STUDENT WORK

STUDENT DISSERTATIONS

FINANCE LAW

Cross-border establishment of credit institutions: a study into whether supervision and authorisation facilitate economic integration for Member States and third countries, in light of Brexit

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Introduction

The primary purpose of this article is to address the following question: Does the law on cross-border supervision and authorisation of credit institutions facilitate economic integration through granting full access to the Internal Market? The rationale behind conducting this question derives from the need for convergence and adherence to the co-ordinated global policy for financial supervision in order to promote global financial stability.[1] This is essential for ensuring financial stability as effective supervision of cross-border banking establishments should mitigate against cross-border spill over effects and impacts of banking failures,[2] as seen in the March 2023 Banking Crisis,[3] since many globally active banks can be considered 'too big to fail.'[4] Accordingly, this highlights the need for Europe to have a strong and integrated system of financial regulation and supervision in order to achieve these aims, enforced by the European Union.[5] Therefore, integration in the financial sector should be viewed through the lens of fostering financial stability. This consequently promotes integration through co-ordinated regulations, ensuring financial stability, when granting authorisation of cross-border banking.[6] As well as this, the main way in which the EU promotes integration is through access and enjoyment of the Internal Market, with the focus being on the free movement of capital.[7]

Thus, the main issue to be discussed in this dissertation concerns whether the EU law for cross-border supervision and authorisation of credit institutions facilitates economic integration, and, if not, whether any proposals can be made to facilitate greater economic integration. This is going to be assessed through analysing authorisation and supervision for EEA credit institutions within the Eurozone, and in light of the United Kingdom having left the European Union on the 31st of January 2020, which resulted in a loss of passporting rights for UK banks, leaving them with restricted access to the Internal Market. (Additionally, post-Brexit access of EEA institutions into the UK will be addressed). Accordingly, with the aim of answering the research question, this dissertation will be split into four sections. The first is an overview of the objectives of the laws and regulations governing cross-border establishment of banks. The second section presents the legal framework, attempting to synthesise international

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[1] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, (Jacques de Larosiere) 3.

[2] Basel Committee on Banking Supervision (BCBS), 'The Basel Framework' < https://www.bis.org/baselframework/BaselFramework.pdf > accessed 19 January 2024; 'BCP01 The core principles' Version effective as of 15 December 2019, para 01.5.

[3] Basel Committee on Banking Supervision, 'Report on the 2023 banking turmoil' (October 2023) < https://www.bis.org/bcbs/publ/d555.pdf > last accessed 5 April 2024

[4] Iris H-Y Chiu and Joanna Wilson, *Banking Law and Regulation* (1st edn, Oxford University Press 2019) 7.

[5] Jacques de Larosiere (n 1).

[6] ibid, 4.

[7] Article 63 TFEU.

regulations, the EU's framework for Member States' credit institutions and the UK's framework post-Brexit, and finally discusses how the law achieves the objectives set out, most importantly economic integration. The third section provides a critical analysis into third country access routes that the UK can use to access the Internal Market, while pinpointing any shortcomings and deficiencies of the law. The fourth section aims to analyse a proposal of how greater economic integration can be achieved.

Overall, the main argument running through this dissertation is that while EU law for the supervision and authorisation of EEA credit institutions does facilitate economic integration, EU law relating to third country bank's access to the Internal Market does not fully achieve this objective due to the numerous restrictions on accessing the Internal Market.

Objectives of the law

Following on from the introduction, this section will be concerned around identifying the aims and objectives of the laws governing cross-border banking establishment. This section will commence by summarising the objectives of the Basel Accords as they have been implemented at both supranational and national levels, consequently having a large impact on EU and UK law.

International regulations – The Basel Accords

The foundational objective for the Basel Accords is to ensure and promote effective supervision of banks,[8] from international to national banks, for all member countries of the Bank for International Settlements. The Framework provides a basic minimum standard,[9] to be complied with and implemented by all member countries in their banking sectors.

Within the Framework are 29 core principles[10] applicable to all member countries, which are intended to be the standard for supervision. Through the concept of proportionality,[11] these principles are implemented with the aim of accommodating the financial needs of all countries. Thus, the Basel Committee on Banking Supervision (BCBS) takes into consideration the different states of the individual countries' economies and financial stability, constituting a broad approach used for implementation.[12]

The primary objective for the implementation of the Basel Accords is to ensure the safety and soundness of banks/the banking system[13] and to ensure financial stability.[14] It should be noted that it is not an objective of banking supervision to guarantee the prevention of banking failures.[15] Rather, the aim is to mitigate the adverse impacts of potential banking failures through effective supervision. This is because bank failure is a potential consequence in the business of banking, and banks run this risk at their own expense. To address financial stability, close compliance to the regulations by member countries should create financial stability in all member countries, although financial stability is not guaranteed.[16]

The European Union – free movement of capital

The initial purpose for the establishment of the European Community was, and still is, the integration of Europe.[17] This has been achieved primarily through the formation of the Internal Market, which encompasses the free movement of goods, persons, capital and services.[18] The main aim of the Internal

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[8] Basel Committee on Banking Supervision (BCBS), 'The Basel Framework' < https://www.bis.org/baselframework/BaselFramework.pdf > accessed 19 January 2024; 'BCP01 The core principles' Version effective as of 15 December 2019, para 01.2.
[9] ibid, para 01.1.
[10] BCBS (n 8) 'BCP01, The core principles' Version effective as of 15 December 2019.
[11] ibid, para 01.14.
[12] BCBS (n 10) para 01.14.
[13] BCBS (n 10) para 01.13.
[14] BCBS (n 10) para 01.35.
[15] ibid.
[16] BCBS (n 10) para 01.35.
[17] Preamble TEU, para 1.
[18] Article 26(2) TFEU.

Market is found in Article 3 of the Treaty on European Union[19] (TEU), which states that this market shall work towards the development of Europe through economic growth and price stability.

With the principle objective of the EU and the Internal Market established, the focus will now be on the free movement of capital found in Article 63 of the Treaty on the Functioning of the European Union[20] (TFEU). Article 63 states, '[W]ithin the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.' This is achieved through two main concepts, the first being the approximation of laws and the second, mutual recognition. The approximation of laws, also known as harmonisation, is found in Article 114 TFEU,[21] with the aim of making laws of all Member States as similar as possible. If Member States' laws are different, this can lead to potential obstacles or barriers to free movement within the Internal Market. Thus, harmonisation aims at converging Member States' laws to remove all barriers, whether already in existence or those that could potentially arise. The latter concept of mutual recognition stems from Article 34-36 TFEU,[22] but was established in the case of *Cassis de Dijon*.[23] This is the concept that once a product, in this case, is accepted in one Member State, the prohibition of acceptance into another Member State would constitute an obstacle to free movement in the Internal Market. Thus, these two concepts help to facilitate the integration of capital, and thus the economies between Member States.

Concerning the integration of the European economies, it is acknowledged in the de Larosiere Report[24] that although the Union has its own aims, it must also meet and comply with international standards for the furtherance of global objectives, for example standards set by the Bank for International Settlements, the International Monetary Fund (IMF), the G20[25] and the World Trade Organisation. To do so requires compliance with both international and supranational supervision regulations, and requires that Europe be integrated in order to achieve these aims.[26] Jacques de Larosiere reiterated that, as with the Basel Accords, the aim of supervision within the EU is financial stability achieved through the implementation of these regulations in the financial sector.[27]

Having regard to the aims stated above, this paragraph will discuss the objectives of the Capital Requirements Regulation[28] (CRR) and the Capital Requirements Directive[29] (CRD IV), which together form the single rulebook for credit institutions. Commencing with the CRR, the Commission's reason for proposing this legislation was to restore stability to the banking sector, and that it also implements global standards for credit institutions to harmonise all provisions relating to this area of legislation.[30] The overall aim is to produce effective institution regulation in the Union, and to ensure the operation of services and their establishment without any barriers to trade.[31] The CRD IV's primary objective is to coordinate and harmonise national rules for credit institutions through the supervisory framework.[32] Furthermore, this Directive also aims at enhancing the Internal Market[33] by allowing movement of credit institutions across the Internal Market under the freedom of establishment[34] and freedom to

[19] Article 3(3) TEU.
[20] Article 63 TFEU.
[21] Article 114 TFEU.
[22] Articles 34-36 TFEU.
[23] Case 120/78 *Cassis de Dijon* [1979] ECR 649.
[24] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, (Jacques de Larosiere).
[25] ibid, 3.
[26] Jacques de Larosiere (n 24), 3.
[27] Jacques de Larosiere (n 24), para 149.
[28] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 [2013] OJL 176 (CRR).
[29] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176 (CRD IV).
[30] Commission, 'Proposal for a regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms' COM/2011/0452 final, Recital 1.1.
[31] Recital 11 CRR.
[32] Recital 2 CRD IV.
[33] ibid, Recital 5.
[34] Article 49 TFEU.

provide services.[35] Hence, mutual recognition[36] applies for credit institutions established in one Member State to be established in another, and that there should be no obstacles that constitute unauthorised restrictions.

The United Kingdom's financial regulation

The principle issue to understand in relation to UK banks, especially systemically important banks, is what is termed as 'too big to fail.'[37] This is the concept that banks are of such financial/economic significance, whether at a national or international level, that failure would have detrimental effects and therefore these consequences should be reduced. One way in which banking failure consequences are mitigated is through the overarching aim of ensuring the stability of the financial system, as seen in s 2A Bank of England Act 1998.[38] The two main authoritative bodies concerning the UK's financial regulation are the Financial Conduct Authority[39] (FCA) and the Prudential Regulation Authority[40] (PRA), whose statutory authority comes from the Financial Services Act 2012[41] (FSA 2012), amending the Financial Services and Markets Act 2000[42] (FSMA 2000). Collaboration between these authorities helps to supervise financial firms. The reasoning behind passing FSMA 2000 was to incorporate the advances of globalisation,[43] the aims of market confidence, public awareness, protection of consumers, and the reduction of financial crime in the UK's financial regulation.[44]

Focusing on the dual regulated bodies, the FCA has the strategic objective of ensuring that the relevant markets, i.e. financial markets, function well.[45] While endeavouring to achieve this, the operational objectives of consumer protection and integrity must be adhered to.[46] Concerning the objective of integrity, this includes both the stability and soundness of the financial system and the system not being subject to financial crime.[47] The PRA, which is the main authority responsible for the supervision and regulation of banks, has the general objective of promoting the safety of PRA authorised firms.[48] Under this general aim comes the need to ensure that authorised persons are administered in a way that avoids negative effects on the stability of the financial system, especially the effects of potential failure.[49]

To conclude this section, it is evident that the main objectives of the law are to ensure financial stability through the effective supervision of banks, in order to mitigate adverse impacts in the event of banking failures. On a supranational level, the law is concerned with promoting economic integration throughout the Union and removing restrictions to the Internal Market.

The framework for supervision and authorisation

The previous section sought to provide an overview of the objectives of the law relating to cross-border establishment of banks, filtering down from international to national level. The aim of this section will be to synthesise all such related regulations and laws of cross-border banking, to provide a synopsis of the legal framework to understand how this framework facilitates economic integration by providing access to the Internal Market.

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35 Article 56 TFEU.
36 Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176.
37 Iris H-Y Chiu and Joanna Wilson, *Banking Law and Regulation* (1st edn Oxford, University Press 2019) 7.
38 Bank of England 1998, s 2A.
39 Financial Services and Markets Act 2000 (FSMA 2000), s 1A.
40 ibid, s 2A.
41 Financial Services Act 2012, s 6(1).
42 FSMA 2000.
43 HL Deb, 18th May 2000, vol 613, cols 363.
44 ibid.
45 FSMA 2000, s 1B(2).
46 FSMA 2000, s 1B(3)(a) and (b).
47 FSMA 2000, s 1D(2)(a) and (b).
48 FSMA, s 2B(2).
49 FSMA 2000, s 2B(3)(a) and (b).

The Basel Framework

At an international level, this framework applies to all holding companies, i.e. a company which is a parent entity overseeing all other entities,[50] to ensure that there is adequate supervision of all banking groups and banks. This links back to the idea, that there are some banks that are so complex and consequential in size that measures should be in place to mitigate the potential impacts that bank failure would cause.[51] Thus, this framework aims to establish a global minimum agreement[52] as to the operation of such institutions and supervision of banks to ensure financial stability.[53]

Concerning cross-border banking, the primary aim of core Principle 8[54] is for supervisors to take a forward-looking approach to supervision,[55] which means taking into consideration the risks to which a bank is exposed, by examining the information provided by the banks themselves and national supervisors.[56] This, in turn, leads to supervisors taking into account risks that might potentially lead to financial unrest within a bank, which is crucial for mitigating cross-border spill over effects. Next is Principle 12, which states that supervisor's must perform consolidated supervision[57] by understanding the structure of the relevant banking group and all activities engaged in, whether they be deposit taking/lending or other financial activities. In carrying out consolidated supervision, it ensures banking activities are regulated with the intention of monitoring the governance of banks, to ensure that able staff run the institutions effectively and to avoid financial crime. Next, Principle 13 establishes the relationship between the home and host countries.[58] The aim of this Principle is to ensure that not only is there effective cooperation between home and host supervisors, but also that no bank or their foreign establishment escapes effective supervision.[59] It is presumed that both authorities will carry out their supervisory roles through the communication of necessary information.[60] In doing so, host authorities can supervise institutions within their territory while cooperating with home supervisors responsible for the consolidated supervision of banking groups and all their foreign established entities.[61]

Building on Principle 13, there are four minimum standards for supervision of international banking groups and their establishment.[62] The first is that the home country should be able to capably perform consolidated supervision.[63] Although there is no criteria for this, there is a range of factors to be taken into consideration. For example does the home supervisor receive financial information on a regular basis; can global risks be controlled; is there adequate authorisation procedures by the home country supervisors; and is there routine inspection of foreign entities/affiliates? The second standard is that cross-border banking establishments should receive consent from both the home and host country.[64] This relates back to the concept that no bank should escape supervision, for example those of shell branches or "sister" institutions.[65] Consolidated supervision is carried out by national authorities in a proportionate manner based on the financial state of the country, and ensures effective procedures for

50 Basel Committee on Banking Supervision (BCBS), 'The Basel Framework' < https://www.bis.org/baselframework/BaselFramework.pdf > accessed 19th January 2024; 'SCO10 Introduction' Version effective as of 15 Dec 2019, para 10.2.
51 ibid, 'SCO40 Globally systemically important banks' Version effective as of 9th November 2021, para 40.1.
52 ibid, para 40.2.
53 BCBS (n 50) 'BCP01, The core principles' Version effective as of 15 December 2019, para 01.35.
54 ibid, para 01.79.
55 BCBS (n 53) para 01.80 (2).
56 BCBS (n 53) para 01.80 (6).
57 BCBS (n 53), para 01.89.
58 BCBS (n 53) 1828.
59 BCBS, 'Principles for the Supervision of Banks' Foreign Establishments (May 1983)' < https://www.bis.org/publ/bcbsc312.pdf > accessed 19th February 2024, 2.
60 BCBS (n 53) para 01.93(2).
61 BCBS (n 53) para 01.90(4).
62 BCBS, 'Minimum Standards for the Supervision of International Banking Groups and their Cross-Border Establishments (July 1992)' < https://www.bis.org/publ/bcbsc314.pdf > accessed 18 February 2024.
63 ibid, 3.
64 BCBS (n 62) 3.
65 BCBS 'The Supervision of Cross-Border Banking (October 1996)' < https://www.bis.org/publ/bcbs27.pdf > accessed 18 February 2024, 2.

authorisation of banking groups, cooperation by home/host supervisors and makes sure all authorities understand their roles and responsibilities.

EU supervision

Focusing on supervision in the EU, it is important to recall that economic integration is facilitated through effective supervision ensuring financial stability, which is of great importance when granting authorisation for cross-border activity of credit institutions.

To provide an overview of the supervisory institutions, within the European Banking Union there are three main pillars, namely the Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM) and the Single Deposit Protection Scheme. The focus will be on SSM, which the European Central Bank (ECB) operates through to act as the prudential supervisor of over 6,000 credit institutions in the euro area.[66] Furthermore, the ECB follows the technical standards set by the European Banking Authority (EBA), whose aim is to provide a centralised set of prudential rules for financial institutions within the EU.[67]

The objective of the SSM concerns strengthening integration in the financial sector because of the fragmentation caused by the 2007/08 financial crisis.[68] Furthermore, through the SSM, the implementation of prudential supervision is carried out, applying to all institutions that come under the authority of the ECB, i.e. all Eurozone Member States plus any non-participating Member States which want to come under ECB supervision. With the difference in supervision applied by different supervisors having been one of the reasons for the financial crisis within the SSM,[69] ECB supervision ensures that minimum harmonisation of national laws applies to the majority of Member States. Hence, the ECB works in partnership with the National Competent Authorities (NCA(s)) to both directly and indirectly supervise credit institutions,[70] which ensures the carrying out of consolidated supervision acknowledging the implementation of Principle 12 in the Basel Framework.

The banking sector is overseen by the ECB in two ways. Firstly, the ECB directly supervises significant institutions through Joint Supervisory Teams (JSTs),[71] which have been established for each significant supervised entity within the Member States and are involved in the day-to-day running of supervision.[72] The second method of supervision is indirect supervision through NCAs, who supervise less significant institutions.[73] Furthermore, supervision is also carried out by a college of supervisors, suggested in the Basel Framework to be flexible structures for collaboration, coordination and information sharing.[74] Thus, at a Union level, colleges of supervisors are used for this precise reason for the supervision of the separate entities of banking groups and branches. Within a college of supervisors, the ECB is the consolidating supervisor.[75] However, in non-participating Member States, the ECB is a member, and the NCAs are observers in participation.[76] The ECB can also take the role of being the consolidating

[66] Matthias Haentjens and Pierre de Gioia Carabellese, *European Banking and Financial Law* (2nd edn, Routledge 2020) 106.
[67] ibid, 108.
[68] Recital 2, Council regulation (EU) No 1024/2013 of 15th October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287 (SSM Regulation).
[69] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 596. See also The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' 25 February 2009 < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024 (Jacques de Larosiere).
[70] Article 6 SSM Regulation.
[71] Article 3, Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) [2014] OJ L 141.
[72] European Central Bank | Banking Supervision, 'Supervisory Manual' < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides202401_manual.en.pdf > accessed 22 February 2024, 9.
[73] Article 6(4) SSM Regulation.
[74] Basel Committee on Banking Supervision, 'Principles for effective supervisory colleges (June 2014)' < https://www.bis.org/publ/bcbs287.pdf > accessed 3 March 2024.
[75] Article 9 SSM Framework Regulation.
[76] ibid, Article 10.

(home supervisor) for colleges from non-EU countries, or the host supervisor.[77] It can be argued that all forms of supervision mentioned above highlight changes made after the financial crisis that help to reduce the potential for conflict between home and host supervisors due to the complexity and cost of supervision.[78] This will maximise efficiency in resolving crises and promote effective supervision of banks, which will ensure the safety and soundness of the banking system. This also ensures financial stability that promotes economic integration, as this co-ordinated and regulated supervision carried out by the EU avoids regulatory loopholes that have the potential to undermine financial stability, while promoting a highly competitive integrated financial sector.[79]

EU passporting rights

With the framework regarding supervision being set out, analysis will now be provided of the EU passporting rights regime. Through Article 33 CRD IV, the principles of freedom of establishment[80] and freedom to provide services[81] provide that a credit institution established in one Member State is able to establish itself and provide services in another Member State without having to gain additional authorisation as its activities are subject to mutual recognition.[82] The effective passporting right for credit institution branches is found in Article 17,[83] which states "[H]ost Member States shall not require authorisation or endowment capital for branches of credit institutions authorised in other Member States." Firstly, authorisation must be obtained in the home state,[84] for which the Member States must notify the EBA which develops standards to be met, for example information to be provided by the NCA,[85] or, if the Member State is subject to ECB supervision, the ECB must be notified in order to grant authorisation.[86] It is important for there to be efficient communication between competent authorities, i.e. the home Member State where the institution is primarily established and the host Member State, which will admit the branch into their territory. Once authorisation is granted, the credit institution has passporting rights, and is subject to mutual recognition.[87] The liberal market access provided by the passporting regime promotes the globalisation of the banking sector, facilitating the internationalisation of banks that wish to provide services to global clients,[88] and facilitates the development of structurally and systemically large banks to operate across borders.[89] This limits restrictions on the free movement of capital within the single market furthering economic integration.

To link passporting rights to prudential supervision of credit institution branches, the supervision of the institutions is the responsibility of competent authorities of the home Member State.[90] Notwithstanding this, competent authorities must collaborate closely to supervise such institutions.[91] In accordance with Article 56,[92] it is evident that there has to be a free flow of information between competent authorities in order that they may fulfil their duties to supervise financial sector entities and to maintain the stability of the financial system across the Member States. The exchange of information within the limitations

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77 European Central Bank | Banking Supervision, 'Supervisory Manual' < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides202401_manual.en.pdf > accessed 22 February 2024, 30.

78 Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 577.

79 The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' 25 February 2009 < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 60.

80 Article 49 TFEU.

81 Article 56 TFEU.

82 Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176 (CRD IV).

83 Article 17 CRD IV.

84 Article 8 CRD IV.

85 Article 8(2)(a) CRD IV.

86 Article 14(1-3) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287.

87 Annex I CRD IV.

88 Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 577.

89 ibid, 587.

90 Article 49 CRD IV.

91 Article 50 CRD IV.

92 Article 56 CRD IV.

of professional secrecy[93] and confidentiality[94] will ensure that in the event of potential banking failures, all authorities involved in cross-border supervision of institutions have access to all information necessary for mitigating the risk and impact of failure. It will also coordinate a system of crisis management with the aim of ensuring financial stability within the Union.

UK supervision and authorisation of banks

The main body in charge of regulating banks within the UK is the PRA in conjunction with the FCA. The PRA carries out its prudential supervision of banks on a judgement-based and forward-looking approach to mitigate potential crises and make firms more resilient, thus maintaining the safety and soundness of the financial system[95] and financial stability. The FCA adopts a forward-looking approach, aiming at identifying issues and performing intervention before they crystallise.[96] This is done through proactive, reactive and thematic based approaches to supervision to cover all present and potential problems.[97] Through coordination between these regulators, the exchange of information will help both bodies to achieve statutory objectives, despite acting independently when managing different institutions.[98]

To address the authorisation of all banks within the UK, the procedure is found under Part 4A FSMA 2000.[99] In s.55A[100] the applicant must be an individual or partnership, or in this case a body corporate, for which the PRA is the regulator. Before authorisation can be granted, the threshold conditions[101] must be met. Such conditions include that the bank has its registered head office in the UK,[102] is capable of being supervised by the FCA,[103] and resources available must be appropriate to the functioning of the activities to be enjoyed.[104] With the permission of the FCA, the PRA will give consent to the applicant.[105] In doing so, the institution should be cooperative to both institutions, disclosing any information concerning the institutions that the PRA would reasonably expect. This, in summary, is the process for authorisation within the UK for banks to be able to be established.

Post-Brexit passporting rights of EEA credit institutions

One of the issues to be discussed is the authorisation procedure for EEA institutions post-Brexit. Pre-IP completion day, EU credit institutions were eligible for free admission into the UK under the passporting regime discussed above. Post-Brexit, these rights have been removed for all EU institutions operating in the UK. The main piece of legislation concerning the transitional arrangements, temporarily amending FSMA 2000, is the EEA Passport Rights Regulations 2018.[106]

Thus, the PRA and FCA, post-IP completion day, are still the regulators under the meaning of this Regulation, to approve the application of institutions to continue regulated activities under Part 4A.[107] In accordance with Regulation 8,[108] institutions with permission under this Regulation are treated as

[93] Article 53 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176 (CDR IV).
[94] Article 54 CRD IV.
[95] Bank of England PRA, 'The Prudential Regulation Authority's approach to banking supervision (July 2023)' < https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/banking-approach-2023.pdf > accessed 3 March 2024, 12.
[96] Financial Conduct Authority, 'FCA Handbook' < https://www.handbook.fca.org.uk/handbook > accessed 2 March 2024, SUP 1A.1 Application and purpose, SUP 1A.3.1.
[97] ibid, the scope of the supervision model for firms, SUP 1A.3.4.
[98] Financial Conduct Authority (n 93). The nature of the FCA's relationship with the PRA, SUP 1A.3.8.
[99] Financial Services and Markets Act 2000 (FSMA 2000), Part 4A.
[100] FSMA 2000, s 55A.
[101] FSMA 2000, s 55B.
[102] FSMA 2000, Sch 6 2B(1)(a).
[103] FSMA 2000, Sch 6 2C(1).
[104] FSMA 2000, Sch 6 2D(1).
[105] FSMA 2000, s 55F(2).
[106] The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (EEA Passport Rights).
[107] FSMA 2000, Part 4A.
[108] The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (EEA Passport Rights), Regulation 8(1).

institutions with permission to carry on activities under Part 4A, i.e. those who have authorisation before IP completion day to carry on activities. For this regulation to apply, conditions in Regulation 10[109] must be satisfied, meaning the institutions authorised under section 31(1)(b) or (c) of FSMA 2000,[110] along with Regulation 14.[111] Under Regulation 14, the person must make an application, which has not been withdrawn immediately before IP completion day, and must have notified the relevant regulator, including all information the regulator requires. Approval for such applications, once given, would commence on IP completion day and ends three years thereafter.[112]

To conclude, this section attempted to set out the framework for cross-border supervision and authorisation of banking activity. It is clear that effective supervision and passporting rights facilitate economic integration within the Internal Market through the enjoyment of free movement of capital and consequently promote economic integration within the Union. Concerning the UK, as EEA institutions still have access to the UK banking sector, this promotes financial globalisation transcending national boundaries.[113]

Third country access into the Internal Market after Brexit

While the previous section analysed the procedures for supervision and authorisation of EEA credit institutions and how the framework facilitates and achieves economic integration, this section will address the issue of the restricted access that UK banks have into the Internal Market due to the loss of passporting rights now that the UK is a third country. The main argument to be presented is that EU laws regarding third country access to the Internal Market, for banks, partially achieve the aims and objectives of the law. It is important to remember that the EU needs to achieve full integration in Europe in furtherance of global objectives.[114] Hence, this section will set out EU interests for third country market access and critically analyse third country regimes in order to pinpoint existing deficiencies.

International standards

As stated, the UK's withdrawal from the EU has resulted in a loss of passporting rights – the likes of which achieved maximum mutual recognition[115] of credit institutions within the Union and minimum restrictions to the three freedoms mentioned. Accordingly, with the UK now classed as a third country, there is no set agreement for financial service transactions between the EU and UK, and that all such arrangements follow international standards set by the BCBS, IMF, Financial Stability Board, but more specifically, the rules set by the World Trade Organisation (WTO) in the General Agreement on Trade in Services implemented through the Trade and Cooperation Agreement.'[116] WTO rules govern the establishment of commercial presence between countries,[117] or in this present case, between the EU and UK. Under WTO rules, one nation must not be favoured over another, i.e. Most-Favoured-Nation treatment (MFN),[118] meaning that transactions of a commercial nature cannot favour the UK more than other third countries, or likewise disadvantage the UK more than other third countries. This is furthered by the principle of non-discrimination,[119] which provides that there must not be unnecessary discriminatory measures between countries in order to promote international economic integration.

[109] EEA Passport Rights, Regulation 10(a).
[110] FSMA 2000, s 31(1)(b) and (c).
[111] EEA Passport Rights, Regulation 14(a)(ii).
[112] EEA Passport Rights, Regulation 17(1)(a).
[113] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) European Business Organization Law Review 575, 578.
[114] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 3.
[115] Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176.
[116] Trade and Cooperation Agreement 2020.
[117] World Trade Organisation, Understanding on Commitments in Financial Services, para 5.
[118] Article II GATS.
[119] Article XIII (1), General Agreement on Trade in Services 1995.

Ultimately, in relation to third country access to the Internal Market, the Union will primarily protect its own interests over third country interests.[120] This is because the EU aims at making EU membership desirable by ensuring non-Member countries do not enjoy the same benefits as Member States,[121] thus meaning membership benefits enjoying a degree of exclusivity. Although this technically goes against the principle of MFN treatment,[122] it is permitted as although Member States have the benefits of membership, they also have financial obligations that third countries do not have. Such obligations include Member State national contributions to the EU budget,[123] as a method for the EU to be financed wholly from its own resources,[124] which is used to fund the EU's objectives/policies and contribute towards the progression of Member State's economic development.[125] According to data from 2019, Member State benefits from the single market exceeded six times their contributions, meaning a one-to-six return on investment varying across different Member States, with some benefitting even more.[126] Hence, this is why Union membership benefits, like full access to the Internal Market, enjoy a degree of exclusivity that third countries cannot fully enjoy or take advantage of, as they do not make these kinds of investments to the EU. Furthermore, while the EU is looking to promote economic integration internationally, when considering applications for third country access into the Internal Market the overall financial stability of the country's economy, and their supervisory practices and management of banks should be taken into consideration.[127] In turn, this acts as a defence mechanism for the Union against 'high-impact' third countries, which could have a negative influence on financial stability or market integrity,[128] while opening the door for increased competition on a global scale.

With the EU's interests in mind, under EU legislation there are two main arrangements for the establishment and provision of services by third countries in the Union, which allow market access while prohibiting full enjoyment of the three freedoms within the Internal Market. The first arrangement to be considered is the authorisation of branches[129] by individual Member States. Branches of third country banks authorised in a Member State enjoy the free movement of capital[130] within that particular Member State. This form of establishment is allowed so long as the rules applied to those branches are not more favourable,[131] than those applied to branches of banks of the Member State and the prudential supervision of the third country bank is equivalent to that of the EU.[132] This means that the minimum supervisory and regulatory rules are applied by the competent authorities of the home country,[133] which ensures effective supervision[134] as there will be effective communication between the third country and host State. This allows for supervisory tasks to be assigned to all authorities involved and permits crisis management solutions to be formed, thus ensuring the safety and soundness of the banking system and financial stability for both the EU and the third country. In addition, the ECB expects that the majority

[120] Commission, 'The European economic and financial system: fostering openness, strength and resilience' COM (2021) 23 final, chapter 4.
[121] European Commission, 'Questions & Answers: EU-UK Trade and Cooperation Agreement' (24 December 2020) < https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532 > accessed 13 March 2024.
[122] Article II, General Agreement on Trade in Services 1995.
[123] Articles 310 and 314 TFEU.
[124] Article 311 TFEU.
[125] Commission, 'Benefits of the EU budget' < https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/benefits-eu-budget_en > last accessed 31 May 2024.
[126] ibid; Commission, 'EU budget for the future| Technical briefing on EU's next long-term budget' (5 November 2019) < https://commission.europa.eu/document/download/5f058880-4661-4d50-8796-a71d1e78c984_en?filename=2019-11-05_eu_budget_technical_briefing_-_with_covers.pdf > last accessed 31 May 2024.
[127] Commission, 'Equivalence in the area of financial services' COM (2019) 349 final.
[128] ibid.
[129] Article 47, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176 (CRD IV).
[130] Article 63 TFEU.
[131] Recital 23 CRD IV.
[132] Article 47(3) CRD IV.
[133] Commission Staff Working Document, 'EU equivalence decisions in financial services policy: an assessment' SWD (2017) 102 final, 7.
[134] Articles 48 and 127, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV).

of financial activities be to be carried out within the Union, rather than in a third country.[135] By establishing branches within the Union, this means that services are being offered to EU clients from within the Union rather than from outside, which consequently promotes market access for third countries, while ensuring EU supervision over the branches.

Despite this, it is evident that there is a lack of legal certainty pertaining to the authorisation of branches in the Member State. This is due to each Member State having their own legal systems with different rules regarding authorisation,[136] which evidences a lack of harmonisation in Member State laws. Therefore, this leads to authorisation being landlocked and banks needing a licence in each Member State,[137] hence why this form of authorisation does not enjoy the freedom of establishment[138] or services[139] within the Union, clearly meaning that this restricts the free movement of capital.[140] In turn, this hinders the facilitation of economic integration.

The second form of establishment for third countries is through a subsidiary.[141] It is deemed appropriate that should a subsidiary, which is a separate legal entity from the parent or group company,[142] be established in a Member State it should enjoy mutual recognition of authorisation among all other Member States.[143] This method of establishment has both advantages and disadvantages for third countries. Positively, it provides legal certainty and increases market confidence for the particular subsidiary established within the Union. This is due to the subsidiary enjoying passporting rights, thus meaning that once authorisation is acquired, there can be no withdrawal of this authorisation by individual Member States. Consequently, in contrast to establishing a branch, establishing a subsidiary grants greater access to the Internal Market, promoting economic integration. It is evident that this form of establishment also benefits the EU, as, due to the services being provided primarily within the EU, there is more flow of capital from third countries. For example, it was estimated that UK banks planned to move €1,200 billion to their euro firms.[144] Concerning effective supervision, it can be argued that establishing a subsidiary contributes to and maintains the stability of the financial system,[145] as Article 48 provides for there to be cooperation for consolidated supervision between the Member State and the third country, through the passing of information between the supervisory authorities.[146] This is furthered by the conclusion of cooperation agreements between the Member State and third country to ensure the exchange of information,[147] thus ensuring the safety and soundness of the banking system.

However, although this benefits the Union, as there is minimal restriction to the free movement of capital and it protects the Union's financial stability, for the UK, there would be special difficulties concerning the establishment of a subsidiary within the Union. To establish a subsidiary in a Member

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[135] European Central Bank, 'Brexit: banks should prepare for year-end and beyond' (18 November 2020) < https://www.bankingsupervision.europa.eu/press/publications/newsletter/2020/html/ssm.nl201118_2.en.html > accessed 13 March 2024.
[136] International Regulatory Strategy Group (IRSG), 'The EU's Third Country Regimes and Alternatives to Passporting' <https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf> accessed 13 March 2024, 118.
[137] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4) *European Business Law Review* 679, 690.
[138] Article 49 TFEU.
[139] Article 56 TFEU.
[140] Article 63 TFEU.
[141] Article 48(b) CRD IV.
[142] Article 4(1)(15), Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms [2013] OJ L 176.
[143] Recital 20 CRD IV.
[144] Stephanie Bergbauer and others, 'Implications of Brexit for the EU financial landscape' (Financial Integration and Structure in the Euro Area, March 2020) < https://www.ecb.europa.eu/pub/fie/article/html/ecb.fieart202003_01~690a86d168.en.html > last accessed 10 April 2024.
[145] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) *European Business Organization Law Review* 575, 592.
[146] Article 48 CRD IV.
[147] Article 55 CRD IV.

State would mean having to transfer much of the business from the parent bank,[148] located in the third country, into the subsidiary in order to ensure that the subsidiary has sufficient authority within itself and is not subject to the authority of the parent bank,[149] except for the purpose of supervision. Although this complies with the objective that the majority of banking business should be carried out within the EU, it means the bank will be primarily under the supervision of the EU and not the UK, which may affect the subsidiary from carrying through the group or parent bank's business strategy.[150] Furthermore, by transferring much or all of the business to the subsidiary in the EU, this would mean that the UK parent bank has less control and management over the subsidiary.[151] This could potentially cause disruption to the stability of the UK's financial system in the event that the subsidiary were to fail. Failure would result in loss of passporting rights for banks that chose to take this route, and would weaken the overall parent bank established in the UK, as much of their business would be conducted through this subsidiary.

With these two regimes set out, it is evident that the EU's law for third country cross-border establishment of banks partially achieves the objectives of the law, specifically economic integration, while protecting its own interests. Despite this, several shortcomings of the law have been highlighted, with the main shortcoming relating to the restricted access that the UK along with other third countries have into the Internal Market, which constitute barriers to the free movement of capital. This hinders the facilitation of economic integration within Europe, which the EU should be encouraging in furtherance of global objectives, even at the expense of their own interests.

An equivalence regime for the banking sector?

With the existing regimes set out, it is evident that third country cross-border establishment access to the Internal Market is heavily restricted. Consequently, this shows that EU law does not fully achieve economic integration due to the many restrictions to the free movement of capital, establishment and services, especially in relation to the UK. Therefore, in order to facilitate greater economic integration, it will be proposed that an equivalence regime[152] for credit institutions should be adopted by EU law. It will be argued that this will be for the mutual benefit of both the EU and the UK (and other third countries) while facilitating greater international economic integration. Prior to Brexit, the UK represented a gateway for third countries to access the Internal Market and many global investment banks accessed the euro area from London.[153] Therefore, it would benefit both the EU and the UK, if the UK has greater access to the Internal Market through the potential adoption of an equivalence regime.

The equivalence regime

As there is no official equivalence regime for the banking sector in the EU, apart from a very minor equivalence regime for determining branch access into the EU,[154] the aim of this section will be to analyse what equivalence is and how it operates for third countries. Equivalence can be summed up as a third country's financial framework/regulation for prudential supervision being so similar to that of the EU's that it is considered 'equivalent' to the EU's supervisory framework.[155] There are several equivalence regimes within the European Union enabling third country access to the Internal Market,

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[148] International Regulatory Strategy Group (IRSG), 'The EU's Third Country Regimes and Alternatives to Passporting' < https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf > accessed 13 March 2024, 121.
[149] ibid, 16.
[150] Almudena de la Mata Munoz, 'The Future of Cross-Border Banking after the Crisis: Facing the Challenges through Regulation and Supervision' (2010) 11(4) *European Business Organization Law Review 575*, 580.
[151] IRSG (n 149) 16.
[152] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' 19(4) (2018) *European Business Law Review* 679, 706.
[153] Stephanie Bergbauer and others, 'Implications of Brexit for the EU financial landscape' (March 2020) Financial Integration and Structure in the Euro Area <
https://www.ecb.europa.eu/pub/fie/article/html/ecb.fieart202003_01~690a86d168.en.html > last accessed 27 March 2024.
[154] Article 47(3), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
[155] Commission, 'Equivalence in the area of financial services' COM (2019) 349 final.

for example the equivalence regime for financial markets found in Directive 2014/65/EU[156] and Regulation (EU) No 600/2014.[157] It is evident that the objective of an equivalence regime is to balance the need for financial stability in the EU, while maintaining an open and globally integrated economy.[158] Furthermore, through equivalence regimes the EU promotes regulatory convergence of international standards and increasing the level of supervisory cooperation between third countries.[159]

Advantages of an equivalence regime

Considering the need for MFN treatment and non-discrimination to be complied with, Berger and Badenhoop acknowledge that the introduction of an equivalence regime for the banking sector would comply with these principles. This is because, although the UK would be primarily benefiting from this regime, it would apply to all third countries who choose to take this route to access the Internal Market.[160] Thus, the EU would neither be treating the UK favourably, nor discriminating against other third countries. In turn, this would avoid the situation where the UK would try to negotiate a 'special deal' that would give the UK the benefits of membership without being burdened with the financial obligations other Member States have.[161]

Furthermore, as the EU does not want to grant third countries the same access into the Internal Market as Member States (discussed in the previous section), introducing an equivalence regime would facilitate greater access into the Internal Market without the UK enjoying the same rights as Member States. This would happen for several reasons. First, the authorisation of such a regime can be unilaterally withdrawn[162] by the Commission (as equivalence decisions are unilateral and discretionary acts conducted by the Commission). This is based on several factors such as the third country not complying with EU standards, divergence from the EU financial framework/regulations, and the third country posing a high risk to EU financial stability through,[163] for example, money laundering or the use of shell banks. The ability to withdraw authorisation on such grounds means that the EU is protecting its financial stability and the integrity of the single rulebook, while offering better access to the Internal Market for the UK.[164]

The main approach taken by the EU for equivalence in financial services for supervision involves an assessment of the third country's framework to enable reliance on the third country's regulations and supervisors.[165] Hence, an equivalence regime would seek to make sure that this objective is fulfilled, not only for the sake of financial stability but also to make sure international standards are being adhered to. By encouraging maintaining compliance with international standards, this consequently means similar risks could be addressed by all jurisdictions in a similar manner to safeguard against systemic risks that operate cross-borders. In turn, this would facilitate integration of the EU's financial market, supported by effective supervision to protect against financial instability.[166] Furthermore, Berger and Badenhoop posit that in order to promote effective supervision, a college of supervisors could be established between the relevant NCAs.[167] Thus, along with negotiated agreements[168] between the

[156] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, [2014] OJ L 173.
[157] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L 173.
[158] COM (2019) 349 final (n 156) 3.
[159] Commission Staff Working Document, 'EU equivalence decisions in financial services policy: an assessment' SWD (2017) 102 final, 5.
[160] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4) *European Business Law Review* 679, 694.
[161] David Howarth and Lucia Quaglia, 'Brexit and the Single European Financial Market' (2017) 55(SI) *Journal of Common Market Studies* 149, 161.
[162] Henning Berger and Nikolai Badenhoop (n 161) 707.
[163] COM (2019) 349 final (n 156) 6.
[164] ibid.
[165] COM (2019) 349 final (n 156) 2.
[166] COM (2019) 349 final, (n 156) 3.
[167] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4) *European Business Law Review* 679, 708.
[168] Article 48(1), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV).

NCAs regarding the exercise of supervision and cooperation agreements[169] to facilitate the exchange of information between supervisory authorities, there would be sufficient cooperation between the third country and the host Member State, so that efficient communication of information and risk management would be implemented. Consequently, effective supervision would be carried out by all authorities involved, which ensures the stability of both the EU's and the UK's financial systems. This would allow the EU to respond to supervisory developments and external risks, in order that the EU maintains a prudential framework that is resilient to cross-border activity to protect against negative effects on financial stability.[170]

Finally, through the points mentioned above, equivalence promotes economic integration not just supra nationally across the EU, but internationally. This due to third countries accessing the Internal Market and being able to enjoy the freedoms of capital, establishment and services throughout the Union, which, although it would not permit as much access as the passporting regime, would allow for higher market access than offered by the other routes examined in section three. Furthermore, although authorisation can be unilaterally revoked,[171] authorisation cannot be disallowed by individual Member States, consequently meaning that an equivalence regime removes restrictions on the free movement of capital that exists for the landlocked regime for branches. An equivalence regime for the banking sector would promote economic integration not only in the EU, but also internationally across the European nations that do not participate in the EEA, along with countries in other continents. It would ensure a level playing field for a globally integrated financial services sector through promoting regulatory convergence to international standards and EU financial regulation, while ensuring confidence in the safety and soundness of the EU's financial system as a whole.[172]

Disadvantages of an equivalence regime

Although Berger and Badenhoop[173] provide some good arguments regarding the advantages of adopting an equivalence regime, there are some flaws in introducing this regime for credit institutions for both the UK and other third countries. Concerning the UK, the primary aim for post-Brexit financial cooperation with the EU is for the UK to maintain autonomy over decision-making and the ability to legislate for their own interests,[174] with future cooperation being based on the principles of regulatory autonomy, transparency and stability.[175] Thus, in protection of the UK interests, Moloney[176] highlights the point that introducing an equivalence regime for credit institutions would become highly political for the UK, evidenced by several factors that would need to be taken into consideration, as examined below.

First, although the UK has previously adopted the single rulebook[177] and, according to HM Treasury,[178] the UK's regulatory framework is currently equivalent to that of the EU, the UK would have to maintain equivalence by following new EU developments (regulations and directives) and enact them into UK national law.[179] Whether the UK currently plans to diverge from the EU's framework remains unclear,

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[169] Article 55 CRD IV.
[170] Commission, 'Equivalence in the area of financial services' COM (2019) 349 final, 1.
[171] Henning Berger and Nikolai Badenhoop (n 168) 704.
[172] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 60.
[173] Henning Berger and Nikolai Badenhoop (n 168).
[174] HM Government, *The future relationship between the United Kingdom and the European Union* (Cm 9593, 2018).
[175] 'Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom' < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf < last accessed 31 May 2024, 9.
[176] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 78.
[177] ibid, 78.
[178] HM Treasury, 'The Capital Requirements Regulation Equivalence Directions 2020' < https://www.legislation.gov.uk/uksi/2019/541/pdfs/uksiod_20190541_en_015.pdf > last accessed 27 March 2024.
[179] International Regulatory Strategy Group, 'The EU's Third Country Regimes and Alternatives to Passporting' < https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf > accessed 13 March 2024, 13.

however there are signs that the UK might do this. For example, the Financial Services and Markets Act 2023[180] will revoke all subordinate EU legislation in the area of financial services, when Schedule 1 Part 2 receives Royal Assent, including the EEA Passport Rights Regulation[181] mentioned in the second section. The adoption of EU legislation into national law would go directly against the UK's interest of maintaining regulatory autonomy to enact legislation in accordance with their own interests; rather the UK would have to adopt legislation working in the interests of the EU's objectives and aims to ensure equivalence is maintained.

Furthermore, pre-Brexit, UK had a direct say in policy and decision-making due to the UK being one of the largest EU Member States in terms of GDP and, under qualified majority voting rules, the UK along with France, Germany and Italy, as the largest Member States, could block proposed pieces of financial legislation.[182] Consequently, the UK used its influence to support a more liberal 'market-making' regulatory approach to promote third country access into the EU, as opposed to the stricter approach of 'market-shaping' taken by France and Germany, concerned with safeguarding the EU against financial instability imported from third countries.[183] Now that the UK has left the EU, the approach to third country market access, and indeed the potential adoption of an equivalence regime for the banking sector, may be stricter without the UK's influence to make the financial regulation more market-friendly[184] for third countries. (This can be further evidenced by the proposal of COM (2021) 663 final,[185] to increase harmonisation of secondary legislation regarding supervision and third country branches to converge the fragmented regulatory landscape that exists across Member States, which is set to amend the CRD IV).

In continuation of this point, as the UK is not part of the EEA and is no longer a Member State, the UK would not have a seat or voting power in the supervisory authorities and so would not be able to influence regulations being adopted.[186] For example, pre-Brexit, the UK would often complain about the financial regulations produced in order to get them 'toned down.'[187] Therefore, with the UK now having left the EU, financial regulations adopted by the EU will probably be very different without the UK's contribution, consequently making the regulations adopted less suitable and more burdensome for the UK.[188] That being the case, through participating in the adoption of an equivalence regime for banks, the UK would have very little authority to be able to diverge from the EU's financial framework and regulations, without potentially having their authorisation revoked as their regulatory framework would no longer be considered equivalent.[189]

Consequently, UK would have to follow a highly technical set of rules enforced by the European Supervisory Authorities.[190] Although having effective supervision is at the centre of cross-border establishment of banks internationally, should the UK adopt such a regime this would result in the UK having to enforce stricter supervision or change its approach, due to the complexity of determining equivalence decisions based on supervision.[191] Thus, the UK would essentially be under the jurisdiction

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[180] Financial Services and Markets Act 2023.
[181] The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018.
[182] David Howarth and Lucia Quaglia, 'Brexit and the Single European Financial Market' (2017) 55(SI) *Journal of Common Market Studies* 149, 150.
[183] ibid, 151.
[184] David Howarth and Lucia Quaglia (n 183) 162.
[185] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU.
[186] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 78.
[187] David Howarth and Lucia Quaglia (n 183) 161.
[188] ibid.
[189] International Regulatory Strategy Group, 'The EU's Third Country Regimes and Alternatives to Passporting' <https://www.irsg.co.uk/assets/IRSG-Full-report-The-EUs-third-country-regimes-and-alternatives-to-passporting.pdf> accessed 13 March 2024, 13.
[190] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 79.
[191] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 79.

of the EU's supervisory authorities. These authorities are arguably technocratic, due to the Commission's reliance on the supervisory authorities to adopt highly technical components of the single rulebook[192] to mitigate against risks to financial stability posed by third country participation in the Internal Market and to centralise/align third country financial regulation with the single rulebook. Thus meaning that the UK, again, would not have full independence to enact legislation contrary to the EU's interests and objectives and would ultimately become, through all the points mentioned above, 'rule-taking'[193] which would directly contradict the interest of ensuring post-Brexit regulatory autonomy.

To conclude this section, it is apparent that proposing an equivalence regime to be adopted by the EU, for the banking sector, would mean that the EU facilitates stronger economic integration in Europe, by promoting the centralisation of third country laws with the EU's framework, while removing restrictions in the Internal Market. However, it has become clear that participating in a potential equivalence regime for credit institutions would be increasingly challenging for the UK, due to the multiple objections the UK would have in safeguarding their own interests and potential divergence from the EU financial framework. Nevertheless, it is clear that despite the disadvantages of the UK participating in such a regime, if the UK wanted to have better market access than that provided by existing routes, the UK would have to be willing to compromise. The adoption of an equivalence regime for credit institutions would be the best access route into the Internal Market without the UK having to join the EEA. For the EU, introducing such a regime would protect the EU's interest in not benefitting third countries more than Member States, and protect their overarching aims relating to financial stability and effective supervision.

Conclusions

This conclusion will commence by restating the overall research question of this dissertation: 'Does the law on cross-border supervision and authorisation of credit institutions facilitate economic integration through granting full access to the Internal Market?'

The main argument flowing through this dissertation accepts that EU law regarding supervision and authorisation of Member States' credit institutions facilitates economic integration through largely unrestricted access to and enjoyment of the Internal Market. However, EU law regarding authorisation of third country banks to access the Internal Market does not fully achieve this objective due to restrictions on the free movement of capital,[194] establishment[195] and services[196] within the single market.

To summarise the conclusions reached through this dissertation, section 1 identified the objectives of all laws relevant to cross-border banking activity, understanding how international regulations, EU and UK law facilitate effective supervision of banks, fostering the safety, soundness and stability of the banking and financial system, while at the same time promoting globalisation of financial markets facilitated through economic integration. Section 2 examined the existing legal framework for supervision and authorisation of EEA institutions participating within the single market, and concluded that supervision and authorisation does facilitate maximum economic integration within the EU, through effective supervision and the use of passporting rights subject to mutual recognition. Section 3 concluded that the existing regimes for third countries, while understandably not granting third countries the same benefits as Member States, do embody various restrictions on accessing the Internal Market.

Taking into consideration these conclusions, and after conducting extensive research into this topic, to answer the research question: the law on cross-border supervision and authorisation of credit institutions partially facilitates economic integration. This is because third countries do not enjoy full access to the Internal Market. Although this is achieved for EEA credit institutions within the EU, the existing third

[192] Niamh Moloney, 'Brexit and Financial Services: (Yet) another re-ordering of institutional governance for the EU financial system?' (2018) 55(SI) *Common Market Law Review* 175, 189.
[193] Niamh Moloney, 'Access to the UK Financial Market after the UK Withdrawal from the EU: Disruption, Design, and Diffusion' (2024) 25(1) *European Business Organization Law Review* 25, 31.
[194] Article 63 TFEU.
[195] Article 49 TFEU.
[196] Article 56 TFEU.

country regimes for cross-border banking authorisation embody numerous restrictions to the enjoyment of the fundamental freedoms within the Internal Market, therefore constituting a barrier to integration. Consequently, section 4 aimed to propose that an equivalence regime[197] for the banking sector should be adopted into EU law. There is much scholarly debate surrounding the potential adoption of such a regime, mainly relating to the highly political[198] and legislative nature of complying with such a regime. However, this regime would facilitate greater economic integration to ensure the EU furthers global objectives,[199] while mutually benefitting both the EU and the UK. It would promote greater economic integration and centralisation of third country jurisdictions with the EU, through harmonisation of supervisory regulations/framework and authorisation into the Internal Market.

[197] Henning Berger and Nikolai Badenhoop, 'Financial Services and Brexit: Navigating Towards Future Market Access' (2018) 19(4*) European Business Law Review* 679, 706.
[198] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17(SI) *German Law Journal* 75, 78.
[199] The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere, 'Report' (25 February 2009) < https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf > accessed 5 of February 2024, 3.