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ARTICLE

The European Commission's Equivalence Decisions for Third-Country Central Counterparties: Between Financial Stability and Political Considerations

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Abstract
Central counterparties (CCPs) play an essential role in modern financial markets. Their market access is strictly regulated, not only domestically but also across borders. To gain access to European Union financial markets, third-country CCPs (TC-CCPs) must comply with the recognition procedure set up by the European Market Infrastructure Regulation (EMIR). One of the conditions in this procedure is that the European Commission has adopted an equivalence decision concerning the legal framework of the TC-CCP's home jurisdiction. Such a decision states that the foreign legal framework is deemed to be equivalent to that provided by EMIR. In this paper, we analyse the equivalence decisions and underlying legal frameworks of three different jurisdictions, i.e., the United Kingdom, the United States, and Switzerland, in order to distil common principles. We also identify common observations concerning the Commission's attitude when it adopts decisions. We find that the Commission demands strict equivalence but is also a negotiator with two faces. What is, at first glance, a technical assessment aimed at safeguarding financial stability is supplemented by broader political and practical considerations. We conclude that the current approach can help promote financial stability but warn that it creates uncertainty for the market players involved.

Keywords Financial stability · Central counterparties · Derivatives · Market infrastructure · Market access · Equivalence

JEL code G18 · G28

1 Introduction

Under the impetus of various mandatory clearing obligations, central counterparties (CCPs) play an increasingly important role in financial markets by clearing enormous amounts of derivatives daily. In short, derivatives can be defined as follows:

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'Financial assets the value or expected performance of which is determined by reference to another ("underlying") asset, rate, index or event'.[1] The value of the derivative is determined by the underlying rate, index, commodity, etc.[2] Derivatives can be used to hedge risks or speculate.[3] They are traded either bilaterally between parties, which is called an over-the-counter derivative (hereafter: OTC derivative), or through an exchange organisation where the organisation is interposed between the parties, such as, for example, a clearinghouse.[4]

A derivative consists of two main elements that can be combined in various ways to create different types of derivatives. Each derivative consists of an option that is complemented by a forward.[5] An option is a right to buy or sell an asset at a future date for a fixed price. A forward is an obligation to buy or sell that asset at a future date for that fixed price. An example of a derivative is a CDS, or credit default swap derivative, where a credit protection buyer agrees to pay the seller in case of failure of the underlying reference entity, in exchange for periodic payments from the credit protection seller.[6]

CCPs, on the other hand, are organisations that aim to reduce the risk of a defaulting counterparty.[7] EMIR defines a CCP as follows: '[A] legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer'.[8] Thus, by splitting the derivative contract into two contracts between the CCP and each of the parties individually, the parties' counterparty credit risk is transferred from the parties to the central counterparty.[9] This counterparty credit risk is the risk that a party to a derivative incurs when the counterparty fails to perform its obligation.[10]

Because a CCP 'takes over' the risk of the financial parties, it must manage these adopted risks. For example, a CCP will usually ask a trading member to post collateral. This collateral is a form of security that represents the risk of the transaction and can take the form of, for example, an initial or variation margin call.[11] An initial margin is a collateral that is collected at the beginning of the contractual relationship and reflects the counterparty credit risk for the duration of the contractual relationship.[12] A variation margin is a collateral that is paid during the contractual relationship and reflects changes in the market value of the clearing member's position.[13]

[1] Armour et al. (2016), p 466.

[2] Allen (2012), p 1080.

[3] Kress (2011), p 52.

[4] Griffith (2012), p 1159; Kress (2011), p 52.

[5] Callens (2022a), p 8; Waldman (1994), p 1028.

[6] Allen (2012), p 1084; Griffith (2012), p 1160; Weber (2016), p 76.

[7] Turing and Yadav (2016), p 28.

[8] Art. 2(1) Regulation 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 (hereafter: EMIR).

[9] Allen (2012), pp 1085–1086.

[10] Griffith (2012), p 1161; McVea (2017), p 116.

[11] Pennesi (2022), pp 158–159; Turing and Yadav (2016), p 29.

[12] Armour et al. (2016), p 469; Lucantoni (2019), p 1650.

[13] Ibid.

Additionally, a CCP will also ask its members to contribute to a default fund, which is a fund that can be used by the CCP when the members' posted collaterals are not sufficient to cover the default.[14] Other examples of how this risk can be managed include determining criteria for CCP membership and establishing centralised crisis management.[15] This crisis management often defines the order of the funds that will be used to absorb the loss caused by the default and is often described as a default waterfall.[16] First, the defaulting member's collaterals and default fund contributions are used, followed by the CCP's own assets and the default fund contributions of non-defaulting members.[17]

Additionally, the CCP can net other obligations from the defaulting member. Netting reduces the credit exposure of non-defaulting clearing members.[18] For example, clearing member A owes member B €1 million due to contract 1a, and member B owes A €1 million due to contract 1b. If A goes bankrupt, B can terminate contract 1b, meaning that he sets off his obligation against the obligation of member A, who will not be able to perform his obligation. After applying this mechanism, B's credit exposure is €0.

CCPs play an essential role in present-day derivatives markets. In the EU, OTC derivatives are, in principle, subject to central clearing.[19] They mutualise the counterparty credit risk inherent in such derivatives through the cascade described above. In doing so, they dramatically simplify the network of claims and obligations, creating relatively straightforward 'hub-and-spoke' structures instead of complex mazes with counterparties of lesser and greater importance.[20] In 2009, while the world economy was still reeling from the effects of the 2007-08 financial crisis, G20 leaders called for the central clearing of derivatives.[21] The explicit goal was to dampen systemic risk channelled through unclear (over)exposures and exacerbated by a loss of confidence.[22]

Systemic risk is 'a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy'.[23] While CCPs contribute to dampening it, they also (ironically but inevitably) concentrate a lot of the risk inherent in OTC derivatives trading and might thus become systemically important themselves.[24] A financial institution or a provider of financial infrastructure is systemically important if its failure or malfunctioning could lead to

[14] Lubben (2017), p 146.

[15] Pennesi (2022), pp 158–159.

[16] Canini (2021), p 683.

[17] Asimakopoulos and Nabilou (2020), p 9; Lubben (2017), p 146. See also Art. 45 EMIR.

[18] Waldman (1994), p 1028.

[19] Art. 4 EMIR.

[20] Yellen (2013).

[21] G20 Leaders (2009), p 9.

[22] Financial Stability Board (2017), p 7.

[23] Art. 2(c) of Regulation 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, [2010] OJ L331, 1–11.

[24] Armour et al. (2016), p 474.

systemic risk.[25] Legislators around the world are conscious that CCPs could fall into this category. Consequently, more stringent rules have been developed for CCPs that are systemically important in their home jurisdiction, as well as for foreign CCPs that are systemically important to the market to which they hope to gain access.

Thus, due to their function, structure, and central position within financial markets, CCPs, on the one hand, reduce systemic risk, but on the other hand, can also become systemically important themselves. Therefore, in order to safeguard financial stability, CCPs have become subject to strict regulatory frameworks. In the EU, the European Market Infrastructure Regulation (EMIR) regulates CCPs and the clearing of derivatives. EMIR not only regulates CCPs that are established in the EU, but it also determines the access of CCPs established outside the EU to the European market. Third-country central counterparties (TC-CCPs) must apply for recognition with the European Securities and Markets Authority (ESMA) before offering clearing services in the Union. Before ESMA can issue such recognition, the European Commission (EC) must have adopted an equivalence decision concerning the legal framework of the third country in which the CCP is established. This decision states that the foreign legal framework is equivalent to the framework provided by EMIR. According to Article 25(6a) EMIR, the European Commission may adopt a decision in which it establishes a list of criteria that it considers when adopting an equivalence decision. The EC, however, has not yet used this power.

This paper critically assesses the equivalence decisions of three different jurisdictions and distils principles that are common to the three legal frameworks. These common principles cannot only serve as a source of inspiration, should the Commission decide to formulate such criteria, but will also help third countries to assess which elements should be present in their legal frameworks in order to obtain an equivalence decision.

First, the recognition procedure for TC-CCPs is set out. Next, we critically assess the equivalence decisions concerning the legal frameworks of the United Kingdom, the United States of America, and Switzerland. Finally, this critical assessment will result in the distillation of principles common to the three countries. However, the assessment has identified not only common principles but also common observations concerning the Commission's attitude when adopting equivalence decisions. The *prima facie* mere technical assessment of equivalence is supplemented by political and practical considerations from the European Commission.

2 Quick Guide to EMIR's Recognition Procedure

EMIR stipulates that TC-CCPs can only provide clearing services after being recognised by ESMA. The EU utilises a dual system, based on the jurisdiction where the CCP is established, to determine whether the CCP can offer its clearing services in the EU. CCPs that are established in the EU can apply for authorisation from the

[25] Art. 3(1)(30) of 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, [2013] OJ L176/338.

national competent authority (NCA) in the Member State in which they are established.[26] They are thus authorised through a national procedure and are subject to the supervision of the NCA.[27] This authorisation is effective for the entire EU, following the European passport principle.[28] CCPs established outside the EU (TC-CCPs), in contrast, must apply to ESMA for recognition to offer clearing services in the EU and are, in certain circumstances, subject to EU-level supervision by ESMA. This recognition procedure is meant to maintain financial stability within the EU.[29]

2.1 The European Commission's Equivalence Decision

According to Article 25(2a) EMIR, ESMA can only recognise a TC-CCP if the EC has adopted an equivalence decision concerning the jurisdiction in which the CCP is established.[30] Equivalence decisions, in general, are meant to ensure financial stability and investor protection, combined with creating globally integrated EU financial markets that are open to financial institutions in third countries.[31]

Three specific elements of the foreign legal framework are evaluated in an equivalence decision. First, the EC assesses whether the third country's legal and supervisory arrangements ensure that CCPs, established in that foreign jurisdiction, comply with legally binding requirements that are equivalent to Chapter 4 of EMIR.[32] This Chapter includes organisational requirements for CCPs (e.g., the creation of a risk committee within the CCP[33]), rules on the conduct of business to ensure the protection of clients (e.g., concerning the interaction with clients when providing services[34]) and prudential requirements concerning the management of defaulting clearing members.[35] The requirements are designed to ensure that CCPs can absorb the losses of clearing members by being sufficiently resourced, whilst, at the same time, not being too costly for CCP members.[36] These prudential requirements include margin requirements for CCPs,[37] the requirement to ask for highly liquid collateral from their members[38] and the introduction of a default fund.[39] Additionally, Chapter 4 determines requirements for the calculations and reporting practices

[26] Art. 14(1) EMIR.

[27] Art. 22(1) EMIR; Pennesi (2022), p 174.

[28] Art. 14(2) EMIR; Lucantoni (2019), p 1619; Moloney (2014), p 605.

[29] Callens (2022b), para. 388.

[30] In accordance with Art. 25(6) EMIR.

[31] European Commission (2017), p 5.

[32] Art. 25(6)(a) EMIR.

[33] Art. 28 EMIR.

[34] Art. 36 EMIR.

[35] Moloney (2014), p 608.

[36] Lucantoni (2019), p 1650.

[37] Art. 41 EMIR.

[38] EMIR Art. 46(1).

[39] EMIR Art. 42.

necessary to satisfy Regulation No 575/2013 on the prudential requirements for credit institutions and investment firms.

Second, CCPs must continuously be subject to effective supervision and enforcement in their home country.[40] Third, the EC evaluates the reciprocity of the foreign legal framework. Namely, the third country should have an equivalent system for recognising CCPs established in other jurisdictions, including EU-based CCPs.[41] This condition is not necessarily induced by reasons of maintaining financial stability within the EU. Rather, it can be seen as a means to ensure access to this foreign jurisdiction for EU-based CCPs.[42]

Upon adopting an equivalence decision, the EC adopts an outcome-based approach.[43] Rather than examining the equivalence of each rule separately, the EC examines whether the general outcome of the legal framework is equivalent to the objective of EMIR, which is safeguarding financial stability.[44] The adoption of this decision is left to the discretion of the EC.[45] It may adopt a decision stating that a legal framework is equivalent but is under no obligation to do so, and once an equivalence decision has been made, it may also be withdrawn[46] at the discretion of the EC.[47] This equivalence could therefore be used as a political instrument.[48] In its staff working document, the EC even states that during the equivalence assessment, it may consider the objectives of the particular legislation and the treaties, such as the protection of financial stability or market integrity.[49] The EC may take into account the third country's wider policy priorities regarding the promotion of values and objectives when adopting an equivalence decision.[50] Currently, the EC has adopted an equivalence decision for 23 different jurisdictions.[51]

40 EMIR Art. 25(6)(b).

41 EMIR Art. 25(6)(c).

42 Callens (2022b), para. 395; Turing and Yadav (2016), p 46.

43 European Commission (2017), p 4.

44 Callens (2022b), para. 388.

45 European Commission (2017), p 8.

46 See Callens (2022b), para. 390: the equivalence decision can be withdrawn if, for example, the third country lowers its supervisory or legislative standards.

47 Financial Markets Law Committee (2017), para. 3.4; Moloney (2020), p 42; Pennesi (2022), p 178.

48 Callens (2022b), para. 438.

49 European Commission (2017), p 9.

50 Ibid.

51 See https://www.esma.europa.eu/supervision/tc-ccps (accessed 12 January 2023), including Australia, Brazil, Canada, Chile, China, Colombia, Dubai, Hong Kong, India, Indonesia, Israel, Japan, Malaysia, Mexico, New Zealand, Republic of Korea, Singapore, South Africa, Switzerland, Taiwan, United Arab Emirates, United Kingdom (temporarily until 30 June 2028) and USA.

2.2 Tier 1 and Tier 2: Assessing a CCP's Systemic Risk

In 2019, Regulation 2019/2099,[52] better known as EMIR 2.2, amended this recognition process by introducing a tiering system for TC-CCPs. If a TC-CCP is systemically important or likely to become systemically important to the EU or an EU Member State, it is categorised as Tier 2 and is subject to more recognition conditions. Additionally, Tier 2 TC-CCPs are subject to onshore supervision by ESMA.[53] Tier 1 TC-CCPs are not systemically important or not likely to become systemically important.

This amendment was, amongst other reasons, introduced as a reaction to Brexit. In its proposal concerning EMIR 2.2, the EC clarified that, as a result of the United Kingdom's exit from the EU, a large number of euro-denominated derivatives transactions would now be cleared by TC-CCPs.[54] The EC argued that this would pose challenges to safeguarding financial stability in the EU. To mitigate the risk of a concentration of risk in a limited number of CCPs, the EC proposed to introduce a tiering system for TC-CCPs.[55]

To assess the systemic importance, Article 25(2a) EMIR sets out several qualitative criteria that are further developed in the EC's delegated act 2020/1303.[56] ESMA should consider these qualitative criteria if at least one out of four quantitative criteria is met, regarding the business that the TC-CCP conducts with European clearing members and clients or in EU currencies.[57]

Three quantitative indicators are evaluated concerning the situation one year before the year in which the systemic importance of the TC-CCP is determined: (1) the maximum open interest of securities transactions or exchange-traded derivatives denominated in EU currencies cleared by the CCP exceeds the amount of EUR 1,000 billion, (2) the maximum notional outstanding of OTC derivatives denominated in EU currencies exceeds the amount of EUR 1,000 billion, or (3) the estimated largest payment obligation committed by an entity in the EU exceeds the amount of EUR 3 billion.[58] The latter payment should result from the default of, at

[52] Regulation 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No. 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, [2019] OJ L322/1.

[53] Art. 24a EMIR; Moloney (2020), p 58.

[54] European Commission, Proposal of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedure and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, COM(2017) 331 final/2, 6.

[55] Ibid., 24.

[56] In accordance with Art. 25(2a) EMIR.

[57] Art. 6(2) Commission Delegated Regulation 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, [2020] OJ L305/7 (hereafter: Commission Delegated Regulation No 2020/1303).

[58] Art. 6(1)(a)-(b) and (d) of Commission Delegated Regulation No 2020/1303.

least, the two largest single clearing members in the event of extreme conditions. The fourth indicator is assessed over two years and considers whether the average aggregated margin requirements and default fund contributions for accounts held at the CCP by entities in the EU exceed the amount of EUR 25 billion.[59]

If one of the four quantitative indicators is fulfilled, ESMA can determine the systemic importance of the CCP using the qualitative criteria.[60] In addition to the requirements set out in the delegated act and Article 25(2a) EMIR, ESMA has issued a methodology for assessing the systemic importance of TC-CCPs. This methodology is meant to supplement the tiering method set out above.[61]

If ESMA considers the CCP to be (or likely to become) systemically important, the CCP belongs to Tier 2; if not, the CCP belongs to Tier 1.[62] Additionally, ESMA can recommend to the EC not to recognise a certain TC-CCP if it considers it to be too systemically important.[63] The CCP is then qualified as a Tier 2 plus TC-CCP, to which the 'EMIR 2.2 "CCP location policy"' applies.[64] If it wants to provide services in the EU, it shall have to establish a subsidiary within the EU and comply with EU regulations.

2.3 ESMA's Decision to Recognise Third-Country CCPs

2.3.1 Not Systemically Important: Deference Model

In addition to the equivalence decision, three remaining conditions of Article 25(2) EMIR must be fulfilled in order for ESMA to recognise a Tier 1 TC-CCP. The CCP must be authorised to provide clearing services in its home jurisdiction and be subject to effective supervision that ensures that the CCP complies with prudential home rules.[65] Furthermore, ESMA must have closed a cooperation agreement with the foreign competent authority.[66] This cooperation agreement must, for example, include a procedure for the coordination of the supervision of CCPs[67] and the

[59] Art. 6(1)(c) of Commission Delegated Regulation No 2020/1303.

[60] Listed in Art. 25(a) EMIR are, for example, the nature, size and complexity of the CCP's business in the EU; the effect of failure on financial markets, institutions or systems; the CCP's clearing member structure; and the CCP's relationships or interdependencies with other financial institutions.

[61] ESMA (2021), para. 9. ESMA evaluates the following indicators: 1) the size of credit exposures of EU participants in relation to their buffer capacity; 2) the size of aggregate credit exposures of EU participants in proportion to relevant benchmarks; 3) the size of liquidity exposures of EU participants in proportion to their buffer capacity; 4) the size of liquidity exposures in proportion to relevant benchmarks; 5) the size of non-prefunded losses in case recovery or resolution plans are triggered in comparison to the capacity of EU participants; 6) the size of non-prefunded losses in case recovery or resolution plans are triggered in comparison to relevant benchmarks; and 7) the impact of non-access to services.

[62] Currently, two CCPs, both established in the UK, are considered to be Tier 2 CCPs: LCH Limited and ICE Clear Europe Limited. See ESMA (2023).

[63] Art. 25(2c) al. 1 and 2 EMIR.

[64] Callens (2023a), pp 41–42.

[65] Art. 25(2)(b) EMIR; Callens (2023b), p 206.

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

[67] Art. 25(7)(d) EMIR.

exchange of information on emergencies by the foreign competent authority.[68] The final requirement for Tier 1 TC-CCPs is that the CCP is not established in a jurisdiction that is considered a risk due to its strategic deficiencies in its legal framework regarding anti-money laundering and counter-financing of terrorism.[69]

The TC-CCP can then provide services in the Union based on mutual recognition. It does not have to follow the requirements of EMIR. This is called a deference model.[70] The TC-CCP can provide services in the EU without being established there because the home rules are deemed to be equivalent. It benefits from the advantage of not being subject to double supervisory and regulatory requirements of the EU.[71]

2.3.2 (Likely to Become) Systemically Important: Subject to EMIR

If a TC-CCP is categorised as a Tier 2 CCP, it must fulfil the requirements of a Tier 1 CCP (*supra* Section 2.3.1) and comply with EMIR, as specified in Article 25(2b)(a) EMIR. It cannot offer services in the Union based on mutual recognition. The TC-CCP must comply with Article 16 EMIR and the rules listed in Titles IV and V EMIR. However, ESMA may assess the 'comparable compliance' of the home regulation with EMIR on a rule-by-rule basis.[72] This means that ESMA will examine to what extent these EMIR rules are already fulfilled by simply following the home rules.[73] This introduction of 'comparable compliance' was influenced by the recognition procedures in the US for non-US CCPs.[74]

Furthermore, the central banks of the Union currency of the financial instruments that are cleared by the CCP must confirm in writing that the TC-CCP complies with the requirements that the central bank has imposed to perform its tasks related to its monetary policy.[75] Lastly, the TC-CCP must hand over a signed written statement in which it declares that it will provide documents and other data to ESMA when requested and grant ESMA access to its business premises.[76] In addition to being subject to the rules of EMIR, the Tier 2 TC-CCP will also be subject to onshore supervision by ESMA, or more specifically, the CCP Supervisory Committee.[77]

68 Art. 25(7)(g) EMIR.

69 Art. 25(2)(d) EMIR.

70 Pennesi (2022), pp 170 and 187.

71 Lehmann (2023), p 13.

72 Art. 25a EMIR; Lehmann (2023), p 24.

73 Moloney (2020), pp 59–60.

74 European Commission, Proposal of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedure and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, COM(2017) 331 final/2, 25.

75 Art. 25(2b)(b) EMIR.

76 Art. 25(2b)(c) EMIR.

77 Art. 24a EMIR; Lehmann (2023), pp 26–27; Moloney (2020), p 58.

3 Analysis of the UK's Legal Framework

3.1 Substantive Changes?

Since Brexit, the UK is a third country when trading with the EU. This means that UK-based CCPs that want to provide services within the EU must apply to ESMA for recognition. As explained earlier (*supra* Section 2), to grant such recognition, the EC must have adopted an equivalence decision regarding the UK's regulatory framework. To ensure a smooth transition, the UK's regulatory framework is temporarily being considered as equivalent to EMIR. This decision was valid until 30 June 2022 but was recently renewed until 30 June 2028.[78]

Upon leaving the EU, the UK retained direct EU legislation, including EMIR.[79] This is referred to as UK EMIR. Although EMIR 2.2 was adopted after Brexit, the UK decided to implement the same tiering system as the EU.[80] UK-based CCPs are thus largely subject to the same rules as EU-based CCPs, as set out in Title IV EMIR. The EC has therefore decided that the regulatory framework is equivalent.[81] This legal framework will only continue to be deemed equivalent insofar as the legislation in the UK is not changed in such a way as to negatively affect the equivalence and lead to an un-level playing field between UK and EU CCPs.[82]

3.2 The Bank of England's Supervision and New Tiering Policy

The Bank of England (hereafter: BoE) remains the relevant supervisory authority for UK-CCPs and Tier 2 non-UK CCPs.[83] Except for its new policy concerning the tiering procedure for TC-CCPs, the BoE has not made significant changes to its supervision policy.[84] The UK has even adopted the tiering system set out in Article

[78] Commission Implementing Decision 2025/215 of 30 January 2025 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No. 648/2012 of the European Parliament and of the Council, [2025] OJ L1/5 (hereafter: UK equivalence decision).

[79] European Union (Withdrawal) Act 2018, s 3 *j*. The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No. 2) Regulations 2016, SI 2016/1416.

[80] Financial Services and Markets Act 2000, s 313(1), as amended by reg. 2(4)(b) The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2020, SI 2020/646, reg. 2(4)(b); The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 1(4), as amended by The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2020, SI 2020/646, reg. 4(2).

[81] See recital 10 UK equivalence decision.

[82] Recital 14 UK equivalence decision.

[83] The Over-the-Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2019, SI 2019/335, reg. 33.

[84] See recital 11 UK equivalence decision.

25(2a) EMIR, even though this was introduced after Brexit.[85] Tier 1 CCPs will be subject to their home regulation and supervision, and Tier 2 CCPs will have to comply with UK regulations and will be subject to UK supervision.[86] The BoE applies a two-stage process to assess the systemic importance of foreign CCPs that are applying for recognition.

Stage 1 includes a triage with two quantitative indicators and one interoperability indicator. The CCP either holds an initial margin of UK clearing members of at least £10 billion across all services at any point in the five years before this assessment, or has held a default fund contribution of at least £1 billion from UK clearing members at any point in the last five years.[87] If one of these two quantitative indicators is met, the CCP proceeds to the proportionality test.[88] This test calculates the proportion of the CCP's UK activity in relation to all of its clearing activities on average over a period of five years. If the proportion of the UK initial margin or the default fund contribution exceeds 20% of all its activities, it proceeds to Stage 2. If this proportion is lower than 20%, a Level 1 informed reliance assessment will be conducted, and if the assessment's requirements are met, the CCP will be categorised as a Tier 1 CCP.[89] This Level 1 assessment mainly examines whether the BoE may rely on the home country's regulation and supervision.[90] If the CCP does not meet the requirement of the Level 1 assessment, it proceeds to Stage 2. The third indicator in Stage 1 is the interoperability indicator. This examines whether the CCP has an interoperability arrangement with a UK CCP.[91] The BoE defines such an agreement as follows: '… allows participants in different CCPs to clear and settle financial transactions across CCPs without participating in multiple systems'.[92] If this criterion is fulfilled, the CCP immediately proceeds to Stage 2.[93] If a CCP meets none of the three indicators, it is categorised as a Tier 1 CCP.

Stage 2 is the advanced assessment stage, where the BoE conducts a systemic risk assessment.[94] This assessment is based on the criteria in Article 25(2a) EMIR and considers several elements, including the products cleared by the CCP, the nature of the CCP's access model, the access to alternative clearing venues, etc.[95]

[85] Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 13, as amended by The Over-the-Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2020, SI 2020/646, reg. 4.

[86] Bank of England (2022), para. 1.2.

[87] Ibid., para. 3.4.

[88] Ibid., para. 3.7.

[89] Ibid., para. 3.9.

[90] For example, it considers the regulatory framework that applies to the CCP and the nature and degree of the supervision of the CCP, and the supervisory priorities of the home country and its relationship with the home authority. See further: Bank of England (2022), para. 3.12.

[91] Ibid., para. 3.4.

[92] Ibid., para. 2.5.

[93] Ibid., para. 3.11.

[94] Ibid., para. 3.18.

[95] Ibid., para. 3.21.

If a CCP is deemed to be systemically important, the BoE will proceed to a Level 2 informed reliance assessment, in which it will determine whether it can rely on the home regulatory framework.[96] This assessment considers all the elements in the Level 1 assessment together with more in-depth requirements that can be found in Annex 1 to the policy statement. If these requirements are met, the CCP will be categorised as a Tier 1 CCP. In contrast, if they are not met, the CCP will be qualified as a Tier 2 CCP and will, thus, be subject to UK supervision and regulation.

3.3 The Reciprocity Condition Under the TTP

Since Article 25 EMIR has not (yet) been substantively amended, non-UK CCPs wanting to offer clearing services in the UK must be recognised by the BoE.[97] Similarly to the recognition procedure in the EU, a non-UK CCP will only be recognised if the home jurisdiction is considered to be equivalent by HM Treasury,[98] and the BoE has a Memorandum of Understanding with the home authority. This recognition procedure applies to non-UK CCPs that were not subject to the Temporary Transition Period, non-UK CCPs that were subject to the Temporary Transition Period and submitted their application before 30 June 2022, and non-UK CCPs that entered the run-off regime. This Temporary Transition Period was introduced in the UK to facilitate the exit from the EU.

When the UK left the EU, the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 gave the BoE the power to delay or modify regulations that were changed due to the EU (Withdrawal) Act 2018.[99] This is called a Temporary Transitional Power. The BoE used this power to constitute a Temporary Recognition Regime (TRR). Under this regime, which will last until 31 December 2026, several non-UK CCPs (including CCPs established in the EU) can provide clearing services in the UK before they are recognised by the BoE.[100] The TRR applies to CCPs that were authorised under Article 17 EMIR, recognised under

[96] Ibid., para. 3.23.

[97] Financial Services and Markets Act 2000, s 285(1)(d), as amended by The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 3(2)(b); The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 13.

[98] Reg. 14 The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 S.I. 1184.

[99] The Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations, 2019 SI 2019/632, reg. 197(2)(a).

[100] Examples of EU-based non-UK CCPs that fall under the TRR: LCH SA (France), Eurex Clearing AG (Germany), European Commodity Clearing (Germany), Athens Exchange Clearing House (Athex Clear) (Greece), etc.; see further: Bank of England, List of third-country CCPs that are taken to be eligible for temporary deemed recognition in the UK by virtue of the Temporary Recognition Regime established by the Central Counterparties (Amendments, etc., and Transitional Provision) (EU Exit) Regulations 2018 as amended, last update: 27 February 2025, https://www.bankofengland.co.uk/eu-withdrawal/-/media/boe/files/financial-stability/financial-market-infrastructure-supervision/list-of-third-country-ccps.pdf?la=en&hash=8C96A829A5F570A235A4944912AFA278A8728399&hash=8C96A829A5F570A235A4944912AFA278A8728399 (accessed 22 March 2025).

Article 25 EMIR or recognised under national law on exit day.[101,102] To enter the TRR, the CCPs had to notify the BoE before exit day of their intention to provide clearing services in the UK and had not yet been recognised by the BoE.[103] Non-UK CCPs that are subject to the TRR had to apply for recognition before 30 June 2022 to be able to continue to provide those services after the expiration of the TRR.[104] The EC has argued that this regime causes much legal uncertainty to TC-CCPs because the BoE has wide discretionary powers to withdraw recognitions.[105] Still, the EC found that the reciprocity requirement was fulfilled.

Moreover, the UK also introduced a run-off regime which allows certain CCPs to continue to offer services for a period that is determined by the BoE of 12 months at the most.[106] The run-off regime can apply to non-UK CCPs that were eligible to enter the TRR but did not do so, and non-UK CCPs that left the TRR without being recognised by the BoE or ceased to be recognised.[107]

4 Analysis of the US Legal Framework

4.1 Dual Legal Regime …

Financial regulation and supervision in the United States are famously divided between authorities. Not only do all States have a role to play, but there are also multiple federal regulators for the banking sector and the investment services sector. Two of the latter are important when it comes to derivatives supervision: the Securities and Exchange Commission (SEC)[108] and the Commodity Futures Trading Commission (CFTC).[109] Their competences are divided according to the type of derivative concerned: the SEC is competent when the underlying asset is a security (or a narrow index or group of securities), while the CFTC is competent when the underlying asset is a commodity. The latter term is constructed very broadly,

101 31 January 2020, as defined by European Union (Withdrawal) Act 2018, s 20(1).

102 The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 17(1)(a).

103 Ibid., reg. 17(1)(b)-(c).

104 Bank of England (2023).

105 See recital 12 UK equivalence decision.

106 The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 19B(2), as amended by The Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019, SI 2019/405, reg. 8. On 18 January 2023, the government proposed an amendment to extend this period to three years and six months, starting on the day of entering the run-off regime, see: Schedule 2, Amendments to the Financial Services and Markets Bill to be moved in Grand Committee, HL Bill 80(f), 4-5, https://bills.parliament.uk/publications/49384/documents/2743 (accessed 16 February 2023).

107 The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 19A(1)-(2), as amended by The Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019, SI 2019/405, reg. 8.

108 Established in 1934 by the Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881.

109 Established in 1974 by the Commodities Exchange Act of 1936, Pub. L. 74–675, 49 Stat. 1491.

making the CFTC the primary derivatives supervisor.[110] Still, both supervisors are responsible for the authorisation and supervision of CCPs. These are called clearing agencies (CAs) in SEC terminology, and derivatives clearing organisations (DCOs) in CFTC terminology.[111] In principle, security-based swaps must be cleared through a CA[112] and commodity-based swaps must be cleared through a DCO.[113] No such requirement exists for futures. Individual CCPs can be authorised and supervised by both the SEC and the CFTC.

Both agencies' supervisory mandates became stronger with the enactment of the Dodd-Frank Act in the wake of the 2007-08 financial crisis.[114] Dodd-Frank recognised that CAs and DCOs could be systemically important and authorised the SEC and CFTC to prescribe additional rules for such CAs and DCOs. The SEC did so in 2016 with Rule 17Ad-22,[115] which was extended to all CCPs under its remit in 2020.[116] This Rule contains a full prudential framework for CCPs. A comparable framework was established by the CFTC, dubbed the 'DCO Core Principles'.[117] The CFTC has maintained a two-tiered structure, however, with a separate layer of rules for systemically important DCOs, including, e.g., provisions on recovery and resolution.[118] CCPs are designated as systemically important by a separate body, i.e., the Financial Stability Oversight Council (FSOC), which is chaired by the Secretary of the Treasury.[119]

In case a foreign CCP plans to enter the US market and offer clearing services to US persons, there is no true mechanism of recognition such as exists in the EU. Indeed, the US has traditionally required such CCPs to register with the relevant agencies and to comply with the requirements they set out.[120] Two mechanisms mitigate this lack of recognition. On the one hand, the SEC has relatively broad powers to exempt (foreign) CCPs from registration, with considerations including the potential impact on US financial stability. This allows it to accommodate foreign CCPs and avoid duplicate or contradictory regulations. For instance, during the negotiations about the SEC equivalence decision (discussed below), the SEC developed a policy under which EU CCPs can more easily register or be given an exemption from registration.[121] On the other hand, the CFTC has developed a flexible 'alternative compliance' regime for foreign CCPs that it deems not systemically important

[110] See extensively: Callens (2022b), paras. 217–229.

[111] Defined in 15 USC §78c(a)(23) and in 7 USC §1a(15).

[112] 15 USC §78c-3(a)(1).

[113] 17 CFR §50.2.

[114] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376.

[115] 17 CFR §240.17Ad-22.

[116] SEC (2020a).

[117] 7 USC §7a-1; 17 CFR §§39.1–8.

[118] 17 CFR §§39.30–42.

[119] Section 804 of the Dodd-Frank Act, 12 USC 5463.

[120] Callens (2022b), para. 459.

[121] SEC (2020b).

to the US.[122] This assessment does not occur according to a bright-line rule and grants significant discretion to the CFTC.[123] As such, in the US, systemic importance leads to a requirement to register with and comply with requirements set by the relevant agencies. However, this too is softened, as the CFTC has issued a statement that it views the EMIR requirements as comparable to the DCO Core Principles (much like the SEC has done).[124] This is called substituted, rather than alternative, compliance,[125] and can significantly facilitate market access for foreign CCPs that do not qualify for the aforementioned alternative compliance.

4.2 … Leading to Dual Equivalence Decisions

The European Commission judges both the SEC and the CFTC systems as equivalent to the EMIR framework. The SEC decision was (only) taken in January 2021,[126] with a slight technical amendment in April 2022.[127] The CFTC decision was taken in March 2016,[128] after about four years of negotiations.[129] At the time of writing, eight US CCPs were recognised in the EU. They are all in the Tier 1 category, i.e., not systemically important in the EU. These recognitions took place in the wake of the equivalence decisions, in 2016, 2017 and 2022.

Both equivalence decisions seem similar in scope but have a significantly different effect in practice. As to the SEC decision, the regulation of 'covered CAs' is considered equivalent to EMIR (subject to further conditions).[130] Since the SEC changed its policy in 2020 and now applies these prudential rules to all, and not just systemically important, CAs under its remit, this means that all SEC-registered CAs could apply for EU recognition. The CFTC decision, however, only recognises the regulation of DCOs as equivalent to EMIR insofar as it includes the additional layer

[122] 17 CFR §39.3(a)(3) and §§39.50-51.

[123] Callens (2022b), para. 464.

[124] Commodity Futures Trading Commission, Notice of Comparability Determination for Certain Requirements under the European Market Infrastructure Regulation, 81 FR 15260. This statement was the result of the long negotiations preceding the CFTC equivalence decision discussed below.

[125] Griffith (2014), p 1334.

[126] Commission Implementing Decision 2021/85 of 27 January 2021 on the equivalence to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission, [2012] OJ L29/27 (hereafter: SEC decision).

[127] Commission Implementing Decision 2022/551 of 4 April 2022 on the equivalence to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission, [2022] OJ L107/82.

[128] Commission Implementing Decision 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 (hereafter: CFTC decision).

[129] Wymeersch (2018), p 219, footnote 33.

[130] Art. 1, first paragraph SEC decision.

of requirements that applies to DCOs that are designated as systemically important or that opt into this enhanced regime.[131]

4.3 Equivalence of Regulatory Framework

The lion's share of the equivalence decisions deals with one condition for equivalence, i.e., that the legal and supervisory arrangements of the foreign jurisdiction ensure that the CCP complies with legal requirements that are comparable to Title IV EMIR (i.e., organisational, conduct-of-business and prudential requirements).[132] Naturally, the SEC and CFTC regimes are not identical to EMIR. The European Commission judges several features to be so important, however, that they would hamper equivalence. This is addressed by requiring US CCPs to include measures of EMIR-level strictness in their internal rules and procedures. These internal rules and procedures are approved by the relevant agency, and the CCP can be sanctioned if it does not comply – hence, the Commission relies on them.[133]

The exact rules and procedures that need to be added depend on the decision itself. In both decisions, the European Commission indirectly imposes stricter rules on the minimum liquidation period and on measures designed to limit procyclicality.[134] A minimum liquidation period should ensure that the CCP has enough time to collect margin to liquidate or transfer the position of a defaulting member. EU law imposes a minimum of two days for non-OTC derivatives and five days for OTC derivatives.[135] In contrast, there is no such requirement for covered CAs and a lower requirement for DCOs.[136] Measures to limit procyclicality are designed to ensure that CCPs do not set overly low margins during an economic upswing and (correspondingly) do not ask for excessively rising margins during a downturn. EU law requires that such measures are taken,[137] while US law does not.[138]

In the CFTC decision, the European Commission added a significant loss absorbency requirement. EU law requires that a CCP is able to withstand the failure of the two counterparties to which it is most exposed under extreme but plausible market conditions.[139] This is the 'cover two' principle. In the US, the cover-two principle applies in a comparable way to SEC-regulated covered CAs but not to all CFTC-regulated systemically important DCOs, as some are only subject to 'cover one'.[140]

131 Art. 1(1) and recitals 7 and 15 CFTC decision; Callens (2022b), para. 425.

132 Art. 25(6)(a) EMIR.

133 See recital 11 SEC decision and recital 8 CFTC decision.

134 Art. 1(a)-(c) SEC decision and art. 1(2) CFTC decision.

135 Article 26(1) of Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties [2013] OJ L52/42 (hereafter: Delegated Regulation (EU) No 153/2013).

136 See recital 11 SEC decision and recital 12 CFTC decision.

137 Article 28(1) Delegated Regulation (EU) No 153/2013.

138 See recital 18 SEC decision and recital 12 CFTC decision.

139 Art. 44(1) EMIR and Art. 53(1) Delegated Regulation (EU) No 153/2013.

140 See recital 16 SEC decision and recital 12 CFTC decision; Callens (2022b), para. 400.

Consequently, the CFTC decision requires that the DCO's internal rules and procedures include the cover-two principle.[141]

4.4 Equivalence of Supervision and Enforcement

Equivalence of prudential rules is only one step in the European Commission's equivalence decisions. The Commission must also ensure that supervision and enforcement in the foreign jurisdiction are effective and thus up to the EU standard.[142] The equivalence decisions unreservedly state that the SEC and CFTC have the necessary powers and conduct enough monitoring for this condition to be fulfilled.[143] This conclusion is all the more important because of the trust that the European Commission has in the agencies' continued monitoring and enforcement of the internal rules and procedures that it imposes in the equivalence decisions.

4.5 Equivalence of Recognition System

Finally, the relevant jurisdiction itself ought to provide for an effective equivalent system for the recognition of foreign CCPs.[144] As described above, the US does not provide a real system for recognition. Rather, market access for foreign CCPs depends on policy by the relevant agencies. This construction comes with uncertainty: such policy can be changed more rapidly than legislation can, although both the SEC and the CFTC are independent agencies and would thus be expected to remain somewhat consistent in their approach. Furthermore, current policies, particularly the statements on exemptions from registration (SEC) and equivalence between EMIR and the DCO Core Principles (CFTC), are the precise results of long negotiations leading to the European Commission's equivalence decisions. These decisions can also be reviewed and repealed in the case of significant changes on the US side. The risk that the SEC and CFTC suddenly change their relatively EU-friendly policies is therefore low.

For these reasons, and particularly because of the aforementioned policies, the European Commission judges the US 'recognition' systems as equivalent to that under EMIR.[145] Of the three conditions for equivalence, this is probably where the EU and US systems deviate most. Particularly for systemically important CCPs (provided they are not 'too systemically important') there is a marked difference between what we describe as 'recognition though with ESMA supervision' and 're-authorisation but some duplicative requirements might be dropped'. At the same time, under the European Commission's outcomes-based approach, this can indeed be called an equivalent system of recognition.

141 Art. 1(3) CFTC decision.

142 Art. 25(6)(b) EMIR.

143 See recitals 23–25 SEC decision and recitals 16-18 CFTC decision.

144 Art. 25(6)(c) EMIR.

145 See recitals 26-30 SEC decision and recitals 19-21 CFTC decision.

5 Analysis of Switzerland's Legal Framework

5.1 Equivalence of Regulatory Framework

Like EMIR, Swiss regulations distinguish systemically important CCPs from non-systemically important CCPs. Non-systemically important CCPs are subject to the regulations set out in the *Loi fédérale sur les infrastructures des marchés financiers et le comportement sur les marchés en matière de négociation de valeurs mobilières et de dérivés* (LIMF). The LIMF aims to guarantee the well-functioning, transparency, and stability of the financial system.[146] Systemically important CCPs are subject to the rules set out in the *Ordonnance relative à la loi fédérale sur la Banque nationale suisse* (NBO). A CCP is systemically important if either the CCP's unavailability can cause large losses to other financial infrastructures or markets, or its clearing members' problems concerning the fulfilment of obligations can have an impact on other clearing members or financial infrastructures or cause them heavy losses.[147]

Similarly to CCPs in the US, Swiss CCPs are subject to a two-tiered structure. They must comply with primary rules as set out in, for example, the LIMF and the NBO, and must present organisation regulations and policies to the FINMA, setting out how they will meet these standards.[148] Once these internal rules of organisation are approved by FINMA, they become binding upon the CCP.[149]

Swiss CCPs, systemically important or not, are generally subject to rules equivalent to Title IV EMIR. Non-systemically important CCPs are subject to the rules set out in Chapter 3 LIMF. This Chapter includes, amongst others, rules on the guarantees the CCP must ask from its members and how these guarantees must be calculated.[150] Similarly to Article 45 EMIR, a Swiss CCP must establish a default waterfall, where the margins are used first, followed by the defaulting member's contribution to the default fund, the CCP's own funds, and the default fund contributions from non-defaulting clearing members.[151]

Systemically important CCPs, on the other hand, must comply with the requirements set out in Articles 22 to 34 NBO.[152] The NBO was amended in 2013. One of the objectives was to ensure that the Swiss regulatory framework was equivalent to EMIR.[153] For its revision, much inspiration was taken from EMIR, which is why

146 Art. 1 §2 *Loi fédérale sur les infrastructures des marches financiers et le comportement sur le marché en matière sur le marché en matière de négociation de valeurs mobilières et de dérivés (Loi sur l'infrastructure des marchés financiers, LIMF) du 19 juin 2015*, *RO* 2015 5339.

147 Art. 22 §1 LIMF.

148 See recital 9 Swiss equivalence decision.

149 Ibid.

150 Art. 49 LIMF, which is similar to Art. 41-42 EMIR.

151 Art. 53 §2 LIMF.

152 Art. 21a §1 *Ordonnance relative à la loi fédérale sur la Banque nationale suisse (Ordonnance de la Banque nationale, NBO) du 18 mars 2004*, *RS* 951.131.

153 ESMA (2013), para. 52; Schweizerische Nationalbank (2013), p 2.

many of the following rules are similar to the rules set out in Title IV EMIR.[154] The rules set out in the NBO are not as elaborate as EMIR, because the Swiss legislator's aim was to avoid that the rules became too specific. To ensure equivalence with EMIR, the SNB has issued an explanatory report in which it expressly states that the provisions of the NBO should be interpreted taking into consideration the provisions of Title IV EMIR.[155] For example, similarly to Article 29 EMIR, systemically important Swiss CCPs must keep records for 10 years.[156] Contrary to Article 29 EMIR, they must only register the main services that were provided and the main activities, whilst EU CCPs must register all services and activities.[157]

5.2 Equivalence of Supervision and Enforcement

SNB and FINMA share supervision and enforcement powers. FINMA is responsible for the supervision of CCPs, except if the CCP is systemically important.[158] In that case, the Swiss National Bank (SNB), together with FINMA, is responsible for its supervision in order to maintain stability within the financial system.[159] To perform its supervisory task, FINMA may subject CCPs to on-site reviews. CCPs are also subject to an annual audit.[160] If the CCP appears to be non-compliant, FINMA may be notified and shall be able to adopt measures in case of infringement, such as the appointment of an investigation agent or confiscation of profits made as a result of the infringement.[161]

In addition to supervising systemically important CCPs, the SNB is also responsible for oversight. It must assess the compliance of CCPs with the requirements set out in the NBO.[162] To this end, the SNB can require documents and information from the CCP to identify risks that threaten financial stability.[163] If the CCP does not provide the required information, the SNB may impose penalties.[164]

5.3 Equivalence of Recognition System

A TC-CCP, including an EU-based CCP, must be recognised by FINMA before providing clearing services in Switzerland.[165] This resembles EMIR's dual system

154 ESMA (2013), para. 51.

155 See recital 6 Swiss equivalence decision; Schweizerische Nationalbank (2013), p 7.

156 Art. 22b NBO.

157 Art. 29 §1 EMIR; Art. 22b §1 NBO.

158 Art. 83 §1 LIMF

159 Art. 83 §3 LIMF *j.* Art. 19 §1 *Loi fédérale sur la Banque nationale suisse (Loi sur la Banque nationale, LBN) du 3 octobre 2003*, *RS* 951.11.

160 Art. 84 LIMF, and see recital 13 Swiss equivalence decision.

161 See recital 14 Swiss equivalence decision.

162 See recital 15 Swiss equivalence decision.

163 Art. 20 §1-§2 LBN.

164 See recital 15 Swiss equivalence decision.

165 Art. 60 §1 LIMF.

that distinguishes EU-based CCPs from TC-CCPs. Those clearing services include granting Swiss members direct access to its infrastructure, offering services to participants of the Swiss financial market, and closing an interoperability agreement with a Swiss CCP.[166]

FINMA will only grant recognition to an EU-based CCP if it is subject to adequate regulation and supervision.[167] EMIR must thus be deemed adequate by the Swiss authorities. Additionally, the supervision by the relevant authorities of the EU Member State[168] where the CCP is established must be adequate as well. Moreover, these supervisory authorities may not have opposed this cross-border trade and must have guaranteed FINMA that they would inform FINMA in case of a breach of EMIR by the EU-based CCP and provide administrative assistance.[169] Similarly to EMIR, FINMA may assess the reciprocity of the relevant jurisdiction. Subsequently, it may refuse recognition if the home jurisdiction does not allow Swiss CCPs to offer services in that jurisdiction or under less favourable conditions.[170] If it does not cause prejudice to the objective of LIMF to guarantee the functioning, transparency, and financial stability of the financial markets, a TC-CCP may be exempted from applying for recognition.[171] The SNB may also designate a TC-CCP as being systemically important.[172]

In contrast to the recognition procedure under EMIR, only the relevant CCP is examined. Under EMIR, the regulatory and supervisory adequacy of the foreign legal framework for CCPs is first examined as a whole by the EC, as part of the equivalence decision. Second, ESMA assesses the regulatory and supervisory adequacy concerning the specific TC-CCP that applies for recognition. In Switzerland, FINMA only examines the legal framework and supervision applying to the specific CCP.

6 Common Principles and Observations Concerning the Commission's Practice of Adopting Equivalence Decisions

6.1 Common Principles to the Third-Country Legal Frameworks

When comparing the three foreign legal frameworks, one can identify three common principles. First, the EC requires (and obtains) near-identicality concerning the prudential requirements set out in Title IV EMIR. The UK has not yet substantively deviated from EMIR, including the prudential requirements. Switzerland anticipatively amended the NBO to the model of EMIR, including the prudential requirements. The US has similar rules to EMIR's prudential requirements, albeit

166 Art. 60 §1 a)–c) LIMF.

167 Art. 60 §2 a) LIMF.

168 Thus, not ESMA, since it only supervises Tier 2 TC-CCPs.

169 Art. 60 §2 b) LIMF.

170 Art. 60 §3 LIMF.

171 Art. 1 §2 and Art. 60 §4 LIMF.

172 See recital 18 Swiss equivalence decision.

with some omissions and differences. Prior to the equivalence decisions, the CFTC already imposed a liquidation period on derivative contracts and the SEC imposed measures that are equivalent to the cover-two principle under Article 44 §1 EMIR.[173]

Second, the three legal frameworks distinguish systemically important and non-systemically important CCPs. In the UK, the tiering system of EMIR 2.2 was adopted as well, even though the UK had already left the EU when EMIR 2.2 was adopted.[174] In the US, subject to the Dodd-Frank Act, a CCP may be designated as a systemically important CCP by the FSOC.[175] Both the CFTC and the SEC have adopted additional rules for these systemically important CCPs.[176] For example, SIDCOs must apply a cover-two principle, whilst normal CDOs are not obliged to do so. Swiss CCPs can be designated as systemically important and are subject to the rules of the NBO and supervision by the SNB and FINMA.[177] Non-Swiss CCPs may also be designated as systemically important by the SNB.

Third, the three legal frameworks allow TC-CCPs to offer clearing services in their territory after recognition or registration and compliance with their own legal framework. However, the three frameworks do allow for some kind of exemption from compliance with their own legal framework. For example, the UK, similarly to the EU, has adopted a system of comparable compliance for Tier 2 CCPs. Both the SEC and the CFTC allow for an exemption from complying with their primary rules. Non-US CCPs should apply to the SEC for registration as a 'clearing agency' and can obtain exemptive relief from the SEC to comply with all the relevant requirements if this relief is consistent with several objectives, including public interest.[178] The CCPs should, however, be subject to comparable supervision and regulation in their home countries.[179] Non-US CCPs can apply to the CFTC for DCO authorisation. The CCP can then be granted substituted compliance if the CCP meets the CFTC requirements by being subject to comparable provisions in its home country and the CFTC has closed a memorandum of understanding with the home supervisor.[180] These exemptions from complying with the US provisions influenced, as

[173] See recital 16 SEC equivalence decision and recital 12 CFTC equivalence decision.

[174] Financial Services and Markets Act 2000, s 313(1), as amended by The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2020, SI 2020/646, reg. 2(4)(b); The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, SI 2018/1184, reg. 1(4) as amended by The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2020, SI 2020/646, reg. 4(2).

[175] Section 804 of the Dodd-Frank Act, 12 USC 5463.

[176] The SEC refers to them as 'covered clearing agencies', see 17 CFR §240.17Ad-22 (which was later extended to all CCPs). The CFTC refers to them as 'SIDCOs', see the DCO Core Principles in 7 USC §7a-1; 17 CFR §§39.1-8.

[177] For supervision see Art. 83 §3 LIMF and Art. 19 §1 *Loi fédérale sur la Banque nationale suisse (Loi sur la Banque nationale, LBN) du 3 octobre 2003*, *RS* 951.11.

[178] See recital 28 SEC equivalence decision.

[179] Ibid.

[180] See recital 20 CFTC equivalence decision.

stated above, the system of comparable compliance for Tier 2 CCPs under EMIR.[181] Finally, in Switzerland, TC-CCPs may apply for recognition with FINMA but can be exempted from applying for recognition if it does not cause prejudice to LIMF's objectives.[182]

Table 1 summarises the three third-country legal frameworks.

6.2 Common Observations on the European Commission's Decision-Making

This critical assessment of the equivalence decisions of the US, the UK and Switzerland has led to the observation that the EC is a negotiator with two faces when adopting equivalence decisions. On the one hand, it insists on the substantive equivalence (at times almost uniformity) of prudential requirements with EMIR of the third country's legal framework and uses these equivalence decisions as political instruments to reach its objectives. On the other hand, the EC wants to reach a workable solution by adopting a practical approach to its substantive requirements, illustrated by its outcome-based approach regarding equivalence.

6.2.1 The European Commission's Equivalence Decisions: A Political Instrument…

As stated above (*supra* Section 2.1), the adoption of an equivalence decision is left to the discretion of the EC. It can, but is under no obligation to, adopt an equivalence decision. This margin of appreciation leaves a lot of power to the EC to, on the one hand, create an 'imposed' Brussels Effect and, on the other hand, attain policy objectives other than the safeguarding of financial stability.

First, the equivalence decision can be seen as a tool to 'pressure' third countries to adopt rules similar to EMIR. In addition to safeguarding financial stability (*supra* Section 2.1), equivalence decisions are meant to facilitate cross-border trade with third countries that have implemented similar requirements and, as such, provide more instruments and services that fulfil EU requirements for EU entities to choose from.[183] This 'pressure' from the EC can be interpreted as an 'imposed' Brussels Effect. The Brussels Effect is defined as 'the EU's unilateral ability to regulate the global marketplace'.[184] The adoption of internal regulations in the EU can influence third countries, either because corporations are voluntarily adjusting themselves to EU regulations (*de facto* Brussels Effect), or because third countries adopt EU-style regulations (*de jure* Brussels Effect).[185] By requiring the equivalence of legal and supervisory arrangements, the EC has ensured that third countries have adopted

181 European Commission, Proposal of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedure and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, COM(2017) 331 final/2, 25.

182 Art. 1 §2 and Art. 60 §4 LIMF.

183 European Commission (2017), p 5.

184 Bradford (2019), p 1.

185 Ibid., p 2.

Table 1 Overview of the three third-country legal frameworks

	Switzerland	United Kingdom	United States of America
Legal and supervisory arrangements equivalent to EMIR	Two-tiered structure, with primary rules (such as NBO and LIMF) and binding organisation regulations and policies. NBO is expressly inspired by EMIR.	EMIR is retained EU law, with no substantive changes yet. UK EMIR has adopted EMIR's tiering system for systemically and non-systemically important TC-CCPs.	Two-tiered structure, with primary rules (such as the Dodd-Frank Act) and internal rules. Primary rules differ in some respects from EMIR. Deemed equivalent if internal rules include a minimum liquidation period of two or five days (depending on the derivative), measures to limit procyclicality, and the cover-two principle (only for DCOs).
Effective supervision and enforcement in third country	By FINMA and SNB. CCPs are subject to an annual audit and must provide relevant information as requested by FINMA and SNB. Both may impose penalties in case of non-compliance.	By the Bank of England. Deemed equivalent because, prior to Brexit, it was the supervisory authority for UK-CCPs under EMIR. The BoE adopted a new tiering policy for TC-CCPs.	By the SEC and the CFTC. Both have the necessary powers and conduct ongoing monitoring through examinations. Important for enforcement of additional requirements in internal rules of CCPs.
Reciprocity	Recognition by FINMA after evaluation of adequate regulation and supervision of the CCP and reciprocity. Possibility of exemption from recognition.	Retained the EMIR recognition procedure for TC-CCPs. Deemed to be fulfilled, notwithstanding the legal uncertainty due to the TTP.	No real recognition procedure. TC-CCPs apply to the SEC for registration. The SEC has broad exemptive authority. TC-CCPs apply to the CFTC for registration and may apply for substituted or alternative compliance.

legislation for CCPs that is modelled on EMIR or at least includes provisions similar to EMIR.

This Brussels Effect is most striking concerning prudential requirements, for which the EC seems to be striving for uniformity rather than equivalence. While the EC adopts a rather practical approach when it comes to reciprocity (*infra* Section 6.2.2), it is rigid when it comes to prudential requirements. To a certain extent, this is unsurprising. First, the Commission expressly states that equivalence decisions are important instruments to create a 'regulatory convergence around international standards'.[186] These decisions are meant to manage cross-border trade with third countries that have implemented prudential requirements similar to the high standards established in EMIR.[187] Second, it would undermine the purpose and usefulness of equivalence decisions in safeguarding financial stability if the EC were to adopt an accommodative approach to the ability of TC-CCPs to absorb the loss of defaulting clearing members. In general, the EC is seen to impose conditions in its equivalence decisions when a third country's legal framework shows major gaps or differences with EMIR.[188]

A good example of this 'imposed' Brussels Effect for prudential requirements can be found in the equivalence decisions for both the SEC and the CFTC. Both regulators did not have primary rules concerning certain prudential requirements that are meant to ensure that CCPs can absorb the losses due to defaulting clearing members. To mitigate this omission, the EC has formulated the condition that only US-CCPs that have introduced these prudential requirements in their internal rules can be recognised by ESMA. As stated above (*supra* Section 4.3), these prudential requirements include rules on a two-day or five-day liquidation period depending on the derivative contract, the adoption of the cover-two principle for certain CCPs, and the adoption of anti-procyclicality measures.

The EC's strictness concerning prudential requirements is not extended to the supervision and reciprocity requirements. Especially the finding of equivalence of the supervision of TC-CCPs can be influenced by political considerations. One can hardly argue that the BoE provides insufficient supervision of its CCPs, given that only three years ago it was the designated NCA for UK-CCPs under EMIR, was subject to EMIR's supervision requirements, and has not changed its supervisory policy since Brexit, except for its approach to the tiering structure under UK-EMIR.

Furthermore, one can argue that the prospect of an equivalence decision has led to an 'anticipative' Brussels Effect. Third countries are anticipatively adopting rules similar to EMIR to ensure the equivalence of their legal and supervisory arrangements. For example, Switzerland anticipatively amended the NBO to the image of EMIR. EMIR was expressly used as a source of inspiration to ensure the equivalence of the NBO with EMIR. What is more, the SNB stated that, for the interpretation of provisions in the NBO that deviate from EMIR, EMIR should be used as a source of interpretation.[189] To a certain extent, this 'anticipative' Brussels Effect

[186] European Commission (2017), p 5.

[187] Ibid.

[188] Girard and Priem (2022), pp 156-157.

[189] Schweizerische Nationalbank (2013), pp 2 and 7.

also applies to the UK. Since its withdrawal from the EU, the UK has not substantively amended UK-EMIR. This could be explained by the fact that the UK aims to obtain a more permanent equivalence decision in the near future, for which a legal framework equivalent to EMIR is necessary.

However, this use of equivalence decisions as a political tool can be criticised. Under the guise of safeguarding financial stability, the EC uses equivalence decisions as a political tool to achieve objectives that are not directly related to maintaining financial stability.[190] The EC openly admits that it may consider the third country's wider policy priorities regarding the promotion of values and objectives when adopting an equivalence decision.[191] This criticism of the use of equivalence decisions as political instruments is reinforced by the fact that this political exploitation remains largely unpunished due to the limited possibilities of judicial recourse. According to Article 263 §6 TFEU, legal persons may have recourse to the CJEU for a review of the legality of acts of the EC. For legal persons to be able to bring an action, the act should either be of direct and individual concern to them or be a regulatory act that is of direct concern to the legal person and does not require implementing measures.[192] However, Callens shows that these broad discretionary powers of the EC cannot (or can hardly) be successfully challenged on grounds of legality.[193]

The discussions between the EU and the UK concerning the temporary equivalence decision and obtaining a more permanent equivalence decision may provide a good illustration of the equivalence decision as a political instrument. In the run-up to Brexit, various stakeholders were concerned that this equivalence decision would be used as a political tool in the wider Brexit negotiations.[194] This fear cannot be called unfounded. In 2016, the Financial Affairs Sub-Committee of the House of Lords conducted a hearing concerning financial services in the UK after Brexit. In that hearing, Stefan Hoffmann, at that time the Head of European Affairs for the Swiss Bankers Association, supported this fear by pointing out several shortcomings of equivalence decisions. He argued that the procedure was neither transparent nor reliable and that, in addition to a more reliable technical assessment, the equivalence decision was also partially a political decision, whereby the outcome would depend on the 'overall mood and climate'.[195] He argued that, even if all the criteria for equivalence were fulfilled, there would be no right to equivalence and that therefore 'you really depend on the mercy, so to speak, of the Commission'.[196]

Moreover, the EC has expressly stated that the adoption of a temporary equivalence decision for the UK was meant to 'buy' some time for EU-CCPs to reduce their exposure and reliance on UK CCPs and create their own clearing capacity to

[190] Callens (2022b), para. 394.

[191] European Commission (2017), p 9.

[192] Art. 263 §4 TFEU.

[193] See further: Callens (2022b), para. 393.

[194] Armour (2017), p 62.

[195] See Stefan Hoffmann on question 55 in Select Committee on the European Union – Financial Affairs Sub-Committee (2016).

[196] Ibid.

reduce the Union's exposure to systemically important UK-CCPs.[197] At the time of adopting the equivalence decision, approximately 90% of the euro-denominated OTC interest rate derivatives were cleared by a single UK-CCP.[198] Thus, rather than losing sight of UK-CCPs, systemically important UK-CCPs remain subject to EMIR-equivalent rules and the supervision by ESMA, despite risks associated with these systemically important UK-CCPs. As stated by the EC:

> While that assessment concluded that, at this point in time, the costs of derecognising those clearing services would outweigh the benefits, it nonetheless identified important risks and vulnerabilities in connection with a continued recognition of those clearing services, in particular, in times of stress in the market.[199]

This politicisation of equivalence decisions remains omnipresent in ongoing discussions between the EU and the UK to adopt a more permanent equivalence decision. Several stakeholders, including EU-banks and UK-CCPs, are pressuring the EC into abandoning its strategy of moving euro-denominated clearing from UK-CCPs.[200] EU banks have opposed this approach because they fear it could create extra costs and make clearing less efficient, and UK-CCPs have opposed this approach because they risk losing a very lucrative business.[201] Additionally, concerns are being voiced that this strategy would create stability issues for EU markets. Concerning this equivalence decision, EU officials would even have been heard to say that the UK should urge the EU to adopt a permanent equivalence decision as the current atmosphere between the EU and the UK is currently positive, especially since the introduction of the Windsor framework regarding trade between Northern Ireland and the EU.[202] This would confirm our observation that the EC can use the equivalence decision as a political tool to achieve other objectives.

6.2.2 … and a Practical Solution

Although the equivalence decision may be used as a political instrument, the decisions studied in this paper do show that once the EC enters into negotiations, it adopts a practical solution, illustrated by its outcome-based assessment of the third country's legal framework. As stated earlier, equivalence decisions are also meant to manage cross-border trade and widen the scope of instruments and services that fulfil requirements similar to EU legislation, from which EU-based financial institutions can choose. The EC's willingness to adopt a practical approach to equivalence

[197] See recital 18 UK equivalence decision.

[198] See recital 5 UK equivalence decision.

[199] Recital 18 Commission Implementing Decision 2022/174 of 8 February 2022 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council, [2022] OJ L28/40.

[200] Fleming et al. (2023).

[201] Ibid.

[202] Ibid.

may be a result of this aim to facilitate cross-border trade and increase choice for EU institutions. This more practical approach is predominantly illustrated by the temporary equivalence decision regarding the UK. The UK is the first country in relation to which the EC has adopted a temporary equivalence decision. As stated above (*supra* Section 6.2.1), this temporary equivalence decision is meant to buy EU-CCPs enough time to create their own clearing capacity in order to reduce their reliance on UK-CCPs for clearing euro-denominated derivatives.[203] As this objective was not attained by the initial end date of the temporary equivalence decision, the EC chose to prolong it until June 2028.[204] This temporary equivalence decision provides a good illustration of the EC as a negotiator with two faces, as it is both a political instrument and a practical solution.

The equivalence decisions of the CFTC and the SEC provide a good illustration as well. As explained earlier (*supra* Section 4.3), rather than requesting a change in the SEC's and CFTC's primary rules, the EC requires that US-CCPs that want to be recognised in the EU add prudential requirements to their internal procedures.[205] These internal rules are thought to achieve the same outcome as EMIR, since upon registration with the relevant supervisory authority in the US, these become binding upon the CCP.

Furthermore, the EC is also willing to adopt a practical solution to the reciprocity requirement. Rather than requiring a formal recognition procedure equivalent to EMIR, the EC assesses whether EU-CCPs can effectively gain access to the third country's market in practice. For example, the UK's recognition procedure was deemed to be equivalent since it had adopted key elements from Article 25 EMIR, even though the EC argued that the discretionary power of the BoE to revoke a temporary deemed recognition resulted in legal uncertainty for EU-CCPs.[206] Additionally, for the US, this condition is considered to be fulfilled as well, even though both the SEC and the CFTC do not have a formal recognition procedure.[207] As stated above (*supra* Section 4.5), this element is considered to be where US and EU regulations deviate the most. Still, the EC believed that, in practice, EU-CCPs can access the US market. The consideration that the policies of the SEC and CFTC may be changed easily is outweighed by the fact that their policies were the result of long negotiations with the EC leading up to the adoption of the equivalence decisions (*supra* Section 4.5).

[203] See recital 18 UK equivalence decision.

[204] See recital 22 UK equivalence decision.

[205] See recitals 16, 17, 18 and 20 SEC equivalence decision and recitals 12 and 13 CFTC equivalence decision.

[206] See recital 12 UK equivalence decision.

[207] See recitals 28-29 SEC equivalence decision and recital 20 CFTC equivalence decision.

7 Conclusion

In this paper, we have sought to present common principles and observations surrounding the EC's equivalence decisions concerning the legal frameworks of TC-CCPs. We first set out the recognition procedure in EMIR for TC-CCPs wanting to offer clearing services in the EU. This was followed by a critical assessment of the equivalence decisions issued for Switzerland, the CFTC, the SEC, and the United Kingdom.

Three common principles have been derived from these equivalence decisions. First, the three legal frameworks have adopted prudential requirements for CCPs that largely resemble the prudential requirements in Chapter 4 EMIR. Second, they all include a tiering system for CCPs depending on their systemic importance, whereby systemically important CCPs are subject to additional requirements. Third, the three countries offer an exemption for foreign CCPs that want to offer clearing services in these countries. These exemptions often depend on the comparability of the foreign legal framework with their own legal framework, or the respect for certain internal considerations, such as public interest.

Additionally, this analysis has led to two common observations concerning the EC's attitude when adopting such equivalence decisions. First, we found that the equivalence decision can be used as a political tool to achieve an imposed and anticipative Brussels Effect and other internal objectives under the guise of safeguarding financial stability. This politicisation also remains largely unchecked due to the lack of judicial recourse against such an equivalence decision, or, perhaps more importantly, the absence of it. This use of the equivalence decision may be, and has been, criticised, including by third countries. One may wonder whether these other internal objectives truly have a close link with financial stability and may help safeguard such stability.

Second, we found that the Commission is prepared to adopt a practical approach once it enters into negotiations with third countries. This may be illustrated by the equivalence decisions concerning the CFTC and the SEC, where the primary rules of both supervisors showed some differences or gaps. The Commission resolved this by obliging US-CCPs to adopt internal rules that address these differences or gaps. Additionally, one may interpret the temporary equivalence decision for the UK as a practical approach to offering enough time for EU-CCPs to build sufficient clearing capacity of their own and not lose sight of systemically important UK-CCPs.

Our findings show that the system of equivalence decisions serves its goal of maintaining EU financial stability. Because of the rigour that the Commission displays in some respects, the domestic rules in the UK, the US and Switzerland are similar or even virtually identical to EMIR. As such, TC-CCPs that want to gain access to the EU market must comply with high standards beneficial to financial stability. However, the politicisation of the system could also hamper the global integration of the safe clearing of derivatives. It also creates uncertainty for market participants, which is compounded by the fact that they can only request but not necessarily expect actual recognition once there is an equivalence decision. These more 'political' considerations are either irrelevant to EU financial stability or may potentially harm it and should therefore be addressed in future policy by the Commission.

Declarations

Conflict of interest The authors declare that there is no conflict of interest.

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