THE UK AS A THIRD COUNTRY ACTOR IN EU FINANCIAL SERVICES REGULATION*

ABSTRACT

Unless it remains in the single market via membership of the EEA or is able otherwise to negotiate special access terms, after Brexit the UK will have to fall back on the third country provisions of EU financial services regulation. This paper examines the complexities of the current Union approach to the treatment of third countries and considers the likelihood of Brexit smoothing the progression towards a more unified EU system. The paper also considers what the evolution of the EU's treatment of third countries is likely to mean for the UK as it seeks to negotiate continued access to the EU single market. Finally, the paper explores new opportunities for the UK to innovate in regulatory design without impairing equivalence or undermining its commitment at the international level to global regulatory convergence.

Keywords: Brexit, EU financial regulation, third countries, equivalence

JEL classifications: G20, F30, K20, L50, P16

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PART I: INTRODUCTION

1. Brexit: an elusive concept

After the vote to leave the EU Theresa May, the new British Prime Minister, told the world that "Brexit means Brexit". This was a Delphic utterance. There are several different versions of Brexit, ranging from "soft Brexit" whereby the UK ceases to be a Member State of the EU but continues to have access to the single market as a member of the European Economic Area (EEA) or under a bespoke arrangement, through to "hard Brexit" whereby the UK has no form of associate membership or other tailored trading relationship with the EU and relies on its membership of the World Trade Organisation (WTO) as a basis for trade with the EU.[1] In a period of uncertainty, to assume a hard Brexit provides a secure foundation for an analytical inquiry, since this is the outer boundary of the range of possibilities. The clarity provided by assuming the extreme case should be helpful in identifying areas where it would be in the UK's interests to secure bespoke treatment as part of its exit negotiations.

[1] HM Government, *Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union* (March 2016).

To achieve hard Brexit internally would require a labour-intensive root and branch review of UK legislation to revise provisions that were dictated by the UK's international treaty obligations as a member of the EU and to fill gaps in areas that were covered by directly-applicable EU law. Financial services regulation would require particular attention because of the extent to which regulatory competence shifted to the EU level during the period of membership.[2] One example of the difficult choices presented by hard Brexit is the geographical scope of the ring-fence for retail banking operations. Originally set as the EEA,[3] in a hard Brexit scenario the scope could be changed to the UK, though doing so would disrupt industry planning that is already underway[4] and could re-ignite debate about the risk of trapped funding within retail banks because of a shortage of suitable assets.[5] The Great Repeal Bill, whereby the British government proposes to transpose EU law into domestic law would function as a stopgap measure while the implications of a more selective approach are carefully weighed.

[2] Niamh Moloney, 'Resetting the Location of Regulatory and Supervisory Control over EU Financial Markets: Lessons from Five Years On' (2013) 62 International and Comparative Quarterly 955.

[3] The Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014, SI 2014/1960, art 2. Background discussion: Independent Commission on Banking, *Final Report: Recommendations* (September 2011); HM Treasury and Department for Business, Innovation and Skills, *Banking Reform: Delivering Stability and Supporting a Sustainable Economy* (Cm 8356, June 2012); HM Treasury and Department for Business, Innovation and Skills, *Banking Reform: A New Structure for Stability and Growth* (Cm 8545, February 2013).

[4] Martin Arnold, 'Banks Ask Regulators for Clarification on Ringfencing', *Financial Times* (London 31 July 2016) www.ft.com/content/3f3b8e82-5708-11e6-9f70-badea1b336d4 accessed 21 December 2016.

[5] Independent Commission on Banking, Final Report (n 3) 277.

Hard Brexit would also require the UK to engage in a fundamental rethink of its external relations with the EU. It is this external aspect of the UK's situation in a hard Brexit scenario that is examined in this paper.

2. The UK as a third country

Hard Brexit would make the UK a third country for the purposes of EU financial services regulation. Having given up its status as a Member State, the UK would cease to benefit from EU Treaty freedoms and from principles of mutual sincere cooperation and no discrimination on grounds of nationality between Member States; in its dealings with the EU the UK would have to fall back onto the WTO General Agreement on Trade in Services (GATS) core principles of non-discrimination and equal treatment. Specific protections in EU financial services regulation from discrimination on grounds of location or currency would fall away.[6] As well as being outside negotiations on the design of EU financial regulation, the UK would no longer enjoy the standing afforded to Member States to bring actions before the Court of Justice of the EU,[7] a status that it used, for example, to block the ECB's attempt to impose a "location" policy to require clearing houses that settle large amounts of euro-denominated transactions to be based in the euro area.[8] In the immediate aftermath of the vote to leave

[6] e.g. Regulation (EU) No 1022/2103, [2013] OJ L287/5 (amending Regulation (EU) No 1093/2010, [2010] OJ L331/12 (the EBA founding Regulation) which provides that no Member State should be discriminated against as a venue for financial services (recital 22).

[7] Treaty on the Functioning of the European Union (TFEU), art 263.

[8] Case T-496/11*United Kingdom v European Central Bank*, judgment 4 March 2015 with respect to the ECB, *Eurosystem Oversight Policy Framework* (July 2011) .

there were already reports of the location issue being re-opened within the EU;[9] the ECB is likely now to make the case for an expanded competence in order to safeguard the euro area financial infrastructure, and may seek to withdraw from its liquidity swap line arrangements for clearing houses that were made with the Bank of England in order to enhance financial stability in relation to central clearing within the EU.[10] There is the possibility of clearing houses becoming less of a policy concern in the longer term because of the advent of newer blockchain-derived technologies;[11] but this cannot be assumed since the alternative of established clearing houses simply absorbing new technologies into their business models is also tenable. The UK will also lose the subtle (though nonetheless important) proximity benefits that flowed from being the host State of the European Banking Authority (EBA), which will have to relocate to within the EU.

3. Third countries in EU financial regulation: a system in transition

What would be the parameters for this new phase of economic diplomacy and regulatory engagement between the UK and the EU? Broadly speaking, EU financial regulation is

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[9] Jim Brunsden and Alex Barker, 'City to be Sidelined by Capital Markets Union Plan' *Financial Times* (London, 29 June 2016) www.ft.com/content/d8e0de94-3e11-11e6-8716-a4a71e8140b0 accessed 21 December 2016.

[10] Angus Armstrong, 'EU Membership, Financial Services and Stability' (2016) 236 National Institute Economic Review 31, referring to ECB and Bank of England, Measures to enhance financial stability in relation to centrally cleared markets in the EU, Joint Press Release (29 March 2015) www.bankofengland.co.uk/publications/Documents/news/2015/044.pdf accessed 21 December 2016.

[11] John Dizard, 'Clearing Houses Should not be a Bargaining Tool in Brexit Talks'ft.com (10 July 2016) www.ft.com/content/cddc7964-44f5-11e6-9b66-0712b3873ae1?sectionid=reports_exchanges-trading-clearing accessed 21 December 2016.

evolving towards a system in which third country banks, investment firms, infrastructure providers and other actors are able to provide diverse financial services and activities across the single market on the basis of compliance with their home regulatory and supervisory framework where (or to the extent that) the third country framework has been deemed by the European Commission to be equivalent to the Union framework and certain other conditions are satisfied, including, where necessary, the putting in place of cooperation arrangements between relevant supervisory authorities. In this respect EU law is following a model familiar to international financial regulation.[12] A finding of equivalence, supported by cooperation arrangements, makes it possible for authorities in different countries or regions to rely on each other; this avoids duplicative or conflicting rules, and closes gaps that could otherwise enable regulatory arbitrage or excessive risk-taking. The benefits that flow from concessions based around regime-equivalence are thus important not only to the business models of internationally-active financial actors but also to systemic stability.[13] It is a rational choice for countries to cooperate to deal with problems that do not respect jurisdictional boundaries.[14] From a business perspective, third country access based on equivalence can lead to significant efficiency gains by enabling streamlined organisation of an international

[12] Dirk A Zetzsche, 'Competitiveness of Financial Centers in Light of Financial and Tax Law Equivalence Requirements' in Ross P Buckley, Emilios Avgouleas and Douglas W Arner (eds), *Reconceptualising Global Finance and its Regulation* (CUP 2016); Pierre-Hugues Verdier, 'Mutual Recognition in International Finance' (2011) 52 Harvard International Law Journal 55.

[13] Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft* (CUP 2014) ch 3.

[14] But multiple forces influence the design of international financial regulation and it is not simply the product of rational choice by countries: Pierre-Hugues Verdier, 'The Political Economy of International Financial Regulation (2013) 88 Indiana Law Journal 1405.

financial services group and avoiding the need to establish a host country presence (subsidiary or branch) to satisfy host State regulatory requirements.

However, a unified Union approach to the treatment of third countries around the concept of equivalence and with a fixed role for the various actors is not yet in place. Equivalence solutions are not universally available. Important areas not covered include payment systems and settlement finality; legal uncertainty in these areas could threaten systemic stability. In some situations, the access that is available to a third country actor is limited to a Member State's national market and there is no single point of entry to the entirety of the EU single market. There is also variation in the extent to which the powers that remain vested in Member States to allow third country actors access to their national market only are subject to specific harmonized conditions. Where equivalence solutions do apply, different measures allocate different roles to the European Commission, European Supervisory Authorities (ESAs) and the national competent authorities in ways that are not always readily understandable as being driven by differences in the contextual setting. There is also a lack of uniformity with respect to whether reciprocity of treatment for EU actors under the third country regime is required as a condition of equivalence.[15]

4. The design and approach of this paper

Part II presents a more detailed picture of the complex world that awaits the UK and its financial service industry on a hard Brexit assumption by outlining the treatment of third countries in a number of key areas of EU financial regulation. Part III considers the reasons

[15] But major measures that form the backbone of EU market regulation are robust in demanding reciprocity: e.g., MiFIR, recital 44 and art 47(1); EMIR recital 7 and art 25(6).

for this complexity and uses that analysis to predict the impact of Brexit on EU external relations. Part IV examines the implications of being a third country vis-à-vis the EU for the UK financial services industry and for UK financial regulatory policy. Part V summarises the findings and concludes.

In looking forward, this study must inevitably engage with uncertainties and unknowns. However, this is not wholly uncharted territory and this study draws upon existing scholarship on the EU's role in international financial regulation to develop an analytically-grounded and informed view on the issues and risks that lie ahead.[16] Legal, political and

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[16] Niamh Moloney, 'The European Union in International Financial Governance' (2017) Russell Sage Foundation Journal of the Social Sciences (forthcoming); Niamh Moloney, 'International Financial Governance, The EU, and Brexit: The "Agencification" of EU Financial Governance and the Implications' (2016) 17 European Business Organization Law Review 451; Alasdair R Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 Journal of European Public Policy 1233; Abraham L Newman and Elliot Posner, 'Putting the EU in its Place: Policy Strategies and the Global Regulatory Context' (2015) 22 Journal of European Public Policy 1316; Chad Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' (2015) 22 Journal of European Public Policy 1336; Lucia Quaglia, 'The Politics of "Third Country Equivalence" in Post-Crisis Financial Services Regulation in the European Union' (2015) 38 West European Politics 167; Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn OUP 2014); Lucia Quaglia, *The European Union and Global Financial Regulation* (OUP 2014); Hans-Jürgen Bieling, 'Shattered Expectations: The Defeat of European Ambitions of Global Financial Reform' (2014) 21 Journal of European Public Policy 346; Daniel Mügge (ed) *Europe and the Governance of Global Finance* (OUP 2014); Daniel Mügge, 'Europe's Regulatory Role in Post-crisis Global Finance'(2014) 21 Journal of European Public Policy 316; Elliot Posner and Nicholas Véron, 'The EU and Financial Regulation: Power Without Purpose' (2014) 17 Journal of European Public Policy 400; Lucia Quaglia, 'The European Union, the USA and International Standard Setting by Regulatory Fora in Finance' (2013) 19 New Political Economy 427; Eilís Ferran, 'Crisis-driven Regulatory Reform' in E Ferran, N Moloney, JG Hill and JC Coffee *The Regulatory Aftermath of the Global Financial Crisis* (CUP 2012); Daniel Mügge, 'The European Presence in Global

other social science literature has dived deep into the EU institutional and political dynamics and internal processes to understand the EU's external influence on financial regulation. Scholars have considered how far the mixed external success is linked to uneven growth in internal EU regulatory capacity across the field of financial regulation and, in turn, the extent to which this unevenness can be traced back to the divergent regulatory preferences of the most economically powerful Member States, in particular the UK, Germany and France, and to competing interest group coalitions. Close examination of how the global regulatory context has influenced various strategies pursued by the EU in different situations (exporting home regulation, seeking to gain first mover advantage, forging mutual recognition and building coalitions) has resulted in an analytical framework that claims predictive power.[17] This body of work thus yields valuable pointers to a future in which British politics and the interests of the UK financial services industry are no longer deeply embedded inside EU internal processes.

Financial Governance: a Principal-Agent Perspective' (2011) 18 Journal of European Public Policy 383; Pierre Schammo, 'Equivalence-based Regulation and EU Prospectus Law - the Shadow Regime' in Daniel Prentice and Arad P Reisberg, *Corporate Finance Law in the UK and the EU* (OUP 2011); Elliot Posner, 'Is a European Approach to Financial Regulation Emerging from the Crisis?' in Eric Helleiner, Stefano Pagliari and Hubert Zimmermann (eds), *Global Finance in Crisis: The Politics of International Regulatory Change* (Routledge 2010); Eilís Ferran, 'Capital Market Openness After Financial Turmoil' in Panos Koutrakos and Malcolm Evans (eds), *Beyond the Established Orders* (Hart Publishing 2010); Andreas Dür, 'Fortress Europe or Open Door Europe? The External Impact of the EU's Single Market in Financial Services' (2010) 18 Journal of European Public Policy 771; Elliot Posner, (2009) 'Making Rules for Global Finance: Transatlantic Regulatory Co-operation at the Turn of the Millennium' (2009) 63 International Organization 665; Eric J Pan, 'A European Solution to the Regulation of Cross-Border Markets' (2007) 2 Brooklyn Journal of Corporate, Financial & Commercial Law 133.

[17] Newman and Posner, ibid; Damro, ibid. See also Stephen Woolcock, *European Union Economic Diplomacy: The Role of the EU in External Economic Relations* (Ashgate 2012).

PART II: THE TREATMENT OF THIRD COUNTRIES IN SELECTED AREAS OF EU FINANCIAL REGULATION

1. Banking and prudential supervision

1.1. International banking groups

EEA deposit-taking institutions (hereafter banks) are free to conduct their cross-border business in the Union by providing services or through branches or subsidiaries.[18] A third country bank is in a different position because it must obtain permission whether to operate as a branch or as a subsidiary. The power to authorise branches of third-country banks to operate within the Union and to set the specific conditions under which they are allowed to operate remains with Member States.[19] Subject to the safeguard that branches of third country banks must not be given more favourable treatment than that accorded to branches of an EU bank,[20] Member State authorities (and the ECB within the Single Supervisory Mechanism for

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[18] CRD, art 33.

[19] For the UK approach: PRA, *Supervising International Banks: The Prudential Regulation Authority's Approach to Branch Supervisio*n (SS10/14). Within the euro area Single Supervisory Mechanism, national competent authorities remain responsible for the supervision of third country credit institutions establishing a branch or providing cross border banking services: Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63, recital 28. The authorisation of a credit institution established as a subsidiary is a task conferred on the ECB: ibid, art 4.

[20] CRD, art 47.

the euro area) make their own determination whether a branch or subsidiary is the appropriate form. At present there is no specific equivalence requirement or process at EU level that applies to decisions about third country bank branching, nor are such decisions subject to specific harmonized conditions.[21] Subsidiarization or not is a key decision because whilst from the business standpoint a branch is often the less costly option, from a financial stability perspective the establishment of a separately-capitalised subsidiary that is under local supervision (and resolution in the event of failure) is advantageous.[22] Permission to a third country bank to conduct business via a branch does not confer single market passporting rights.[23]

Formal EU equivalence tests do apply in certain other contexts relevant to international banking groups. First, equivalence can enable streamlined consolidated supervision of an EU bank that is part of an international banking group headquartered in a third country. Provided the third country regime for consolidated supervision is considered equivalent to the EU regime, the third country consolidated supervision regime can suffice; without equivalence, EU consolidated supervision requirements or other appropriate supervisory techniques which

[21] CRD, recital 23 and art 47(3) envisage rules that accord parity of treatment to third country branches throughout the Union. For the future, note that in November 2016 the Commission published a legislative proposal that, if adopted, will oblige Member States to require an intermediate EU holding company where two or more institutions in the Union are part of the same large (threshold: EUR 30 billion or a non-EU G-SII) third country group: European Commission 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures' COM(2016) 854.

[22] Jonathan Fiechter, İnci Ötker-Robe, Anna Ilyina, Michael Hsu, André Santos, A and Jay Surti, *Subsidiaries or Branches: Does One Size Fit All?* (IMF SDN/11/04).

[23] CRD recital 23.

achieve the objectives of supervision on a consolidated basis will apply.[24] Secondly, equivalence has a role in ensuring the cooperation between supervisors both within and outside colleges of supervisors that is essential for effective supervision of an international bank group. Supervisors need to be able freely to exchange information with each other secure in the knowledge that it will be treated with appropriate confidentiality and professional secrecy. These matters are also within the realm of formal EU equivalence examination: the conclusion of a cooperation agreement providing for the exchange of information with a third country's authorities is subject to a guarantee that the third country's professional secrecy requirements are at least equivalent to those in EU law;[25] there must be equivalence with respect to confidentiality requirements in order for a third country authority to be admitted to participation in a college of supervisors.[26]

1.2. The prudential treatment of EU institutions' third country exposures

Equivalence can unlock a favourable treatment for prudential purposes of certain categories of third country exposures. The detailed prudential requirements applicable to EU banks and other institutions provide for equivalence determinations in a range of areas in order for the application of the same preferential treatment of third country exposures as applies to EU exposures.[27] The equivalence determination is with respect to the prudential supervisory and regulatory requirements of the third country.

[24] CRD, art 127.

[25] CRD, art 55.

[26] CRD, art 116(6).

[27] CRR, arts 107(3) and (4), 114(7), 115(4), 116(5), 132(3) and 142(2).

1.3. Procedural aspects of equivalence in the banking context

Consolidated supervision:[28] the competent authorities of the relevant Member States carry out the assessment of the equivalence of consolidated supervision for subsidiaries of third country groups. The Commission may request the European Banking Committee to give general guidance as to whether the consolidated supervision arrangements in third countries are likely to achieve the objectives of consolidated supervision. The European Banking Committee is composed of high-level representatives from Member States (mostly from ministries of finance). The ECB and the EBA attend as observers. The EBA is required to assist the Commission and the European Banking Committee. Competent authorities are required to take account of guidance from the European Banking Committee and are required to consult with the EBA before adopting a decision.

Confidentiality and professional secrecy:[29] CRD, article 116(6) provides that in order for a third country authority to participate in a college of supervisors, all of the competent authorities in the college must be of the opinion that the third country confidentiality requirements are equivalent.[30] In this context the determination of equivalence does not involve the Commission. The EBA has issued recommendations on the equivalence of a number of third country confidentiality regimes to inform the opinions of the national competent authorities.[31] These recommendations were issued on the basis of Article 16 of the EBA Regulation[32] and, as such, competent authorities must comply or explain.

[28] CRD, art 127.

[29] CRD, art 116(6) and art 55.

[30] CRD, art 116(6); Commission Implementing Regulation (EU) 2016/99, [2015] OJ L21/21.

[31] EBA/REC/2015/01.

[32] Regulation (EU) No 1093/2010, [2010] OJ L/12.

The EBA recommendations do not formally extend to the CRD, article 55 decisions on equivalence with respect to professional secrecy that Member States must make ahead of entering into cooperation agreements with third country authorities.[33] Nevertheless, equivalence assessments regimes performed for the purposes of article 116(6) can also be useful for article 55.[34]

Prudential treatment of third country exposures: in all of these cases the responsibility to determine equivalence now rests with the Commission, and decisions are made by way of implementing acts; prior to 1 January 2015 it lay with national competent authorities. The EBA does not have a formal legislative mandate to assist the process but in practice it is asked by the Commission to work on assessments.[35]

1.4. Dissatisfaction with procedural aspects of equivalence in banking

The equivalence assessment processes in banking have been singled out by the EBA as an area in need of improvement.[36] With respect to consolidated supervision (CRD, article 127) it has recommended that it should be for the Commission, assisted by the EBA, to issue implementing decisions on equivalence. This would move the process towards the emerging

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[33] CRD, art 55.

[34] EBA, Opinion on Cooperation with Third Countries (EBA/Op/2015/19) para 13.

[35] Ibid, paras 15-16. EBA (in common with the other ESAs) is empowered by its founding Regulation to assist in preparing equivalence assessments: Regulation (EU) No 1093/2010, art 33(1).

[36] EBA, Opinion (n 34).

"standard" EU equivalence model.[37] As regards its own position, the EBA has called for explicit mandates to assist the Commission and to issue recommendations.

2. Cross-border investment services

2.1. Services to retail clients

There is no cross-border passport available to a third country firm that wants to provide investment services to retail clients (or clients who are elective ("opted up") professional clients by virtue of their experience and expertise). The position under MiFIDII (applicable from January 2018) remains that access is on a State-by-State basis.[38] Subject to the usual safeguard that third country firms must not be treated more favourably than EU firms, Member States can retain exemptions in their national law that permit third country firms that do not have a branch in the Member State to provide investment services without local authorisation. UK law provides a generous exemption in favour of overseas persons[39], but there is a variable degree of openness across the Member States with respect to the provision of cross-border investment services by third country firms without a local authorisation.[40]

[37] As well as examples considered in this study, this model has been adopted for insurance purposes in the Solvency II Directive: EIOPA, Equivalence https://eiopa.europa.eu/external-relations/equivalence accessed 21 December 2016. At the very detailed level of the form of the EU legal instrument used for equivalence decisions, depending on context delegated or implementing acts are specified.

[38] MiFIDII, arts 39-43.

[39] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72 exemption for overseas persons.

[40] MIFIR, recital 41 ("The provision of services by third-country firms in the Union is subject to national regimes and requirements. Those regimes are highly differentiated …").

Where, however, a Member State chooses to require a third country firm to establish a branch, under MiFIDII there is an authorisation process to which a number of EU harmonized conditions apply. These conditions, which are not as stringent as a full equivalence-based examination, are that: the provision of services for which the firm requests authorisation in question is subject to authorisation and supervision in the third country; the requesting firm is properly authorised in the third country; due regard is paid to FATF recommendations relating to anti-money-laundering and terrorism financing; cooperation agreements are in place between the Member State and third country authorities; the branch has sufficient initial capital at its disposal; persons are appointed to manage the branch in compliance with EU requirements with respect to management bodies; there is an OECD Model compliant tax cooperation agreement in place between the Member State and the third country; and the firm belongs to an authorised or recognised investor compensation regime. On an ongoing basis, a third country branch must comply with certain MiFIDII obligations and is subject to the supervision of the Member State's competent authority; but the Member State must not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by MiFIDII.

2.2. Services to eligible counterparties and professional clients

Under MiFIR (also fully applicable from January 2018) a third country firm is able to provide investment services or perform investment activities to eligible counterparties and professional clients across the single market and without the establishment of a branch where it is registered in the register of third country firms kept by the European Securities and

Markets Authority (ESMA).[41] Whilst ESMA can withdraw registration where it has well-founded reasons to do so, it does not assume responsibility to supervise registered third country firms.[42] Entry onto the ESMA register is subject to three conditions: an equivalence determination by the Commission with respect to the third country's legal and supervisory arrangements; the firm being authorised in the jurisdiction of its head office to provide the investment services or activities to be provided in the Union and being subject to effective supervision and enforcement ensuring full compliance with the requirements applicable in that third country; and there being cooperation arrangements in place with the third country authorities.[43] Subject to a transitional arrangement,[44] once there is an equivalence determination by the Commission with respect to a third country (and provided it remains in effect) Member States will no longer be able to allow that third country's firms to provide investment services or activities to eligible counterparties and professional in accordance with national regimes.[45]

An equivalence decision by the Commission for this purpose is required to state that the legal and supervisory arrangements of the third country ensure that firms authorised in that third country comply with legally binding prudential and business conduct requirements which have equivalent effect to the requirements set out in MiFIR, MiFIDII and CRD and associated delegated and implementing measures. It must also confirm reciprocity of treatment for EU firms under the third country legal regime. To arrive at the determination, the Commission must establish by reference to the prudential and business conduct

[41] MiFIR, arts 46-49 and art 54.

[42] MiFIR, art 49.

[43] MiFIR, art 46(2).

[44] MiFIR, art 54.

[45] MiFIR, art 46(4).

framework of the third country that firms providing investment services and activities in that third country are: (a) subject to authorisation and to effective supervision and enforcement on an ongoing basis; (b) subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) subject to adequate organisational requirements in the area of internal control functions; and (d) subject to appropriate conduct of business rules. The third country framework must also ensure market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation. The Commission's decision on equivalence is subject to oversight by the European Securities Committee (a body comprised of representatives of Member States).[46] The Commission will look to ESMA as a source of technical advice.

Where a third country firm has established a branch in an EU Member State and its home country has been judged to be equivalent, it is then able to provide on a cross-border basis the services and activities covered under the authorisation to eligible counterparties and professional clients without the establishment of new branches.[47]

3. Credit rating agencies

EU law restricts the use of ratings issued by third country rating agencies for EU regulatory purposes.[48] There are two routes whereby third country ratings can be used, the first being an "endorsement" regime and the latter a "certification" regime based on equivalence. The

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[46] MiFIR, art 47 and art 51.

[47] MiFIR, art 47 (3).

[48] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] L302/1 (as amended), arts 4–5.

endorsement route allows a rating agency registered with ESMA (the single supervisor for rating agencies in the EU) which is part of the same group as a third country rating agency to endorse for EU regulatory purposes a rating issued by the third country agency. The endorsement process is subject to a number of conditions including that the EU credit rating agency has verified and is able to demonstrate on an ongoing basis to ESMA that the conduct of credit rating activities by its associated third-country credit rating agency fulfils requirements which are at least "as stringent as" requirements applicable to EU credit rating agencies, and that it is subject to effective supervision. The "as stringent" standard is similar to the required standard for equivalence and must be satisfied by reference to third country measures that are legally binding.[49] The reference to "legally binding" measures was initially controversial because the EU was ahead of other jurisdictions in shifting away from non-binding self-regulation of credit rating agencies. However, other major economies have since joined the trend towards public regulation of credit rating agencies and concerns as to the practical utility of the endorsement route have receded. Jurisdictions that have passed the ESMA "as stringent" test include the United States, Australia, Japan, Canada, Singapore and Hong Kong.

The certification route is available to third country credit rating agencies that have no presence or affiliation in the EU provided they are not systemically important for the financial stability or integrity of the financial markets of one or more Member States. The certification route for, in effect smaller rating agencies that do not have a global presence, is subject to a determination of third country equivalence by the Commission, overseen by the European Securities Committee. The requirements are that credit rating agencies in that third

[49] ESMA, Guidelines on the application of the endorsement regime under Article 4(3) of the Credit Rating Agencies Regulation No 1060/2009, 12-19.

country are subject to: authorisation or registration; effective supervision and enforcement on an ongoing basis; and legally binding rules which are equivalent to the EU requirements for rating agencies (subject to certain exceptions and exemptions). In addition, ratings must be shielded from interference by supervisors and other public authorities of the third country. Reciprocity of treatment is not mandated. ESMA provides technical assistance to the Commission in these equivalence assessments.[50]

4. Benchmarks

Regulation of benchmarks is a new area that has followed in the wake of benchmark manipulation scandals. The EU regime, which is broad in scope, bears some similarity to its approach in relation to rating agencies so far as third countries are concerned. Under the EU Benchmark Regulation,[51] benchmarks produced by non-EU administrators can only be used in the EU where the administrator is authorised or registered under an equivalent third country regime or the benchmark is endorsed by an EU administrator.[52] As an interim measure pending an equivalence decision, a non-EU benchmark can be used where the administrator is recognised by a Member State competent authority.[53]

[50] ESMA, Non-EU Credit Rating Agencies, www.esma.europa.eu/supervision/non-eu-credit-rating-agencies accessed 21 December 2016.

[51] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, [2016] OJ L 171/1.

[52] Regulation (EU) 2016/1011, arts 30-31 and art 33.

[53] Regulation (EU) 2016/1011, art 32.

The equivalence determination by the Commission relates to binding requirements in the third country that correspond to the EU Benchmark Regulation, taking account in particular of whether the legal framework and supervisory practice of the third country ensure compliance with relevant IOSCO principles. Effective on-going and supervision must also be in place. The Commission's implementing decision, which is overseen by the European Securities Committee, may relate to all of a third country's administrators or may be confined to specific administrators, or specific benchmarks or families of benchmarks. ESMA will provide technical assistance in the process. ESMA is also responsible for establishing cooperation arrangements with the third country supervisor. The possibility of a partial equivalence determination (of specific administrators, benchmarks or families of benchmarks) is a concession to the international state of play; some jurisdictions have chosen to regulate only a limited number of critical benchmarks whereas the EU approach is more comprehensive.

The endorsement route allows an EU authorised or registered administrator, or other supervised entity located in the Union with a clear and well-defined role within the control or accountability framework of a third country administrator, which is able to monitor effectively the provision of a benchmark, to apply to a Member State competent authority to endorse a third country benchmark or family of benchmarks for Union use.[54] One of the conditions to endorsement is that the provision of the benchmark (or family) fulfils on an on-going basis requirements that are at least as stringent as the EU requirements on benchmarking. There must also be an objective reason to provide the benchmark or family of benchmarks in the third country and for that benchmark or family to be endorsed. The Commission is empowered to adopt delegated acts, which are overseen by the European

[54] Regulation (EU) 2016/1011, art 33.

Parliament and by the Council, to determine the conditions within which competent authorities may assess whether there is an objective reason. An important departure from the position in relation to rating agencies is that for the purposes of the "as stringent" test self-regulatory, as well as mandatory, requirements count. This feature reflects the fact that the EU's decision to impose mandatory requirements is not (yet) widely replicated elsewhere; to insist on comparability of mandatory requirements would have defeated the purpose of providing the endorsement route as an alternative to the equivalence regime, which is widely thought to be unworkable in practical terms. The possibility of partial endorsement also caters for differences in approach between the EU and other jurisdictions.

The stopgap recognition procedure depends on the third country administrator acquiring recognition by its Member State of reference, which is determined on the basis of criteria set out in the Benchmark Regulation.[55] The administrator must comply with the EU Benchmark Regulation (save for certain provisions) or with relevant IOSCO principles provided the application of such principles is equivalent to compliance with the applicable terms of the Benchmark Regulation. In this case equivalence is to be verified by an independent external auditor in the case of a non-supervised administrator, or the third country national competent authority in the case of a supervised administrator. The conditions applicable to the recognition route also include the administrator appointing a legal representative in the Member State of reference to assume oversight functions and to be accountable to the Member State's competent authority.

There is concern that the three routes and the concessions built into them in recognition of differences in approach elsewhere do not do enough to ensure that non-EU benchmarks will

[55] Regulation (EU) 2016/1011, art 32.

still be available to EU firms.[56] Whilst similar concerns were expressed about the impact of EU regime for credit rating agencies on non-EU agencies and the more gloomy predictions did not come true, benchmark administrators and rating agencies have different business models and the incentives for benchmark administrators to maintain EU eligibility may be weaker.

5. Market infrastructure providers

Market infrastructure providers include trading platforms, clearing houses (also known as central counterparties (CCPs)) and information-gathering trade repositories. In a hard Brexit scenario, UK market infrastructure providers will lose the regulatory status (e.g. being a "regulated market" for purposes associated with the admission of securities to listing) and associated entitlements they enjoyed under EU law. Important EU legal protections with respect to the operation of payment systems and settlement finality will cease to apply. This loss is mitigated to a limited extent by equivalence-based provisions in MiFIR and EMIR to allow, amongst other things, third country infrastructure providers to be eligible as trading and/or clearing venues for mandatory EU trading/settlement obligations, and to access on a non-discriminatory basis trading venues and CCPs established in the Union. The position with respect to CCPs under EMIR can be taken as an illustrative example.[57] The EMIR CCP

[56] Clifford Chance, *The New EU Benchmarks Regulation: What You Need to Know* (9 May 2016) www.cliffordchance.com/briefings/2016/09/the_new_eu_benchmarksregulationwhatyounee.html accessed 21 December 2016 Morrison Foerster, *Setting the New Benchmark: EU Regulation on Financial Benchmarks* (13 June 2016) https://media2.mofo.com/documents/160613eufinancialbenchmarks.pdf accessed 21 December 2016.

[57] The EMIR CCP equivalence process is broadly typical of the regulatory approach in this area, but even here the EU legislators have not been completely consistent. See, e.g., MiFIR, art 23(1) on trading obligations for

regime is a good example of the direction of travel for the Union's unified approach to third country equivalence.

ESMA is directly responsible for recognising central counterparties (CCPs) established in third countries to allow them to provide clearing services within the Union.[58] Recognition allows counterparties that are subject to the EMIR clearing obligation to use the third country CCP for that purpose.[59] An equivalence determination by the Commission is one of the conditions to which recognition is subject.[60] The determination of equivalence by the Commission takes the form of an implementing act overseen by the European Securities Committee. The Commission is required to determine that the legal and supervisory arrangements of the third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to requirements laid down in the EMIR, that those CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis, and also that the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes.[61] In addition, ESMA must also be satisfied that the CCP is established or authorised in a third country that is considered to have equivalent systems for anti-money-laundering and combatting the financing of terrorism to those of the Union.[62] In furtherance

investment firms which includes a third country trading venue as an eligible venue provided it has been assessed as equivalent in accordance with the process under the 2003 Prospectus Directive, which is different from the EMIR CCP framework.

58 EMIR, art 25.

59 EMIR, art 4(5).

60 EMIR, art 25(6).

61 EMIR, art 25(6).

62 EMIR, art 25(2).

of the aim of ensuring that recognised third country CCPs do not disrupt the orderly functioning of Union markets, the information provided to ESMA concerning the recognition of a third country CCP should enable ESMA to assess whether that CCP is in full compliance with the applicable third country prudential requirements.[63]

6. Funds and fund managers

UCITS (undertakings for the collective investment in transferable securities) account for around 75 per cent of all collective investments by small investors in Europe. To qualify for the UCITS designation, the fund must be EU-based and it must be managed by an EU-based management company.[64] In a hard Brexit scenario, UK fund managers will no longer be able to manage UCITS directly (but may still be able to act as a delegated manager). UK funds will not be able to use the EU UCITS brand but may instead be within the scope of the Alternative Investment Fund Managers Directive (AIFMD). Hard Brexit will also exclude UK funds and fund managers from other EU fund brands that can be marketed to eligible investors across the Union: ELTIFs (European long term investment funds);[65] EuVECA (European venture capital funds);[66] and EuSEF (European Social Entrepreneurship Funds).[67]

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[63] Commission Delegated Regulation (EU) No 153/2013, [2013] OJ L52/51, recital 5.

[64] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L302/32 (amended by Directive 2014/91/EU), art 1 and arts 5-6.

[65] Regulation (EU) 2015/760 of the European Parliament and of the Council of 25 April 2015 [2015] OJ L123/98, art 3(2) and art 5(2).

[66] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds [2013] OJ L 115/1, art 2(1)(b) and art 3(a)(iii) (subject to review: art 26(1)(h)).

Post Brexit the UK asset management industry will need to look to the AIFMD, which provides a framework for the pan-European marketing and management of alternative investment funds to professional investors. (Marketing to retail investors remains under Member State control subject to Union transparency requirements. [68]) EU fund managers have a full passport (subject to notification requirements) to market and manage EU funds. However, the position with respect to third country funds and/or third country fund managers is notoriously complex.[69] The Directive contains two third country regimes, one conferring a Union passport and the other enabling private placements within a Member State but not cross-border; the former is to be switched on at a future date and the latter is expected to be phased out after a period when the two regimes operate in tandem.[70]

Even after its staged introduction, the passport for third country funds and fund managers will still be subject to stringent conditions. Where both the fund and the fund manager are based in third countries these conditions are: the fund manager must obtain authorisation by a Member State "of reference;"[71] the fund manager must comply with AIFMD requirements save where compliance is not compatible with applicable third country national laws and provided there is actual compliance with an equivalent rule under the foreign law; the laws

[67] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds [2013] OJ L115/18, art 2(1)(b) and art 3(1)(iii) (subject to review: art 27(1)(f)).

[68] AIFMD, art 43.

[69] Eilís Ferran, 'After the Crisis: The Regulation of Hedge Funds and Private Equity in the EU' (2011) 12 European Business Organization Law Review 379.

[70] AIFMD, arts 34 – 42 and arts 67 - 68.

[71] Commission Implementing Regulation (EU) No 448/2013 [2013] OJ L132/3.

and supervisory system of the third country in which the manager is based must not prevent the effective exercise of supervisory functions under AIFMD; the manager must appoint a legal representative in the EU; appropriate cooperation arrangements must be in place between the authorities in reference Member State and the relevant third countries; the reference Member State's law and jurisdiction are to govern disputes; there must be an OECD-compliant tax convention in place between reference MS and the third countries; and the third countries must not be on the FATF list of uncooperative jurisdictions with respect to money laundering and terrorist financing. There are supervisory notification requirements in respect of marketing intentions.[72] A variant set of the passport conditions apply where the manager is based in the third country but the fund is not, or vice versa. A key point to note with regard to these conditions is that, passport notwithstanding, a third country fund manager must still comply with the AIFMD requirements (except for specific cases of incompatibility with the third country national law); it is not permitted to operate generally on the basis of "equivalent" third country laws.

The "switching on" process for third countries depends on ESMA delivering an opinion on the operation of the passport for EU managers and funds and on the operation of national private placement regimes, and advice on the extension of the passport to third countries.[73] ESMA must give positive advice where it considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic

[72] AIFMD, art 37.

[73] AIFMD, art 67.

risk, impeding the extension of the passport.[74] The actual flicking of the switch is the responsibility of the Commission.[75]

ESMA is conducting a country-by-country assessment of the potential extension of the AIFMD passport.[76] At the time of writing (August 2016), it had examined twelve countries and given an unqualified or only moderately qualified opinion on most of them (including the United States, Australia, Hong Kong and Singapore), but it deferred its decision on Bermuda and the Cayman Islands because both countries were in the process of implementing new regulatory regimes; in addition, it noted that the assessment could not be completed for the Isle of Man because of the absence of an AIFMD-like regime. ESMA's verification criteria for this exercise included the operation of existing supervisory cooperation arrangements with the third country, the third country's record in dealing with investor complaints, whether there was tangible evidence of adequate surveillance of market developments with a view to tracking systemic risks by the third country supervisory authority, and the possible implications of an extension for investor choice and market competition. ESMA considered how the relevant third country rules on investor protection measured up against those in the AIFMD and also how the regulatory regime in the third country measured up against relevant IOSCO principles. Whilst this was not a formal "equivalence" assessment, ESMA noted that "it is nevertheless relevant and necessary to investigate the extent to which the regulatory

[74] AIFMD, art 67(4).

[75] AIFMD, art 67(6).

[76] ESMA, Advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs (ESMA/2016/1140); ESMA, Advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs (ESMA/2015/1236).

framework of the non-EU country differs from the AIFMD".[77] The dialogue between the Commission and ESMA on this exercise included a call from the Commission for a more detailed assessment of the capacity of supervisory authorities and their track record in ensuring effective enforcement.[78] This exchange substantiates the point that equivalence (loosely interpreted) depends as much on the practical reality of regulation (supervision and enforcement) as it does on what is said on paper.

The AIFMD also imposes conditions on Member States' national private placement regimes for third country actors, namely that the manager must comply with AIFMD transparency and disclosure requirements, there must be cooperation arrangements in place between relevant supervisory authorities, and the third country in which the manager/fund is based must not be on the FATF list of uncooperative jurisdictions. Member States can impose their own stricter marketing requirements.[79]

PART III: WHY IS THE TREATMENT OF THIRD COUNTRIES SO COMPLICATED?

Part of the explanation for this complicated state of affairs is that it reflects necessary bespoke tailoring to fit specific situations. The recent example of the framework for non-EU benchmarks illustrates: the treatment of third countries is complex, but for good reason. The EU has adopted a more comprehensive legislative regime for benchmark regulation than the

[77] ESMA/2015/1236, para 20; ESMA/2016/1140, para 21.

[78] European Commission letter to ESMA on the AIFMD passport, 17 December 2015, at www.esma.europa.eu/press-news/esma-news/esma-publishes-letter-european-commission-aifmd-passport accessed 21 December 2016.

[79] AIFMD, art 36 and art 42.

rest of the world thereby creating a situation in which a third country regime rigidly tied to the concept of equivalence by reference to legally-binding requirements would have been unworkable; other alternatives were needed to maintain access to a range of benchmarks to ensure the efficient functioning of the financial system.[80] But at least some of the complexity can be viewed as a microcosm of the lack of coherence and consistency in EU financial services regulation in general, a problem that was exacerbated during the post-crisis period by the high political saliency of the issues and the resulting intense pressure on the law-making machinery. Stories behind the hotchpotch of arrangements for third country actors include hard-fought battles around sharply-divided views on whether a unified EU approach would lead to more or less protectionism, power plays at multiple levels, and initial uncertainties within the EU institutions with respect to the appropriate distribution of responsibilities between Commission and the newly-established ESAs. The especially convoluted AIFMD framework is held out in the academic literature as a notorious example of a compromise solution to bridge a gulf between France and Germany on the one hand, and the UK on the other with respect to the openness of the EU to the international hedge fund industry.[81] The fragmented way in which the EU institutions conduct legislative work is also a relevant factor because a silo-based approach is not conducive to achieving a consistent approach on horizontal issues that are common to a range of measures.[82] A former Chair of the European Parliament's influential Economic and Monetary Affairs Committee has spoken of third country issues being relegated to the end of negotiations and of the risk of "rubbish

[80] ECON Report on the on the proposal for a regulation on indices used as benchmark (A8-0131/2015) (Rapporteur: Cora van Nieuwenhuizen) 75.

[81] Lucia Quaglia, 'The Politics of "Third Country Equivalence"' (n 16) 175-177.

[82] ECON, Enhancing the Coherence of EU Financial Services Legislation, informal report adopted in committee, 30 January 2014.

compromises".[83] Another consideration is that thinking on the treatment of third countries in EU financial regulation has evolved over the years making it inevitable that some older measures will lag behind.[84]

The process of evolution is set to continue as a result of both general stocktakes and reviews of EU financial regulation as well as periodic reviews of specific measures.[85] The European Parliament has called for an evolution towards "a consistent and coherent system of sensible recognition of each other's equal or similar standards".[86] The Commission has noted that "[t]he system based on the concept of equivalence has been significantly refined in recent years, and should be further improved in the future".[87] As noted in Part II, the EBA has

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[83] Sharon Bowles quoted in European Union Committee, *The Post-crisis EU Financial Regulatory Framework: Do the Pieces Fit* (HL Paper 103, 5th Report of Session 2014-15), para 207.

[84] e.g., in the prospectus context, equivalence of third country requirements is currently addressed by means of an ESMA opinion: Moloney, *EU Securities and Financial Markets* Regulation (n 16) 124. The revised approach under the new Prospectus Regulation (Council approval 7 December 2016, European Parliament approval to follow in 2017) will broadly align the prospectus regime for third country issuers with that applicable to transparency obligations under the Transparency Directive, as revised by the 2010 Omnibus Directive and Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 [2013] OJ L294/13: Moloney, ibid, 150-1.

[85] European Commission, 'A Reformed Financial Sector for Europe' COM(2014) 279; European Parliament, 'Report on Stocktaking and Challenges of the EU Financial Services Regulation:
Impact and the Way Forward Towards a More Efficient and Effective EU Framework for Financial Regulation and a Capital Markets Union' A8-0360/2015; European Commission, 'Call for Evidence: EU Regulatory Framework for Financial Services' IP/15/5731; European Commission, 'Summary of Contributions to the 'Call for Evidence' (May 2016) http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/summary-of-responses_en.pdf accessed 21 December 2016.

[86] European Parliament, ibid , para 40.

[87] European Commission, 'Economic Review of the Financial Regulation Agenda' SWD(2014) 158, 187.

identified specific areas of banking regulation where more clarity is needed in the equivalence assessment processes.[88]

Brexit is likely to smooth the progression towards a more unified system for the treatment of third countries. To substantiate this claim, it is useful here to draw on Lucia Quaglia's explanation of EU third country rules in financial regulation as being the product of strategic framing by the European Commission to facilitate agreement between Member State coalitions. [89] There may be less pressure on the Commission to broker difficult internal compromises on the treatment of third countries that satisfy both the more "closed" economies, such as Germany and France, and the more "open" economies once the UK, the lead member of the "open" camp, is out of the picture. By similar reasoning however, a post-Brexit streamlined Union system for third countries that offers a more comprehensive single point of entry to the EU could be susceptible to protectionist tendencies in the way that it operates. There is a known risk of a post-Brexit inward turn across EU policy making in general.[90] However, there are three powerful considerations that significantly reduce the chances of this risk becoming a reality in the area of financial services.

First, the prospect of negative macroeconomic effects resulting from protectionism should discourage extremism. The EU economy continues to struggle, and the flagship capital markets union project is predicated on a need to facilitate the access of the corporate sector and of investors to a broader range of funding sources and investment opportunities in order

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[88] EBA, Opinion, (n 34).

[89] Lucia Quaglia, 'The Politics of "Third Country Equivalence"' (n 16).

[90] Jim Brunsden and Duncan Robinson, 'Brexit Set to Give More Protectionist EU States Clout' *Financial Times* (London, 26 June 2016) www.ft.com/content/235ff2da-3bbe-11e6-9f2c-36b487ebd80a accessed 21 December 2016.

to support jobs and growth.[91] This aim is unlikely to be furthered by building "fortress Europe" from which UK (and other third country) finance and investments are excluded and which, surely, would provoke tit-for-tat actions against European financial firms that seek to conduct cross-border business. The strength of the EU's economic self-interest in remaining an internationally open financial market can thus be expected to remain a key variable in its dealings with third countries in general, and the UK in particular.

Secondly, a post-Brexit inward turn would cross directly across the EU's established financial services political agenda at the international level. EU financial regulation framework is now rich with declarations and requirements that express the Union's deep commitment to the G20 agenda, to playing a central role in worldwide financial markets, to basing its regulatory choices around international standards, to working cooperatively with other countries to find mutually supportive, non-overlapping solutions, and to being open for international business.[92] This is not lip-service: the EU political institutions have had the aim of strengthening European influence on global finance in their sights for many years[93] (though evaluations differ on how successful efforts to export the EU version of financial regulation have been[94]). Self-interest in international cooperation to contain the risk of systemic harm reinforces this commitment.

[91] European Commission, 'Action Plan on Building a Capital Markets Union' COM(2015) 468.

[92] MiFIR, recital 41 provides a strong example but statements covering all or some of these areas can also be found in the other instruments (EMIR, CRD, CRR) that form the backbone of EU financial regulation. The more niche Benchmarks Regulation makes extensive reference to relevant IOSCO principles.

[93] European Commission, 'White Paper - Financial Services Policy 2005-2010' COM(2005)629 4.

[94] A frequently-cited example of EU success in exporting its approach is in relation to the regulation of rating agencies: Kristina St Charles, 'Regulatory Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies' (2010) 19 Minnesota Journal of International Law 399; Eilís Ferran,

The third consideration is the growing capacity of the technocratic ESAs in the equivalence sphere, to which Niamh Moloney has drawn attention.[95] As largely apolitical organisations, their involvement in equivalence processes should help to shield determinations on specific matters from politically-driven distortions. (Although, as Moloney notes, consideration of how the ESAs themselves will adjust to the withdrawal of the UK, how, in particular, the ECB-EBA relationship will evolve post-Brexit, and how all of this will impact on EU relations with third countries quickly becomes quite speculative.)

PART IV: WHAT ARE THE IMPLICATIONS FOR THE UK?

1. The UK's interest in a more unified EU system for the treatment of third countries

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'Crisis-driven Regulatory Reform (n 16) 104-107; Niamh Moloney, *EU Securities and Financial Markets Regulation* (n 16) 677-82. But the rich scholarship in n 16 above indicates regulatory clout is not the only driver of EU external relations in finance and that global contextual considerations influence the choice of strategies. Scholarship in other areas of EU external relations also questions the importance of regulatory clout. It has been argued that evidence from the trade agreement context is that the EU does not really engage in excessive exporting, in order not to jeopardize agreements that would benefit European firms: Alasdair R Young, 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New Generation" Preferential Trade Agreements' (2015) 22 Journal of European Public Policy 1253. Also questioning the "export" characterization of EU external relations and suggesting that the EU launches interactive processes to find shared solutions: Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 American Journal of Comparative Law 87.

[95] Moloney, 'International Financial Governance' (n 16).

The UK is implicated in the complicated arrangements that currently govern third country access to the EU. Its strong interest in maintaining the openness of London as an international financial centre dictated a case-by-case stance in legislative negotiations with respect to the adoption of EU-led equivalence as the conceptual basis for third country access. Fear that an equivalence determination at European level could prove to be too high a standard for others to meet meant that, on occasion, the UK was among those pressing hard for certain matters to remain outside the emerging EU equivalence-led approach to third countries and/or for alternative arrangements to be put in place as well. Non-standard arrangements that were in accordance with UK preferences include the retention of national regimes for the provision of retail financial services, the endorsement routes for third country rating agencies and benchmark administrators, and the staged approach to the introduction of the AIFMD passport accompanied by the retention of national private placement regimes.[96]

The complications of the EU's current approach to third countries take on a different complexion as the UK transitions to being a third country itself. Since not all financial services and activities are covered by an EU single point of entry passport in favour of third countries, should the UK fail to negotiate special exit terms, to continue some activities UK actors with EU operations would have to absorb the costs of navigating variable exemptions under Member States' national laws and/or restructuring their corporate group to establish an EU-based entity that comes under the umbrella of Union regulation and supervision. International businesses that until now have used the UK as their EU entry point would also

[96] Quaglia, 'The Politics of "Third Country Equivalence"'(n 16) 173-174; Stefano Pagliari, 'A Wall Around Europe: The European Regulatory Response to the Global Financial Crisis and the Turn in Transatlantic Relations' (2013) 35 Journal of European Integration 391; Ferran, 'Crisis-driven Regulatory Reform' (n 16).

need to consider alternatives. Part III of this study identified as a likely prospect a more streamlined EU approach to third countries. Paradoxically, having been reluctant as a Member State to submit to a unified EU system for the treatment of third country, in a hard Brexit scenario the UK may come to welcome an accelerated shift by the EU towards precisely such a system, provided it does not become a vehicle for protectionist policies.

2. **Taking back control of regulation … but remaining equivalent**

Equivalence determinations (or similar exercises such as that being conducted by ESMA under the AIFMD) with respect to UK financial services regulation and supervision at the time of exit from the EU should be relatively straightforward exercises provided the UK's financial services regulatory and supervisory framework remains largely unchanged at that point. Assuming this to be the case, the UK will be strongly in the running to be the first country that passes the EU equivalence test in all the contexts in which it comes to be asked.

If the UK were to embark quickly on extensive reform of its domestic financial regulation to strip out elements that were required by EU law but not in line with its domestic preferences (the proverbial "bonfire of the regulations" that featured in some of the pro-Brexit campaigning as an aspect of taking back control), this action could put equivalence in doubt. Whereas experience so far has been built up around "ordinary" third countries and the key issue has been whether the systems have converged sufficiently to be considered equivalent, in the case of the UK as a departing State third country, the question would be whether it remains equivalent in spite of the extent to which its system has started to diverge from that of the EU. Doubt, uncertainty and delay around resolution of that question would be anathema to business efficiency and could have adverse systemic repercussions.

The landmark EU-US deal on equivalence with respect to CCPs took over three years to conclude.[97] Evaluations with respect to the AIFMD third country provisions have also been delayed.[98] Not all determinations have been quite so difficult; the growing body of decisions on equivalence provides reassurance as to the sophistication of the process; the focus on substantive outcomes in practice as well as on paper has gone some way to allay fears that blockages would be caused by undue attention to differences in line-by-line detail, or that technical discussions would be derailed by politics. The UK would have the advantage of having been in close alignment with the EU and as such could expect some aspects of the process to move quickly. But it would also have the disadvantage of being in the position of seeking to destabilise the status quo whilst, at the same time, being under pressure from the major industry players of the City of London to maintain with as little disruption as possible the mutual market access that they consider key to the post-Brexit success of UK financial and related professional services.[99] The reopening of old controversies (for example on bankers' bonuses) would run the risk of being viewed as a deliberately provocative act. On pragmatic grounds this is a risk that the UK does not need to take given that whilst it did not

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[97] Commission Implementing Decision (EU) 2016/377 of 15 March 2016 on the equivalence of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the Commodity Futures Trading Commission to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council [2016] OJ/l70 32. On 16 December 2016, the European Commission has determined that India, Brazil, New Zealand, Japan Commodities, United Arab Emirates and Dubai International Financial Centre have the equivalent regulatory regimes for central counterparties (CCPs) as the European Union.

[98] ESMA, Advice (n 76).

[99] TheCityUK, UK Financial and Related Professional Services: Meeting the challenges and delivering opportunities (London, August 2016) www.thecityuk.com/research/uk-frps-challenges-and-opportunities/ accessed 21 December 2016.

always get its way, broadly speaking the system of EU financial regulation that the UK is leaving behind is one that reflects and suits British interests. Furthermore, staying close to the EU should help the UK in its negotiations with other countries to put in place new access arrangements to replace those that followed from EU membership.

The longer term prospects are inevitably more speculative but insights drawn from our current understanding of law and politics of EU and international financial regulation can help to give an informed view on whether the UK is destined to be forever bound to being in lockstep with the EU. First, we can be sure that financial regulation and financial markets will continue to co-evolve.[100] Notwithstanding the massive post-crisis reform efforts, new vulnerabilities will emerge in the financial system (there is evidence of this already happening[101]), and there will be new opportunities as well; the financial regulatory system exists in a state of permanent adaptation to this changing external environment. Secondly, with some confidence we can discount the likelihood of fundamental disagreement between the UK and the EU on the broad parameters of financial regulatory policy. Brexit comes after a period of high political saliency around the capacity of interconnected financial markets to contaminate each other, which has propelled a significant degree of international regulatory convergence through standard-setting bodies such as the Basel Committee and IOSCO, greater emphasis on major economies leading by example in the implementation of international standards and more transparency around the results of compliance assessments.[102] In Part III, it was argued that Brexit by itself will not cause the EU to turn its

[100] Simon Deakin, 'The Evolution of Theory and Method in Law and Finance' in Niamh Moloney, Eilís Ferran and Jennifer Payne, *The Oxford Handbook of Financial Regulation* (OUP 2015).

[101] Mark Carney, Letter to G20 Finance Ministers and Central Bank Governors, 19 July 2016, www.fsb.org/wp-content/uploads/FSB-Chair-letter-to-G20-Ministers-and-Governors-July-2016.pdf accessed 21 December 2016.

[102] Financial Stability Board, Implementation and Effects of the G20 Regulatory Reforms (November 2015).

back on the G20-led reforms aimed at "fixing the fault lines that led to the global financial crisis".[103] Exactly the same can also be said of the UK. The collective interests of both the EU and UK depend on a well-functioning international regulatory system, which they can each influence (the UK may have more opportunity in this regard once free of the constraints of being a Member State and thus able more easily to participate in coalitions with other third countries to shape the terms on which global finance is conducted[104]) but not dictate.

To some degree all countries experience a loss of regulatory sovereignty as international financial regulation gathers strength.[105] The disincentives to change this are strong. The crux of the "taking back control" issue, then, is the scope for the UK in the years after Brexit to write its own rules (and to design its own system for oversight and enforcement) within the bounded space left by the framework of international financial regulation and also without impairing EU equivalence. International standards tend to operate at a sufficiently high level of generality to leave room for adaptation to local circumstances.[106] Leaving this room for manoeuvre has been a significant factor in the success of the "soft law" system for international financial standards but its downside is that when it comes to the granularity of

[103] Ibid, 5.

[104] But see Moloney, 'International Financial Governance' (n 16), on the loss of channels of international influence post-Brexit.

[105] Scott Farrell, 'Sovereignty Lost. The Impact of an Imperfect Federation of International Financial Markets Law' (2013) 28 Journal of International Banking Law and Regulation 479 (with particular reference to Australia).

[106] Chris Brummer, *Soft Law and the Global Financial System: Rule-making in the 21st Century* (2nd edn, CUP 2015); Pierre-Henri Conac, *The European Union's Role in International Economic Fora Paper 6: The IOSCO* (IP/A/ECON/2014-15; PE542.195, July 2015) www.europarl.europa.eu/RegData/etudes/STUD/2015/542195/IPOL_STU(2015)542195_EN.pdf accessed 21 December 2016.

an equivalence assessment the systems in question can look quite different notwithstanding that they share the common core of a relevant international standard. Even with a commitment to substantive outcomes rather than identical wording, this divergence can hold up the equivalence determination process quite significantly, as demonstrated by the US-EU lengthy negotiations on CCPs, where the legislative frameworks in question implemented an agenda that had been agreed at the G20 summit in Pittsburgh in September 2009.

Like any other country, the UK will want to fine tune international standards so that they sit comfortably with local circumstances and to select the implementation options that are best aligned with its global competitiveness agenda. But unlike any other country, it will also have to contend with the path dependencies resulting from its past EU membership. Barring a turn to highly protectionist EU policies that would make the cost of doing business in Europe prohibitive, the legacy of the past can be expected to hang over UK policy to some extent and to engender an approach that continues to be characterized by caution and pragmatism. Nevertheless, there are factors that point to the UK being able to exert a degree of leadership in regulatory design in the longer term, particularly as the focus shifts from whether to re-open past issues to finding solutions to new problems.

3. Regulatory innovation and competition in the longer term

Three ways for the post Brexit UK to carve a distinctive regulatory path within the bounds of international standards and equivalence can be identified. The first relates to "super-equivalence" – that is going above and beyond what is required by standards and EU law. Super-equivalence (also known as gold plating) is not an issue so far as international standards are concerned, but EU financial regulation has increasingly taken the form of full or maximum harmonization measures beyond which Member States are not permitted to go. The point has particular significance for prudential regulation where the UK's wish to retain the power to impose higher capital charges was a source of some tension within EU processes in the recent past.[107] The inconsistencies in the equivalence tests adopted in EU instruments extend to whether the third country requirements must be "equivalent" or "at least equivalent"; whether or not this reflects deliberate choice is debatable.[108] Where the relevant test is "at least", it should not be possible for the UK to fail the test by being super-equivalent. The position with respect to a straight equivalence test may be less clear. However, to reach the conclusion that super-equivalence does not satisfy a straight equivalence standard would, it is suggested, strain the credibility of commitments to avoid legalism. Admittedly aggressive super-equivalence might make it hard for the UK to satisfy itself that EU regulation meets its standards, which would have implications for two-way access based on reciprocity of treatment, but super-equivalence is any event bounded by international competitiveness considerations and within these bounds the reciprocity implications of super-equivalence should be manageable.

The second possibility for the UK to put its own stamp on financial regulation post-Brexit is through the development of parallel regulatory requirements that allow businesses to choose whether or not to be regulated by an EU-equivalent regime. Jersey has been in the vanguard in using regulatory optionality as a strategic response to post-crisis EU financial regulation, and it now maintains one alternative fund management regime that is designed to mirror the

[107] Ferran, 'Crisis-driven Regulatory Reform' (n 16) 42-43.

[108] Compare, e.g., CRD, art 55 (professional secrecy requirements at least equivalent) and CRD, art 116(6) (confidentiality requirements that are equivalent).

EU AIFMD and another that is designed for activity outside the EU.[109] Guernsey also has an AIFMD parallel regime,[110] and Bermuda and the Cayman Islands are going in the same direction. ESMA's broadly positive advice on Jersey and Guernsey for AIFMD purposes is a clear signal that a degree of optionality in a third country's regulatory system is not unacceptable in principle to EU bodies charged with determining equivalence.

As well as following the Jersey/Guernsey lead in the AIFMD context, the possibility of parallel regimes for MiFIDII/MiFIR purposes has also been mooted as a post Brexit option for the UK.[111] For this to work from an equivalence angle would require the European Commission, advised by ESMA, to be satisfied that the non-EU compliant alternative is not material to its evaluation for passporting purposes, that the UK is a country in which firms comply with legally binding prudential and business conduct requirements which have equivalent effect to the relevant EU requirements.[112]

How attractive it would be to the UK government to offer parallel regimes is an untested question. As long as the lessons of the financial crisis – that regulatory fragmentation can lead to gaps that result in systemic vulnerabilities – remain in the memory, there is likely to be wariness among policymakers about introducing differentiated requirements for fear that this could undermine safety. Moreover, the UK would be unlikely to want to put its

[109] Relevant information on the Jersey Financial Services Commission webpage at www.jerseyfsc.org/funds_securities_issues/AIFMD/index.asp accessed 21 December 2016.

[110] Relevant information on the Guernsey Financial Services Commission webpage at www.gfsc.gg/Investment/Pages/Guernsey's-AIFMD-Regime.aspx accessed 21 December 2016

[111] Stephenson Harwood, *BREXIT: The MiFID Passport* www.shlegal.com/docs/default-source/news-insights-documents/07_16_brexit_the_mifid_passport.pdf?sfvrsn=2 accessed 21 December 2016.

[112] MiFIR, art 47.

credibility within international standard-setting bodies that aim at regulatory convergence at risk by an ill-judged venture into extensive optionality. And unless a particular alternative non-EU compliant regime is intended to cater for purely domestic business, the UK would still need to consider compatibility with other third country standards to ensure that the regime offers users sufficient access to global international (non-EU) markets to be attractive to an international clientele. The multilevel relationships that sit behind the regulation of international finance form a complex and sticky web from which advanced economic powers effectively cannot break free: they are condemned to cooperate and to refrain from an over-aggressive strategy around regulatory export.[113]

The development of parallel regimes would take the UK into the realm of engaging in regulatory competition with the EU, but for reasons mentioned immediately above, this would likely be possible only under rather limited conditions. There is heated debate in the academic literature for and against regulatory competition, but a small amount of competition between the UK and EU in targeted areas of financial regulation is unlikely to be harmful, and could be beneficial. One of the advantages claimed for regulatory competition is that it can expose bureaucratic error. With that thought in mind, it is interesting to note that it is against the AIFMD, widely regarded as a low point of the EU's post-crisis regulatory response, where competition in the form of parallel regimes is flourishing. This may not be coincidental.

Finally, and probably the strongest point in support of the UK being able to break free of the detail of EU law in the longer term (whilst remaining equivalent) lies in the deep skill and expertise in financial regulation that the UK enjoys and the opportunities afforded by a

[113] Young, 'Liberalizing Trade' (n 94).

dynamic regulatory field that exists in a permanent state of adaptation to put that expertise to use in driving regulatory innovation. As an EU Member State, this concentrated expertise enabled the UK to exert considerable influence over the design of EU regulation. Moreover, on certain matters – bank resolution and bank structural reform being two prominent examples – it was ahead of the EU in the adoption of regulatory reform. As a Member State, the UK might sometimes have held back from anticipating possible EU level intervention so as not to prolong disruption and add to adaptation/compliance costs. Since that consideration will no longer apply, Brexit may enhance the UK's "first mover" capabilities, and, in turn, help to enable the UK to set the agenda for equivalence negotiations with the EU.

PART V: CONCLUSION

A unified Union approach to the treatment of third countries based on the concept of equivalence is not yet in place. This paper has examined the approach to third counties in EU banking and markets regulation to reveal a complex, but dynamic, situation. As a Member State the UK did not support the exclusive adoption of EU-led equivalence as the conceptual basis for third country matters because of concerns that this would threaten the openness of London as an international financial centre. Paradoxically, having been reluctant as a Member State to support a unified EU system for the treatment of third countries, in a hard Brexit scenario the UK may come to welcome an accelerated shift by the EU towards precisely such a system, provided it does not become a vehicle for protectionist policies.

Drawing on the scholarly analysis of the law and politics of EU and international financial regulation to date, this paper has found that Brexit is likely to smooth the progression towards a more unified EU system for the treatment of third countries. It has identified three powerful reasons to doubt whether this will prompt an inward turn in EU international relations: the EU's economic self-interest in remaining an internationally open financial market; the EU's political agenda to play an influential part in shaping international financial regulation; and the growing capacity of the technocratic ESAs in the equivalence sphere. The paper has maintained that since the UK is also deeply committed to the G20 agenda for international financial regulation, there is unlikely to be fundamental disagreement between the UK and the EU on the broad parameters of financial regulatory policy but, also, that experience shows that the common core of a relevant international standard does not guarantee a smooth ride when it comes to equivalence determinations. Drawing on current scholarship but looking ahead to an unprecedented situation, this study has argued that the UK will face a unique problem in dealing with the EU on equivalence in the short term because whereas for "ordinary" third countries, the question is whether the systems have converged sufficiently to be considered equivalent, in the case of the UK as a former Member State third country, the question will be whether it remains equivalent in spite of the extent to which its system has started to diverge from the EU approach. The potentially destabilizing consequences of disturbing the status quo can be expected to weaken the UK's negotiating position vis-a-vis the EU and point to a strategy in the short term of maintaining a domestic framework that is close to EU law.

Longer term, there are three possibilities for the Brexiteers' campaign slogan to "take back control" to acquire real meaning in the financial services area. First, being "super-equivalent" should become easier – though the UK's global competitiveness agenda should temper pursuit of super-equivalence as a policy goal. Secondly, there is scope to develop parallel regimes in certain areas, one EU-compliant, one not, to cater for different constituencies –

though this too is subject to a counterbalancing force in the form of the danger that becoming known as the supplier of a proliferation of alternative regimes, which could undermine the UK as a credible voice in the international standard-setting fora that aim at regulatory convergence. Thirdly, Brexit should enhance the UK's capacity to use its expertise in financial regulation to be the "first mover" in finding solutions to new regulatory problems.

Table of references to frequently cited EU legal instruments

AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L174/1
CRD	Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338
CRR	Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L176/1
EMIR	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 [2012] OJ L201/1
MiFIDII	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 (recast) [2014] L173/349
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84