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The legal integration of European capital markets: beyond regulatory harmonisation

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CMU: half-full or half-empty?

- **Reasons to be optimistic if we look backward**
 - Single rulebook increasingly integrated
 - Supervisory convergence has developed steadily
- **Reasons to be unsatisfied if we look forward**
 - Capital markets remain essentially national
 - Persisting home biases
 - Market infrastructures remain fragmented



Legal reasons for missing integration (examples)

- **Minimum harmonisation persists in some areas**
- **Express or implied reference to national laws**
 - Preventing autonomous interpretation of EU law
- **Use of standards and open-texture rules**
 - Inevitable for effective regulation, but local interpretations
- **Unaddressed relationship between private law and CMU/SIU measures**
 - Private law principles can add on top of EU law



Fixing legal fragmentation

- Enrolling market participants in shaping the legal framework
 - Bottom-up approach to complement top-down architecture
- Enhancing the role of conflict-of-law rules
 - Clearer framework needed – a special regime?
 - More space to market participants' choice
- The role of data governance
 - Harmonisation through standardization of production process?
 - Data spaces for supervisors and courts



Risk of conflicting interpretations (retail market)

Financial service provider based in Country A

Determines NCA (with its interpret. of COBs)

Performing services to retail investor in Country B

Determines applicable law



Securities/bank account in Country C

Determines (in part) jurisdiction for tortious liability (including pre-contractual)

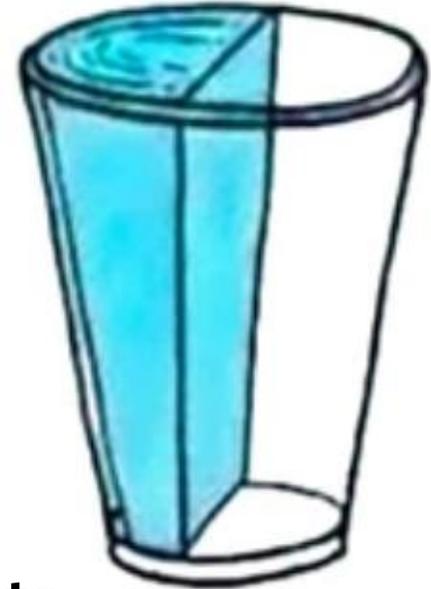
New conflict-of-laws regime

- **Higher predictability of litigation settings**
 - NCA, applicable law, and jurisdiction
- **Leveraging on multiple single authorities in the CMU**
 - When connecting factors enable concentration
 - The example of bonds and UCITS markets
- **Fostering uniformity through negative integration and/or strengthening Member States' incentives to support centralisation of supervision**
 - At least, NCAs play a role in the ESAs' governance



The (un-)expected role of data

- **Integrating the market for the raw materials can help integrate CMU**
 - Harmonisation through standardization of production process
- **Some positive effects may come from pending reforms**
 - Circulation of standardised client info (RIS; FIDA)
 - ESAP as the European EDGAR; CTP as the European NMS
 - ESAs as data hub to support NCAs
- **Data governance in uncharted territories may deliver further results**
 - Law as code approach in supporting RegTech and SupTech
 - Circulation of court decisions across the borders



A new *lex mercatoria* for the CMU?

- **Learning from the past: *lex mercatoria***
 - Supranational by definition
 - The case of negotiable instruments
- **Leveraging on the 28th regime**
 - Supranational by definition
 - We need to work on:
 - Autonomy of the 28th regime vis-à-vis national laws
 - The organisation of Courts





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Thank you