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ARTICLE

# The Future of Equivalence in the EU Financial Sector

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## Abstract

The future of equivalence in the EU financial sector does not look all that bright. Granting third-country entities access to the EU financial markets is increasingly less about reliance on equivalent third-country rules and equivalent third-country supervision. Considerations other than equivalence are increasingly given more relative weight, either explicitly or implicitly, in particular (i) EU financial stability risks, (ii) EU market integrity, (iii) EU retail investor protection, (iv) preserving or regaining EU autonomy in an increasingly complex world (e.g., Brexit and the economic rise of China), (v) protecting EU entities against competitors from third countries, (vi) trying to conquer market share in a lucrative business (e.g., derivatives clearing), and (vii) other EU policy considerations. These considerations are gaining ground not merely in relation to the question of whether an equivalence framework should even be in place, and if so, whether equivalence decisions should indeed be taken, but also with regard to the regulatory and supervisory framework that the EU applies to (1) entities established in third countries for which the Commission has adopted equivalence decisions, and (2) third-country branches established in the EU. In view of this, the Territorial Approach and the Extra-Territorial Approach are clearly on the rise, in each case to the detriment of the Equivalence Approach. At the same time, loopholes in the execution of the Territorial Approach continue to exist at the national level, at least for the time being.

**Keywords** EU · Financial law · Equivalence · Brexit · Financial stability · Market integrity · Investor protection · EU internal market · Geopolitics

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## 1 Introduction

The Global Financial Crisis has painfully demonstrated that financial markets are truly global.[1] Consequently, the European Union (EU)[2] has little choice but to relate, in one way or another, to (i) financial institutions and other entities established in third countries that wish to become active in the EU (third-country entities), and (ii) the third countries in which those third-country entities are based. This is an issue that any jurisdiction or regional trading bloc has to face.

Across the globe, different strategies are applied to manage access of third-country entities to the domestic financial markets. As I see it, there are essentially five strategies:[3]

***Global Markets Approach***
First of all, there is the Global Markets Approach. In this approach, reliance is placed on third-country rules and third-country supervision, irrespective of whether they are sufficiently similar to domestic rules and domestic supervision.

***Equivalence Approach***
Second, there is the Equivalence Approach. In this approach, reliance is once again placed on third-country rules and third-country supervision, but only if they are sufficiently similar to domestic rules and domestic supervision.

***Extra-Territorial Approach***
Third, there is the Extra-Territorial Approach. In this approach, domestic rules and domestic supervision are applied to third-country entities.

***Territorial Approach***
Fourth, there is the Territorial Approach. In this approach, no access is granted unless the third-country entity establishes a subsidiary on domestic territory, which, as a domestic entity, will then be subject to domestic rules and domestic supervision.

***Isolationist Approach***
The fifth and final approach is the Isolationist Approach. In this approach, third-country entities have no access at all.

The topic of this article is whether the Equivalence Approach has any future in the EU financial sector. It is structured as follows. First, I provide a definition of the EU equivalence approach (Sect. 2). I then go on to explain the purpose of the EU equivalence approach as the Commission sees it (Sect. 3), and discuss whether granting equivalence is a legal or a political decision (Sect. 4). The next section addresses the decline of the Equivalence Approach (Sect. 5), followed by some examples that illustrate the rise

[1] See, e.g., Arner et al. (2019); Pennesi (2022), pp 1–2; Schürger (2023), p 1.

[2] For the purpose of this article, reference to the EU includes reference to the members of the European Economic Area (EEA), which consists not only of the EU Member States but also of Iceland, Liechtenstein and Norway.

[3] See for an at least partially different categorisation of approaches: Moloney (2023), pp 849–855; Pennesi (2022), pp 39–46; Schürger (2023), pp 2–6.

of the Territorial and the Extra-Territorial Approach, in each case to the detriment of the Equivalence Approach (Sects. 6 and 7). The next section highlights the fact that, in the meantime, loopholes continue to exist in the execution of the Territorial Approach at national level (Sect. 8). In the final section, I draw a number of conclusions (Sect. 9).

## 2 EU Equivalence: Definition

According to the Commission, the 'main' EU approach is equivalence. Equivalence in the EU involves a positive assessment by the Commission of the third-country framework, which enables: (i) reliance on third-country rules, and (ii) the work of the third-country supervisor.[4] It is important to note that speaking about 'the' EU equivalence approach is somewhat misleading as a uniform approach does not exist in the EU. Instead, there are forty equivalence mechanisms embedded in sixteen legal acts on EU financial law, each of them corresponding to specific types of financial activities and/or financial institutions.[5] Nonetheless, a minimum requirement for a positive equivalence decision is always that the third-country framework is sufficiently similar to the relevant EU framework. Sometimes reciprocity is a requirement, and often there are additional requirements.[6]

## 3 EU Equivalence: Purpose

By 2019, over 280 equivalence decisions had been taken in respect of more than 30 third countries.[7] Yet, as will be shown below, many areas are not covered.[8] In view of this, the Commission's statement that the 'main' EU approach is equivalence is an

4 European Commission (2019), p 4.

5 These are: (i) Directive 2013/34/EU (Accounting Directive) (Arts. 46(1) and 47), (ii) Directive 2004/109/EC (Transparency Directive) (Arts. 23(1), 23(4), subparas. 1(ii) and 3), (iii) Directive 2006/43/ EC (Statutory Audit Directive) (Arts. 45(5)(d) and (6), 46(1) and (2), 47(1) and (3)), (iv) Regulation (EC) 1060/2009 (Credit Rating Agency Regulation) (Art. 5(1) and (6)), (v) Regulation (EU) 909/2014 (Central Securities Depositories Regulation) (Arts. 25(2) and (4), 25(9)), (vi) Regulation (EU) 648/2012 (European Market Infrastructure Regulation) (Arts. 1(4) and (4), 2a, 13(2) and (3), 25(1), (2) and (6), 75(1), 76a and 77), (vii) Regulation (EU) 2015/2365 (Securities Financing Transactions Regulation) (Arts. 2(2) and (4), 19(1), (3) and (4), 21(1) and (2)), (viii) Regulation (EU) 600/2014 (Markets in Financial Instruments Regulation) (Arts. 1(6) and (9), 28(1)(d) and (4), 33(2) and (3), 38, 46(1) and (2)), (ix) Directive 2014/65/EU (Markets in Financial Instruments Directive II) (Art. 25(4)(a)(i) and (ii) and subparas. 2–4), (x) Regulation (EU) 596/2014 (Market Abuse Regulation) (Art. 6(1) and (5)), (xi) Regulation (EU) 236/2012 (Short Selling Regulation) (Arts. 2(1)(k) and 17(1) and (2)), (xii) Regulation (EU) 2016/1011 (Benchmark Regulation) (Art. 30(1), (2) and (3)), (xiii) Regulation (EU) 2017/1129 (Prospectus Regulation) (Art. 29(1) and (3), subpara. 2), (xiv) Directive 2011/61/EU (Alternative Investment Fund Managers Directive) (Arts. 21(3), subpara. 2 and (6), 37(2)), (xv) Regulation (EU) 573/2013 (Capital Requirements Regulation II) (Arts. 107(3) and (4), 114(7), 115(4), 116(5), 132(3)(a) and subpara. 2, 142(1), no 4 and (2)), (xvi) Directive 2009/138/EC (Solvency II) (Arts. 172(2) and (3), 227(1), subpara. 2 and (4), 260(1) and (3)). This overview is based on the useful table provided by Schürger (2023), p 153.

6 See for an overview: Moloney (2023), pp 849–909; Pennesi (2022), pp 75–94, 111–200; Schürger (2023), pp 64–156. See also on equivalence: Conac (2020); Hill (2020); Howell (2020); Moloney (2020); Pennesi (2021); Servais (2020); Srivastava and Moffatt (2020); Wymeersch (2018).

7 European Commission (2019), p 2. See for a list of the equivalence decisions that have so far been adopted by the European Commission: https://finance.ec.europa.eu/eu-and-world/equivalence-non-eu-financial-frameworks_en#decisions (updated until 17 November 2023).

8 Similarly Moloney (2023), p 855.

overstatement. This is all the more so as even equivalence decisions themselves depend on so much more than equivalence, especially since Brexit. Indeed, this is apparent from the very purpose of equivalence as the Commission itself sees it. It views the equivalence process primarily as a risk management exercise in which the *risks* (costs) of granting third-country entities access to the EU financial markets are weighed against the *benefits* of granting such access, all from the perspective of the EU.[9]

In this assessment, the risks (costs) include any negative impacts on (i) EU financial stability, (ii) EU market integrity, (iii) EU investor protection, and (iv) the level playing field in the EU internal market. In this connection, risks (costs) are understood in a broad sense, since the Commission also considers whether equivalence decisions would be compatible with EU policy priorities in areas such as (i) international sanctions, (ii) the fight against money laundering and terrorist financing, (iii) tax good governance on a global level, and (iv) other relevant external policy priorities. In other words, access to the EU financial markets is regularly used as a bargaining chip for other EU interests, always provided that the legal requirements for granting equivalence are met. All of these factors are indicative of the amount of risk (cost) to the financial stability or the need for adequate protection of financial market participants and other persons in the EU. According to the Commission, taking into account these aspects is important for preserving the reputation and the long-term stability of the EU financial sector.[10] In this exercise, the *benefits* of granting third-country entities market access are understood to mean exploiting the benefits of open and globally integrated EU financial markets.[11]

The Commission emphasises that equivalence provisions are tailored to the needs of each specific legal act. They should always be read in the light of the objectives pursued by that act, in particular its contribution to the establishment and functioning of the internal market, market integrity, investor protection and, more broadly, its contribution to financial stability. The legal acts set out the conditions and criteria on which and the extent to which the EU may take into account the regulatory and supervisory framework of a third country when regulating and supervising EU financial markets in situations involving a cross-border element. As a result, there are considerable differences in how the equivalence mechanisms are constructed and included in EU financial law, be it in terms of (i) the process to be followed, (ii) the content of the assessment required, or (iii) the implementation of a positive equivalence finding. According to the Commission, it is now generally accepted that it would be extremely difficult to implement a uniform assessment and decision-making process encompassing various areas of equivalence.[12]

## 4 EU Equivalence: A Legal or a Political Decision?

In view of the purpose of equivalence set out in the previous section, it should not come as a surprise that the Commission describes equivalence decisions as unilateral and discretionary acts.[13] Put differently, the EU financial markets are of great

[9] European Commission (2019), p 4.
[10] Ibid.
[11] Ibid.
[12] Ibid., pp 4–5.
[13] Ibid., p 4.

strategic and geopolitical importance to the EU. Therefore, in the view of the Commission, third countries should not have any legal entitlement to a positive equivalence decision by the Commission, even if the legal conditions (including equivalence) are met. In line with this, the Commission may unilaterally revoke or suspend equivalence decisions, and may also grant equivalence conditionally.[14]

Not everyone agrees with the view taken by the Commission. In the legal literature this view has been challenged on the following grounds. First, it is argued that, as an administrative agency, the Commission is bound by the consequences foreseen by law and is not in a position to decide as it deems fit. Second, it is argued that the many conditions attached to the assessment of equivalence also speak in favour of a rule-bound decision by the Commission. It is argued that where the legal conditions are fulfilled—which is a matter to be assessed by the Commission—it must render a positive assessment, otherwise the conditionality would hardly make any sense. The third argument advanced in the legal literature is that the General Agreement on Trade in Services (GATS) prohibits members from discriminating against foreign service providers (Art. 16 GATS). The prudential carve-out in this Agreement allows a different treatment only on prudential grounds, not for general trade or other policy reasons (GATS, Annex on Financial Services, s 2(a)).[15]

In response to these arguments and assuming that they are legally valid, I would quote a sentence from Henry Kissinger's book 'World Order': 'The vitality of an international order is reflected in the balance it strikes between legitimacy and power and the relative emphasis given to each.'[16] When it comes to power, the Single Market is arguably all that the EU has got. The EU financial markets – which are essential constituent parts of the Single Market – are of great strategic and geopolitical importance to the EU. The EU appears to be gradually shifting its emphasis from legitimacy to power, in any event when it comes to access to the EU financial markets, but probably in a much broader sense as well.

## 5 The Decline of the Equivalence Approach

Granting third-country entities access to the EU financial markets is less and less about reliance on equivalent third-country rules and equivalent third-country supervision. Considerations other than equivalence are increasingly given more relative weight, especially since Brexit, either explicitly or implicitly, in particular (i) EU financial stability risks, (ii) EU market integrity, (iii) EU retail investor protection,

[14] See on the legal nature of equivalence decisions, for example, Moloney (2023), pp 857–858.

[15] See Lehmann (2023), pp 14–15; Schürger (2023), pp 103–146; Lehmann and Schürger (2023), pp 207–209. GATS, Annex on Financial Services, s 2(a) reads as follows: 'Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.'

[16] Kissinger (2014), p 66.

(iv) preserving or regaining EU autonomy in an increasingly complex world (e.g., Brexit and the economic rise of China), (v) protecting EU entities against competitors from third countries, (vi) trying to conquer market share in a lucrative business (e.g., derivatives clearing), and (vii) other EU policy considerations.[17]

These considerations are playing an ever more prominent role not only in relation to the question of whether an equivalence framework should exist at all and, if so, whether equivalence decisions should indeed be taken, but also in relation to the regulatory and supervisory regime that the EU applies to (1) entities established in third countries for which the Commission has adopted equivalence decisions, and (2) third-country branches established within the EU.

Below, some examples are provided to illustrate the rise of the Territorial Approach (Sect. 6) and the Extra-Territorial Approach (Sect. 7), in each case to the detriment of the Equivalence Approach.

## 6 The Rise of the Territorial Approach

### 6.1 General

The rise of the Territorial Approach is evident first of all from the fact that many EU acts do not even feature equivalence frameworks, which is even true of more recent acts such as the Crowdfunding Regulation[18] and the Markets in Crypto-Assets Regulation (MiCAR)[19] (Sect. 6.2). In other areas, this follows from the fact that the Commission is apparently not prepared to take equivalence decisions, even where EU equivalence frameworks are in place (Sect. 6.3). Finally, the Territorial Approach is gaining ground because subsidiary requirements are increasingly imposed or may be imposed, even if equivalence decisions have been taken by the Commission (Sect. 6.4).

### 6.2 EU Equivalence Regime Is Non-existent

No equivalence regime exists for several types of third-country entities. This is the case for (i) credit institutions,[20] (ii) payment services providers,[21] (iii) payment

[17] In a similar vein, at least partially: Moloney (2023), pp 858, 860–864; Schürger (2023), pp 58–60.

[18] Regulation (EU) 2020/1503.

[19] Regulation (EU) 2023/1114.

[20] Credit institutions are regulated in the EU by (i) Directive 2013/36/EU (Capital Requirements Directive IV (CRD IV)) and (ii) Regulation (EU) 573/2013 (Capital Requirements Regulation II (CRR II)) and are defined as institutions that engage in the deposit-taking business or take other repayable funds from the public and grant credits for their own account (Art. 4(1), no (1) CRR II). As a result of the recent reform by Regulation (EU) 2019/2033 (Investment Firm Regulation (IFR)), investment firms that carry out proprietary trading or the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and whose assets equal or exceed the threshold of €30 billion (so-called Class 1a investment firms) are considered CRR credit institutions. See Art. 62(3)(a) and (b) Investment Firm Regulation, amending the definition of a credit institution in Art. 4(1), no (1) CRR II. Cf. Moloney (2023), pp 403–405; Schürger (2023), pp 39–41.

[21] Directive (EU) 2015/2366 (Payment Services Directive II (PSD II) does not feature an equivalence mechanism. Cf. Schürger (2023), p 41.

and securities settlement systems,[22] (iv) undertakings for collective investment in transferable securities (UCITS), their managers and their depositaries,[23] (v) operators of regulated markets (RMs),[24] (vi) insurance intermediaries,[25] (vii) crowdfunding service providers,[26] and (viii) issuers of crypto-assets and crypto-assets service providers.[27]

In all of these cases, the issue is left to the Member States, which may or may not grant third-country institutions access to their territory. Any such national equivalence mechanisms will not involve market access to the EU financial markets at large, and will be able to provide access only to the territory of the Member State concerned. Third-country entities of this type can gain access to the EU financial markets all at once only by establishing a subsidiary in a Member State and seeking authorisation from the competent financial supervisor in that Member State. The subsidiary will then become subject to (i) the applicable EU rules (as transposed into the national rules and regulations in the relevant Member State, to the extent that they are included in EU directives) and (ii) supervision by the competent financial supervisor in the Member State concerned. Once the subsidiary has been granted authorisation, it can operate throughout the EU. The local authorisation therefore functions as a European passport.[28] In any event, the Territorial Approach applies

[22] Directive 98/26/EC (Settlement Finality Directive) does not feature an equivalence mechanism that enables the recognition of non-EU systems for the transfer of financial instruments and the settlement of payments. Cf. Schürger (2023), p 41.

[23] Directive 2009/65/EC (Directive on undertakings for collective investment in transferable securities (UCITS Directive)) does not feature an equivalence mechanism. Cf. Moloney (2023), pp 864–866; Pennesi (2022), pp 143–144; Schürger (2023), pp 43–44, pp 44–45.

[24] Trading venues are regulated markets (RMs), multilateral trading facilities (MTFs) and organised trading facilities (OTFs), see Art. 4(1)(24) Directive 2014/65/EU (Markets in Financial Instruments Directive II (MiFID II)). MiFID II and Regulation (EU) 600/2014 (Markets in Financial Instruments Regulation (MiFIR)) do not feature a third-country regime for non-EU operators of RMs. This is different for non-EU operators of an MTF or an OTF. The operation of an MTF or OTF qualifies as an investment activity that may be performed by a thirdcountry firm under the MiFIR's third-country regime for investment firms (Arts. 46-49 MiFIR), albeit that the Commission is apparently not prepared to take any equivalence decisions under the third-country regime for investment firms, at least for the time being. See Section 6.3, below. Notwithstanding the foregoing, MiFIR contains several provisions that apply to 'third-country venues', a term that is not defined in MiFIR but appears to refer to trading venues in general (i.e., including RMs) operated by third-country firms. See Busch and Louisse (2017), paras. 10.14-10.16; Schürger (2023), pp 50-53

[25] Directive (EU) 2016/97 (Insurance Distribution Directive (IDD)) does not feature an equivalence mechanism. Cf. Schürger (2023), pp 43–44.

[26] Regulation (EU) 2020/1503 (Crowdfunding Regulation) does not feature an equivalence mechanism. Cf. Schürger (2023), pp 43–44.

[27] MiCAR does not feature and equivalence mechanism. In addition, Regulation (EU) No 1286/2014 (on key information documents for packaged retail and insurance-based investment products (PRIIPs Regulation)) likewise lacks an equivalence regime, as it does not recognise foreign key information documents, cf. Schürger (2023), pp 29–30, 58. Regulation (EU) 2017/2402 (Securitisation Regulation) does not feature an equivalence regime either, cf. Moloney (2023), p 862 and accompanying footnote 71.

[28] In the main text it is assumed that a local financial supervisor (i.e., a supervisor at Member State level) is responsible for granting authorisation and for ongoing supervision, but there are certainly exceptions. Probably the most prominent example is the European Central Bank (ECB). For credit institutions established in Member States that participate in the Single Supervisory Mechanism (SSM) (established by Council Regulation (EU) No 1024/2013 (SSM Regulation)) the ECB is (i) always responsible for

to these types of third-country entity. In view of the review clause in MiCAR, this may change in the future for issuers of crypto-assets and crypto-assets service providers.[29]

### 6.3 EU Equivalence Regime Exists but Is Unused

In other instances, equivalence mechanisms *are* in place, but the Commission is apparently not prepared to take any equivalence decisions under the legal framework concerned. This is the case with the equivalence regimes for (i) alternative investment funds (AIFs), their managers and their depositaries,[30] and (ii) investment firms providing investment activities and investment services to eligible counterparties and per se professional clients (often jointly referred to as wholesale clients).[31] Indeed, with regard to the equivalence regime mentioned at (ii), the Commission recently went so far as to state that equivalence decisions are not envisaged in the near future.[32] In other words, the issue is again being left to the Member States, which may or may not grant third-country entities access to their own territory. The only way for these types of third-country entity to gain access to the EU financial markets all at once is to establish a subsidiary in the EU, which will then become subject to (i) the EU rules and (ii) EU supervision. Again, once the subsidiary has been granted authorisation, it can operate throughout the EU. The local authorisation therefore functions as a European passport. Thus, the Territorial Approach likewise applies to these types of third-party entity.

It is noteworthy in this context that the equivalence regime for third-country investment firms mentioned at (ii) above was recently reformed in response to

Footnote 28 (continued)

granting authorisation to credit institutions and (ii) responsible for their ongoing prudential supervision if the relevant credit institution qualifies as ‘significant’. Participating Member States are those whose currency is the euro or whose currency is not the euro but which have established a close cooperation, such as Bulgaria. See on the SSM, for example: Wymeersch (2020). Further examples are ESMA authorisation and supervision of (i) credit rating agencies (CRAs), (ii) trade repositories (TRs), (iii) data reporting service providers (DRSPs), and (iv) administrators of critical benchmarks. See Moloney (2023), pp 637–678 (CRAs), 630–632 (TRs), 511–513 (DRSPs), 748–750 (administrators of critical benchmarks). A very recent example is direct supervision of ‘critical ICT third-party service providers’ by ESMA, EBA or EIOPA. See Arts. 31–44 Regulation (EU) 2022/2554 (DORA) and see Sect. 6.4 (Example IV, sixth and seventh paragraph) below.

[29] See Art. 140(1) and (2), opening words, and point (v) MiCAR: ‘1. By 30 June 2027, having consulted EBA and ESMA, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation accompanied, where appropriate, by a legislative proposal. An interim report shall be presented by 30 June 2025, accompanied, where appropriate, by a legislative proposal. 2. The reports referred to in paragraph 1 shall contain the following: … (v) an assessment of whether an equivalence regime should be established under this Regulation for entities providing crypto-asset services, issuers of asset-referenced tokens or issuers of e-money tokens from third countries …’.

[30] Arts. 21(3), subpara. 2 and (6), 37(2) Directive 2011/61/EU (Alternative Investment Fund Managers Directive (AIFMD)). See: Moloney (2023), pp 877–883; Pennesi (2022), pp 144–148; Schürger (2023), pp 47–49.

[31] Arts. 46–49 MiFIR. See: Moloney (2023), pp 880–883; Pennesi (2022), pp 131–141; Schürger (2023), pp 38–39; Busch and Louisse (2017), paras. 10.17–10.44.

[32] European Commission (2021), n. 36.

Brexit.[33] The equivalence decision now not only requires equivalent third-country rules, effective supervision and enforcement, as well as reciprocity, but also depends on whether the services provided by the firms are likely to be of systemic importance. In this scenario, the assessment must be more 'detailed and granular', and the Commission is entitled to attach specific operational conditions to its equivalence decision.[34]

### 6.4 Subsidiary Requirement

There are also cases in which a subsidiary requirement can or must be imposed. Four examples are given below.

***Example I—CCPs***

Central counterparties (CCPs) play a crucial role in the clearing of standardised OTC derivatives transactions.[35] Systemically relevant CCPs established in third countries for which the Commission has adopted an equivalence decision (so-called Tier 2 CCPs) are faced with the threat of a subsidiary requirement.

The European Market Infrastructure Regulation (EMIR)[36] was amended in October 2019 (EMIR 2.2)[37] in such a way that third-country CCPs established in countries for which the Commission has adopted an equivalence decision are divided into two groups: systemically relevant (Tier 2 CCPs) and non-systemically relevant (Tier 1 CCPs). If a third-country CCP is not systemically relevant, there are no additional requirements for recognition by the European Securities and Markets Authority (ESMA) of a CCP in that third country. The CCP can then operate within the EU on the basis of compliance with the rules of its home country and need not additionally comply with the European rules under EMIR.[38] However, the situation is different once ESMA considers that a third-country CCP is or will become systemically relevant. In that case, the CCP must fulfil additional requirements in order to be allowed to start or continue operating in the EU, including compliance with the strict prudential EMIR requirements that also apply to CCPs established in the EU.[39] ESMA is charged with supervising ongoing compliance by Tier 2 CCPs with these

[33] Art. 63 Investment Firm Regulation.

[34] Art. 47(1), subpara. 2, (1a) subpara. 2 MiFIR. Cf. Moloney (2023), pp 882–883; Schürger (2023), pp 38–39.

[35] OTC stands for 'over the counter'. See on the regulation of CCPs, for example: Moloney (2023), pp 589–635.

[36] Regulation (EU) No 648/2012.

[37] Regulation (EU) 2019/2099 (EMIR 2.2). A first amendment of EMIR concerned the 'EMIR refit', which was concerned with streamlining the regime and rendering it more proportionate (EMIR 2.1), see Regulation (EU) 2019/834 (EMIR 2.1). On EMIR 2.1 see, for example, Moloney (2023), p 599.

[38] Art. 25(2) EMIR.

[39] Art. 25(2b) EMIR. But please note that Art. 25a EMIR provides that a Tier-2 CCP can be deemed to satisfy the applicable EMIR requirements by complying with the rules and regulations of the third country, if ESMA, upon a reasoned request from the CCP concerned, adopts a finding of 'comparable compliance' as regards the relevant third-country rules. See also Delegated Regulation 2020/1304, which contains the minimum elements to be assessed by ESMA when assessing third-country CCPs' requests for comparable compliance as well as the modalities and conditions of that assessment.

EMIR requirements.[40] Once ESMA considers that a third-country CCP has become so systemically relevant that even compliance with the prudential EMIR provisions is insufficient, ESMA (in consultation with the relevant central banks) *may* advise the Commission to take a decision that the third-country CCP may no longer operate in the EU unless it establishes a subsidiary in the EU.[41]

Clearly, the EMIR 2.2 reforms are a direct response to Brexit. The exact standard to be applied by ESMA in assessing whether a third-country CCP is or will become systemically relevant is specified in implementing legislation (Level 2 rules).[42] The recognition decision for the three UK CCPs as third-country CCPs,[43] following an earlier temporary equivalence decision from the Commission for CCPs based in the UK,[44] sets out how they are classified. LME Clear Limited is classified as a Tier 1 CCP and is therefore not systemically relevant, but ICE Clear Europe Limited and LCH Limited are both classified as Tier 2 CCPs and are therefore systemically relevant. However, ESMA did *not* recommend to the Commission that they may no longer operate in the EU unless they establish subsidiaries in the EU. At least 'not at this point in time'. Instead, ESMA proposed to mitigate the risks in alternative ways.[45] The temporary equivalence decision covering the framework for CCPs in the UK has subsequently been prolonged by the Commission and will now expire on 30 June 2025.[46] At the same time, the Commission has urged EU market participants to reduce excessive exposures to such systemic infrastructures located in a third country, considering the potential risks in a stress scenario.[47]

So, in this case and at this point in time, ESMA did not go as far as to advise the Commission to compel the UK Tier 2 CCPs to set up a subsidiary in a Member State, thereby obliging the subsidiary to seek authorisation from the competent financial supervisor in that Member State. It would then become fully subject to (i) the strict EMIR requirements and (ii) supervision by the competent financial supervisor in the Member State of the subsidiary's establishment.[48] In that case, the Territorial Approach rather than the Equivalence Approach would have applied, even though an equivalence decision had been taken.

***Example II—CCPs***

But this is not the end of the story. In December 2022, the Commission proposed further amendments to EMIR (EMIR 3.0), featuring what I would describe as a 'proportionate subsidiary requirement', quite apart from any equivalence assessment.[49]

40 Art. 25b EMIR.
41 Art. 25(2c) EMIR. See on the EMIR 2.2 reforms, for example, Moloney (2023), pp 888–893.
42 Delegated Regulation (EU) 2020/1303.
43 ESMA (2020).
44 Implementing Decision (EU) 2020/1308.
45 ESMA (2021c).
46 Implementing Decision (EU) 2022/174.
47 Ibid., recital (19).
48 Arts. 14–22 EMIR.
49 European Commission (2022), (EMIR 3.0).

The proposal requires all relevant market participants in the EU to hold active accounts at EU CCPs for clearing at least a proportion of certain systemic derivative contracts.[50] The exact proportion and the methodology for calculation will be specified in implementing legislation (Level 2 rules).[51] So, if third-country CCPs wish to keep this portion of their business, they will need to set up a subsidiary in a Member State for that purpose. In other words, this is a proportionate subsidiary requirement. And the Territorial Approach would again apply to that subsidiary as it would need to seek authorisation from the competent financial supervisor in that Member State. It would then become fully subject to (i) the strict EMIR requirements and (ii) supervision by the competent financial supervisor in the Member State of the subsidiary's establishment.[52]

***Example III—Third-Country Bank Branches (TCBs)***

A further example concerns third-country credit institutions. As mentioned previously, no equivalence regime exists for third-country credit institutions (see Sect. 5). However, equivalence regimes do exist for third-country bank *branches* (TCBs) at national level, but they can grant access only to the market of the Member State concerned and not to the internal market of the EU. Branches must be distinguished from subsidiaries. Branches are simply a component part of the legal person established in the third country concerned, whereas subsidiaries have separate legal personality.

In any event, the only way for third-country credit institutions to gain access to the EU financial markets all at once is to establish a subsidiary in a Member State and seek authorisation from either (i) the European Central Bank (ECB) (if the subsidiary is established in a Member State that participates in the Single Supervisory Mechanism (SSM)), or (ii) the competent financial supervisor at the level of the Member State concerned (if the subsidiary is established in a Member State that does not participate in the SSM). The subsidiary will then become subject to (i) the applicable EU rules and (ii) supervision by the competent financial supervisors in the Member State concerned and possibly direct prudential supervision by the ECB instead of prudential supervision at Member State level (if the subsidiary is established in a Member State that participates in the SSM, and if that subsidiary qualifies as 'significant' credit institution within the meaning of the SSM Regulation).[53] Once the subsidiary has been granted authorisation, it can operate throughout the EU.[54] The Territorial Approach therefore applies to third-country credit institutions.

At the same time, TCBs have a material footprint in the EU banking markets. According to the Commission, there is a risk that TCBs are illegally active in other

[50] These are: (a) interest rate derivatives denominated in euro and Polish zloty; (b) Credit Default Swaps (CDS) denominated in euro; (c) Short-Term Interest Rate Derivatives (STIR) denominated in euro. See Art. 7a(2) EMIR 3.0.

[51] Art. 7a(5) EMIR 3.0.

[52] Arts. 14–22 EMIR.

[53] See *supra* n. 29.

[54] Arts. 33 and 34(1) CRD IV.

Member States than the Member State in which they are established. In addition, the requirements for TCBs vary from one Member State to another.[55]

Given these arguments, the Commission takes the view that there are (i) risks to the financial stability and market integrity of the EU and (ii) opportunities for regulatory arbitrage. In 2021, the Commission therefore proposed a harmonised framework for TCBs. Third-country credit institutions would be required to set up a branch in a Member State and seek authorisation under Title VI of the CRD IV for that branch as a condition of being allowed to start conducting banking activities in that Member State only.[56]

According to the Commission's proposal, TCBs are subject not only to an explicit authorisation procedure, but also to (1) minimum regulatory requirements (minimum capital endowment, liquidity requirement, internal governance and risk control requirements, booking arrangements in order to track the assets and liabilities linked to the business conducted by the TCB in the Member State), (2) reporting requirements (TCBs are required to report regularly to their competent authorities information on their compliance with the requirements laid out in CRD IV and in national law, and financial information in relation to the assets and liabilities on their books), and (3) EU supervision (competent authorities are required to conduct regular reviews of TCBs' compliance with their regulatory requirements, for example, for anti-money laundering purposes, and take supervisory measures to ensure or restore compliance with those requirements).[57]

The requirements would be stricter for so-called Class 1 TCBs than for Class 2 TCBs. The former class comprises the larger TCBs (i.e., those holding assets equal to or in excess of €5 billion), as well as TCBs authorised to take deposits from retail customers and TCBs considered 'non-qualifying', the latter two regardless of their size. Class 2 comprises all TCBs not classified as Class 1. A TCB would be deemed 'qualifying' where its head office is established in a third country (i) which has in place a supervisory and regulatory framework for banks and confidentiality requirements that have been assessed as equivalent to those in the EU, and (ii) which is not listed as a high-risk third country that has strategic deficiencies in its regime on anti-money laundering and counter-terrorist financing. If these two requirements are *not* met, the TCB will be classified as 'non-qualifying'.[58]

In addition, and this is important for the purposes of this article, the proposed regime also features a power to require the establishment of a subsidiary rather than a TCB ('power to subsidiarise'), *at least* in the following two types of cases: (1) where the TCB engages in activities with counterparts in *other* Member States in contravention of the internal market rules, or (2) where the TCB poses a significant risk to the financial stability of the EU or of the Member State where it is established.[59] The exact standard to be applied in assessing whether a TCB poses

[55] European Commission (2021), pp 15–16.

[56] Ibid., p 16, and the proposals for the new Arts. 21c and 48c CRD IV.

[57] Ibid., pp 16–17, and the proposals for the new Arts. 48e-48i CRD IV.

[58] Ibid., p 17, and the proposals for the new Arts. 48a and 48b CRD IV.

[59] Ibid., and the proposals for the new Arts. 48j and 48k CRD IV.

a threat to financial stability will be specified in implementing legislation (Level 2 rules).[60]

If the competent EU supervisor exercises its power to subsidiarise, the newly established subsidiary will become subject to (i) the applicable EU rules, and (ii) supervision by the competent EU financial supervisors. Once the subsidiary has been granted authorisation, it will be able to operate throughout the EU (unlike a TCB).[61] The Territorial Approach would thus apply to the newly established subsidiary.

***Example IV—Third-Country Companies Providing Critical ICT Services to EU Financial Institutions***

A final example concerns third-country companies providing critical ICT services to EU financial institutions, all within the meaning of the Digital Operational Resilience Act (DORA).[62]

First, a few words about the overall purpose, scope and approach of DORA. In order to achieve a 'high common level of digital operational resilience', DORA lays down uniform requirements concerning the security of network and information systems supporting the business processes of 'financial entities' as defined in DORA.[63]

The term 'financial entities' is broadly defined and covers most regulated financial institutions, including entities such as (a) credit institutions, (b) payment institutions, (c) account information service providers, (d) electronic money institutions, (e) investment firms, (f) crypto-assets service providers, (g) CCPs, (h) trading venues (i.e., RMs, multilateral trading facilities (MTFs) and organised trading facilities (OTFs)), (i) insurance companies, (j) insurance intermediaries, (k) managers of AIFs and UCITS, and (l) crowdfunding service providers.[64] However, DORA's scope extends beyond financial entities, as it also applies to critical ICT third-party service providers.[65]

The approach taken by DORA is, first of all, that it subjects financial entities to requirements in relation to (i) information and communication technology (ICT) risk management, (ii) reporting of major ICT-related incidents and notifying, on a voluntary basis, significant cyber threats to the competent authorities, (iii) reporting of major operational or security payment-related incidents to the competent authorities by the types of financial entities referred to in (a)-(d) of the previous paragraph, (iv) digital operational resilience testing, (v) information and intelligence sharing in relation to cyber threats and vulnerabilities, and (vi) measures for the sound management of ICT third-party risk.[66]

[60] See the proposal for the new Art. 48j(4) CRD IV as included in European Commission (2021).

[61] See for further details Sect. 6.1 (Example III, second paragraph) above.

[62] Regulation (EU) 2022/2554 (DORA).

[63] Art. 1(1), opening words, DORA.

[64] See for the full list of 'financial entities' covered by DORA: Art. 2(1)(a)-(t) DORA.

[65] Art. 2(1)(u) DORA.

[66] Art. 1(1)(a) DORA.

In addition, DORA introduces (1) requirements for the contractual arrangements concluded between ICT third-party service providers and financial entities, (2) rules for the establishment and conduct of the so-called 'Oversight Framework' for critical ICT third-party service providers when providing services to financial entities (see also the next paragraph), and (3) rules on cooperation among competent authorities, and rules on supervision and enforcement by competent authorities in relation to all matters covered by DORA.[67]

For the purposes of this article, it is relevant to take a closer look at the 'Oversight Framework' for critical ICT third-party service providers.[68] ESMA, EBA[69] and EIOPA[70] (the ESAs)[71] will jointly designate the ICT third-party service providers that are critical for financial entities ('critical ICT third-party service providers').[72] This designation must be based on all of the following criteria: (a) the systemic impact on the stability, continuity or quality of the provision of financial services in the event that the relevant ICT third-party service provider would face a large-scale operational failure to provide its services, (b) the systemic character or importance of the financial entities that rely on the relevant ICT third-party service provider, (c) the reliance of financial entities on the services provided by the relevant ICT third-party service provider in relation to critical or important functions of financial entities that ultimately involve the same ICT third-party service provider, and (d) the degree of substitutability of the ICT third-party service provider.[73] Where the ICT third-party service provider belongs to a group, the criteria referred to in (a)-(d) must be considered in relation to the ICT services provided by the group as a whole.[74] These criteria will be further specified in Level 2 rules.[75]

If an ICT third-party service provider is designated as critical, the joint ESAs will appoint a 'Lead Overseer' for this critical ICT third-party service provider. The Lead Overseer will be ESMA, EBA or EIOPA, depending on whether the critical ICT third-party service provider mainly serves financial entities for which ESMA, EBA or EIOPA is responsible.[76]

This brings me to the final example. DORA provides that financial entities must only make use of the services of an ICT third-party service provider established in a

[67] Art. 1(1)(b)-(d) DORA.

[68] Arts. 31–44 DORA.

[69] 'EBA' stands for 'European Banking Authority'.

[70] 'EIOPA' stands for 'European Insurance and Occupational Pensions Authority'.

[71] 'ESAs' stands for 'European Supervisory Authorities'.

[72] Art. 31(1)(a) DORA. See Art. 31(8) DORA for ICT third-party service providers that are exempted from designation.

[73] Art. 31(2) DORA.

[74] Art. 31(3) DORA.

[75] Art. 31(6) DORA. On 26 May 2023 the joint ESAs published a discussion paper on the Level 2 rules: JC SC DOR-23-5.

[76] The ESA to be appointed is the ESA that is responsible 'for the financial entities having together the largest share of total assets out of the value of total assets of all financial entities using the services of the relevant critical ICT third-party service provider, as evidenced by the sum of the individual balance sheets of those financial entities'. See Art. 31(1)(b) DORA.

third country that has been designated as critical if the latter has established a subsidiary in the EU within the 12 months following the designation. In other words, ICT third-party service providers established in third countries that are designated as critical cannot perform their services from a third country. They can only provide their services to financial entities in the EU through a subsidiary established in the EU, which will then be subject to (i) the strict DORA requirements and (ii) supervision by the relevant ESA. Thus, the Territorial Approach applies to such parties.[77]

## 7 The Rise of the Extra-Territorial Approach

This section provides three examples that illustrate the rise of the Extra-Territorial Approach.

***Example I—CCPs***

First of all, as mentioned previously, third-country Tier 2 CCPs recognised by ESMA and established in a third country for which the Commission has taken a positive equivalence decision are subject to (i) the strict prudential EMIR requirements that also apply to CCPs established in the EU and (ii) supervision by ESMA. This amounts to the Extra-Territorial Approach, as EU rules and EU supervision are applied to third-country CCPs.[78]

***Example II—Investment Firms***

MiFID II contains a Member State option regarding the position of a third-country firm wishing to provide investment services and/or perform investment activities in a Member State to retail clients or to clients who have obtained professional client status by opting up (‘opt-up professional clients’). The Member State concerned may require such investment firms to establish a branch in its territory (Member State option).[79]

If a Member State exercises this option, MiFID II prescribes the following procedure. The branch must acquire a prior authorisation from the competent financial supervisor.[80] The investment firm should submit its application for authorisation to the supervisor of the Member State where it intends to establish a branch.[81] When making the application, the third-country firm must provide

[77] Art. 31(12) DORA. See also Arts. 31(13) and 35(1)(d)(iv) DORA.

[78] See for further details Sect. 6.4 (Example I, second paragraph) above. Of course, as set out in Sect. 6.4 (Example I, second paragraph) above, as soon as a third-country CCP becomes so systemically relevant in ESMA’s opinion that even compliance with the prudential EMIR provisions is insufficient, ESMA (in consultation with the relevant central banks) *can* advise the Commission to take a decision that the third-country CCP may no longer operate in the EU unless it establishes a subsidiary in the EU. In that scenario, the Territorial Approach applies.

[79] Art. 39(1) MiFID II.

[80] Art. 39(2), opening words, MiFID II.

[81] Art. 39(3) MiFID II.

the financial supervisor with certain information to ensure that it can adequately assess the application.[82]

The financial supervisor will grant the authorisation if the cumulative conditions referred to below at 1–7 are fulfilled.[83] This constitutes *maximum harmonisation*: the Member States may not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by MiFID II.[84] Nor may they treat any branch of third-country firms more favourably than firms from the EU.[85]

1. The provision of services for which the third-country firm requests authorisation is subject to authorisation and supervision in the third country where the firm is established and the requesting firm is properly authorised, whereby the competent authority pays due regard to any recommendations of the Financial Action Task Force (FATF) in the context of anti-money laundering and countering the financing of terrorism.[86]
2. Cooperation arrangements, which include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the financial supervisor in the Member State where the branch is to be established and the financial supervisor of the third country where the firm is established.[87]
3. There is sufficient initial capital at the branch's free disposal.[88]
4. One or more persons are appointed to be responsible for the management of the branch and they all comply with the governance requirements laid down in CRD IV, which are declared applicable in MiFID II to all investment firms covered by MiFID II.[89]
5. The third country where the third-country firm is established has signed an agreement with the Member State where the branch is to be established, which (a) fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital, and (b) ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements.[90]
6. The firm belongs to an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC.[91]
7. The branch must (insofar as is relevant) be able to comply with various MiFID II provisions: (a) organisational requirements, (b) algorithmic trading, (c) trad-

[82] See Art. 40 (Obligation to provide information) MiFID II.
[83] Art. 39(2), opening words, and Art. 41(1), opening words, MiFID II.
[84] Art. 41(2), second paragraph, first part of the sentence, MiFID II.
[85] Art. 41(2), second paragraph, second part of the sentence, MiFID II.
[86] Art. 39(2)(a) MiFID II.
[87] Art. 39(2)(b) MiFID II.
[88] Art. 39(2)(c) MiFID II.
[89] Art. 39(2)(d) MiFID II.
[90] Art. 39(2)(e) MiFID II.
[91] Art. 39(2)(f) MiFID II.

ing process and finalisation of transactions in an MTF and an OTF, (d) specific requirements for MTFs, (e) specific requirements for OTFs, (f) various conduct of business obligations (conflicts of interest, general duty to act honestly, fairly and professionally, provision of adequate information, know-your-customer (KYC) rules, best execution, client order handling, transactions with eligible counterparties), (g) market transparency and integrity, (h) the transparency rules for trading venues, and (i) transaction reporting rules.[92]

If a Member State does *not* exercise the Member State option, MiFID II merely contains one stipulation: the Member State may not require a third-country firm to establish a branch if the firm wishes to provide investment services and/or perform investment activities in the Member State concerned to retail clients or opt-up professional clients. After all, the harmonised requirements described above apply in such a case. Whether and, if so, on what conditions a third-country firm may provide investment services and/or perform investment activities in the Member State concerned to retail clients or opt-up professional clients depends on the national regime of the Member State concerned.

The following should be taken into account in this connection. Whether or not a Member State exercises the Member State option, an authorisation does not constitute a European passport. If Member State A has exercised the Member State option and granted an authorisation to a branch in its territory of investment firm X, which is established in a third country, the authorisation does *not* qualify as a European passport. In short, if investment firm X subsequently wishes to provide investment services and/or perform investment activities in Member State B to retail clients and opt-up professional clients, and Member State B has also exercised the Member State option, investment firm X will also have to establish a branch in Member State B for which an application must be submitted to the financial supervisor in Member State B for separate authorisation. Naturally, the requirements to be imposed in respect of an authorisation for a branch of a third-country investment firm have been harmonised. Consequently, the requirements to be met by investment firm X in Member State B should not differ from those that apply in Member State A.

If Member State B has *not* exercised the Member State option, the requirement that investment firm X should also establish a branch in Member State B does not apply. Whether and, if so, on what conditions investment firm X may provide investment services and/or perform investment activities in Member State B to retail clients and opt-up professional clients will depend on the national regime of Member State B, although Member State B cannot demand the establishment of a branch since in such circumstances the harmonised requirements apply. In comparison with the situation described in the previous paragraph, namely where Member State B has exercised the Member State option, this has the disadvantage that the requirements to be met by investment firm X may differ between Member State B and Member State A.

In conclusion, it follows from what has been said above that if a third-country firm wishes to provide investment services and/or perform investment activities to

[92] Art. 41(1)(b) in conjunction with (2), first paragraph, MiFID II.

retail clients or opt-up professional clients in a Member State that has exercised the Member State option, the Extra-Territorial Approach applies. After all, in such cases (i) the EU rules referred to at 1–7 above apply, and (ii) financial supervision and authorisation at the level of the Member State concerned are applied to the branch, which is not a separate legal entity but part of a legal entity established in a third country. If the Member State concerned has *not* exercised the Member State option, the approach adopted will depend on the applicable national regime.[93]

***Example III—Third-Country Bank Branches (TCBs)***
Third, as mentioned previously, according to a Commission proposal from 2021, TCBs that wish to become active within the territory of a Member State should become subject to an explicit authorisation procedure and to (1) minimum regulatory requirements, (2) reporting requirements, and (3) EU supervision. The requirements are stricter for so-called Class 1 TCBs than for Class 2 TCBs. In these cases, the Extra-Territorial Approach applies. After all, in such cases (i) EU rules apply, and (ii) EU financial supervision and authorisation at the level of the Member State concerned are applied to the TCB, which is part of a legal entity established in a third country.[94]

## 8 Loopholes in the Execution of the Territorial Approach at the National Level

In the meantime, financial supervisors at the national level are following a less restrictive approach when it comes to granting third-country entities access to the EU financial markets, at least in certain cases. This is evident from ESMA's recent assessment of the Brexit relocation process ('Peer review into the NCAs' handling of relocation to the EU in the context of the UK's withdrawal from the EU', referred to below as the 'Peer Review').[95]

But first let us take a few steps back. Because of Brexit, the UK became a third country. As discussed, equivalence regimes for UCITS managers and operators of RMs are non-existent (Sect. 6.2), whereas the Commission is apparently not prepared to take any equivalence decisions based on the frameworks that are in place for third-country investment firms and third-country managers of AIFs (Sect. 6.3). For these (and other) types of UK entities there is no access to the EU financial markets, unless the UK entity concerned establishes a subsidiary within the EU, which will then become subject to (i) EU rules and (ii) financial supervision and

[93] See further on this topic, for example, Busch and Louisse (2017), paras 10.45–10.56.
[94] See for further details Sect. 6.4 (Example III, third, fourth and fifth paragraph) above. Of course, as set out in Sect. 6.4 (Example III, seventh and eighth paragraph) above, if the competent EU supervisor exercises its power to subsidiarise, the newly established subsidiary concerned will become fully subject to (i) CRD IV and other applicable EU rules, and (ii) EU supervision. In that scenario, the Territorial Approach applies.
[95] ESMA (2022a); ESMA (2022b).

authorisation in the Member State of establishment. The Territorial Approach thus applies to these types of UK entity. UK entities such as (i) investment firms (including those that operate an MTF or an OTF), (ii) operators of RMs (including those that operate an MTF or an OTF) and (iii) managers of UCITS and AIFs have therefore established subsidiaries in the EU and sought authorisation from the national competent financial supervisor (national competent authority or NCA) in the EU.

One key concern for ESMA was to ensure a level playing field among jurisdictions in the context of relocation of entities from the UK to the EU. ESMA worked closely with NCAs during the Brexit transition to provide guidance through opinions, supervisory briefings and Q&As, in order to assist market participants and deal with relocation in an aligned way across the EU. ESMA also provided an EU-wide collaborative platform in the form of the Supervisory Coordination Network (SCN). The SCN brought together senior supervisors from NCAs while they were processing the authorisation requests and helped reach common views on a number of important issues. These initiatives targeted enhanced convergence in NCAs' individual assessments of transfer of activities and authorisation requests from relocating firms, including investment firms, trading venues (RMs, MTFs and OTFs) and fund managers (AIFs and UCITS managers).[96]

This brings us to the Peer Review, which provides observations on how NCAs have handled the associated relocations. The key findings in the report are as follows. In certain cases NCAs allowed for an extensive use of outsourcing/delegation arrangements. In addition, several firms relocated with limited technical and human resources in the EU. In particular, NCAs applied different interpretations of proportionality when it came to substance requirements. In certain cases this led to some smaller firms relocating with only very minimal set-ups.[97] In other words, loopholes in the execution of the Territorial Approach continue to exist at the national level, at least for the time being.[98]

## 9 Conclusions

All in all, the future of equivalence in the EU financial sector does not look all that bright. Granting third-country entities access to the EU financial markets is increasingly less about reliance on equivalent third-country rules and equivalent

[96] ESMA (2022a), pp 18–19.

[97] Ibid., pp 6–13 (summary).

[98] For completeness' sake it is noted that 'reverse solicitation' is also a possible legal avenue for EU access. Where a financial service is exclusively initiated by an EU client, and then provided by a third-country entity, it is not deemed to be provided within the territory of the EU. The relevant third-country entity cannot solicit clients or market additional services once solicited by the client. Reverse solicitation is expressly acknowledged under Art. 46(5), third paragraph, MiFIR, Art. 42 MiFID II, and Art. 61 MiCAR. See also European Commission (2021), which features the new Art. 21c(2) and (3), to be included in CRD IV. Yet, as pointed out by Moloney, the reverse solicitation route does not provide a stable legal platform for EU access, as its availability depends on how Member States individually interpret what kind of engagements are permissible as 'reverse solicitations'. See Moloney (2023), pp 854–855, 883–884; ESMA (2021a); ESMA (2021b). In any event, *if* the reverse solicitation route is available, the Global Markets Approach applies.

third-country supervision. Considerations other than equivalence are increasingly given more relative weight, either explicitly or implicitly, in particular (i) EU financial stability risks, (ii) EU market integrity, (iii) EU retail investor protection, (iv) preserving or regaining EU autonomy in an increasingly complex world (e.g., Brexit and the economic rise of China), (v) protecting EU entities against competitors from third countries, (vi) trying to conquer market share in a lucrative business (e.g., derivatives clearing), and (vii) other EU policy considerations. These considerations are gaining ground not merely in relation to the question of whether an equivalence framework should even be in place, and if so, whether equivalence decisions should indeed be taken, but also with regard to the regulatory and supervisory framework that the EU applies to (1) entities established in third countries for which the Commission has adopted equivalence decisions, and (2) third-country branches established in the EU. In view of this, the Territorial Approach and the Extra-Territorial Approach are clearly on the rise, in each case to the detriment of the Equivalence Approach. At the same time, loopholes in the execution of the Territorial Approach continue to exist at the national level, at least for the time being.



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