M. LEHMANN, J. SCHÜRGER, "Multilateralizing Deference – A Proposal for Reforming Global Financial Law", *Review of Banking and Financial Law* 2022, vol. 41, *forthcoming* (proposing to let an international institution issue a non-binding opinion on deference); A. UNTERMAN, "Regulating Global FMIs: Achieving Stability and Efficiency across Borders" in M. DIEHL, B. ALEXANDROVA-KABADJOVA, R. HEUVER, S. MARTÍNEZ-JARAMILLO (eds.), *Analyzing the Economics of Financial Market Infrastructures*, Hershey, IGI Global, 2016, (41) 65 (envisioning a centralized international institution that would verify compliance with internationally agreed minimum requirements, allowing, upon positive assessment, a CCP to operate in other jurisdictions than the one in which it is established); A. ARTAMONOV, "Cross-Border Application of OTC Derivatives Rules: Revisiting the Substituted Compliance Approach", *Journal of Financial Regulation* 2015, vol. 1, (206) 222-223 (proposing that decisions with respect to comparability of regulatory and supervisory frameworks be made by a neutral international organization such as the Financial Stability Board (FSB)); E. J. PAN, "Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks", *Chicago Journal of International Law* 2010, vol. 11, 243-284 (proposing an international administrative law model for the supervision of financial markets regulation). *Cf.* P.-H. CONAC, "The International Organisation of Securities Commissions (IOSCO), Europe, Brexit, and Rethinking Cross-border Regulation: A Call for a World Finance Organisation", *European Company and Financial Law Review* 2020, vol. 17, 72-98; C. M. BAKER, "When Regulators Collide: Financial Market Stability, Systemic Risk, Clearinghouses, and CDS", *Virginia Law and Business Review* 2016, vol. 10, (343) 384-394; E. F. GREENE, J. L. BOEHM, "The Limits of "Name-And-Shame" in International Financial Regulation", *Cornell Law Review* 2012, vol. 97, (1083) 1136-1137.

[133] J. C. COFFEE, "Extraterritorial Financial Regulation: Why E.T. Can't Come Home", *Cornell Law Review* 2014, vol. 99, (1259) 1262. *Cf. e.g.,* E. C. CHAFFEE, "Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation", *University of Cincinnati Law Review* 2010, vol. 79, 587-618 (envisioning globally harmonized and centralized securities regulation but admitting that this scenario is—at least in the short run—unrealistic).

[134] A. UNTERMAN, "Regulating Global FMIs: Achieving Stability and Efficiency across Borders" in M. DIEHL, B. ALEXANDROVA-KABADJOVA, R. HEUVER, S. MARTÍNEZ-JARAMILLO (eds.), *Analyzing the Economics of Financial Market Infrastructures*, Hershey, IGI Global, 2016, (41) 64.

[135] *Cf.* in the context of securities regulation: C. BRUMMER, "Post-American Securities Regulation", *California Law Review* 2010, vol. 98, (327) 349-355.

[136] G20, *G20 Leaders' Declaration St Petersburg,* 6 September 2013, no. 71, available via http://www.g20.utoronto.ca/2013/2013-0906-declaration.html. See also: ODRG, *Report of the OTC Derivatives Regulators Group (ODRG) to G20 Leaders on Cross-Border Implementation Issues*, November 2015, available via https://www.esma.europa.eu/sites/default/files/library/2015/11/odrg-06-11-15_-_report_of_the_odrg_to_the_g20_nov_final_06112015.pdf, 10 p.; ODRG, *Report of the OTC Derivatives Regulators Group (ODRG) to G20 Leaders on Cross-Border Implementation Issues*, November 2014, available via https://www.esma.europa.eu/sites/default/files/library/2015/11/odrg_report_7_november_2014.pdf, 10 p.

sufficiently similar,[137] has become a go-to intermediate policy solution in cross-border financial markets to mitigate the potential adverse effects of fragmented legal and supervisory arrangements if international harmonization or centralization proves impossible. Deference may take various forms (*e.g.*, mutual recognition, substituted compliance, or comparable compliance)[138] and stands in opposition to the more conservative paradigm of 'national treatment', in which foreign entities are granted access to a jurisdiction's financial markets if they submit to host country regulation and supervision.[139] As indicated by STUMP, deference eliminates some of the frictions that would arise if multiple jurisdictions were to apply policies of national treatment: "*We will never have the exact same rules around the globe. We should rather strive to minimize the frequency and impact of duplicative regulatory oversight while also demanding high comparable standards* […]."[140]

In the aftermath of Brexit, the policy shifts implemented by the EU for third country CCP supervision appear to oppose the internationally agreed direction of travel towards reinforced deference. As explained above, the EU has always employed a double-track supervisory system for CCPs with distinct entry points and supervisory procedures for respectively CCPs established in the EU (authorization) and third countries (recognition). With respect to EU regime for third country CCPs, the recognition regime for T1 CCPs—which applied to all third country CCPs prior to the adoption of EMIR 2.2 and provides market access to third country CCPs through compliance with home country requirements—conceptually fits within the progressive paradigm of deference, be it that there are certain *ex ante* control mechanisms or conditions in place (*e.g.,* equivalence), as analyzed above. EU equivalence regimes were traditionally considered to be relatively progressive in their reliance on home country regulation and supervision of third country entities.[141] However, in the wake of Brexit, the EU has been moving away from the paradigm of deference for third country CCP supervision towards the paradigm of national treatment.[142] The present framework contains less or no deference to third country regulation and supervision for T2 and T2+ CCPs and, instead, employs inward-looking national treatment (T2 CCPs) and location (T2+ CCPs) policies. As indicated above, this may lead to market and

[137] See generally: IOSCO, *Good Practices on Processes for Deference: Report*, June 2020, available via https://www.iosco.org/library/pubdocs/pdf/IOSCOPD659.pdf.

[138] *Cf.* IOSCO, *Market Fragmentation & Cross-border Regulation: Report*, June 2019, 3, available via https://www.iosco.org/library/pubdocs/pdf/IOSCOPD629.pdf. Mutual recognition refers to the notion that regulators and supervisors from different jurisdictions reciprocally recognize that the concerned foreign legal and supervisory regimes are sufficiently similar to allow that compliance with the foreign legal and supervisory framework is deemed to function as a (partial) substitute for compliance with the domestic framework. *Cf.* P.-H. VERDIER, "Mutual Recognition in International Finance", *Harvard International Law Journal* 2011, vol. 52, (55) 57 and 63; P. B. GRIFFIN, "The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services", *Columbia Journal of European Law* 2001, vol. 7, (337) 337. Substituted compliance refers to the unilateral decision to defer to a foreign legal and supervisory framework as a (partial) substitute for compliance with the domestic framework. See, *e.g.*, E. TAFARA, R. J. PETERSON, "A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework", *Harvard International Law Journal* 2007, vol. 48, 31-68.

[139] See on national treatment in general: P.-H. VERDIER, "Mutual Recognition in International Finance", *Harvard International Law Journal* 2011, vol. 52, (55) 63; S. K. SCHMIDT, "Mutual recognition as a new mode of governance", *Journal of European Public Policy* 2007, vol. 14, (667) 671. *Cf.* IOSCO, *IOSCO Task Force on Cross-Border Regulation: Final Report*, September 2015, 6 *et seq*., available via https://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf.

[140] CFTC, Exemption From Derivatives Clearing Organization Registration, Supplemental notice of proposed rulemaking, 84 FR 35456 (July 23, 2019), at 35479 (statement by CFTC Commissioner STUMP).

[141] See *e.g.,* A. UNTERMAN, "Regulating Global FMIs: Achieving Stability and Efficiency across Borders" in M. DIEHL, B. ALEXANDROVA-KABADJOVA, R. HEUVER, S. MARTÍNEZ-JARAMILLO (eds.), *Analyzing the Economics of Financial Market Infrastructures*, Hershey, IGI Global, 2016, (41) 49.

[142] *Cf.* N. MOLONEY, "Reflections on the EU Third Country Regime for Capital Markets in the Shadow of Brexit", *European Company and Financial Law Review* 2020, vol. 17, (35) 59.

liquidity fragmentation that could jeopardize effective risk and clearing member default management at CCPs, which could in turn produce financial stability risks.

That the EU is swimming against the tide in the aftermath of Brexit with respect to market access for third country CCPs is also revealed when the amended EU system for third country CCP supervision is compared to recent changes in the US system for the supervision of foreign CCPs. The double-track EU regime based upon the jurisdiction in which CCPs are established differs from the traditionally single-track approach in the US, where all CCPs seeking to offer clearing services to US persons historically had to apply to US authorities for 'registration'—either with the Commodity Futures Trading Commission (CFTC) or the Securities and Exchange Commission (SEC)[143]—and had to comply with the relevant US rules, regardless of whether they were established in the US. However, for CCPs that fall under the jurisdiction of the CFTC, the US has recently shifted away from the paradigm of national treatment for CCP regulation and supervision by developing two regimes that allow foreign CCPs to access the US market for clearing services without having to fully submit to US regulation and supervision: alternative compliance and exemption from registration.[144] With alternative compliance, non-systemically important foreign CCPs are allowed to register with the CFTC for the clearing of swaps yet largely 'comply' with the applicable US rules through compliance with their home country regulatory regime.[145] As an alternative to registration (through alternative compliance or otherwise), the CFTC may decide to exempt a CCP from registration for the clearing of swaps if it finds that the foreign CCP is subject to comparable, comprehensive regulation and supervision by home country authorities.[146] It follows from the above that the EU has been adopting a more restrictive regime for third country CCP supervision while the US has been relaxing existing policies of national treatment. Ultimately, it could be argued that the EU now has more inward-looking supervisory policies for non-domestic CCPs than the US, *e.g.*, through the EU location policy for T2+ CCPs and the duplicative EU control mechanisms for T2 CCPs (equivalence assessment by the European Commission *and* obligation to comply with host country regulations for CCPs (EMIR)).[147]

B. POST-BREXIT RELATION BETWEEN THE EU SUPERVISORY SYSTEMS FOR EU AND THIRD COUNTRY CCPS

Informed by the observations about the recent changes in the EU system for the supervision of third country CCPs and the assessment of the largely decentralized EU system for the supervision of EU CCPs, this section examines the relation between the two regimes. The central element that appears to follow from this juxtaposition is that, to safeguard EU financial stability, a more

[143] Regulatory and supervisory powers related to US securities and derivatives markets have traditionally been divided between the CFTC and SEC. Largely oversimplified, the CTFC has jurisdiction for derivatives and the SEC has jurisdiction for securities. Complications in this division of powers arise for financial products that touch upon the jurisdiction attached to both securities and derivatives (*e.g.,* derivatives referencing securities). See in more detail: E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 267 *et seq*.

[144] See more in detail on alternative compliance and exemption from registration: E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 523 *et seq*.

[145] CFTC, Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, Final rule, 85 FR 67160 (October 21, 2020).

[146] CEA § 5b(h), 7 USC § 7a-1(h); CFTC, Exemption From Derivatives Clearing Organization Registration, Final rule, 86 FR 949 (January 7, 2021). The direct implication of an exemption from registration is that the foreign CCP must not observe US rules. Vitally—and crucially different from what is the case for registered CCPs—exempt CCPs are permitted to clear proprietary swaps of US persons and futures commission merchants, but may not clear US customer positions. See 17 CFR § 39.6(b)(1).

[147] See for a proposal of reform: E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 516-517.

centralized supervisory system for EU CCPs would make more sense than the current primarily decentralized system. In addition to the arguments sketched above (section four), this paper submits that the post-Brexit approach for third country CCP supervision may serve as a catalyst for a more centralized supervisory system for EU CCPs. First, the present system of primarily decentralized EU CCP supervision is difficult to logically square with the policy arguments underpinning the post-Brexit EU supervisory system for T2 CCPs. That is to say, the requirement for T2 CCPs to comply with EU-rules and submit to EU-supervision has been conceived in light of legitimate EU-concerns about financial stability risks that may arise from euro-denominated financial transactions or transactions involving EU market participants being cleared through third country CCPs that are systemically important for the financial stability of the EU or the member states. More specifically, with the departure of the UK from the EU, substantial volumes of euro-denominated financial transactions and transactions involving EU market participants—in particular OTC derivatives—are now being cleared via CCPs located outside of the EU, *i.e.,* in the UK. This market constellation is quite peculiar to the EU-UK setup and is not mirrored to the same extent anywhere else in the world, due to concentrations that were allowed to build up while the UK was still part of the EU.

To my understanding, the solution that the post-Brexit EU regime for T2 CCP seeks to offer to the financial stability threat coming from the UK has been devised around a belief that third country regulators and supervisors cannot be trusted to the same extent as EU regulators and supervisors to reach outcomes that are optimal to achieve financial stability in the EU and the member states. As examined in the context of the benefits that a centralized supervisory system for EU CCPs would bring (section four), risk management and loss absorption mechanisms employed by CCPs may in times of crisis result in value redistribution among stakeholders, creating scope for CCP supervisors to pursue a value distribution that is in line with their (single-jurisdiction) supervisory mandate but may go against general financial stability or the interests of other jurisdictions. Viewed through that lens, the conviction that UK regulators and supervisors may not pursue CCP crisis management decisions that are optimal to EU financial stability seems justified and helps to understand the current EU regime for T2 CCPs from a political economy perspective. In other words, although the current interaction between the EU and UK framework may not be optimal for overall financial stability, it serves to protect EU financial stability against value redistribution via prioritization of non-EU interests through the application of third country supervisory mandates.

If concerns about value redistribution are the primary driver behind the current framework for T2 third country CCPs, it appears to make sense to also incorporate these concerns in our framework for the supervision of EU CCPs. Indeed, the EU has implemented an extraterritorial system—which may have far-reaching implications for overall financial stability—in an attempt to combat or prevent value redistribution to the disadvantage of the EU through reliance on T2 CCPs, which makes it intellectually difficult to ignore a largely equivalent argument in the context of EU CCP supervision. Accordingly, one would or could reasonably expect that the (non-extraterritorial) EU-rules for EU CCP supervision too aim to prevent value redistribution that may adversely affect EU financial stability or financial stability in the member states. At present, this is not the case. The current primarily decentralized EU supervisory system for EU CCPs facilitates the execution of the single-jurisdiction mandate of the relevant NCA, especially in crisis situations. As outlined in section two of this article, ESMA and the CCP colleges play an important role in the day-to-day supervision of EU CCPs through strong involvement in authorization and risk model validation processes. However, as also shown in section two, NCAs have largely retained

autonomous responsibilities in crisis situations to allow them to swiftly respond to emergencies, with limited formal requirements on coordination with ESMA and the EMIR colleges. Although ESMA and the CCP colleges may thus generally try to discourage NCAs from implicitly or explicitly pursuing a balance of stakeholder interests that favors national interests (for instance, through risk model validations), the scope for value redistribution in line with national interests remains intact in crisis situations (when it arguably matters most). Against that backdrop, more centralized supervisory responsibilities over EU CCPs would provide stronger guarantees for EU financial stability or financial stability in the other member states, most importantly because the unidimensional perspective of the NCA's mandate would be formally mitigated. In other words, although concerns about third country CCP impact on EU financial stability are legitimate, we may want to put our own house in order and fully centralize supervisory capabilities over at least some EU CCPs at the EU-level, so that the stakes of different EU-stakeholders may be appropriately balanced in the interest of EU financial stability (see the next subsection on how such centralized system could look like and to what EU CCPs it should apply). As extensively discussed in this paper, this would require the political will to overcome the fiscal barrier to full harmonization of supervisory powers over EU CCPs.

Secondly, along a similar line, the controversial location policy for T2+ CCPs could be more justifiable if the EU were to adopt a fully centralized system of EU CCP supervision for at least some EU CCPs. CCP location policies are quite controversial in internationally integrated financial markets, *inter alia* because retaliation would necessarily lead to market fragmentation. However, if one is convinced that the EMIR 2.2 location policy has to remain in place, it appears to make sense to fully centralize supervisory powers over at least some EU CCPs, so that we do not request third country CCPs that are deemed 'too systemically important' to relocate from a system with centralized supervision to a system with fragmented supervision. In other words, if we are asking T2+ CCPs to set up shop in an EU member state to continue providing certain clearing services to EU clearing members and trading venues because we fear value redistribution to the disadvantage of the EU if they remain established in a third country, we may want to design the EU system for the supervision of EU CCPs so that redistribution across member states is also minimized upon relocation to the EU.

As indicated above, more centralized supervision of EU CCPs would require political will. Whether such political will may be found is doubtful. In November 2021, European Commissioner for Financial Services, Financial Stability, and Capital Markets Union Mairead MCGUINNESS called for a stronger role for supervision at the EU-level over EU CCPs in a statement on the proposed way forward for central clearing in the post-Brexit era.[148] In early February 2022, the Commission launched a targeted consultation on the review of the central clearing framework in the EU.[149] This consultation comes against the background of a double objective: (i) to build EU clearing capacity through measures to make the EU more attractive as a competitive and cost-efficient clearing hub; and (ii) to reinforce supervision of EU CCPs, which is deemed appropriate if the EU

[148] EUROPEAN COMMISSION, *Statement: Commissioner McGuinness announces proposed way forward for central clearing*, 10 November 2021, available via https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5905, 2 p.
[149] EUROPEAN COMMISSION, *Consultation document: Targeted consultation on the review of the central clearing framework in the EU*, 8 February 2022, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2022-central-clearing-review-consultation-document_en.pdf, 46 p.

is to increase its capacity for central clearing.[150] With respect to this second element, the Commission explicitly mentions that there is a need for stronger EU-level supervision.[151] As was to be expected, responses were mixed, with certain respondents favoring a stronger role for EU-level supervision (*e.g*., certain CCPs) and other respondents (*e.g.,* certain NCAs) fiercely opposing further centralization of supervisory competences.[152] Similarly, in a recent consultation from the Commission on the operation of the ESAs, responses were mixed, with certain respondents stating that direct EU supervision should be considered for pan-European market infrastructures such as EU CCPs, while others resisted this idea.[153] Maybe somewhat more surprisingly, ESMA has indicated that the majority of its members does not support full centralization of supervisory powers for EU CCPs and would rather focus on streamlining existing supervisory processes.[154]

C. Towards a More Integrated Supervisory System for EU CCPs

In light of the considerations sketched in this and the previous section, a more centralized system for the supervision for EU CCPs appears appropriate. The question arises what intensity the reinforced centralization of supervisory capabilities should have. This paper suggests to adopt a system in which ESMA serves as the single supervisor for systemically important EU CCPs. On the other hand, non-systemically important EU CCPs could remain under the primary supervision of their NCA. The distinction between systemically and non-systemically important EU CCPs could be drawn along lines that are similar to the ones that are currently being used for the distinction between T1 and T2 third country CCPs, preferably with a strong focus on cross-border activities and risk-based metrics such as initial margin requirements and default fund contributions. For both types of EU CCPs, interactions between relevant authorities would still be possible through the EMIR colleges, although the legislative framework may have to be streamlined to make supervisory workflows and interactions through the colleges more efficient. For systemically important EU CCPs, a positive side-effect of the proposed full supervisory centralization would be that the complexity and duration of coordination and approval procedures under EMIR—which has frustrated CCPs and market participants for creating a competitive disadvantage vis-à-vis CCPs operating under third country frameworks—could be partly addressed by leveraging more on the interaction between ESMA and the EMIR college instead of relying on the currently multi-layered governance system with ESMA, the NCA, and the EMIR college.

The premise underlying the proposed distinction is that systemically important EU CCPs warrant more centralized supervisory arrangements, while arguments in favor of stronger centralization

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[150] EUROPEAN COMMISSION, *Consultation document: Targeted consultation on the review of the central clearing framework in the EU*, 8 February 2022, 3, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2022-central-clearing-review-consultation-document_en.pdf.

[151] EUROPEAN COMMISSION, *Consultation document: Targeted consultation on the review of the central clearing framework in the EU*, 8 February 2022, 3 and 39, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2022-central-clearing-review-consultation-document_en.pdf.

[152] See the received contributions, available via https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/consultations-banking-and-finance/targeted-consultation-review-central-clearing-framework-eu_en.

[153] EUROPEAN COMMISSION, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs)*, 23 May 2022, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/accounting_and_taxes/documents/220523-esas-operations-report_en.pdf, 18 p.

[154] ESMA CHAIR, *Letter: European Commission's targeted consultation on the review of the EU central clearing framework*, 1 April 2022, ESMA91-372-2125, 18 *et seq*., available via https://www.esma.europa.eu/press-news/esma-news/esma-responds-european-commission-consultation-emir-review.

of supervisory competences might be less compelling for non-systemically important EU CCPs. The most important reason for this is that the fiscal argument against centralization of supervisory powers is built upon the assumption that the cost of CCP failure or resolution falls within the jurisdiction where the CCP is established and, hence, that supervisory and fiscal responsibilities should be aligned and assigned to the jurisdiction in which the CCP is established. The validity of this assumption appears to be inversely related to the degree of cross-border or systemic activity of the concerned CCP, meaning that the adverse effects of distress at systemically important CCPs are more likely to significantly affect (stakeholders in) member states different than the one in which the CCP is established. For non-systemically important CCPs, on the other hand, it seems more plausible that adverse effects of trouble at the CCP will primarily fall upon (constituents of) the jurisdiction in which the CCP is established, making the argument about alignment of supervisory and fiscal responsibilities more convincing.

Although this article is conceptually agnostic with respect to what EU institution or agency would serve as the centralized EU CCP supervisor, this section has assumed for pragmatic reasons that the single EU-supervisor for systemically important EU CCPs would be ESMA. In light of ESMA's current role in CCP supervision, both for T2 CCPs (recognition and ongoing supervision) and EU CCPs (involvement in the EMIR colleges, review of alterations to risk models and parameters, and facilitation of coherence and convergence), such centralization with ESMA appears logical. It would allow to leverage existing expertise and be in line with the EU capital markets union (CMU) project, which envisions more direct supervision by the ESAs.[155] Additionally, the subjection of systemically important EU CCPs to fully centralized EU-supervision by ESMA also seems appropriate to optimize coordination with third country regulators and supervisors. Furthermore, the proposed system would assure that a single EU authority is responsible for the application of the EU-rulebook for CCPs to both third country and EU CCPs that are systemically important for the financial stability of the EU or the member states, promoting consistency. Finally, under the proposed system, ESMA would be able to use its existing powers to promote convergence and coherence in relation to non-systemically important EU CCPs. That being said, it must be noted that—even though the ESMA Regulation theoretically requires ESMA to act in the interest of the EU alone[156]—decision-making through the board of directors of ESMA may in practice not be free of conflicts of (national) interests, as the board comprises representatives of the NCAs.[157] Centralization of supervisory powers over EU CCPs with ESMA should thus not be viewed as a silver bullet for the elimination of undue cross-border value redistribution through EU CCP supervisory decisions. Although it would be an improvement in comparison to the current decentralized supervisory setup, it would not necessarily remove all possibilities for prioritization of national interests.

[155] EUROPEAN COMMISSION, *Communication from the Commission: A Capital Markets Union for people and businesses-new action plan*, 24 September 2020, COM(2020) 590 final, 14 (action 16), available via https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF. See also: EUROPEAN COMMISSION, *Consultation document: Targeted consultation on the supervisory convergence and the single rule book. Taking stock of the framework for supervising European capital markets, banks, insurers and pension funds*, 12 March 2021, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2021-esas-review-consultation-document_en.pdf.

[156] Art. 1(5) ESMA Regulation.

[157] See, *e.g.*, EUROPEAN COMMISSION, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)*, 8 August 2014, COM(2014) 509 final.

§ 6. CONCLUSIONS

In light of the extra-territorial regulatory and supervisory bulwarks that the EU has erected against the deluge that overreliance on CCPs at the other side of the Channel may trigger, this paper has proposed to repair the EU's own roof while the sun is still shining. If not, it may no longer be possible when dark clouds are approaching, meaning that further integration would have to wait until a major calamity—such as a CCP failure—has materialized. As an addition to existing arguments, this paper has presented two new arguments in favor of a more centralized EU supervisory system for EU CCPs. First, in light of the value redistribution concerns that have fundamentally shaped the post-Brexit EU-framework for T2 third country CCPs, this paper has argued that it is inconsistent to maintain a primarily decentralized framework for the supervision of EU CCPs because such decentralization fails to address potential value redistribution within the EU itself. Secondly, along a similar line, this paper has submitted that the controversial post-Brexit location policy for T2+ CCPs could be more justifiable if the EU were to adopt a fully centralized system of EU CCP supervision for at least some EU CCPs, so that 'too systemically important' third country CCPs are not requested to relocate from a system with centralized supervision to a system with fragmented supervision. Building upon these two arguments, the paper has hypothesized that the post-Brexit system of third country CCP supervision may serve as a catalyst for more centralized EU CCP supervision. To arrive at a less unidimensional approach, the paper has suggested to adopt a system in which ESMA serves as the single supervisor for systemically important EU CCPs. The premise underlying the proposal is that systemically important EU CCPs warrant more centralized supervisory arrangements, while arguments in favor of stronger centralization of supervisory competences might be less compelling for non-systemically important EU CCPs.