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Extra-Territorial Regulatory Action in the Financial Markets: Does the EU Third-Country Central Counterparty Regime Go Too Far?

Jo Braithwaite and David Murphy*

*Jo Braithwaite, Professor of Law, LSE Law School (corresponding author). David Murphy, Visiting Professor in Practice, LSE Law School. The authors warmly thank Dr Elizabeth Howell of LSE Law School and Bas Zebregs for their valuable feedback on an earlier version of this article. The usual caveats apply. The law is stated as at 16 September 2024.

Key points

- Extra-territorial regulatory action is inherently controversial as it is in tension with state sovereignty and the principle of comity between nations. However, extra-territorial regulation of financial market participants has become increasingly commonplace since 2008 and, especially, Brexit.
- A particularly important example occurs in relation to financial market infrastructure, due to the prevalence of globally systemic institutions, notably central counterparties or 'CCPs'.
- This article examines how to evaluate extra-territorial regulatory techniques, with particular reference to the European Union's recent proposals regarding third-country CCPs in updates to the European Market Infrastructure Regulation ('EMIR') known as EMIR 3.0.
- It proposes a normative framework based upon Global Administrative Law (GAL) for this, and analyses the EMIR 3.0 proposals in this light, emphasizing the need for clarity about the goals of extra-territorial action and the demonstration that it represents the least onerous means needed to achieve these goals.
- This analysis locates the ongoing debates about the EMIR 3.0 regime for third-country CCPs in a wider, scholarly context and throws light on the proportionality and efficacy of the proposals.
- The article also suggests a technique for the review of extra-territorial financial regulation more broadly, arguing that GAL provides a valuable way of evaluating substance and of holding decision-makers to account.

1. Introduction

Extra-territorial regulatory action, meaning the deliberate projection of regulatory power beyond an authority's 'home' jurisdiction, is inherently controversial. Such action is, at least potentially, in tension with state sovereignty and the principle of comity between nations.[1]

[1] J Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 Am J Int Law 782. As Sir John Donaldson M.R. put it in *British Airways Board v Laker Airways* [1984] QB 142 (CA) 185–6, 'Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards'.

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As Buxbaum has put it, 'Extraterritoriality has a bad reputation', due to its association with state 'overreach',[2] while Colangelo describes the exercise of extra-territorial jurisdiction as 'messy' because of the 'layers of national and international legal issues' involved.[3] There remains a general presumption against extra-territorial action by regulators, absent a clear legislative signal,[4] while, more pragmatically, such action risks creating disproportionate and unsupportable burdens for affected parties.[5]

As this article explores, however, the extra-territorial regulation of financial market participants already authorized and supervised in their 'home' jurisdictions has become increasingly commonplace. This development generally emerged in line with economic, technological and environmental globalization;[6] as Battini rightly puts it, 'Globalisation makes extraterritoriality less exceptional'.[7] However, extra-territorial regulation in the global financial markets has increased sharply in the period since the 2008 global financial crisis, including in new rules targeting the vast, global 'over the counter' (OTC) derivatives markets, while the extra-territoriality of financial regulation has become an even more topical issue following the UK's withdrawal from the EU in 2020. Post-Brexit, the UK has become a 'third country' for the purposes of EU financial regulation, and vice versa. These developments have tested the extra-territorial features of financial regulation in unprecedented ways, while pushing the topic high up the political agenda. For example, debate has intensified about the effectiveness of unilateral 'equivalence' mechanisms, whereby regulators have the power to determine whether a third-country regime should be declared 'equivalent' for a specific regulatory purpose.[8] Busch is amongst those scholars who have recently noted the 'decline' of equivalence as a co-ordinating technique between the EU and third countries,[9] at a time when 'live political conditions' significantly complicate such arrangements as those between the UK and EU.[10] Extra-territorial regulatory powers are therefore not only embedded in a wide variety of US, EU and UK post-crisis financial regulation, but, in systemically important parts of the global economy, they are currently being deployed, tested and debated in unprecedented ways.

The focus of this article is a case study of the clearing sector, which is a vital part of global financial market infrastructure offering a paradigmatic case of the rise of, and contemporary challenges around, extra-territorial regulatory techniques.[11] While cross-border co-ordination and co-operation has long been a feature of the global regulatory framework for clearing, as

[2] HL Buxbaum, 'The Practice(s) of Extraterritoriality', in HL Buxbaum and T Fleury Graffe (eds), *Extraterritoriality/L'extraterritorialité* (Brill 2022) 3, who goes on to emphasise the diversity of practices that may be described as extraterritorial regulation.

[3] AJ Colangelo, 'What is Extraterritorial Jurisdiction?' (2014) 99 Cornell L Rev 1302, 1302 and 1309.

[4] In the context of US law, the presumption was famously reaffirmed by a unanimous Supreme Court in *Morrison v National Australia Bank* 130 S. Ct. 2869 (2010), though this decision has subsequently led to debate about the focus of particular legislation for this purpose, as discussed in Colangelo, ibid, 1335–40.

[5] See, eg, the then Commodity Futures Trading Commission (CFTC) Chair Heath Tarbert's remarks on the potential 'absurdity' of 'everyone trying to regulate everyone else' in the global swaps markets: Statement of Chairman Heath P Tarbert in Support of Final Cross-Border Swap Rule (23 July 2020) <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement072320b> (all websites last accessed on 16 September 2024).

[6] For an historical account of modern extra-territorial legal practices, see Buxbaum (n 2).

[7] S Battini, 'Globalisation and Extraterritorial Regulation: An Unexceptional Exception', in G Anthony and others (eds), *Values in Global Administrative Law* (Hart 2011) 75.

[8] For analysis of the regulatory complexities facing the UK as a third country, see E Ferran, 'The UK as a Third Country Actor in EU Financial Services Regulation' (2017) 3 Journal of Financial Regulation 40. For a detailed analysis of equivalence as 'a legal and procedural mechanism used to manage third country actors' access to the EU financial market (and also to manage EU actors' and counterparties' interactions with third country entities; and to moderate the extraterritorial application of EU law to third country transactions and actors)', see N Moloney, *EU Securities and Financial Markets Regulation* (4th edn, OUP 2023) Ch X, s X.2.2 'The Equivalence Regime'. For specific discussion of the relationship with the objective of promoting financial stability in the EU, see F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) 58 Common Mark Law Rev 39. See further Section 4 'A transformed recognition process'.

[9] D Busch, 'The Future of Equivalence in the EU Financial Sector' (2024) 25 EBOR 3, s 5 'The Decline of the Equivalence Approach', where Busch goes on to consider the accompanying 'Rise of the Territorial Approach' as well as the 'Extra-Territorial Approach'. The decline of equivalence emerges as a theme of several contributions to this special issue of the European Business Organization Law Review (EBOR) on 'Beyond Equivalence: Third Country Regimes in European Financial Regulation', see, eg, N Moloney, 'Access to the UK Financial Market After the UK Withdrawal from the EU: Disruption, Design and Diffusion' (2024) 25 EBOR 25.

[10] ibid 42.

[11] For more details on the nature of clearing by a CCP, see D Murphy, *Derivatives Regulation: Rules and Reasoning from Lehman to Covid* (OUP 2022); J Braithwaite 'The Inherent Limits of 'Legal Devices': Lessons for the Public Sector's Central Counterparty Prescription for the OTC Derivatives Markets' (2011) 12 EBOR 87.

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promoted by influential global standards,[12] regulators have increasingly engaged in diverse types of extra-territorial actions as clearing has become more systemically significant and more intensely concentrated. These actions range from, at the milder end of the spectrum, entering into 'information sharing commitments … on a best-effort basis',[13] to, at the more coercive end, various types of location policies, as in the case with Japan's policies around local entities clearing yen-denominated contracts.[14] Most recently, EU authorities' ongoing response to findings of EU market participants' 'excessive exposures'[15] to the three London-based clearing services deemed to be of 'substantial systemic significance' has highlighted the challenge of balancing financial stability concerns, on the one hand, with the impact of extra-territorial measures on complex, global and highly interconnected markets, on the other. At the time of writing, both the exercise of EU authorities' extra-territorial powers as provided for in 'EMIR 2.2'[16] and extensions to this regime in the new 'EMIR 3.0' are being intensely debated by regulators and in the scholarship.[17] As such, the third-country regime under EMIR provides an urgent and important paradigm of extra-territorial financial regulation in action.

Against this background, the aims of this article are two-fold. The first aim is to explore how best to evaluate the exercise of different types of extra-territorial regulatory techniques in the global financial markets, at a time when these techniques are growing in relevance, as outlined in Section 2. The article proposes a normative framework based upon Global Administrative Law (GAL) as a valuable one with which to explore this kind of regulatory action. The argument is made in Section 3 that this framework is particularly well-suited to assessing actions in the global clearing sector because of the sector's concentration, cross-border character and public–private hybridity. The second aim of the article is to locate the ongoing debates about the EMIR regime for the recognition of third-country central counterparties (ie, CCPs based outside the EU) in this wider, scholarly context. This regime is considered in-depth in Section 4, and Section 5 expands upon several significant implications of this analysis for the powerful regulatory techniques and mitigating features in the current EMIR regime, as well as for new, highly contested policy proposals and even for the clearing mandate itself. These conclusions shed light on ongoing debates, and they also demonstrate how a GAL-informed analysis provides a valuable way of evaluating

[12] See discussion of the influential 'Principles for Financial Market Infrastructures' in Section 2 'Drivers of extra-territorial regulatory action'.

[13] See ESMA's description of information sharing commitments from UK authorities to EU authorities when a UK CCP is in crisis in ESMA, Assessment Report under art 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd, 16 December 2021 ('ESMA art 25(2c) Assessment Report'), [342].

[14] The European Commission gives as examples of extra-territorial clearing policy: requirements in Japan for Japanese entities clearing JPY interest rate swaps; and US rules around registration/supervision of CCPs serving US firms, see European Commission, Impact Assessment Report accompanying Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of the Union clearing markets, and Proposal for a Directive of the European Parliament and of the Council amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally clearing derivative transactions, (7 December 2022) SWD (2022) 697 Final ('EMIR 3.0 Impact Assessment'), s 3.2.2 and Annex 6. For a discussion of the US approach including alternative compliance for foreign CCPs accessing the US market, see E Callens and K Löber, 'The Future of Centrally Cleared OTC Derivatives Markets', in B Zebregs and others (eds), *Clearing OTC Derivatives in Europe* (OUP 2023) 542.

[15] The exposures were identified as 'excessive' in EMIR 3.0 (in the final compromise text, Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets, 13 February 2024, ('EMIR 3.0'), <https://data.consilium.europa.eu/doc/document/ST-6344-2024-INIT/en/pdf>, eg, at (4), (10), (10ba), (30)) and in EMIR 3.0 Impact Assessment, eg, throughout Section 1 (Introduction).

[16] 'EMIR' refers to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ('EMIR'). 'EMIR 2.2' is the widely used abbreviation for Regulation (EU) No 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 authorization of CCPs and requirements for the recognition of third-country CCPs, OJ L322/1 (12 December 2019). See further Section 4 'A transformed recognition process'.

[17] See further Section 4 'EMIR 3.0'. Recent developments in the clearing sector are also discussed in Moloney (n 8), s X.9; Turing 'Brexit: Equivalence; Location Policy' and P Pearson, 'Development of the Regulatory Regime for OTC Derivatives Clearing', in Zebregs and others (n 14). In a sign of the levels of extra-territorial activity in this sector, and the importance of the issues at stake, clearing has also become a prominent case study in the more general EU regulatory literature. See, eg, the discussion of clearing regulation in P Davies, 'Financial Stability and the Global Influence of EU Law', in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019); and J Scott, 'The New EU "Extraterritoriality"' (2014) 51 Common Mark Law Rev 1343.

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the substance of an extra-territorial regulatory regime and of holding decision-makers to account. Overall, therefore, this article contributes to the ongoing debates about the regulatory techniques in the EMIR regime for third countries, in a way that speaks to the validity of extra-territorial financial regulation more broadly.

2. Extra-territoriality in post-crisis financial regulation

The global and interconnected nature of the financial markets means that entities based in a 'home' jurisdiction can have a substantial effect on the financial stability of another, 'host', country; by contrast, the supervision of financial institutions has traditionally been based with the authority in the institution's home jurisdiction. Thus, as Allen and Lastra have observed, 'Financial regulation ultimately takes place at a national level, but financial activity is transnational, so national financial systems are inherently vulnerable to the effect of actions taken outside the jurisdiction'.[18] These vulnerabilities materialized in the course of the global financial crisis, one of the factors behind which was, borrowing the UK's Turner Review's phrase, 'Global finance without global government'.[19] As this section explains, despite the emergence of new global standards, extra-territorial financial regulation has been a prominent feature of post-crisis reforms; furthermore, this kind of regulatory action has become particularly significant in areas where there is concentration in the provision of key services, such as the clearing sector.

Drivers of extra-territorial regulatory action

Since the most recent global financial crisis, various trans-national regulatory agreements or norms, such as those promulgated by the Basel Committee on Banking Supervision, have sought to promote co-ordination between jurisdictions around agreed standards and thereby improve risk management on a system-wide scale. An important example, introduced in support of the implementation of mandatory clearing worldwide, is the Committee on Payments and Market Infrastructures (CPMI) and International Organization of Securities Commissions (IOSCO)'s 'Principles for Financial Market Infrastructures' (PFMI),[20] which have been implemented through national and regional clearing regulations worldwide, including in EMIR and through the Bank of England's rules for UK CCPs.[21]

In practice, however, even in areas where there are now widely adopted 'soft law' standards such as the PFMI, the co-ordination of rules between different jurisdictions often falls short. This may happen for various reasons, including a national regulator's desire to impose more stringent rules than the globally agreed ones ('gold-plating'); apprehensions over the possibility of weak or incompetent supervision by the home regulator; because, as Davies has observed, international accords may represent 'less-than-robust standards', perhaps reflecting the need to achieve consensus within the standards-setting body;[22] or, as in the case of the PFMI, standards being expressed in general or principles-based terms, allowing considerable divergence when jurisdictions actually implement them.[23] Moreover, even where jurisdictions' rules are broadly aligned with each other, there remain situations where an entity based in a different jurisdiction could create significant additional risks for a host country. There are several possible scenarios whereby such concerns may arise.

[18] JG Allen and RM Lastra, 'Border Problems: Mapping the Third Border' (2020) 83 MLR 505, 509.

[19] Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (March 2009), s 1.3 in ch 1, 'What Went Wrong?'. The specific focus in these sections of the Turner Review was the collapse of Lehman Brothers and the Icelandic banking crisis, but the discussion concerned the regulation of cross-border firms more broadly.

[20] CPMI and IOSCO, *Principles for Financial Market Infrastructures* (16 April 2012) ('PFMI'), and CPMI and IOSCO, *Resilience of Central Counterparties (CCPs): Further Guidance on the PFMI* (5 July 2017), <https://www.bis.org/cpmi/info_pfmi.htm>.

[21] 'We use the CPMI-IOSCO Principles for financial market infrastructures as an international benchmark for our standards', Bank of England website, Financial market infrastructure supervision/What do we do? <https://www.bankofengland.co.uk/financial-stability/financial-market-infrastructure-supervision/what-do-we-do>.

[22] Davies (n 17) 154–5.

[23] See, eg, Principle 1 of the PFMIs (Legal basis) 'An FMI should have a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions.' Callens and Löber (n 14), 544 also point out that the PFMI and other such international standards can only 'mitigate the effects of the dichotomy' between global markets and local rules.

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First, there may be a lack of useful information for a host country about a third-country entity providing key services to a host country's market participants, or about a branch of a third-country entity operating in its jurisdiction. This information gap may arise due to different home and host disclosure requirements, a lack of standardization, and shortcomings in information-sharing policies, which, as Berner et al. have documented in the context of the global swaps markets, are challenging to implement successfully in practice.[24] There may also be concern about the enforceability of information-sharing arrangements. For example, post-Brexit, there are various 'soft obligations' around information sharing between the Bank of England and EU authorities, including through Crisis Management Groups for the largest UK CCPs. However, on the basis that these are non-binding arrangements, it remains ESMA's position that 'uncertainty about access to timely and complete information during a crisis with a UK CCP presents a risk for EU financial stability'.[25] Second, host countries may have concerns that lax supervision elsewhere might attract entities to re-domicile to the more congenial jurisdiction while continuing to provide services in the host country.[26] Finally, and critically, host regulators may have grounds for anxiety over a home country's approach to supervision and, in particular, to crisis management. This may be the case even when supervisory colleges involving home and host authorities have been set up to facilitate what Callens and Löber call a 'more multi-jurisdictional perspective'.[27] As these authors conclude, supervisory colleges such as those set up under Article 18 of EMIR 'can only offer an incomplete solution to the challenges in supervision of financial institutions, and in particular globally active [financial market infrastructures] such as CCPs'.[28] The 2021 EU Regulation on CCP recovery and resolution introduced 'Resolution Colleges' as a way of balancing the decision-making powers of national authorities with the interests of other EU stakeholders[29] but, as ESMA has observed, in crises, 'difficult choices will need to be made, which may put strains on the framework'.[30] Of particular concern is the risk of 'selfish' crisis management, recovery plans and resolution actions by home authorities, that is, favouring the interests of the home country's economy. This is a real risk in practice; indeed, the statutory objectives for resolution authorities often expressly focus on the interests of the home jurisdiction.[31] Thus, even if host and home regulations are identical (as with the UK and the EU at Brexit), home application of these rules and cooperative supervisory arrangements may not be sufficient to reduce the risk of a third-country FMI to a level acceptable for a host country. This remains the case despite other helpful arrangements, such as third-country FMI access to central bank lending facilities in the home currency.

Host regulators may therefore seek to establish what Budding and Murphy have previously labelled 'supervisory nexus'[32] over financial market participants based outside their jurisdiction. Notably, the US has adopted a variety of extra-territorial measures in the course of implementing

[24] Designing regulation in order to collect, aggregate and making available comparable financial information presents is extremely challenging in practice and has become more pressing in light of post-crisis reforms; see, eg, discussion of standardizing and aggregation US swaps data in RB Berner, R Doyle and K Lamar, 'Data Reporting in the United States' in J-H Binder and P Saguato, *Financial Market Infrastructures: Law and Regulation* (OUP 2021).

[25] ESMA art 25(2c) Assessment Report, [344]. See generally s 5.6, ibid, 'Supervisory capacity in EU in crisis/recovery/resolution events'.

[26] Gravelle and Pagliari argue that extra-territorial supervisory action is necessary to pre-empt the 'hollowing out [of derivatives policy] through regulatory arbitrage': M Gravelle and S Pagliari, 'Global Markets, National Toolkits: Extraterritorial Derivatives Rule-making in Response to the Global Crisis', in E Helleiner, S Pagliari and I Spagna (eds), *Governing the World's Biggest Market: The Politics of Derivatives Regulation After the 2008 Crisis* (OUP 2018) 83. However, it is not clear why OTC derivatives would be particularly prone to this vulnerability, especially given the prevalence of internationally agreed standards in this area.

[27] Callens and Löber (n 14) 545.

[28] ibid.

[29] Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties [2021] OJ L22/1 ('CCP Recovery and Resolution Regulation'), art 4 (Resolution Colleges).

[30] ESMA art 25(2c) Assessment, [407].

[31] Eg, the UK's Banking Act 2009, s 4 gives seven objectives to the Bank of England as Resolution Authority, of which the first three are expressly focused on the United Kingdom: the first objective is 'to ensure the continuity of banking services *in the United Kingdom*'; the second 'to protect and enhance the stability of the financial system *of the United Kingdom*'; the third 'to protect and enhance public confidence in the stability of the financial system *of the United Kingdom*' (emphasis added). There are no objectives in this context which refer to effects on other financial systems.

[32] The term 'supervisory nexus' was introduced in E Budding and D Murphy, 'Design Choices in Central Clearing: Issues Facing Small Advanced Economies' (2014) Reserve Bank of New Zealand Analytical Note series AN2014/08, for the ability of a regulator to obtain information, impose standards, conduct supervision and/or exercise emergency

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post-crisis financial regulation, sometimes triggering significant controversy in the process. CFTC guidance about the definition of a 'U.S. Person' for the purpose of its cross-border guidance on swaps regulation is a high-profile case of this.[33] The proliferation of extra-territorial regulatory action has, however, been most intense in areas where a small number of private sector entities dominate the cross-border provision of widely used services. One such example is the credit ratings sector, where the market is dominated by the so-called 'Big Three' international agencies.[34] In this context, the EU regulatory regime includes various regulatory routes for non-EU credit rating agencies if they wish to do business with EU financial institutions,[35] including certification[36] for less significant-to-the-EU CRAs and the relatively burdensome route of 'endorsement' for more significant ones.[37] Similarly, extra-territorial regulation has become a high profile and increasingly politicized issue in the global clearing sector, in part because, here also, the cross-border provision of services is highly concentrated, in particular as regards clearing services for over-the-counter (OTC) derivatives.

Concentration and connectedness in the clearing sector

The clearing sector is a concentrated one, with small number of providers overall and only limited choices for any given asset class (ie, equity, energy, interest rate derivatives, and so on), especially for derivatives. Borrowing the European Commission's useful approach of analysing demand and supply side factors, as deployed it its recent impact assessment of EMIR 3.0 proposals,[38] this section explains the concentrated structure of the sector globally including, but not limited to, the bilateral dimension of the clearing market as between the EU and UK.

Looking at the sector globally, there are few providers of clearing services, with several forming part of the same corporate group.[39] Moreover, because there are high thresholds to entry into this operationally complex and heavily regulated market, clearing services are often provided by CCPs which are part of large, cross-border infrastructure groups, offering diverse services to international market participants[40] (though there remain some smaller, long-standing providers of predominantly national clearing services).[41] For example, the LCH Group, which offers a range of important clearing services, is part of the London Stock Exchange Group plc's 'post-trade division' and includes the London-based LCH Ltd and the Paris-based LCH SA.[42] The London-based ICE Europe Ltd is, in turn, part of the US-based NYSE-listed Intercontinental Exchange, which also includes US-based CCPs ICE Clear Credit and ICE Clear US as well as ICE Clear Netherlands and ICE Clear Singapore.[43] Furthermore, within this already concentrated

powers over an entity. If that entity is outside the regulator's direct jurisdiction, some means of establishing the desired supervisory nexus are required.

[33] In a Statement supporting the final, 'balanced' version of the relevant guidance about the extra-territorial jurisdiction of the CFTC under the Dodd-Frank Act, and in particular about the CFTC guidance on the definition of 'US Person' for the purpose, the CFTC Chair Heath Tarbert acknowledged that '… in recent years, the CFTC's own cross-border guidance on swaps has caused concerns about a regulatory arms race and the balkanization of global financial markets.' Tarbert (n 5).

[34] Namely, Moody's, S&P and Fitch; the effectiveness of post-crisis reforms in the EU and US is discussed in C Bush, 'Dealing with the Conflicts of Interest of Credit Ratings Agencies: A Balanced Cure for the Disease' (2022) 17 Cap Mark Law J 334.

[35] Under Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L302/1 ('CRA Regulation') as amended by Regulation (EU) No 513/2011 of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies [2011] OJ L145/30; and Regulation (EU) No 462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L146/1.

[36] See CRA Regulation, art 5: the certification process requires a determination that the relevant home country rules are equivalence to those of the EU; see ESMA, CRA Authorization, List of registered or certified CRAs at <https://www.esma.europa.eu/credit-rating-agencies/cra-authorisation>.

[37] See CRA Regulation, art 4. Endorsement is available for CRAs that are affiliated or work closely with EU-registered CRAs. Essentially, the EU-registered CRA provides supervisory nexus for the EU over the offshore ratings agency.

[38] EMIR 3.0 Impact Assessment, s 3 'Problem definition'.

[39] For analysis of the complex corporate governance requirements for European financial market infrastructure groups, including detail and discussion of the corporate structure of the main actors in the European clearing sector, see E Ferran and E Hickman, 'The Regulation of Corporate Governance in European Financial Market Infrastructures: A Critique' (2024) 21 Eur Co Financ Law Rev 1.

[40] See discussion of these services, and the potential conflicts which follow, in R Lewis and D Murphy, 'What Kind of Thing is a Central Counterparty? The Role of Clearing Houses as a Source of Policy Controversy' in Zebregs and others (n 14).

[41] Eg, JSE Clear in South Africa and JSCC in Japan.

[42] For further details, see 'LCH, About Us: what we do' <https://www.lch.com/about-us>.

[43] For further details, see ICE, <https://www.ice.com/about/exchanges-clearing>.

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sector, only a small subset CCPs offer clearing services for OTC derivatives, meaning there are narrow choices for parties subject to legislative clearing mandates or voluntarily wishing to clear OTC derivatives products. For example, ESMA currently authorizes fourteen EU CCPs in twelve member states, of which only four are authorized to clear OTC interest rate derivatives (by far the most significant type of OTC derivative by market size),[44] and only one, Eurex, based in Germany, clears interest rate derivatives in international (ie, non-EU) currencies.[45] This level of concentration in the clearing sector is a global pattern; the Financial Stability Board has identified thirteen CCPs as systemically important in more than one jurisdiction, six of which are in the EU and two in the UK.[46] Indeed, on the basis that so few CCPs 'perform the vast majority of clearing services around the world', Lehmann has referred to them as 'the linchpin of the global financial system' observing that '[v]irtually no other sector of the financial industry has achieved this degree of integration on a world-wide scale'.[47]

Looking from the *demand*-side, there are powerful incentives for users to concentrate their and their clients' business in as few clearing services as possible, which has further catalysed the emergence of a small number of systemically significant global CCPs. Both operational and regulatory incentives are likely to drive market participants to use a single clearing service for each OTC derivatives asset class, even where there is a choice of clearing services, or a choice whether to clear or not.[48] Most critically, CCPs facilitate multilateral netting,[49] which is fundamental to the ability of CCPs to perform the range of functions which attracted global regulators to mandatory clearing in the first place, but which also strongly incentivises clearing members to use a single CCP in a given asset class. Consequently, netting efficiencies within a clearing service can lead to monopoly-like effects as members prefer to clear contracts at a CCP where they already have a substantial volume of cleared trades, backed up by a liquid market.[50]

These efficiencies may take various forms. Depending on the arrangements in place within a particular clearing service and the type of positions assumed in a particular portfolio, cross-currency and/or cross-product margining may be available for clearing members and clients using a single CCP. Netting may also be recognized for regulatory purposes.[51] If so, there would correspondingly be lower amounts of collateral, capital and default fund contributions required. There may also be indirect savings associated with clearing with a single service, for example, in terms of a dealer's costs of hedging.[52] Because efficiencies are both direct and indirect, and because the benefits of netting are dependent on CCP rulebooks, margin policies and markets participants' portfolios, it is difficult to calculate these benefits definitively. However, detailed work in ESMA's assessment of three London-based clearing services of 'substantial systemic importance' under Article 25(2c) of EMIR (published in December 2021, discussed further in the next section)[53] has produced some interesting indicative findings on both the status quo and the possible impact of the EU's non-recognition these services and the subsequent move of

[44] ESMA, List of Central Counterparties authorised to offer services and activities in the Union (data stated as at 3 September 2024) <https://www.esma.europa.eu/document/list-central-counterparties-authorised-offer-services-and-activities-in-union>.

[45] A Thomadakis and K Lannoo, 'Clearing and Trading and Settlement' in Zebregs and others (n 14), s 4.3 and Table 13.1.

[46] Financial Stability Board, 'CCPs that are Systemically Significant in More Than One Jurisdiction (SI>1 CCPs)' (a biennial review; latest data at September 2022), <https://www.fsb.org/work-of-the-fsb/market-and-institutional-resilience/derivatives-markets-and-central-counterparties-2/>.

[47] M Lehmann, 'Brexit and CCP Supervision: From Extraterritoriality to a Model of Shared Control' (2021) EBI Working Paper Series No 101, 4.

[48] For a review of commercial and risk criteria, should market participants have a choice about where to clear, see U Karl, 'Cross-Border Clearing', in Zebregs and others (n 14), 466–71.

[49] For the legal techniques underpinning clearing, see Braithwaite (n 11), and for a detailed account of operational processes involved, see Zebregs and others (n 14), Pts II and III.

[50] D Duffie and H Zhou, 'Does a Central Clearing Counterparty Reduce Counterparty Risk?' (2011) 1 Review of Asset Pricing Studies 74 shows that, from a netting point of view, it is optimal to have one CCP in an asset class; for empirical research demonstrating the costs of clearing across multiple CCPs, see E Benos and others, The Cost of Clearing Fragmentation (2019) BIS Working Papers No 286.

[51] See, eg, Basel Committee on Banking Supervision, 'The Standardised Approach for Measuring Counterparty Credit Risk Exposures' (March 2014) <https://www.bis.org/publ/bcbs279.htm>.

[52] See the worked example at ESMA art 25(2c) Assessment, [240]; Box 5.

[53] ESMA art 25(2c) Assessment.

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EUR-denominated swaps clearing to an EU-domiciled CCP.[54] ESMA's findings as regards the significance of netting at LCH Ltd's SwapClear service alone include the following:

- Clearing members estimated to ESMA that being required to clear with an EU CCP instead of at SwapClear would lead to an increase in margin requirements ranging from 16 to 76 per cent;[55]
- Different types of EU clearing clients benefit to a different extent from netting efficiencies; EU funds benefit from cross-currency margin efficiencies more than other types of clients, with the 'current total netting benefits' at 28 per cent;[56]
- The total margin savings (as a result of cross-currency and cross-product netting) at LCH Ltd for EU clearing members is currently '44 percent' in total. According to ESMA, these figures imply that the impact of regulation requiring clearing in the EU rather than at LCH Ltd would see 'a maximum potential margin increase of 53.7 percent or 10.6bn';[57]
- Overall, ESMA's cost–benefit analysis concluded that the impact of breaking up existing netting sets at LCH Ltd's SwapClear service would have strongly negative impacts for clearing members and EU funds, with no positive impacts flowing from broken netting sets.[58]

Finally, as ESMA's 2021 observations about these London-based clearing services recognized, concentration in the sector also operates at clearing member level. CCP membership is dominated by small number of large, global banks,[59] through which the CCP is connected to an extensive, cross-border network of global clients. Indeed, recent work has shown that 24 of the top 30 global systemically important banks (G-SIBs) and all 15 European 'other systemically important banks' are clearing members of London-based LCH Ltd, 19 G-SIBs are members of CME, and 17 G-SIBs are members of Eurex Clearing.[60] Through these members, client relationships extend cross-border and cross-sector: ESMA's 2021 assessment reported that LCH Ltd's SwapClear service had 47 EU clearing members from 12 EU Member States, while EU clients from no fewer than 23 Member States were active on the service, including 'EU credit institutions, pension funds, insurance companies, other funds and corporates'.[61] The network of members' clients is therefore an important factor in terms of assessing risks to be associated with a clearing services. In practice, however, these connections are more difficult for the CCP and regulators to monitor, given that a CCP will not necessarily be aware of the identity of clients for whom a member is accessing clearing services; as ESMA itself notes, 'data on clients is limited'.[62]

While it is axiomatic, therefore, that the clearing process will lead to some levels of concentration because of the CCP's position as the hub of a cleared market, in practice, the global clearing sector has become intensely concentrated in a small number of service providers, with only a subset offering clearing services for OTC derivatives. It is unsurprising, therefore, that there is now a widely held presumption that most CCPs are systemically important, at least for their home jurisdiction, but in some important cases, for 'host' jurisdictions as well.[63]

[54] Including LCH Ltd's SwapClear, ie, non-recognition in this context would have meant that EU members and clients could no longer comply with EMIR obligations by clearing through SwapClear in London, thereby breaking up existing netting sets. See further Section 4.
[55] ESMA art 25(2c) Assessment, [239].
[56] ibid [246].
[57] ibid [248].
[58] See, eg, ibid, Table 29, p. 90.
[59] See C Poilvet and J Jardelot, 'Open Access for OTC Derivatives', in Zebregs and others (n 14); J Braithwaite, 'The Dilemma of Client Clearing in the OTC Derivatives Markets' (2016) 17 EBOR 355.
[60] Thomadakis and Lannoo (n 45) Table 13.4, 422–3.
[61] ESMA art 25(2c) Assessment, [25]–[27].
[62] ibid [27].
[63] See, eg, F Wendt, 'Central Counterparties: Addressing their Too Important to Fail Nature' (January 2015) IMF Working Paper WP/15/21, noting this international presumption that 'all CCPs are systemically important at least in their own jurisdiction', citing on this point the PFMIs, at [1.20], which states that this presumption operates for CCPs, as well as other types of FMIs such as trade repositories, because of the 'critical roles in the markets they serve'. See also CCP Recovery and Resolution Regulation, Recital 4: 'While some CCPs remain focused on domestic markets, they are all systemically important at least in their home jurisdictions.'

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3. Evaluating extra-territorial financial regulation

Scholarly context

Various important implications flow from the highly concentrated structure of the global CCP sector described in the preceding section. Additionally, the post-crisis clearing mandate for standardized OTC derivatives, which meets a public policy objective largely using private CCPs, is an important factor in this debate. For instance, Callens and Löber recently speculated 'whether the provision of central clearing to financial markets should not be seen as a public good in view of the inherent and increasing mitigation of systemic risks'.[64] Introducing a significant new policy suggestion following on from similar lines of argument, Lehmann has argued that CCPs should be regulated under a 'novel paradigm' of voluntary 'shared control' between states affected by a CCP's activities, on the basis that CCPs are a type of 'globally significant financial market infrastructures', analogizing with debates about the governance of resources such as the Artic Sea and the internet.[65] The value of this paradigm, Lehmann argues, is that it recognizes the truly global nature of clearing services and presents an alternative to the status quo, namely, the national regulation of CCPs accompanied by third-country measures, which risk market fragmentation.[66] Other responses to what Callens and Löber call the 'friction' between the 'global OTC derivatives marketplace and … the largely decentralized regulatory and supervisory approach towards CCPs' have included those authors' call for, inter alia, more convergence in CCP regulation and enhanced supervisory architecture.[67] Taking this debate further, Zebregs and de Serière have recently argued that extra-territorial regulation of CCPs by EU authorities can usefully be considered in the context of an 'international legal order', by which they mean that regulatory authorities' actions should conform with principles including 'mutual recognition, reciprocity and proportionality'.[68] Compared to these norms, they conclude that actions under EMIR 2.2 to date, and those proposed under EMIR 3.0 are, for now, 'arguably well justified', though this may change depending on the nature of future regulatory action, in particular, as regards the UK.[69] Indeed, looking ahead, Zebregs and de Serière warn that exercising certain of the EU's new powers under the reformed EMIR regime[70] 'too liberally' could be perceived by third countries as disproportionate, and 'as a violation of the international legal order', thereby potentially opening up the risk of retaliatory measures against the EU.[71]

While sharing some of the same concerns as Lehmann about the status quo, in particular about the risk of market fragmentation following disproportionate actions by host jurisdictions, we focus in this article on *evaluating* the exercise of extra-territorial regulatory actions, rather than offering an alternative to the legal regime underlying these kinds of actions. In undertaking this task, we agree with, but seek to develop further, the evaluative approach adopted by Zebregs and de Serière, which identified an 'international legal order' as an evaluative framework for extra-territorial regulatory actions. Specifically, the remaining sections of the article argue that the well-established concept of 'Global Administrative Law' provides a valuable framework for evaluating the exercise of extra-territorial regulation in the financial markets, offering a more developed normative approach. We then consider the implications for the ongoing debates about the approach to third-country CCPs under the EMIR regime.

An evaluative framework: Global Administrative Law

The concept of Global Administrative Law ('GAL') is well established, having emerged some 20 years ago, in response to the increase in global administrative rule-making in many different spheres.[72] The central insight developed in the foundational literature by Kingsbury and other

[64] Callens and Löber (n 14) 549.
[65] Lehmann (n 47) pt III.A.
[66] ibid, pt IV and Conclusion. In fact, Lehmann states that the ideal paradigm would be 'truly global supervision' of CCPs by a global regulator, but this model is mentioned only briefly, on the basis that it is 'utopia' for now. ibid 39.
[67] Callens and Löber (n 14) 542 and 541, and on the challenges of cross-border regulation of CCPs generally, see s 3, ibid.
[68] B Zebregs and V de Serière, 'CCPs: EU Equivalence and Regulatory "Bazookas"' (2024) 25 EBOR 117, 139.
[69] ibid 141.
[70] The EMIR regime, including recent reforms which significantly extend the EU's regulatory powers in relation to third country CCPs, is explored in Section 4.
[71] Zebregs and de Serière (n 68) 141 and generally, s 9, ibid.
[72] See B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 15–6. The relationship between GAL and this upwards shift in regulatory activity is also

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scholars is that 'much of global governance (particularly global regulatory governance) can usefully be analysed as administration'.[73] While the precise definition of GAL is contested, in broad terms,[74] it has usefully been framed as 'comprising the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies' which may include 'formal intergovernmental regulatory bodies' 'hybrid public-private regulatory bodies' and 'national regulatory bodies operating with reference to an international intergovernmental regime'.[75] By drawing upon 'values that are immanent within the modern practice of public law',[76] GAL has thereby provided a valuable normative framework with which to evaluate the legitimacy of diverse types of global governance regimes, while emphasizing the public–private hybridity of such regimes.

GAL has, to date, often been associated with sectors such as international arbitration and world trade, and case studies have tended to focus on these areas. However, it also offers a valuable framework with much potential for analysing the legitimacy of extra-territorial action in the global financial markets. As the literature makes clear, GAL comprises a legal system extending beyond the output of formal administrative bodies established by international treaties, to networks of diverse parties engaged in collective global regulation;[77] as a result, GAL is well placed as a means of evaluating complex and multilateral regulatory dynamics of the post-crisis financial markets. Indeed, as this article has already pointed out, in modern financial markets, few regulatory scenarios will be purely 'domestic', while regulatory networks comprise diverse public, private and hybrid actors with high levels of interconnectedness.

There are, however, particularly strong reasons why GAL provides an appropriate way of understanding and evaluating extra-territorial action in the clearing sector, in particular in terms of assessing regulatory actions since the clearing mandate for certain OTC derivatives was introduced worldwide. As we have already shown, the post-crisis clearing mandate saw regulators worldwide promoting public policy objectives through largely privately owned and operated CCPs, thereby increasing concentration and connectedness in the clearing sector, and catalysing extra-territorial regulatory actions which are ongoing today, some 12 years after the original version of EMIR came into force. The resulting, hybrid regulatory network may therefore be considered as a significant example of GAL, and usefully analysed as such. To put it another way, the claim here is that CCPs are not only *subject* to GAL, through global norms, regional rules, and local authorization and supervision, but they should be thought of as a *constituent* of it, as the entities through which important global public policy goals, including financial stability and market continuity, are implemented. It follows, therefore, that administrative decision-making in this sector should be evaluated in a way that takes account of these public and private dimensions, as well as of the formal regulatory frameworks found at domestic, regional, and global levels.

Public law 'precepts'

From the starting point described above, the normative claim of GAL is that 'precepts of accountability developed in domestic administrative law are regarded as a resource that can properly be drawn on when thinking about accountability at the global level'.[78] As such, these

emphasised, in general terms, by Craig, though he does not cite the financial market regulation specifically: 'The field of global administrative law is predicated on the assumption that such norms should be generally applicable at the global level, more especially as regulatory power in certain areas has moved upwards from the nation state.' P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 647.

[73] B Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20 Eur J Int Law 23, 24–5.

[74] Narrower definitions have been used, eg, see G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 Eur J Int Law 121, suggesting at 149 that a 'strict definition' of GAL would be as 'a system akin to domestic judicial review in that it keeps public authorities within the bounds of legality and provides enforceable remedies to individuals harmed by unlawful state conduct ... '

[75] Kingsbury and others (n 72) 17.

[76] See Van Harten and Loughlin (n 74) 150.

[77] Kingsbury and others (n 72) 17. The diversity of global governance networks is discussed at length in Craig (n 72) 574–80.

[78] See Craig (n 72) 628. The terminology varies: these 'precepts' have, eg, been referred to as 'meta-norms that regulate the activities of global administrative bodies' by D Barak-Erez and O Perez, 'Whose Administrative Law is it Anyway? How Global Norms Reshape the Administrative State' (2013) 46 Cornell Int Law J 455, 455.

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normative precepts underpin the framework which can provide the basis for GAL-informed analysis of global regulatory activities.[79]

With caveats that there is no 'one size fits all' approach to measuring accountability of global administrative actions, and that context matters,[80] various analytical frameworks have been proposed in the GAL literature.[81] In earlier work, one of the authors of this article has identified seven 'legitimating principles for GAL-like actions' that run through the GAL debate, namely: legality and accountability under the law; transparency and predictability of process; rationality of decision-making; proportionality and protection of rights; participation from affected stakeholders; independent dispute resolution mechanisms; and existence of a review mechanism.[82] In the context of prudential regulation, this work has emphasized the particular importance of: rationality of decision-making (so when private parties are required to take burdensome or costly actions, it is because there is a rational reason); transparent and predictable decision-making (as reflected in reasonable policy timeframes, transparent processes, and visibility of the regulatory agenda); and the participation of a full range of stakeholders in policy-making and interpretation, backed up by a process of review of regulatory decisions and ultimately, a timely and expert dispute resolution mechanism.[83]

Global clearing 'ecosystem'

The initial, fundamental insight from GAL as regards the post-crisis clearing sector is that clearing needs to be understood as a global ecosystem,[84] characterized by strong interconnections between public and private parties, as well as between jurisdictions. This starting point has significant implications when extra-territorial regulatory action is on the table; weighing up the benefits of what policy makers are seeking to achieve with such actions against the potential costs as between home and host countries or authorities should not only be assessed in a bilateral way, but also in light of the global clearing ecosystem as a whole.

For example, for a policy attempting to repatriate clearing from host to home jurisdiction, an accompanying impact assessment should take account of potential scenarios where clearing not only shifts from host to home clearing services, but also to CCPs in different third-country jurisdictions. These third countries might include the obvious, established candidates but also smaller, ambitious jurisdictions which might take the opportunity to attract clearing business once netting sets are broken and business is on the move. At the same time, extra-territorial policy such as non-recognition of a third-country CCP by a home jurisdiction should always attempt to explore the full range of implications for stakeholders, including the prospect of clearing members setting up subsidiaries in third countries to avoid relocation policies. Moreover, the prospects of extra-territorial actions sparking third countries' own regulatory responses, therefore leading to greater costs, fragmentation and regulatory burdens, need to be considered. Fully assessing extra-territorial measures in terms of the global clearing ecosystem

[79] An issue considered in depth in Kingsbury (n 73) is the nature of these precepts. The author offers a 'workable concept of law in GAL' based upon principles which are 'immanent in public law', ibid 23, 30; see also Craig (n 72) 646 diverging in some respects from Kingsbury, ibid, on this point. However, it is also recognised in the literature, eg, Kingsbury and others (n 72) 28, that 'Direct analogies between national and transnational administrative law must be viewed with great caution.'

[80] Kingsbury and others acknowledged in their 2005 paper that it was too early in the development of the field to propose more than 'candidates' for 'the doctrinal elements governing this field as a whole'. The 'doctrinal elements' identified at that time included procedural participation and transparency; reasoned decisions; review; substantive standards (including proportionality, rationality, legitimate expectations). Kingsbury and others (n 72) 37–41.

[81] See, eg, RB Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) 13 Int J Const Law 499, who at 499–500 identifies four 'administrative law mechanisms, including transparency, participation, reason giving and review'. Kingsbury (n 73) 23, 32 considers five 'indicative' principles that are 'potentially applicable within any system of public law', namely, the principles of legality, rationality, proportionality, and the rule of law and human rights.

[82] Murphy (n 11) 240–241 (footnotes omitted).

[83] The significance of dispute resolution in the context of the regime for third country CCPs is returned to in Section 5 'Transparency and dispute resolution'. In practice, the ECJ litigation around the ECB's attempted location policy has already demonstrated the need for robust dispute resolution processes to stand behind clearing regulation. United Kingdom v ECB T-496/11; T-45/12 and T-93-13. For detailed discussion of this litigation, see H Marjosola, 'Missing Pieces in the Patchwork of EU Financial Stability Regime? The Case of Central Counterparties' (2015) 52 Common Mark Law Rev 1491.

[84] The term 'ecosystem' is used elsewhere in the clearing literature, eg, in the EMIR 3.0 Impact Assessment, which describes 'risks which cut across the clearing ecosystem with its multiple actors' ibid 25, but we use it here to describe the inclusive perspective on the global clearing network that results from a GAL analysis specifically.

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and taking account of diverse public and private decision-makers worldwide therefore complicates these assessments; however, this reflects the reality of the highly interconnected sector far more accurately than evaluating extra-territoriality simply in terms of the impact on bilateral relations between home and host jurisdictions.

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4. Extra-territoriality in EMIR

The European Market Infrastructure Regulation ('EMIR') came into force in 2012 as part of the G20-led regulatory response to the global financial crisis. Since 2012, framework rules in EMIR have been fleshed out by numerous Regulatory Technical Standards,[85] while EMIR itself has been revised on several occasions, most significantly for these purposes, with reforms known as EMIR 2.2, which were proposed in 2017 and adopted in 2019.[86] So-called 'EMIR 3.0' is currently in the process of being implemented, with the European Parliament and the Council reaching agreement on this package of reforms in February 2024. The existing literature offers several detailed accounts of the authorization and supervision of CCPs under the EMIR regime prior to the EMIR 3.0 final text,[87] including of the regime for the recognition of third-country CCPs.[88] Consequently, this section does not go over this regime in full, but it highlights specific extra-territorial features of the EU's authorization and recognition regime for CCPs, up to and including the debate around EMIR 3.0. Overall, this section demonstrates that, since the original EMIR framework, the extra-territorial regime for third-country CCPs been transformed in terms of its complexity and its wider political significance, largely as a result of the UK's withdrawal from the EU. Specifically, this section shows that what was a relatively self-contained regime, albeit one that was somewhat susceptible to wider political and regulatory pressures, now involves enhanced extra-territorial regulatory powers, the operation of which has become an integral part of the broader international political process. On this basis, the article argues that the contemporary EU regime for third-country CCPs is a particularly appropriate one to evaluate through a GAL-informed analysis, as is developed further in Section 5.

Authorization and Recognition of CCPs

EMIR provides that a CCP based in an EU Member State must be authorized by its national competent authority (NCA), subject to which it may offer clearing services across the EU.[89] Other Member States' interests carry some weight in this intra-EU authorization process, through the role of the CCP's college. For example, membership of the college will include other EU NCAs, depending on where the CCP's most significant clearing members are established.[90] EMIR provides that the CCP's NCA must 'duly consider' the college's positive opinion on authorization, while the CCP may not be authorized if all the members of the college (excluding the CCP's home authorities) reach a negative opinion.[91] Overall, however, the NCA's role remains pivotal and the process of authorization is largely decentralized. As Callens observes, this

[85] Eg, Regulatory Technical Standards (RTS) provide the detail of the reporting requirement found in EMIR, art 9 (5), see eg, Commission Delegated Regulation (EU) 2022/1855 of 10 June 2022 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards specifying the minimum details of the data to be reported to trade repositories and the type of reports to be used [2022] OJ L262/1.

[86] Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorization of CCPs and requirements for the recognition of third-country CCPs, OJ L322/1 (12 December 2019). These changes had been made to EMIR by the point it was on-shored as 'UK EMIR', meaning that the UK, for now, follows a parallel process when recognizing third-country CCPs including those based in the EU. For details of the technical legislation onshoring EMIR into UK law, see FCA, UK EMIR Library, <https://www.fca.org.uk/markets/uk-emir/library> UK EMIR is not discussed separately in this article, but for recent discussion, see Moloney (n 9) and E Ferran, 'International Competitiveness and Financial Regulators' Mandates: Coming Around Again in the UK' (2023) 9 Journal of Financial Regulation 30.

[87] Eg, the detailed account in Pearson (n 17).

[88] See Turing (n 17); Zebregs and de Serière (n 68); Busch (n 9); N Moloney, 'Reflections on the EU Third Country Regime for Capital Markets in the Shadow of Brexit' (2020) 1 ECFR 35, 58–61; and on EMIR 2.2, Lehmann (n 47) 14–24.

[89] EMIR, art 14; the procedure for granting and refusing authorisation at art 17; and the role of the college at art 19. See the discussion of the 'difficult' negotiations behind these provisions in Pearson (n 17) s 3.3.4.

[90] EMIR, art 18 determines membership of a CCP's college; arts 18(c) and (ca) provide for competent authorities of other Member States to join the college in certain circumstances, by reference to the location of the three largest clearing members by default fund contribution and by consent of the CCP's NCA, respectively.

[91] EMIR, art 17(4).

contrasts with EMIR's recognition process for third-country CCPs wishing to offer clearing services which he describes as 'fully centralized at the EU-level'.[92]

A third-country CCP must be recognized by ESMA in order to provide clearing services to members or trading venues established in the EU.[93] The original, 2012, version of EMIR empowered ESMA to recognize a third-country CCP according to a relatively simple and self-contained process. In overview, ESMA was required to assess whether four pre-conditions had been met, and these included (i) that the Commission had determined that the legal and supervisory arrangements of the relevant third country were equivalent to those in Title IV of EMIR ('Requirements for CCPs'),[94] and (ii) that there were co-operation arrangements with the relevant third-country NCAs for ESMA's access to information about the CCP in question and for ESMA to be notified by the NCA of certain matters.[95] As part of this assessment, EMIR required ESMA to consult various EU Member States NCAs, Central Banks, and other EU regulators potentially exposed to the third-country CCP,[96] but as Pearson puts it, recognition of third-country CCPs was, as it remains, 'the direct responsibility' of ESMA.[97]

The 2016 UK referendum vote to leave the EU meant that two of the EU's largest CCPs would, upon the UK's withdrawal, be located in a third-country. The EMIR 2.2 reforms were in part a response to the shortcomings of EMIR's regime for third-country CCPs highlighted by this scenario, while also reflecting the EU's desire to relocate clearing activity from the UK into the EU.[98] As one of the recitals to EMIR 2.2 put it, 'In view of the growing cross-border dimension of CCPs and of the interlinkages in the Union financial system, it is necessary to improve the ability of the Union to identify, monitor and mitigate the potential risks related to third-country CCPs'.[99] These measures made major changes to EMIR and have been contentious. Indeed, EMIR 2.2 has been described as 'the most radical' of the EU's post-Brexit reforms to financial regulation,[100] and as bringing in a 'more intrusive and on-shored approach'.[101] The specific implications for third-country CCPs are discussed further below.

A transformed recognition process

EMIR 2.2 transformed the recognition regime for third-country CCPs by introducing extensive new requirements and regulatory powers for ESMA, as this section explores. However, an accompanying change was the introduction of the new 'tiering' process, which mitigates these requirements in some cases. Tiering requires ESMA to determine whether a third-country CCP applying for recognition under EMIR 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',[102] with the recognition process then adjusted accordingly. Third-country CCPs may be found to be systemically important for the EU or one of its Member States, so-called Tier 2 CCPs,[103] or not, whereby they are categorized as Tier 1.[104] At the time of writing, ESMA has recognized 37 third-country CCPs, all but two of which are categorized as Tier 1; the Tier 2 CCPs are LCH Limited and ICE Clear Europe Limited, both based in London.[105]

[92] E Callens, 'Third Country Central Counterparty (CCP) Supervision as a Catalyst for More Centralized EU CCP Supervision?' (2023) 23 J Corp Law Stud 197, 205.
[93] EMIR, art 25.
[94] While equivalence decisions are controlled by the Commission, it acts with the advice of ESMA, which 'has emerged as a pivotal player in the equivalence process', Moloney (n 88) 43, 47. See Section 4 'A transformed recognition process' on equivalence within the EMIR regime.
[95] EMIR, version in force 16 August 2012 to 24 June 2015, art 25(2), (6) and (7).
[96] ibid art 25(3).
[97] Pearson (n 17) 59.
[98] The Brexit vote, following on from the 2008 global financial crisis and the 2010–2012 euro area fiscal crisis, has been described as 'the start of a third re-setting shock with lasting implications for how EU financial governance is organized': N Moloney, 'Brexit and EU Financial Governance: Business as Usual or Institutional Change?' (2017) 42 Eur Law Rev 112, 113.
[99] EMIR 2.2, Recital 29.
[100] Moloney (n 88) 61.
[101] Moloney (n 8) 887.
[102] EMIR, art 25(2a).
[103] ibid.
[104] ibid art 25(2).
[105] ESMA, List of third-country central counterparties recognised to offer services and activities in the Union (ESMA70-152-348, list described as last updated on 13 August 2024) <https://www.esma.europa.eu/document/list-third-country-ccps-recognised-offer-services-and-activities-in-union>.

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Thanks to this new tiering stage, EMIR 2.2's greatly expanded recognition regime for third-country CCPs could be described by ESMA as one that was 'progressive and risk-driven'[106] while Zebregs and de Serière also conclude of the resulting rule design that 'proportionality is one of the leading principles'.[107] Tiering certainly does mitigate some of the effects of the transformed recognition rules for CCPs which are categorized as 'Tier 1', however, for several reasons, the balance it offers should not detract from the impact of those rules which apply as a general matter under EMIR 2.2, even to Tier 1 CCPs. Indeed, exploring four grounds on which EMIR 2.2 has transformed the EU regime for recognition of third-country CCPs shows that several of these grounds impact *all* third-country CCPs, regardless of which tier they are put into.

The first ground on which EMIR 2.2 has transformed the recognition procedure for third-country CCPs is in terms of ESMA's role, which has been greatly expanded and which now includes the duty to take account of a far broader range of stakeholders and interests, from both within and beyond the EU. For example, under the new Article 25(2a)(a), ESMA is required determine the appropriate tier for a third-country CCP applying for recognition by considering, inter alia, 'the nature, size and complexity of the CCP's business in the Union, and outside the Union to the extent its business many have an impact on the Union or on one or more of its Member States ... ' In the same context, ESMA has also to consider the impact of the CCP's failure or disruption on the financial markets, financial institutions and 'the broader financial system', not limited to the EU.[108]

ESMA's expanded role in this context extends to direct engagement with other regulators. Notably, Article 25c requires ESMA to set up a 'Third country CCP college' members of which include the chair of the ESMA CCP Supervisory Committee, a range of other interested regulators and NCAs from across the Union, with the new college having extensive responsibilities across the recognition regime. Moreover, several important provisions require ESMA to consult or act subject to confirmations from central banks of issue of 'all Union currencies of the financial instruments cleared or to be cleared by the CCP'.[109] For example, recognition of a Tier 2 CCP is made subject not only to ESMA's own assessments but also the CCP's compliance with extensive requirements that these central banks of issue may also impose, including 'to submit any information which the central bank of issue may require upon its reasoned request, where that information has not otherwise been obtained by ESMA'.[110] Collectively, therefore, these provisions require a network of regulators to work together to consider the risks around recognition of a third country's CCP.

Under the transformed recognition regime, ESMA must now also actively reach agreement with certain third-country entities. For example, under Article 25(7), there are now an expanded range of issues which need to be covered by co-operation arrangements between ESMA and the NCAs for recognized third-country CCPs. These include arrangements specifying 'the procedures necessary for the effective monitoring of regulatory and supervisory developments in a third country' and 'the procedures for third-country authorities to assure the effective enforcement of decisions adopted by ESMA in accordance with' certain parts of EMIR.[111] Decisions for this purpose include requests for information, on-site inspections by ESMA and ESMA's powers to fine third-country CCPs for listed infringements. Recognition of a third-country CCP is therefore now made subject to that CCP's home regulator agreeing *ex ante* arrangements to enforce ESMA decisions at a local level. Moreover, because these requirements are built into the preconditional equivalence part of the recognition regime, they are not mitigated by the CCP in question being placed in a particular tier.

Relatedly, EMIR 2.2 has added new routes of transmission for EU rules into third countries, in addition to the long-standing requirement of a Commission determination of the equivalence of the relevant legal and supervisory regime of the third country in Title IV of EMIR, discussed

106 ESMA, Third-Country CCPs, <https://www.esma.europa.eu/central-counterparties/third-country-ccps>
107 Zebregs and de Serière (n 68) 140. See also Pennesi (n 8), discussing tiering under EMIR 2.2 in terms of a new 'proportionate approach' to supervising third-country CCPs, ibid 60.
108 EMIR, art 25(2a)(b).
109 ibid art 25(3)(f). This was amended from 'the most relevant Union currencies' to 'all Union currencies' by EMIR 2.2, thereby potentially expanding the number of central banks drawn into this process for any given third-country CCP.
110 EMIR, art 25(2b)(b)(i).
111 ibid art 25(7)(e) and (f).

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above. There is a vast literature on the role of equivalence in this respect,[112] and also on the heightened 'importance and political sensitivity of any future UK/EU equivalence determinations and of the mechanism(s) deployed to reach such determinations'[113] since Brexit, especially in light of fact that equivalence decisions can be withdrawn unilaterally.[114] The most significant development under EMIR 2.2 in this context is its requirement that Tier 2 CCPs directly comply 'at the moment of recognition and thereafter' with the requirements in Article 16 and Titles IV and V of EMIR, covering, capital, organizational, conduct of business, prudential and interoperability requirements.[115] This is a far-reaching extra-territorial rule, extending key parts of EMIR directly to third-country CCPs categorized as Tier 2. There seems to be overlap with Article 25(6) here, that is, the requirement of equivalence with the Title IV rules as a pre-condition of any CCP's recognition, but as Turing notes, this new requirement may expect 'closer adherence' than equivalence, though it is as yet untested. Furthermore, this is a *CCP*-level requirement, compared to an equivalence decision which is made as regards a *jurisdiction's* regulatory framework. There is, however, some mitigation of the burden of complying with this new requirement thanks to the introduction of a 'comparable compliance' provision under Article 25a. This provision permits a CCP to apply to ESMA for a detailed assessment[116] that it should be deemed to satisfy these parts of EMIR through compliance with its home rules. This CCP-level assessment is to be requested and conducted according to further detailed rules laid down by the Commission,[117] and these detailed rules permit ESMA to consider broader factors such as recommendations developed by the relevant international standards-setting bodies.[118]

Third, the revised recognition regime brought in by EMIR 2.2 subjects third-country CCPs to far greater monitoring and other types of ongoing powers, mostly exercised by ESMA, but also, in certain cases, with central banks of issue of EU currencies and the European Systemic Risk Board (ESRB). Indeed, Moloney has observed that the result of these ongoing review and monitoring powers, 'ESMA has ... claimed a form of supervisory oversight' over third-country CCPs.[119] This enhanced supervisory role is found in provisions such as Article 25b, whereby ESMA supervises the ongoing compliance of Tier 2 CCPs with the initial requirements for recognition and conducts assessments of the resilience of Tier 2 CCPs along with the ESRB. There are

[112] Eg, Conac describes equivalence as 'a clever way to "export" EU regulation to other jurisdictions and to promote the G20 agenda of a regulatory level playing field.' P-H Conac, 'The International Organization of Securities Commissions (IOSCO), Europe, Brexit, and Rethinking Cross-border Regulation' (2020) 1 ECFR 72, 76, while Hadjiyianni calls this outcome of equivalence the '*de jure* Brussels effect'; I Hadjiyianni, 'The European Union as a Global Regulatory Power' (2021) 41 OJLS 243, 254 (italics in the original). However, for a real-world example of the equivalence regime in action, see Davies's analysis of the 'long and stony path' before the Commission and CFTC reached political agreement to recognize the equivalence of each other's clearing rules, in Davies (n 17) s 3. Relatedly, for a recent review describing a relative decline in the significance of equivalence see Busch (n 9), which considers equivalence across EU financial services, noting the forty different equivalent mechanisms in sixteen legal acts on EU financial law (ibid 5) arguing that equivalence decisions have now become more of a political tool for the EU and 'less and less about reliance on equivalent third-country rules and equivalent third-country supervision' (ibid 7).

[113] For discussion of the implications of the Brexit vote for the equivalence processes embedded in EU financial markets regulation, including in EMIR, see Moloney (n 98) 123–6; E Wymeersch, 'Third-Country Equivalence and Access to the EU Financial Markets Including in Case of Brexit' (2018) 4 Journal of Financial Regulation 209 (also discussing equivalence in EU financial regulation generally); and Ferran (n 8). More recently, Conac suggests that equivalence has become so political and rigid that will not be workable in increasingly fragmented post-Brexit global financial markets and that greater deference to an international standard-setter such as IOSCO is preferable: Conac (n 112).

[114] As Nästegärd comments, the fact that equivalence can be withdrawn unilaterally and on short notice 'does not create a safe and predictable environment for firms that are reliant on equivalence decisions for their export of products to another country' and noting later in the article the EU's sometime use of equivalence as a 'political tool': E Nästegärd, 'Equivalence Decisions in the EU and UK Financial Services Sectors Post-Brexit' (2022) 33 EBOR 463, 466 and 472. Pennesi (n 8) also emphasizes that 'Equivalence can ... be considered as a *unilateral* recognition regime', ibid 48 (italics in original), discussing the equivalence regime in EMIR, ibid 52–3. For the Commission's own account of the nature of equivalence decisions, see European Commission, Equivalence in the area of Financial Services COM(2019) 349 (29.7.2019).

[115] EMIR, art 25 (2b)(a).

[116] See ESMA, Final Report: Technical Advice on Comparable Compliance under art 25a of EMIR, ESMA70-151-2649 (11 November 2019). See further, Section 5 'Fragility of checks and balances'.

[117] Commission Delegated Regulation (EU) 2020/1304 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regards to the minimum elements to be assesses by ESMA when assessing third-country CCP's request for comparable compliance and the modalities and conditions of that assessment [2020] OJ L305/13.

[118] ibid, Recital 3. For discussion of this requirement in practice, see Moloney (n 88), suggesting that 'comparable compliance' will be rigorous and 'not easily achieved' but also noting the potential for 'moderating and calibrating' in practice (ibid 60, 61).

[119] ibid 40.

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many other such ongoing powers woven throughout the recognition regime, and a striking example is the power to request information under Article 25f. This provision gives ESMA the very broad disclosure power to 'require recognized CCPs and related third parties to whom those CCPs have outsourced operational functions or activities to provide all necessary information to enable ESMA to carry out its duties under this Regulation', with only the requirement that a copy of the request is provided to the home regulators 'without delay' as an acknowledgement that this is a potentially far-reaching incursion into a third-country jurisdiction.[120] Again, this article applies to all recognized CCPs and makes no mention of different tiers, though for Tier 2 CCPs, this requirement is backed up by ESMA's right to fine the CCP for non-compliance.[121] A later Article even empowers ESMA to conduct 'all necessary on-site inspections at any business premises, land or property of Tier 2 CCPs and related third parties to whom those CCPs have outsourced operational functions, services or activities' and refers back to the *ex ante* co-operation arrangements ESMA and third-country NCAs must have in place as a requirement of CCP recognition.[122]

Finally, various features of EMIR 2.2 have significantly increased the potential for recognition of a CCP to be withdrawn by ESMA. As already noted, the EMIR recognition process has always included the pre-condition that legal and supervisory arrangements of the third country have been deemed equivalent to Title IV of EMIR. This is a fragile foundation; equivalence decisions, as the Commission sets out in its 2019 report, are 'unilateral and discretionary acts of the EU'[123] which, as already discussed, can be suspended, withdrawn, given on a time-limited basis or set with conditions and limitations.[124] Moreover, as has been extensively documented, equivalence decisions have become increasingly politicized in recent years.[125] The challenges associated with the equivalence process in the post-Brexit era have been highlighted by what Moloney has called the EU's '*force majeure*' response in the wake of the UK's decision to withdraw from the EU, granting the UK CCP regulation temporary equivalence until 30 June 2025, in contrast with the Commission's decision not to adopt temporary equivalence for UK trading venues.[126] From this unstable starting point, the EMIR 2.2 recognition regime has introduced further fragilities for public sector regulators and diverse private parties relying upon recognition of a third-country CCPs. For example, conditions to the underlying equivalence decision have been introduced in a new final paragraph to Article 25(6), including the provision that the equivalence decision may be made subject to 'the ability by ESMA to effectively exercise its responsibilities in relation to third-country CCPs' in Tiers 1 or 2. Later provisions in Article 25 also make it clear that a CCP may lose recognition, for example, if a Tier 2 CCP fails to make annual confirmation to ESMA that it still meets requirements imposed at its initial recognition.[127] Article 25p (Withdrawal of recognition) adds further grounds whereby ESMA, after consulting, 'shall withdraw a recognition decision', including where the CCP itself has infringed conditions, where the third-country regulator has failed to provide ESMA with co-operation, or there has been withdrawal or suspension of, or failure to meet conditions under, the third country's equivalence decision.[128] Recognition can be withdrawn for some, or all, of a CCP's activities, which option enables this sanction to be used more readily than if it were an 'all or nothing' tool.[129]

Relatedly, EMIR 2.2 also introduced the new possibility of *non*-recognition of a Tier 2 CCP. This outcome, which would have an extremely wide-ranging impact on the clearing sector and the financial system more broadly if ever deployed, begins with an assessment by ESMA that a Tier 2 CCP, or some of its clearing services, is 'of such substantial systemic importance that that

[120] EMIR, art 25f(1) and (5).
[121] EMIR, Annex III (IV).
[122] EMIR, art 25h.
[123] European Commission, Equivalence in the area of Financial Services (COM (2019) 349), 4.
[124] ibid, 8 and see nn 112–114 above. For detailed discussion of the nature of, and challenges associated with, the equivalence regime, including analysis of its 'opacity' and 'limited justiciability' see Moloney (n 8) X.2.2.
[125] See nn 112–114 above and accompanying discussion.
[126] Moloney (n 9) 40. The EU's temporary equivalence decision for the UK CCP regime was made in Commission Implementing Decision (EU) 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 48/2012 [2022] OJ L28/40, and is discussed further in ibid, s 5.
[127] EMIR art 25b.
[128] ibid art 25p(1).
[129] ibid art 25p(1).

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CCP should not be recognized to provide certain clearing services or activities'.[130] This assessment has to be made with the agreement of the central banks of issue of Union currencies of the financial instruments being cleared, as discussed above, and, overall, is based upon the risk to the financial stability of the EU or one or more Member States. After's ESMA assessment to this effect, the matter proceeds with a recommendation by ESMA to the Commission, which the Commission must then consider and act upon within 30 days. Non-recognition, if adopted by the Commission in an implementing act, is described as a 'measure of last resort'[131] and it is, in effect, a location policy, given that the third-country CCP group could only continue to provide services to EU members and trading venues through an EU-based, authorized CCP.[132]

Non-recognition has already been considered, but ultimately rejected, in the context of three London-based clearing services.[133] ESMA's December 2021 assessment[134] found that there were excessive exposures and risks to EU from these UK clearing services, which were beyond scope of EMIR framework to manage. However, the assessment ultimately concluded that, in terms of removing recognition now or in a tapered way, the costs outweighed the benefits 'at this point in time'.[135] This assessment did not, then, support the status quo, but in response it suggested a gradual, rather than 'cliff-edge', shift[136] to reduce levels of clearing through these UK-based services, in order to bring them down to levels which the EMIR third-country regime would be capable of managing. While the blunt tool of non-recognition was therefore not used in this instance, measures are underway to promote this gradual shift of business to EU CCPs. With this objective in mind, the implementation of the EMIR 3.0 reforms is now being finalized.

EMIR 3.0

The preceding section discussed the increasingly complex, political and extra-territorial aspects of the EMIR regime for third-country CCPs that has emerged since Brexit, but it also observed that ESMA has recently concluded that even this extended regime is not entirely suitable for managing EU risks in this concentrated market. EMIR 3.0 is, in part, a response to this.[137] Specifically, the Commission has explained these reforms as part of continued efforts to tackle 'excessive concentration of clearing in some third-country CCPs', and also as a means to build up the EU's clearing capacity, in support of broader policies, such as capital markets union and 'EU's open strategic autonomy'.[138] EMIR 3.0 therefore appears to be a somewhat more limited intervention compared to measures such as non-recognition under EMIR 2.2, but nonetheless, this project exemplifies the approach of expressly co-opting clearing policy to promote wider political objectives.

Most significantly for these purposes, EMIR 3.0 includes a new 'active account' requirement.[139] Broadly put, this would require parties who are subject to the clearing obligation in EMIR, and whose activity in certain qualifying instruments exceeds a threshold, to maintain and use an active account at an EU CCP. The instruments are Euro- or Polish zloty-denominated interest rate derivatives and short-term Euro-denominated interest rate derivatives. Detailed requirements of how much use is required are to be set by ESMA, with the largest dealers being

[130] ibid art 25(2c).
[131] ibid.
[132] ibid art 25(2c)(a).
[133] As noted, ESMA determined two UK-based CCPs to be Tier 2 CCPs, under art 25 of EMIR. In the art 25(2c) assessment that followed, three services offered by these CCPs were found to be of substantial systemic importance: (1) LCH Ltd's SwapClear for OTC interest rate derivatives denominated in EUR and PLN; (2) ICE Clear Europe Ltd's service for CDS products denominated in EUR; and (3) ICE Clear Europe Ltd's service for STIR products denominated in EUR. Note that ICE Clear Europe Ltd's CDS service has subsequently been closed. For background to the assessment, see ESMA Article 25(2c) Assessment Report, ch 1.
[134] ESMA art 25(2c) Assessment Report.
[135] ibid [413].
[136] ibid [400].
[137] Directorate-General for Financial Stability, Financial Services and Capital Markets Union, 'Commission welcomes political agreement on the clearing package, a boost for the capital markets union' News article (7 February 2024) <https://finance.ec.europa.eu/news/commission-welcomes-political-agreement-clearing-package-boost-capital-markets-union-2024-02-07_en>.
[138] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of the Union clearing markets, COM (2022) 697 (7.12.2022), s 1 of Explanatory Memorandum ('Context of the Proposal').
[139] See EMIR 3.0, art 7a.

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potentially required to clear up to 900 trades in qualifying instruments per year at EU CCPs.[140] This requirement will therefore have an impact on market participants' clearing operations, on the business model of CCPs and the financial market infrastructure groups that they sit within, and, most importantly, on the netting effects outlined earlier in this article.

5. Implications

As the article established in Section 3, a GAL-informed normative framework is particularly well suited to evaluating the public–private hybrid regulatory network in the global clearing sector. This sector, and the policy context which shapes it, have undergone significance changes since Brexit, becoming even more complex, fragile and politicized. Below, we identify three sets of implications from applying a GAL normative framework to the transformed EMIR regime for the recognition of third-country CCP, to proposals in EMIR 3.0, and to the ongoing debates around them.

Fragility of checks and balances

As we have seen, EMIR 2.2 greatly expanded ESMA's powers within the recognition regime for third-country CCPs, at both the application stages and on an ongoing basis, with the latter extending to information, on-site inspection and monitoring powers directly exercisable by ESMA over recognized third-country CCPs. Within the same regime, however, the tiering process, along with the option for Tier 2 CCPs to apply to ESMA for a finding of 'comparable compliance' with the requirements in Articles 16 and Titles IV and V of EMIR, provides means of mitigating certain demands of the EMIR regulatory framework and, therefore, of adjusting ESMA's powers so that they may be exercised in a proportionate way. These important checks on the operation of the recognition regime have, as we noted in Section 4, led some authors to conclude that the 'principle of proportionality is applied throughout the EMIR regulatory framework'.[141] However, even considering that many of the requirements of the recognition process apply regardless of the tier of the applicant CCP, we would suggest a more cautious conclusion about proportionality within this regime, for several reasons.

The first reason for caution is that certain important checks within the regime are dependent on the relevant EU entities' decisions, and the design of this decision-making potentially limits or qualifies the balancing effects in practice. For example, some checks built into the EMIR regime are based upon unilateral and discretionary decisions by the relevant EU decision-maker (most importantly, the underlying 'equivalence' decision). Elsewhere, checks within the regime rest upon decisions which require complex input from a third-country CCP, but do not include measures to provide transparency as to the basis for a specific decision and do not offer any express basis for the CCP to appeal or review. An important example here is the regime for ESMA's assessment of comparable compliance under Article 25a. As required by EMIR, the detailed requirements which have to be shown by a Tier 2 CCP applying for 'comparable compliance' are set out at length in delegated regulation.[142] However, the procedure for submitting a request does not require ESMA to provide a reasoned decision in response, while if the application is refused, a CCP may not reapply 'unless there has been a relevant change to the applicable third-country framework or to the way in which that CCP complies with that framework'.[143] Further, there is no mention of an appeal process in this delegated regulation. Similar points can be made with respect to the process whereby ESMA determines whether a third-country CCP is systemically important for the financial stability of the Union or one or more of its Member States, that is, the vital question in terms of proportionality because it informs which tier applies to an

[140] The level two text which will determine the precise number is not yet available at the time of writing: 900 is the maximum based on the policy decisions delegated to ESMA in the final level 1 text.
[141] Zebregs and de Serière (n 68) 140.
[142] Commission Delegated Regulation (EU) 2020/1304 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and Council with regard to the minimum elements to be assessed by ESMA when assessing third-country CCPs' requests for comparable compliance and the modalities and conditions of that assessment [2020] OJ L305/13.
[143] ibid art 1(6).

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applicant CCP.[144] Such details significantly qualify these important balancing features of the EMIR regime, and they matter even more acutely where the decision-making in question risks becoming politicized, as is the case in the post-Brexit clearing sector.

Second, and relatedly, the EMIR regime is also designed in ways that clearly present risks of regulatory action that is far from proportionate, even though such measures have not been applied to date. The two outstanding case studies in this respect are the non-recognition powers in EMIR, as revised by EMIR 2.2, and the quantitative element to the 'active account' requirement in EMIR 3.0.

As established by ESMA's own assessment of three London-based clearing services, a non-recognition decision may disproportionate because of the associated risk of disrupting netting sets, underlying hedging arrangements and access to clearing (in particular for those parties required to comply with the clearing mandate, and for clients accessing clearing through members rather than directly). Regulatory decisions on these lines, which would increase the costs and burdens of clearing for global members and clients must, in particular, be questioned in the context of the main rule in EMIR, that is, the clearing mandate *requiring* clearing under Article 4. This is especially important given the small number of service providers to begin with, and the fact that access has already been shown to be a long-standing challenge for certain types of clients.[145] The same risks of disruption to the public–private clearing ecosystem, the use of which is mandatory in certain circumstances, is presented by the quantitative requirement to clear a certain number of positions through authorized EU CCPs. This policy rests on the assumption that clearing business currently concentrated at a single third-country CCP can sensibly be split between different CCPs, at least one of which is in the EU.

Furthermore, both non-recognition and the active account requirement risk counter-productive regulatory effects due to the global and hybrid nature of the clearing ecosystem, as identified earlier in the article. These could include EU market participants setting up entities based outside the EU in order to continue to clear in third-country CCPs,[146] and/or reciprocal regulatory measures from host jurisdictions from where the EU aims to repatriate clearing business. This includes not just the UK but potentially also the US and other ambitious jurisdictions seeking to expand their clearing sector.[147] All of these actions would exacerbate fragmentation. For these reasons, if EU policy goals include generating greater volumes of clearing activity within the EU, these goals would be better served by building up the capacity of EU CCPs and facilitating new clearing services within the Union, rather than by extra-territorial intervention aimed at systemically important third-country CCPs.

Transparency and dispute resolution

The application of the expanded EU recognition regime has had the beneficial effect of generating significant new publicly available information about the global clearing sector, making a valuable contribution to transparency. This is an important benefit, ultimately in line with the goals of the post-crisis clearing mandate itself, which also supports more robust decision-making by regulators. By way of example, the ESMA assessment report into the three London-based clearing services conducted under Article 25(2c) of EMIR shone a light on diverse issues including CCP market structure and market share, the number and nature of the CCPs' membership and clients, CCP ownership, governance, and crisis management. Furthermore, it required

[144] EMIR, art 25(2) and Commission Delegated Regulation (EU) 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and 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 one or more of its Member States [2020] OJ L 305/7.

[145] See the findings of the 2018 Derivatives Assessment Team's study, including that 'Some smaller clients and some of those with more directional portfolios report experiencing difficulties gaining and/or maintaining access to central clearing': Financial Stability Board, Incentives to centrally clear OTC derivatives: a post-implementation evaluation of the effects of the G20 financial regulatory reforms- final report (19 November 2018), 3.

[146] Considered in ESMA art 25(2c) Assessment Report, [307]–[311]. While detailed discussion of these challenges is beyond the scope of this article, it is relevant to note the difficulties of cross-legal entity netting between CCPs, so clearing at different CCPs (even within the same group) is unlikely to provide the efficiency benefits of netting at a single CCP.

[147] By way of example, see Pennesi's discussion of the risk of third-country 'retaliatory measures' if the EU were to withdraw equivalence, citing the example of Switzerland's measures after the Commission's decision not to renew its equivalence decision relating to Swiss trading venues after 2019, in Pennesi (n 8) 57.

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ESMA to design and apply a valuable 'costs, benefits and consequences' methodology, written up in detail in the published report.[148] Even with its redactions, the report makes an important contribution to transparency in the sector.

However, GAL scholarship highlights the importance not only of transparency of information and around how it is used in making discrete decisions (eg, in our context, to continue recognition of a clearing service or not) but also of *applying* information for goals such as trust-building, review, enhancing participation and even to support constructive dispute resolution processes.[149] The EMIR recognition regime, however, has little to say about these issues. On the last of these, for example, Howell has highlighted and evaluated the importance of high-level dispute resolution processes in the wake of the UK's withdrawal from the EU, drawing out the particular challenges around their design.[150] Moreover, despite the inevitable challenges, facilitating greater engagement and providing for review and constructive dispute resolution within the recognition regime is particularly important to maintaining good, ongoing regulatory relationships. In this context, as we have shown, globally significant extra-territorial arrangements are currently being designed and applied in a highly politicized environment; meanwhile 'trustful cooperation' between regulators in home and host jurisdictions remains essential, in particular in the context of recovery and resolution of CCPs.[151] And, as we have already emphasized, the vitally important mitigation arrangements underpinning the proportionality of the third-country CCP regime can be unilaterally denied or withdrawn on short notice; against this background, 'trustful co-operation' and the processes to support it greatly matter. Express provisions requiring the publication of reasoned decisions; providing a means of review; allowing for greater engagement by third-country parties, beyond initial points of engagement with ESMA; and expressly providing for constructive, well-designed dispute resolution are all features which would therefore help to promote the legitimacy of the recognition regime for its many different stakeholders.

CCPs and the clearing mandate

Finally, we return to the post-crisis clearing mandate itself, as provided for in Article 4 of EMIR. Given that the GAL framework emphasizes the proportionality and rationality of decision-making within a global regulatory system, it is important to step back and consider how the EU's extra-territorial approach to third-country CCPs fits in with the over-arching policy of mandatory clearing, though this is not something that we are aware of having been addressed in these recent debates.

For example, to what extent could it be disproportionate for regulators to mandate clearing for certain derivatives and also mandate the use of particular services (eg, under EMIR 3.0's active account requirement), in a context where there are so few providers? Is it, potentially, even rational to impose a requirement on a market participant to clear certain contracts, on the basis that a CCP offers important benefits including multilateral netting, robust default management and the promotion of financial stability, but subsequently to impose regulatory rules requiring the use of a service which the market participant, by definition, would not itself choose to use, and whose use potentially undermines the original set of policy goals? Relatedly, even if EU policies were successful in moving significant volumes of clearing business into Member States, given that CCP recovery and resolution powers ultimately remain in the hands of national regulators, there may be unwelcome implications for taxpayers at a national level flowing from a risk created by regulation. This may itself be an irrational outcome for those national taxpayers, when compared to the status quo.

The underlying question is therefore whether EU regulators' current concerns about third-country CCPs in fact mark a moment to which the appropriate response is to revisit the policy of mandatory clearing itself. The underlying aims of the global clearing mandate ushered in after

148 ESMA art 25(2c) Assessment Report.
149 See, eg, Craig (n 72) 754–9; Kingsbury (n 73) 41–50.
150 E Howell, 'Post-'Brexit' Financial Governance: Which Dispute Settlement Framework Should Be Utilised?' (2020) 83 Modern Law Rev 128.
151 ESMA art 25(2c) Assessment Report, [425]. Tellingly, concerns about reliance on 'trustful co-operation' of this kind led to the report suggesting that a new MoU should be negotiated between ESMA and the Bank of England on recovery and resolution.

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the G20's post-crisis statements may, in fact, have become impossible to reconcile with growing concerns about concentration in today's clearing sector. It may also be possible, for example, that the post-crisis clearing mandate has now run its course, because the mandatory use of clearing has established patterns of activity that parties would be likely to maintain on a voluntary basis. Exploring these possibilities is for future work, but, in the meantime, we suggest that it was a missed opportunity when revisiting the clearing mandate was not considered as part of the 2022 EMIR 3.0 impact assessment, even in Annex 6's discussion of 'options to be discarded as an early stage'.[152]

6. Conclusion

The objective of this article has been to contribute to the debates about the regulatory techniques within the EMIR regime for third-country CCPs in a way that speaks to evaluating extra-territorial financial regulation more broadly. As such, the article has argued that a GAL-informed normative framework is a valuable one with which to evaluate the increasingly complex and politicized extra-territorial actions underway within the global financial regulatory system, and it has considered the EMIR regime for third-country CCPs as a paradigm. Through this lens, the article has emphasized the need to consider the global effects of extra-territorial regulatory actions, which are often considered as a bilateral matter as between home and host jurisdictions. It has also evaluated the implications of public–private hybridity for extra-territorial regulation, in particular where private entities operating in a complex, concentrated and interconnected sector are co-opted into the pursuit of public policy goals. Finally, it has demonstrated how practical implications flow from a GAL-informed analysis; in the EMIR context, these range from highlighting the fragility of proportionality arrangements within the recognition regime, through to suggesting a review of the clearing mandate itself. As extra-territorial regulatory measures in the financial markets are becoming more common, more technically complex and more politicized, this article has argued that GAL provides a valuable way both of evaluating substance and of holding decision-makers to account.

[152] EMIR 3.0 Impact Assessment, Annex 6.

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