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The Legal Integration of European Capital Markets: Beyond Regulatory Harmonisation

Part I – Introduction

1. *EU capital markets integration: a process (still) in the making*

Financial markets integration has long been a high priority on the European agenda. From the very inception of the integration project enshrined in the Treaty of Rome, European policymakers have tried to tackle the barriers to the free circulation of capitals and to the free provision of financial services across the borders, with or without an establishment in the country of destination. The reasons for this integration process are manifold, and all of them contribute to explaining the crucial role of financial services in the European economic context. First, financial services are a market on their own and, therefore, the reduction of transaction costs for their cross-border provision is an efficiency-enhancing strategy just like in any other market. Second, broader capital markets facilitate risk management through diversification and allow firms to tap broader sources of funding. Third, more homogeneous and intertwined capital markets buttress the Economic and Monetary Union (EMU), because this can hardly support a single monetary policy in fragmented financial systems.

Much progress has been made since the early steps of financial markets integration, but it is a widely acknowledged fact that this progress has to date fallen short of delivering truly integrated capital markets in the EU. This has been emphasized recently in the 2024 Draghi and Letta reports ("The future of European competitiveness"[1] and "Much more than a Market"[2]), as well as in the most recent policy initiatives of the EU Commission, such as the 2025 Competitiveness Compass. This paper focuses on the integration process that falls within the scope of the Capital Markets Union (CMU[3]) and, more recently, of the Savings and Investments Union (SIU[4]), as a result of the Commission's renewed commitment towards the creation of unified capital markets envisaged in its latest Communication on the matter. The aim of this paper is to highlight some of the legal reasons why capital markets still suffer from fragmentation. In particular, it addresses some of the shortcomings that afflict the CMU project from the point of view of regulatory and supervisory integration, while also showing that the SIU does not seem to be immune from the same concerns. As the analysis will show, some margins still exist to reach a higher level of harmonisation and integration within the CMU. However, even fully harmonised rules on the books are unlikely to lead,

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[1] *The future of European competitiveness*, Report by Mario Draghi (2024), available at https://commission.europa.eu.

[2] *Much More than a Market*, Report by Enrico Letta (2024), available at https://www.consilium.europa.eu.

[3] See European Commission, *Action Plan on Building a Capital Markets Union* (COM(2015) 468 final) (30 September 2015); Id., A Capital Markets Union for people and businesses – new action plan (COM(2020) 590 final) (24 September 2020).

[4] European Commission, *Savings and Investments Union. A Strategy to Foster Citizens' Wealth and Economic Competitiveness in the EU* (COM(2025) 124 final), available at https://finance.ec.europa.eu.

on their own, to a truly homogeneous regulatory framework across the EU. This ambitious outcome requires policymakers to pay more attention to supervision and enforcement and, within these areas, to the crucial role of data and data governance in capital markets.

Despite the reiterated efforts towards maximum and complete harmonization, including the recent attempt to create a single rulebook for EU capital markets law, capital markets integration is still a process in the making in the Union as fragmentation among national systems persists.[5] As a result, regulatory and supervisory divergence is widely perceived as an obstacle to the creation of a true CMU. This paper shows that, while some room remains for further regulatory convergence, many differences among national legal systems are unlikely to disappear in the short run. Therefore, a reasonable policy approach should focus on how to best manage those differences (whether these are efficient or not) through the coordination of the enforcement agents at both public and private level. This requires, in more detail, a legal context that facilitates smoother transactions across the borders as well as enhanced coordination among national competent authorities (NCAs) and between public and private actors.

The main policy implication of the paper is that, among the regulatory tools that can contribute to achieving these outcomes, lawmakers should focus on those that leverage, in various fashions, on private parties' incentives. As integrating capital markets requires proper coordination among a full array of policies, there is certainly no silver bullet that can on its own remove the persisting barriers among national systems. However, two strategies are worth considering in that regard. The first one is a better use of conflict-of-law rules so as to give more room to market participants' preferences. The secondo one is to delineate and adequate data governance for financial information.

While this paper concentrates on some legal determinants for the lack of a truly integrated market in the Union, there are obviously other reasons for the persisting fragmentation of European capital markets. In an ideal setting, prices of financial assets in the CMU should reflect their risk-adjusted expected returns with little or no country-specific effects. Remaining legal frictions affecting cross-border investments are certainly not the only reason why this is not yet the case within the Union – and not even within the euro area, where the single monetary policy fosters the convergence of interest rates.[6]

Contributing to market fragmentation are also other factors, including persisting macroeconomic imbalances, which other convergence tools such as the budgetary and economic coordination measures address. Moreover, the flexible exemptions in the European bank resolution regime justify some fears that bailouts will still be possible beyond the residual role they have in the Bank Recovery and Resolution Directive and, as the case may be, the Regulation on the Single Resolution Mechanism (Directive 2014/59/EU and Regulation (EU) No 806/2014). This is perceived as a potential conduit for the doom-loop that has affected the stability of some Member States during the last financial crises. In this regard, while there is no doubt that a fully-fledged CMU can support a strong Banking Union (EBU), the reverse is also true.

Besides the fears surrounding macroeconomic imbalances and their effects on cross-border investments, one should also not overlook other elements whose exogenous nature makes them hard to address through regulatory tools, at least in their traditional shapes. These include the well-known problem of home bias, whether determined by bounded rationality or by asymmetric information on systems other than that of the investor's country of origin, possibly due to language barriers, as well.

These and other factors are not directly linked to capital market law and will not therefore be further considered here. In this paper, the focus is rather on legal barriers or, in any event, on factual

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[5] Luis de Guindos, 'Europe needs a fully-fledged capital markets union – now more than ever' (2 September 2020) The ECB Blog, available at https://www.ecb.europa.eu; Florian Heider et al, 'The Geopolitical Case for CMU and Two Different Pathways Toward Capital Market Integration', 2024 Safe White Paper No 102, available at https://safe-frankfurt.de.

[6] Paul De Grauwe, *Economics of Monetary Union* (OUP 2020), 129, 246.

barriers that the law is still struggling to tackle and are therefore, in this sense, still legal in their nature. The aim is to provide a concise map of selected legal problems that can illustrate how data regulation could significantly contribute to building a CMU.

The paper is divided in three parts. The first part carries out an assessment of the state of legal integration in European capital markets regulation. It shows, based on a series of examples, how the project of having a Single Rulebook for the CMU did not deliver the expected results in many areas. In the light of the shortcomings of the current policies for legal integration, the paper submits that new approaches should complement traditional regulatory harmonisation by enrolling market participants' incentives to foster capital market integration. One of such new approaches is market participants' choice of law and jurisdiction, and the other is strengthened data governance, which are addressed in the second and third part of the paper, respectively.

The second part of the paper, focused on choice of law and jurisdiction, shows that while some progresses towards integration can still be made through traditional regulatory measures aimed at unifying national legal systems, mutual recognition and the negative harmonization should be better exploited to this end. In so doing, more room should be left for markets' participants choice concerning applicable law and jurisdiction, so as to foster capital markets integration through the creation of financial centres and the positive network externalities these develop in terms of specialisation. Moreover, policymakers should focus more on enhanced coordination among national supervisors and between public and private actors involved in enforcement.

This, in turn, requires proper regulation of data, as the third part of the paper explains. Even in the new context of data-driven integration, diverging national interpretations of common EU rules will continue to hinder cross-border transactions unless data and their governance support a better management of these persisting regulatory divergencies. The paper therefore provides a concise overview of how data are at the heart of the most recent developments in the CMU and SIU and how this will affect the activities of listed companies, investment service providers, trading venues and, ultimately, investors.

Part II – Legal barriers and regulatory harmonization

2. *Maximum and complete harmonisation?*

A traditional source of ineffectiveness that has long affected the regulatory integration EU financial markets is the insufficient or unclear level of harmonisation.

While other classifications are possible, it is convenient to distinguish the different forms of harmonisation along with two parameters – intensity and scope.[7] The intensity of harmonisation depends on the harmonisation method (e.g. maximum vs minimum), which defines the remaining space for national choices (or the lack thereof) within the scope of application of the European law measures method. Minimum harmonisation allows Member States to adopt national measures that are more restrictive than those set for by the EU provisions. This leeway is subject to the general requirement that more restrictive measures should not infringe the Treaties and, in particular, should not create obstacles to the free provision of financial services (with or without establishment) or to the free movement of capital as specified in Articles 49, 56, and 63 TFEU, respectively. In principle, maximum harmonisation does not leave any margin of manoeuvre to the Member States, instead.

[7] For a broadly similar classification in the field of securities law see Luca Enriques and Matteo Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' in Paul Krüger Andersen and Karsten Engsig Sørensen (eds), *Company Law and Finance* (Tomson-Sweet & Maxwell, 2008), 167, who classify the different dimensions of harmonisation as: (i) substantive v. conflict-of-law; (ii) comprehensive v. partial; (iii) maximum v. minimum; (iv) and mandatory v. optional.

Rather, Member States are just required to apply or implement EU rules with no option to make them stricter (let alone softer). The scope of the harmonisation identifies the areas that EU legal acts covers and that are, therefore, subject to some form of pre-emption of national measures. Complete harmonisation prevents Member States from adopting national measures in areas falling into the scope of application of the relevant EU law, while partial harmonisation leaves leeway to intervene in those areas provided that there is no conflict with EU rules.

The creation of a single rulebook inevitably reduces the scope of subsidiarity in a substantive sense, together with the minimum harmonisation principle this tends to foster. Rather, the single rulebook relies on the procedural implications of that principle, particularly during impact assessments.[8] Nonetheless, harmonisation through directives remains the integration tool for significant parts of the CMU architecture.[9] Whether this ensures a sufficient level of regulatory homogeneity is questionable, but sometimes the most pressing problem is rather the vague qualifications of the level of harmonisation EU measures are meant to deliver, because this leads to uncertainty.

It is relatively common for EU secondary legislation to omit any classifications concerning the scope and the intensity of the harmonisation it sets forth.[10] Even when the law sheds some light on this matter, the qualification may refer to some provisions only, which leaves the default regime applicable to the rest of the legislative act uncertain. This problem is widespread across EU measures that foster market integration, including those focussing on services,[11] and financial services are no exception. Again, some examples will clarify the point.

The first relevant example comes from the Markets in Financial Instruments Directive (Directive 2014/65/EU – MiFID II). That Directive is unambiguous on the nature and scope of the harmonisation when it addresses conduct-of-business rules for banks and investment firms in the provision of investment services. In this area, the Directive explicitly allows for more restrictive national measures only on an exceptional basis, and only when these are grounded on objective reasons and meet a proportionality test. Moreover, Member States can invoke only specific features in their national markets' structure that may create a risk to investor protection and market integrity (Article 24(12) MiFID II). The procedural lining for the adoption of super-equivalent measures is the duty to notify their content, two months ahead of their entry into force, to the Commission, which provides an opinion.[12]

These rules define a clear framework for the adoption of stricter national measures, but their scope of application does not go beyond conduct-of-business rules. In other areas of MiFID II, such as the requirements for trading venues (including regulated markets) and for the provision of listing and trading services, the limits for additional national measures are less clear. As a consequence, national interpretations still affect the level of autonomy that each Member State grant to trading venue operators,[13] which may prevent further aggregations.[14] In turn, reduced aggregation of trading venues broadens the space left to data spaces, as fragmentation of liquidity determines fragmentation of market data and, hence, the need to consolidate them.

[8] Ton van den Brink, 'Towards an ever clearer division of authority between the European Union and the Member States?' in Ton van den Brink et al (eds), *Sovereignty in the shared legal order of the EU: core values of regulation and enforcement* (Intersentia 2015), 229, 231.
[9] CEPS, ECMI and ECRI, Proposal for a CEPS-ECMI-ECRI Task Force – Adjusting the EU's regulatory process and supervisory structures (2025), available at https://www.ecmi.eu.
[10] See Piet Jan Slot, 'Harmonisation' (1996) 21 European Law Review 378, 388; van den Brink (n 8), 237-8.
[11] On the uncertainty concerning Directive 2006/123/EC (EU Services Directive) see Catherine Barnard, 'Unravelling the Services Directive' (2008) 24 Common Market Law Review 323, 367.
[12] These rules seem to take inspiration from the mechanisms provided under Article 114(4), (5) and (6) TFEU, with some material adaptations.
[13] See on this matter ESMA, Opinion to support supervisory convergence in the area of secondary markets in the context of the United Kingdom withdrawing from the European Union (ESMA70-154-270) (13 July 2017).
[14] CEPS, Time to re-energise the EU's capital markets (CEPS 2022), available at https://www.ceps.eu/ceps-publications.

3. *Divergent interpretations of general provisions in EU law*

There are, however, more substantive reasons why the single rulebook for capital markets may not deliver maximum and complete harmonisation, irrespective of its (in)ability to curb Member State options and of the nature of its components as directives or regulations. One of these reasons is the use of general provisions (or standards) in EU law.

General provisions play an essential role in EU law, just like in any other legal system. Such broad standards are often necessary to fill gaps in the application of more detailed rules, as these may overlook some specific problems that practical cases create. In this regard, general provisions address regulatory incompleteness, which inevitably affects any regulatory system, just like contractual incompleteness is an inescapable feature of private bargaining.

A good example is the duty of investment firms to act in accordance with the best interest of their clients.[15] This duty requires investment service providers to perform their role so that it does not go to the detriment of their counterparty, whose interest they are bound to protect. In the field of investment services, specific rules of conduct specify how investment firms and other providers of investment services shall behave to cater for the interest of their clients. These are very detailed rules that calibrate the level of protection depending on the transactional or fiduciary nature of the service and on the nature of the client involved (Article 25 (2) and (3) Directive 2014/65/EU on markets in financial instruments – MiFID II). For some transactional services such as order transmission and execution (brokerage), most of these detailed rules do not apply, subject to adequate disclosure, as long as the service is provided upon the client's initiative and concerns non-complex instruments, such as listed shares or bonds (execution-only regime – Article 25(4) MiFID II).[16] In spite of these exemptions, the general duty to act in the client's best interest continues to apply even to execution-only services.[17] This shows how that general provision, just like many others in EU financial law, can perform as a gap-filler in the absence of more detailed provisions. In such context, the principle expands the scope of application of EU law to partially compensate for the waiver of more detailed harmonisation measures.

But general standards of conduct may also play a role within the scope of application of more detailed rules. In particular, they can help interpret those detailed rules whenever their guidance is ambiguous or, in any event, leaves room for different outcomes. For instance, the duty to act in the best interest of the client applies to the remuneration of investment firms' staff even if such remuneration is also subject to more detailed rules (Article 24(10) MiFID II; Articles 30 to 34 Directive – Investment Firms Directive)[18]. By the same token, this and other general provisions may apply on top of detailed conduct of business rules when these are not able, in and of themselves, to always achieve key regulatory objectives such as investor protection.[19]

Irrespective of their specific function as gap-fillers or interpretive criteria, general provisions may lead to divergent enforcement practices at the national level. This is to some extent connected with their very same function, as flexibility is at the same time their added value, in terms of effectiveness,

[15] See Luca Enriques and Matteo Gargantini, 'The Overarching Duty to Act in the Best Interest of the Client in MiFID II' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets* (Oxford: Oxford University Press, 2017), 92.
[16] See ESMA, *Consultation Paper. Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements* (ESMA35-36-2159) (29 January 2021), 6, 15 (indicating Art. 25(4) MiFID II as the legal basis for execution-only services).
[17] An even lighter regime applies to transactional services involving the subset of professional investors which included banks, investment firms and asset managers (eligible counterparties – Article 30 MiFID II), as in this case also the duty to act in accordance with the best interest of the counterparty is waived.
[18] See in particular Article 30(1)(e), requiring investment firms to have remuneration policies in place that avoid conflicts of interest.
[19] Enriques and Gargantini (n 15).

and their drawback, in terms of consistency. Compared to their equivalents in national contractual laws (on which see section 5.2 below), these standards may receive clarification through requests for preliminary rulings brought before the CJEU, which facilitates consistency across the EU. However, the ability of Article 267 TFEU to ensure uniform application of general provisions remains limited, if one considers that only occasionally can divergent views between supervisors and supervised entities reach national courts, first, and the CJEU, then.

4. *Divergent interpretations of specific provisions in EU law*

General provisions (or standards) leave room for interpretation also from a supervisory perspective, because they grant NCAs a discretion they do not enjoy with more specific rules. Therefore, those provisions facilitate divergent national application of EU rules, even when these are of a maximum harmonisation nature or take the form of regulations.

Cognizant of these consequences, European policymakers often try to detail the implications of general principles, although at the cost of reduced flexibility. Once again, the examples are countless, and this paper will only focus on those where this specification exercise falls short of ensuring uniform interpretation at the national level. For instance, a great deal of uncertainty has traditionally originated in the issuer duty to disclose information referring to events that have not yet occurred, but that are likely to do so.[20]

To dispel these doubts, the recent Listing Act (Regulation (EU) 2024/2809) has specified that disclosure for a protracted process shall only take place when the final event has occurred—a level of development that the Commission will help clarify through a delegated act.[21] This is an important step towards legal certainty, although some issues will remain. For instance, the question remains open as to the treatment of events that do not occur in stages, thus being subject to the general duty to disclose prospective events that are likely. Another open issue that will most likely lead to divergent interpretation is whether, and to what extent, information concerning the impact of the issuer's business on sustainability factors can qualify as inside information.[22]

To address the same concerns surrounding early disclosure of inside information, issuers were allowed to postpone the publication of inside information they are bound to make public when – among other conditions – the delay was in the legitimate interest of issuers and was not likely to mislead the public (old Article 17(4) MAR). Because terms like 'legitimate interest' and 'mislead' were quite generic, the level 1 Regulation delegated ESMA to adopt guidelines to clarify them. This solution did not deliver complete harmonisation, however, especially as regards the need that delay not be misleading.[23] Hence, the Listing Act recently replaced this condition for delay with the requirement that need that retained information does not contradict the latest public announcements or other issuer communications on the same matter (Recital 61 Listing Act; new Article 17(4)(b) MAR). This being the most problematic criterion to apply, the Listing Act delegates the Commission to define 'where necessary', a non-exhaustive list of situations where such a contrast between previous and subsequent announcement exists.[24]

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[20] Recently Matteo Gargantini and Carmine Di Noia, 'Disclosure of Inside Information', in Rüdiger Veil (ed), *Regulating EU Capital Markets Union: Disclosure and Market Conduct in a Securities Code* (OUP forthcoming 2025).

[21] See ESMA, Final Report. Technical advice concerning MAR and MiFID II SME GM (ESMA74-1103241886-1086) (7 May 2025).

[22] See, with different opinions, Mülbert, Peter O. and Sajnovits, Alexander, 'The Inside Information Regime of the MAR and the Rise of the ESG Era' (2021) 18 European Company and Financial Law Review 256; Rüdiger Veil, Marc Wiesner and Moritz Reichert, 'Disclosure and Enforcement under the EU Listing Act' (2022) 19 European Company and Financial Law Review 445.

[23] Gargantini and Di Noia (n 20).

[24] See now ESMA (n 21).

Time will tell whether this new framework will provide more legal certainty, especially because it is essentially based on the previous ESMA Guidelines on the same matter. For sure, there is no certainty that NCAs will resolve differences as regards the exceptional or physiological nature of delay as a way to address uncertainties surrounding disclosure duties. In fact, while ESMA seems to consider the remedy to have an exceptional nature,[25] some NCAs seem to allow for more flexibility,[26] possibly to compensate for the persisting concerns related to adopting a single definition of inside information for both insider dealing and disclosure duties.[27]

Sometimes, EU law also sets out standards that are directly addressing how NCAs should carry out their functions. Prospectus publication requires preliminary approval by the pertinent NCA, and EU law specifies the criteria for the scrutiny such authority must run. Despite the promising results of the 2022 ESMA Peer Review on this topic,[28] persisting divergences in this regard led the Listing Act to delegate the Commission to adopt acts specifying the criteria for the scrutiny of prospectuses – including its completeness, comprehensibility and consistency – as well as their approval procedure. Among the matters to specify are the circumstances under which NCAs are allowed to use additional criteria for the scrutiny of the prospectus or to require additional information. Remarkably, the Commission has also the power to determine the maximum duration of the scrutiny of the prospectus by NCAs (new Article 20(11) Prospectus Regulation) is to be finalised and a decision reached by the competent authority on whether that prospectus is approved or the approval is refused and the review process terminated, and the conditions for possible derogations from that timeframe.

Once again, time will tell whether this combination of Level 1 and Level 2 measures will deliver, but the ESMA suggestion to set the deadlines for approval at 120 working days (which can be further extended for additional 90 working days) still leave broad room for national variation in this regard.[29] To some extent, national divergences in the NCA liability regimes may also play a role in increasing such inconsistencies, because supervisors that are more easily held accountable for misleading information within prospectuses will understandably try to protect themselves with stricter scrutiny of the documents.[30]

Even legal concepts that are not necessarily ‘general’ from the point of view of their hierarchical ranking or of their scope of application may nonetheless be open to interpretation because of their open texture, which refers to matters of fact or aspects that are not harmonised. This may easily occur when explicit or implicit references to national laws prevent autonomous interpretation of European measures. For instance, a key definition for the whole CMU is the notion of ‘transferable security’, which is the core element of the broader concept of ‘financial instrument’ and, therefore, of investment services and trading venues, as well as of crowdfunding services among the others (Article 4(1)(15), (24), (44), and Section C Annex I MiFID II; Article 2(1)(a) and (m) Regulation (EU)

[25] ESMA, Policy orientations on possible implementing measures under the Market Abuse Regulation. Discussion Paper (ESMA/2013/1649) (14 November 2013), § 304; Id., Guidelines on the Market Abuse Regulation – market soundings and delay of disclosure of inside information. Final Report (ESMA/2016/1130), 13 July 2016, § 52.

[26] Consob, *Adozione delle Linee Guida in materia di “Gestione delle Informazioni privilegiate” e “Raccomandazioni di investimento”. Relazione illustrativa* (13 October 2017), 7, available at www.consob.it; Id. *Proposta di adozione di due comunicazioni recanti l’adozione delle Guide Operative “Gestione delle Informazioni privilegiate” e “Raccomandazioni di investimento”. Documento di consultazione* (6 April 2017), 5 s., available at www.consob.it (recommending issuers make regular use of the opportunity of delaying publication of inside information).

[27] Technical Expert Stakeholder Group (TESG) on SMEs, *Empowering EU capital markets for SMEs - Making listing cool again. Final Report* (May 2021), 74, available at https://ec.europa.eu; European Commission, *Targeted Consultation – Listing Act: Making Public Capital Markets More Attractive for EU Companies and Facilitating Access to Capital for SMEs* (19 November 2021), 36-7, at https://ec.europa.eu.

[28] ESMA, *Peer review of the scrutiny and approval procedures of prospectuses by competent authorities. Peer review report* (ESMA42-111-7170) (21 July 2022), 31-7, available at https://www.esma.europa.eu.

[29] ESMA, Consultation Paper on draft technical advice concerning the Prospectus Regulation and on updating the CDR on metadata (ESMA32-117195963-1276) (24 October 2024).

[30] For a comparative study see Danny Busch et al (eds), *Liability of Financial Supervisors and Resolution Authorities* (OUP 2022).

2020/1503 on European crowdfunding service providers). One of the essential elements of transferable securities is their ability to be negotiated on capital markets, but this may depend on the applicable national laws and on their – sometimes uncertain – interpretations. This is more often the case with some borderline assets such as shares in private limited liability companies and loans.[31] Remarkably, the need to identify a more precise boundary for these concepts emerged in the context of the Market in Crypto-Assets Regulation (Regulation (EU) 2023/1114 on markets in crypto-assets – MiCAR), because this does not apply to crypto-assets that qualify as financial instruments (Article 2(4)(a)).

These and other divergent interpretations at national level reduce the homogeneity of the regulatory environment, which is one of the essential features of the single rulebook as a pillar of the CMU. They may also be an obstacle to the cross-border provision of financial services when, for the reasons we will explore in the following subsections, they lead to conflicting indications by the pertinent NCA and the competent court of jurisdiction.

An example that is particularly apt to illustrate the point relates to the scope of application of the EU regime for investment services to dealing on own account. A remarkable feature of that regime is that the bulk of MiFID II rules of conduct applies to investment services alone, but the MiFID II surprisingly does not provide an overarching definition of 'investment services'. Rather, MiFID II provides a list of activities collectively labelled as 'investment services and activities' (Article 4(1)(2) and Annex I(A)), and then defines each of them without specifying when the investment firm is providing a service or carrying out an activity. The boundary between the two situations may be blurred, however, and uncertainty is particularly pervasive for dealing on own account.[32] This is normally acknowledged to be an activity, as confirmed by the broad exemption from applicability of MiFID II rules (Article 2(1)(d) MiFID II). However, the exemption does not apply when dealing on own account is provided when executing client orders (Article 2(1)(d)(iv)), as this entails a form of discretion by an investment firm acting on behalf of the client, who relies on that investment firm's ability to get the best possible conditions to the client's benefit (Article 27). In other words, investment services are prone to agency problems, while dealing on own account is not.

Uncertainty about the scope of application of MiFID II originates from the fact that whether an investment firm is acting on behalf of customers, and is therefore executing an order in their interest, also depends on the parties' expectations concerning their respective rights and duties, and on whether the law, as interpreted by NCAs and courts, gives protection to those expectations. In some cases, MiFID II helps clarify the applicable regime. For instance, primary market transactions amounting to direct placement of own products by banks and investment firms always qualify as 'execution of orders on behalf of clients' (Article 4(1)(5) MiFID II; Article 41 Regulation (EU) 2017/565). This provision seems relatively straightforward, although some uncertainties remain concerning its scope of application. Some scholars believe that banks and investment firms are not subject to the regime for order execution when they are merely acting in the primary market in their capacity as issuers without servicing the client.[33] The CJEU seems to have taken a more protective approach when dealing with the matter, to the point that any transaction on primary markets concerning financial instruments issued by a bank or an investment firm shall be regarded as a service.[34] Other interpretations tend to broaden the scope of application of the rule even more, based on the

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[31] Anne Hakvoort, 'Secondary Trading of Crowdfunding Investments' in Pietro Ortolani and Marije Louisse (eds), *The EU Crowdfunding Regulation* (OUP 2021), § 13.45-54; ESMA, *Annex 1 – Legal qualification of crypto-assets – survey to NCAs* (ESMA50-157-1384) (January 2019), part 3, p. 4-11, available at https://www.esma.europa.eu.

[32] As per Art. 4(1)(6) MiFID II, dealing on own account means 'trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments.'

[33] Kitty Lieverse, 'The Scope of MiFID II' in Busch and Ferrarini (n 15), 29-30.

[34] CJEU, C-688/15, *Anisimovienė and Others (Snoras)*, 22 March 2018. For an analysis see Danny Busch, 'Self-placement, dealing on own account and the provision of investment services' (2019) 14 Capital Markets Law Journal 4.

understanding that professional issuance of financial instruments may in and of itself lead to qualify the issuer as an investment firm.[35]

But doubts surrounding the boundaries between investment services and investment activities in connection with dealing on own account can be even more pervasive in the secondary market. Here, the question of whether the firm is acting on behalf of the customer or as a mere contractual counterparty has no direct answer in the law. The matter cannot be addressed here[36] but, for the purpose of this analysis, it is worth mentioning that guidance to the market is not always consistent. For instance, the Commission has traditionally held that every person entering into a transaction with an investment firm should be considered a client rather than a counterparty.[37] ESMA has dealt with the matter more recently, but only in connection with specific settings, such as the definition of systematic internalisers. These are investment firms that 'deal on own account when executing client orders' on an organised, frequent, systematic and substantial basis (Article 4(1)(20) MiFID II). In this context, ESMA is of the opinion that an investment firm is always executing orders on behalf of the client when its counterparty is not a financial institution. Otherwise, (only) one of the two parties involved (can and) shall be regarded as executing orders on behalf. This party shall be determined – either party by party or transaction by transaction – based on elements such as the identity of the firm initiating the order or executing it and on any other hint suggesting reliance of one party on the other.[38]

All in all, interpretive divergence at the supervisory level in this and other matters seems largely unavoidable, at least in the current framework where ESMA has limited direct supervisory tasks and NCAs remain crucial.[39] ESMA's powers facilitating supervisory convergence help address this problem, but can hardly solve it (Articles 1(5)(g) and 8(1)(b) Regulation (EU) No 1095/2010). In particular, fine-tuning of guidelines and Q&A documents may further narrow down the distance among NCA interpretations (Articles 16 and 16b), while more specific measures such as information exchange, coordination groups and peer-review exercises do not seem to have developed their full potential (Articles 29 and 30).[40] ESMA cannot replace local supervisory discretion and day-to-day tasks, as opposed to what happens in the EBU, where even for less significant banks the ECB can instruct NCAs or directly exercise powers to ensure consistent application of high supervisory standards (Article 6(5) Regulation (EU) No 1024/2013).

There is, however, a structural limit to harmonisation through supervisory convergence. This comes from the fact that neither ESMA nor NCAs, nor the European System of Financial Supervision (ESFS) taken as a whole, has the monopoly on the interpretation and enforcement of the CMU rules. This is shared with courts. Courts' role has remarkable consequences in the CMU, as private enforcement plays there a larger role compared to what happens in the EBU, where the typical setting

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[35] This was the interpretation by the FCA, *The Perimeter Guidance Manual* (June 2021), Q15A, available at https://www.fca.org.uk.

[36] For a broad analysis see Danny Busch, 'Agency and Principal Dealing under the Markets in Financial Instruments Directive' (2017) 25 European Review of Private Law 337.

[37] With some exceptions only for the best execution regime in case no order is executed on behalf of a client. In this case, there is a presumption that a firm is acting on behalf of a client when this latter qualifies as retail: EU Commission, *Answers to CESR scope issues under MiFID and the implementing directive* (Working Document ESC-07-2007), available at https://ec/europa/eu.

[38] ESMA, *Questions and Answers on MiFID II and MiFIR transparency topics* (ESMA70-872942901-35) (20 May 2022), Q 7.7, available at https://www.esma.europa.eu.

[39] Currently, ESMA has direct supervisory powers for credit rating agencies (Art. 15 Regulation (EC) 1060/2009 on credit rating agencies), trade repositories (Art. 55 Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories – EMIR; Art. 5 Regulation (EU) 2015/2365 on securities financing transactions – SFTR), data reporting services providers (Article 27b Regulation (EU) 600/2014 on markets in financial instruments – MiFIR) and securitisation repositories (Art. 10 Regulation (EU) 2017/2402 on securitisations). Other powers may come in the future. Among them, the supervision on external reviewers in the field of green bonds (European Commission, 'Proposal for a Regulation on European green bonds' (COM(2021) 391 final) (6 July 2021)).

[40] For a broad account of ESMA's powers see Niamh Moloney, *The Age of ESMA. Governing EU Financial Markets* (Hart 2018).

of litigation is rather between supervised entities and supervisors. The next section further elaborates on some of these consequences.

5. *Coordinating enforcement at public and private level*

The last source of persistent divergence within the CMU this paper purports to address is a consequence of the somewhat uneasy relationship between the CMU provisions and their enforcement that the previous sections have highlighted. While the rules that build the CMU are largely defined at the EU level, enforcement strategies often fall in the remit of Member States' sovereignty. This form of divergence is the manifestation, within the realm of CMU, of the typical allocation of powers that originates from national enforcement discretion.[41] Two examples are worth considering here. The first relates to Member States' implicit or explicit options regarding enforcement tools. The second example is peculiar to the role of private enforcement instead, and stems from the allocation of adjudicating powers to civil and commercial courts next to the sanctioning powers of NCAs.

5.1. *Public enforcement: national discretion and coordination issues*

Some remaining areas for divergence originate from the options Member States retain in the selection of the enforcement tools at their disposal. This applies to all three traditional forms of non-criminal enforcement, and in particular administrative and private enforcement.

Starting from administrative enforcement, MAR provides once again a good case in point. To ensure effective detection and repression, the EU regime on administrative market abuse violations establishes competence upon both the NCA of the Member State where the relevant trading venue is established and the NCA of the Member State where the actions amounting to market abuse are carried out (Article 22 MAR). Concurrent jurisdiction also characterises the criminal regime, where the power to prosecute and convict lies with both the criminal authority of the Member State where the violation was perpetrated and the criminal authority of the Member State of which the accused persons are nationals (Article 10 MAD II). If this setting reduces the possibility that market abuse goes unpunished, it also raises some concerns, especially because it increases the risk of conflicting interpretations by NCAs – ESMA's role in fostering supervisory convergence is key in this regard, but this is not always sufficient to ensure perfect alignment, as the previous sections demonstrate. The problem is, to some extent, addressed for issuers, because for certain provisions that apply to listed companies MAR takes care of identifying a single NCA.[42] Unfortunately, these conflict-of-law rules do not expressly apply to all the provisions concerning issuers, and no similar attempts are made for other market participants.

Uneasy identification of applicable law (and of NCAs) may also hinder coordination among supervisors. For instance, the law applicable to shareholder rights defined under Directive 2007/36/EC (Shareholder Rights Directive – SHRD) is the law of the Member State in which the listed company has its registered office (Article 1(2) SHRD).[43] This connecting factor does not easily accommodate the enrolment of intermediaries which maintain securities accounts – such as central securities depositories, banks and investment firms – in the protection of shareholders (Article 2(1)(d) SHRD). Absent specific rules on this matter, the only possible reading of the SHRD is that the NCA is also to be determined based on the same connecting factor (as NCAs normally do not enforce

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[41] Van den Brink (n 8), 239-40.

[42] See e.g., Art. 17(3) MAR and Art. 6 Reg. (EU) 2016/522 (identifying the NCA for the notification of a delay in the disclosure of inside information based on the issuer registered office).

[43] Different criteria apply to institutional investors, asset managers, and proxy advisors.

foreign laws).[44] This makes sense as long as substantive rules on shareholder rights are at stake, because those rights follow the law of the company. However, from the point of view of the corporate action procedures, making intermediaries subject to as many laws and NCAs as are the countries of listed companies in which their clients have invested is very unlikely to deliver an efficient system, due to the risk of conflicting rules and interpretations (Articles 3a-3f SHRD). Again, ESMA coordination role will be crucial in this regard, although national courts – and possibly the CJEU – will have the final say on the identification of the NCA.

5.2. *Private enforcement: the role of national laws, and coordination issues*

Even more complicated is the situation for private enforcement, another area where national differences persist. Once again, problems may originate not so much from those differences, but rather from the way these are handled by the law. The last area this paper considers among those where harmonisation is not complete relates to private enforcement.

The legislative acts that build the CMU tend to leave the Member States broad discretion when defining private enforcement measures, provided that equivalence and effectiveness are ensured.[45] A key element in this regard is the relationship between EU law and rules of conduct under national private law. This is an area where material divergences persist, which can be partially explained with the overall reluctance that EU law and the CJEU case law have shown in deriving implied rights with horizontal effects in the field of financial law.[46] Some of the persisting divergences are addressed below using MiFID II as an example.[47]

Overall, MiFID II has strengthened the role of private enforcement by mandating compensation or other remedial actions for financial losses or damages resulting from infringement of MIFID II provisions (article 69(2) MiFID II).[48] Nonetheless, a distance remains between Member States where violation of MiFID II rules automatically ensures redress and Member States where this is not the case. In the first group of countries, provisions implementing MiFID II are often regarded as directly or indirectly part of the contractual rules that bind investment firms.[49] In the second group, the distinction between public law and private law is more important, and public law infringements may not be sufficient to ground redress without an autonomous civil law claim.[50]

The variance is even broader than this general distinction would suggest, as within the same country the availability of private enforcement for MiFID II violations may depend on the specific rule at stake and/or on the nature of the claimant. Sometimes, in fact, civil liability may arise from the breach of MiFID II detailed conduct-of-business rules, but not for violations of general provisions

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[44] Alessio Bartolacelli et al, 'Article 14a and 14b: Enforcement of SRD II Provisions' in Hanne Birkmose and Konstantinos Sergakis, The Shareholder Rights Directive II (Edward Elgar 2021), § 13.16-17

[45] On MiFID I see CJEU, C-604/11, *Genil*, 30 May 2013, § 57 (principles of equivalence and effectiveness bind Member States in the determination of private law consequences of violations).

[46] For an analysis see Takis Tridimas, 'Financial regulation and privale law remedies: an EU law perspective' in Olha Cherednychenko and Mads Andenas, *Financial egulation and Civil Liability in European Law* (Edward Elgar 2020), 47.

[47] For a broader analysis see Federico Della Negra, *MiFID II and Private Law: Enforcing EU Conduct of Business Rules*, (Hart 2018).

[48] This may be understood as a specification of the general principle of effectiveness, as scholars reached the same conclusion under the previous regime as well: Michel Tison, 'The civil law effects of MiFID in a comparative law perspective' in Stefan Grundmann et al (eds), *Unternehmen, Markt und Verantwortung: Festschrift für Klaus J. Hopt zum 70. Geburtstag* (De Gruyter 2010), 2621, 2624. On the new rule see Tridimas (n 46), 68-9.

[49] This is the case, among the others, with France, Spain and Italy (see Thierry Bonneau, 'France', 114; Manuel Ángel López Sánchez et al, 'Spain', 177; Filippo Rossi and Marco Garavelli, 'Italy', 139-40, all in Danny Busch and Cees van Dam (eds), *A Bank's Duty of Care* (Hart 2017)).

[50] This is the case, among the others, with Germany and, to a lesser extent, the Netherlands (see respectively Jens-Hinrich Binder, 'Germany', 72-4, and Danny Busch et al, 'Netherlands', 209, both in Busch and van Dam (eds), n 49). It is however questionable that the public nature of MiFID II provisions can lead to exclude implied rights that allow private remedies (Tridimas (n 46), 63).

such as those mentioned in section 3. In Member States following this model – which has been labelled as 'substitution model'[51] – general provisions are not deemed specific enough to autonomously ground redress.[52] In other cases, restrictions to private enforcement may rather depend on the nature of the claimant. The UK provided an interesting example in this regard, as private enforcement for certain violations of conduct-of-business rules was automatically granted only to individuals and to legal entities not suffering the relevant loss in the course of their business.[53] Even after Brexit, the example continues showing that different models of private enforcement are compatible with EU law.

To be sure, not all the differences in the private enforcement framework create the risk of regulatory arbitration, as the level of investor protection may not be that different in practice.[54] Furthermore, some inconsistencies seem unavoidable at the moment, considering that perfect homogeneity would require more pervasive harmonisation of general contractual law principles. Once again, problems rather seem to arise where the same market participant may become subject to different, and possibly conflicting, interpretations.[55]

This can easily occur with the interpretation of general provisions, which inevitably lend themselves to divergent readings. For instance, general standards of care have been interpreted by civil and commercial courts to hold intermediaries liable under information duties that were stricter than those defined under EU law, particularly by mandating disclosure on the specific financial instruments even when EU law referred, more generically, to the type of financial instruments.[56] Along the same line, some national courts have deemed investment firms bound to share information concerning the probabilistic scenarios they have used to determine the fair value of complex financial instruments such as interest rate swaps.[57]

Another case in point are the different understandings that surround the boundaries of dealing on own account, as well as the consequences this determines on the application of MiFID II provisions (as highlighted in section 4).[58] More in general, civil and commercial courts may interpret the boundaries between transactional and fiduciary-based services (section 4 again) on the basis of national private law principles, which do not necessarily coincide with those set forth in MiFID II.[59]

These differences may reduce legal certainty and hamper financial markets' integration within the CMU. Imagine an investment firm from a Member State (A) that provides online investment services in another Member State (B), with no establishment in the territory of this latter. In this case, the NCA of Member State A is entrusted with public enforcement (Article 34 MiFID II). Applicable private law depends, instead, on the nature of the service recipient. If that client qualifies as a consumer, the client's domicile determines the applicable law (Article 6 Regulation (EC) No 593/2008 – Rome I; Article 12 Regulation (EC) No 864/2007 – Rome II, for contractual and pre-

[51] Olha Cherednychenko, 'Public Regulation, Contract Law, and the Protection of the Weaker Party: Some Lessons from the Field of Financial Services' (2014) European Review of Private Law 663, 671.

[52] Peter Mülbert, 'The Eclipse of Contract Law in the Investment Firm-Client-Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective' in Guido Ferrarini and Eddy Wymeersch (eds), *Investor Protection in Europe* (OUP 2006), 308 (Art. 19(1) MiFID I was not further detailed by level 2 provisions and could not justify integration of disclosure duties set forth by dir. 2006/73/EC).

[53] Art. 138D Financial Services and Markets Act 2000. See Tison (n 48), 2631; Cherednychenko (n 51), 670. For an application see *Grant Estates Limited (in liquidation) and Others v The Royal Bank of Scotland plc and Others* [2012] CSOH 133, 21 August 2012, §§ 31-48 (critically Busch n 36).

[54] Danny Busch, Why MiFID matters to private law – the example of MiFID's impact on asset manager's civil liability, (2012) 7 Capital Markets Law Journal 386, 398-9; for a comparative analysis see Tison (n 48), 2624 and 2630-2.

[55] Tison (n 48), 2633; Mülbert (n 52), 318-9 (both submitting that national court should refrain from applying local private law when assessing cross-border free provision of financial services rules).

[56] Mülbert (n 52), 317; Binder, Germany (n 50), 74-5; Busch (n 54), 396.

[57] Luca Enriques and Matteo Gargantini, 'The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case' (2017) 3 Italian Law Journal 485.

[58] For France see Bonneau (n 49), 131.

[59] For Germany see Binder (n 50), 68.

contractual claims,[60] respectively). For professional clients, the home country of the investment firm drives the selection of applicable law instead (Article 4(1)(b) Rome I; Article 12 Rome II, for contractual and pre-contractual claims, respectively).[61] As for jurisdiction on contractual claims, consumers have the power to decide whether to establish a proceeding in their country or in the country of origin of the investment firms. Professionals have to bring action before the court of the place of provision of the service, instead, which may not be easy to identify for online services (Articles 7(1) and 17 Regulation (EU) No 1215/2012 – Brussels I-bis).[62] Should the claim qualify as tortious due to its pre-contractual nature,[63] identifying jurisdiction would be even more difficult, as the place where the damage occurred[64] is hard to identify, as the intricated case law of the CJEU on the localisation of financial damages demonstrates (Article 7(2) Brussels I-bis).[65]

The situation is not much better for issuers. To be sure, the CJEU clarified that the relevant connecting factor for issuer disclosure duties is the place where issuers should comply with the statutory reporting obligations deriving from listing on regulated markets.[66] However, it fell short of identifying in which Member State this place shall be located, thud leading to divergent interpretations in this regard.[67] As we shall see in section 8, requests for preliminary rulings are indeed a relatively weak tool to ensure consistency in legal interpretation across the CMU/SIU.

In all the circumstances above that lead to a situation where the applicable law, the competent court of jurisdiction or the NCA are in different Member States, market participants such as issuers or investment firms may be subject to inconsistent interpretations, which obviously reduces the ability of the CMU to deliver a truly integrated regulatory environment.

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[60] Pre-contractual claims may originate from breach of disclosure duties (Recital 30 Rome II). In some countries, civil claims based on MiFID II violations may qualify as tortious based on the public law nature of national implementing measures and the connected contravention of a statutory duty (for the Netherlands see Busch et al (n 50), 209).

[61] Note that the notion of 'retail client' in financial law (Art. 4(1)(11) MiFID II) and the notion of consumer in EU private international law do not coincide, which adds further complexity to the system (CJEU, C-208/18, *Petruchová*, 3 Ocotber 2019; CJEU, C-500/18, *Reliantco Investment and Reliantco Investment Limassol Sucursala Bucureşti*, 2 April 2020]

[62] Peter Mankowski, 'Article 7' in Ulrich Magnus and Peter Mankowsi (ed), *Brussels Ibis Regulation – Commentary* (Otto Schmidt 2015), 238-40.

[63] Whether pre-contractual liability is tortious under Art. 7 Brussels I-bis is debated and may depend on the circumstances of the case (see Mankowski (n 62), 182-3, 273, 313-4). In any event, the uncertainties on the location of financial damages affect areas where the qualification of the claim as tortious is undisputed, as for prospectus liability (see n 65 below for references).

[64] This is the connecting factor that is most often invoked by claimants as the place where the harmful event occurred, the alternative being the place where the wrongful conduct took place (CJEU, 21-76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, 30 November 1976).

[65] CJEU, C-168/02, *Kronhofer*, 10 June 2004; CJEU, C-375/13, *Kolassa*, 28 January 2015; CJEU, C-12/15, *Universal Music International Holding*, 16 June 2016; CJEU, C-304/17, *Löber*, 12 September 2018; CJEU, C-709/19, *Vereniging van Effectenbezitters*, 12 May 2021. For an analysis see Francisco Garcimartín, 'The Law Applicable to Prospectus Liability in the European Union' (2011) 5 Law and Financial Markets Review 449; Matthias Haentjens and Dorine Verheij, 'Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit' (2016) 31 Journal of International Banking Law and Regulation 346; Matthias Lehmann, 'Private international law and finance: nothing special?' [2018] Nederlands Internationaal Privaatrecht 1; Matteo Gargantini, 'Prospectus Liability. Competent Courts of Jurisdiction and Applicable Law' in Danny Busch et al, *Prospectus Regulation and Prospectus Liability* (OUP 2020), 441.

[66] CJEU, *Vereniging* (n 65).

[67] Frederick Rielaender, 'Financial torts and EU private international law: will the search for the place of "financial damage" ever come to an end?' (2022) 18 Journal of Private International Law 28, 40; Matthias Lehmann, 'A new piece in the puzzle of locating financial loss: the ruling in *VEB v BP* on jurisdiction for collective actions based on deficient investor information' (2022) 18 Journal of Private International Law 1, 4; Heidi MK Yli-Kankahila, 'Locating Damage in the Securities Market in the EU—The Road to VEB' (2023) 34 European Business Law Review 481; Laura van Bochove and Matthias Haentjens, 'Effectenbezitters: New Efforts to Localise the Place of Damage' (EAPIL blog, 23 June 2021), available at https://eapil.org.

Part III – Developing bottom-up convergence (i): rules of conflict and financial centres

6. *Dealing with harmonisation's limits: from divergence to diversity*

As the previous sections have demonstrated, the CMU has delivered a much more homogeneous regulatory and supervisory framework for capital market in the EU. At the same time, divergences remain at the regulatory and supervisory level as well as, more in general, in the enforcement practices. Reducing some of the remaining distance among national systems is certainly possible, and the Commission has shown its commitment to strengthening harmonisation and supervisory convergence – as required under Action 16 of the CMU Action Plan.[68] However, the very existence of a SIU project demonstrates that these efforts have fallen short of delivering perfectly integrated capital markets in the EU.

A realistic view of the last decades should lead to acknowledge that there are limits to what harmonisation and supervisory convergence can achieve, at least for the time being. While additional efforts in that direction are certainly worth pursuing, additional road should be explored to complement legal and supervisory approximation (or even uniformity). One way to do this is to enrol strategies that leverage on market participants' incentives to exploit efficient legal framework and, when they have the autonomy to do so, to contribute to designing them. These bottom-up strategies can support top-down harmonization by adding some powerful drivers to capital markets integration.

After all, attempts to facilitate market integration through adequate legal frameworks have characterized Europe long before the SIU, the CMU and even the European Union were created. Legal history is well aware of the dynamics that, starting from the late Middle Ages, led to the creation of a *lex mercatoria* which, going beyond the law established by political or ecclesiastic authorities, supported transnational commerce throughout Europe. The distinguishing features in the genesis of such body of standards and rules was its strong reliance on custom and best practices that merchants developed spontaneously out of their interactions, as well as a system of adjudication that was separate from the courts of the State (or the City-state).[69] In this regard, the *lex mercatoria* shares some similarities with the idea of establishing a 28th regime delineated in the recent Competitiveness Compass,[70] but the history of *lex mercatoria* shows that an additional regime of this kind can only work with a suitable enforcement system.

One example can illustrate the effectiveness of bottom-up integration strategies in the *lex mercatoria* experience. In the late 17th century, the English courts (Lord Holt) developed the theory that "a bona fide transferee for value can acquire a good title from a mere finder". A few years later, due to the development of the English case law, this principle became the foundation of negotiable instruments as a tool to create secondary markets for investments (this development is mostly due to Lord Mansfield). Nowadays, this legal concept is therefore still at the core of the CMU, which revolves around financial instruments, whose key component are transferable securities, i.e. instruments that are negotiable on the capital market (Article 4(44) MiFID II). The power of bottom-up integration nis revealed by the fact that, absent any form of authoritative supranational harmonization, other courts simultaneously developed similar legal concepts that, while relying on different conceptualization depending on the national law and case law, reached the same result in terms of circulation of investments. For instance, the same rule was applicable in Italy due to the decision of Giuseppe Casaregis, who served as a judge in Genoa and developed the basis for what are now known as the Italian equivalent of negotiable instruments ("titoli di credito"). By the same token, similar developments occurred in Germany ("Wertpapier") and France ("effet de commerce").

[68] See European Commission (n 3), 35.
[69] Francesco Galgano, *Lex mercatoria* (Il Mulino 2010).
[70] European Commission (n 3).

The reason for this convergence was that those principles for the circulation of investments were considered to be part of the *lex mercatoria*, a set of knowledge shared by merchants and upheld by courts that considered uniformity and transnationality of customs as a crucial element in their adjudications.

In light of the lesson history can teach, the remainder of the paper sketches out two strategies that, by involving a more active role of market participants, might foster market integration by complementing top-down harmonization in ways that echo the experience of *lex mercatoria*. The first strategy relies on conflict of law rules and issuer choice in the selection of jurisdiction and applicable law. The second strategy leverages on the legal framework concerning what has become – nest to money – the most important input in the provision of financial services: data.

Starting with rules of conflict, one must consider that, among the sources of regulatory divergence this paper has shown, two seem particularly thorny. The first one is the lack of a centralised supervisor for the CMU/SIU, as opposed to the EBU. The second one is the role of national courts in private enforcement. The next subsections will consider these factors separately. Overall, the approach taken will start from the assumption that in both cases – and especially for national civil and commercial courts – lack of centralisation is a limit to perfect harmonisation of interpretation.

To be sure, national variation is not necessarily bad. As local enforcement is part of the CMU picture, diversity is needed to a certain degree to make sure CMU provisions can be enforced. In this regard, some remaining differences should be welcome due to their ability to accommodate national specificities. Moreover, even if one believes that those differences are an obstacle to a perfectly integrated CMU, some variance in the application of EU financial law is here to stay. What then becomes crucial is, rather, to make sure that this variance is properly managed to reduce legal risks for market participants, at least until centralisation of public (and, less likely, private) enforcement occurs. In this regard, conflict-of-law rules would deserve more attention from policymakers than is the case today and should be addressed more systematically for both the identification of NCAs and for private enforcement (including applicable law and jurisdiction). Let us see how.

6.1. *Does the CMU need a single supervisor?*

As supervisory divergence originates from the existence of multiple NCAs, a logical way to approach the problem would be to concentrate supervisory powers in a single centralised entity. Expanding ESMA direct supervisory powers beyond the existing ones may be the most immediate way to do that. For feasibility reasons, this centralisation process may also selectively involve certain regulated areas, at least initially, as also envisaged by Action 16 of the new CMU Action Plan.[71]

For instance, in the field of prospectus approval, scholars have submitted that completion of the CMU would require the creation of a fully-fledged European Listing Authority for the entire European Union.[72] This central authority would, to some extent, replicate the functioning of the Single Supervisory Mechanism (SSM), which serves as the backbone of the EBU. In line with this term of comparison, also the European Listing Authority would be competent for larger issuers, while the approval of prospectuses concerning smaller companies would remain in the NCAs' remit.[73] In this manner, the European capital markets would retain some room for forum shopping and supervisory competition. For larger issuers, this proposal would also eliminate the bureaucratic costs of prospectus notification, which is today a precondition for accessing the European passport (Art.

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[71] For the existing powers see supra section 4. See also European Commission (n 27), 29 (asking stakeholders to identify areas where direct supervision should be considered).

[72] A reasoned and detailed proposal in this sense can be found in Emilios Avgouleas and Guido Ferrarini, 'A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA. Costs, Benefits, and Legal Impediments' in Danny Busch et al (eds), *Capital Markets Union in Europe* (Oxford: 2018), 55.

[73] Ibid, 58-9 and 68.

25 and 26 Prospectus Regulation). It would also deliver higher economies of scale, hence potentially reducing the direct and indirect costs of supervision. To some extent, this would also match the centralisation of regulatory powers with the centralisation of supervisory powers, thus reflecting a tendency to have spillover effects between the two.[74]

The European Commission took a step towards the centralisation of prospectus approval in its proposal for a reform of the three European Supervisory Authorities (ESAs).[75] This initiative devised the conferral upon ESMA of the power to approve certain prospectuses for which centralisation was justified, in the Commission's opinion, by a cross-border dimension within the Union, by a particular level of technical complexity, or by the potential risks of regulatory arbitrage. These were prospectuses for the admission to trading of wholesale non-equity securities on a regulated market accessible only to qualified investors, prospectuses relating to specific types of complex securities, such as asset-backed securities, or to specific types of issuers, such as property companies, mineral companies, scientific research-based companies, shipping companies and, remarkably, third-country issuers. However, due to a lack of political agreement, these proposals did not remain in the reform package that was subsequently approved.[76]

The Commission's unsuccessful attempt shows that the time might not be yet ripe for centralisation of supervision in critical areas such as prospectus approval, and this conclusion may be extended to other areas such as investment services and trading venues. This may be due to prevailing national resistances, but it is also true that the immediate establishment of a single competent authority would prevent market participants, including investors, from continuing to rely on those NCAs that have demonstrated to be perfectly able to meet their needs. Whatever the reasons for the obstacles on the road towards a European Securities and Exchange Commission, another approach that might deserve consideration – either as such or as an intermediate step towards further top-down supervisory centralisation – is therefore the conferral on ESMA of supervisory powers, but with no exclusive competence on them.[77] In other words, ESMA could qualify as an additional 28th competent authority,[78] to which market participants could refer to as an alternative to their NCA.[79] Such an approach would, of course, have its own flaws, including the cost of duplicating supervisory structures, and it might equally face some resistance.[80] However, it should be politically more palatable than the immediate creation of a European Securities and Exchange Commission. Adding ESMA as an additional central authority, possibly with some improvements to its regulatory framework,[81] would avoid the risk of petrification that may accompany the creation of a competent authority with monopolistic power and would allow making the big step towards a single European authority – if this is deemed appropriate – only after testing its success among issuers and investors. This form of competition would also not suffer from a higher risk of a race to the bottom than the

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[74] Miroslava Scholten and Daniel Scholten, 'From regulation to enforcement in the EU policy cycle: a new type of functional spillover?' (2017) 55 Journal of Common Market Studies 925.
[75] European Commission, *Proposal for a Regulation of the European Parliament and of the Council* (COM(2017) 536 final) (20 September 2017) (see Art. 9(10)).
[76] See the Texts Adopted by the European Parliament on 19 April 2019.
[77] See, with regard to prospectus approval, Carmine Di Noia and Matteo Gargantini, 'The Approval of Prospectus. Competent Authorities, Notifications, and Sanctions' in Busch et al (eds) (n 65), 359.
[78] This would also mirror, where available, the rationale of a 28th regulatory regime (see n 70 and accompanying text).
[79] The proposal to create an additional European regime that provides a further option for market participants, without replacing the existing national system, is not unprecedented. In the field of crowdfunding see European Commission, *Proposal for a Regulation of the European Parliament and of the council on European Crowdfunding Service Providers (ESSP) for Business* (COM(2018) 113 final) (8 March 2018).
[80] To be sure, the Commission's proposal on Crowdfunding (n 79) had no better fortune than that on centralization of prospectus approval within the ESAs reform (n 75), when it comes to the role of ESMA (see European Parliament, *Legislative resolution on the proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business* (COM(2018)0113 – C8-0103/2018 – 2018/0048(COD)) (27 March 2019).
[81] For some proposals see e.g. Less is More. Proposals to Simplify and Improve European Rule-Making in the Financial Services Sector – Report by an Expert Group (10 February 2025), available at https://www.ebf.eu.

current system does, as ESMA would surely not indulge in any contest to attract issuers at the expense of prospectus quality and would likely have an eye on unfair practice by its competitors.

6.2. *Fixing conflict-of-law rules*

Multiple NCAs will likely characterise the regulatory framework for the CMU in the years to come, at least until a systemic crisis or a major financial scandal create a policy window that fosters reforms.[82] Moreover, even with a centralised Securities and Exchange Commission, national courts will retain jurisdiction on private enforcement, with the implications highlighted in section 5.2. Both points contribute to making conflict-of-law rules a salient factor in delivering a coherent regulatory framework for the CMU even when this accommodates some level of diversity.

A general review of the connecting factors may be advisable, in the first place, for NCAs. In some areas, current provisions do not seem to reflect thorough consideration of their implication in terms of legal certainty and costs. This is the case, for instance, with shareholder rights, as section 5.1 has shown. In other areas, providing market participants with some broader choice may leverage negative harmonisation to deliver a de facto more integrated CMU.[83] Increased legal mobility of market participants would, in fact, facilitate the concentration of supervision in some financial centres, even after Brexit. Even if this goes often unnoticed, European capital markets are already enjoying some centralisation when the connecting factors enable sufficient freedom to choose the preferred NCA. For instance, a particularly flexible regime applies to prospectus approval of non-equity securities. A look at the ESMA data on the number of prospectuses that are approved and passported, combined with the type of securities they concern, demonstrates the point.[84] In particular, the NCAs of Luxembourg, Ireland and Germany seem to have a consolidated role as European hubs for the approval of prospectuses on, respectively, debt securities, asset-backed securities and derivatives, sometimes sharing the role among them.[85] Unsurprisingly, no such centralisation seems to exist for equity securities, due to the current regime for the identification of NCAs.[86] The role of Luxembourg and Ireland for UCITS funds and AIFs confirms the point.[87]

To be sure, it remains uncertain whether broadening competition among NCAs would determine a race to the top or a race to the bottom. A complete analysis would be out of the scope of this paper,[88] but within the CMU the risks of suboptimal outcomes in a more competitive context are greatly reduced by ESMA's powers of intervention, at least in case of blatant violations of the rules on prospectus approval.[89] After all, this concern might equally apply to the very idea of regulatory passports, which is already one of the backbones of the CMU.

In the second place, private enforcement should be able to rely on a clear framework for the identification of the applicable law and the competent court of jurisdiction. Currently, the CMU falls

[82] On policy windows see John Kingdon, *Agendas, Alternatives, and Public Policies* (Little Brown 1984).
[83] See e.g. Matteo Gargantini, 'Regulatory harmonisation and fragmented enforcement in the Capital Markets Union' 2022 EULEN Working Paper Series, available at https://jmn-eulen.nl; Florian Heider et al (n 5).
[84] See ESMA, *Report – EEA prospectus activity in 2017* (ESMA31-62-111) (15 October 2018), 9-13.
[85] The analysis is inevitably approximate, based as it is on the numbers of prospectus rather than on the total value of the securities they accompany.
[86] On the determinants for the creation of competitive financial centers see in general Thomas Gehrig, 'Location of and Competition between Financial Centers' in Xavier Freixas et al (eds), *Handbook of European Financial Markets and Institutions* (OUP 2008), 619.
[87] ESMA, *Performance and Costs of EU Retail Investment Products. Annual Statistical Report* (ESMA50-165-1677) (5 April 2022), 9, available at https://www.esma.europa.eu (for UCITS funds); Id., *EU Alternative Investment Funds. Annual Statistical Report* (ESMA50-165-1948) (3 February 2022), 28, available at https://www.esma.europa.eu (for hedge funds).
[88] See Luca Enriques and Tobias Tröger, 'Issuer Choice in Europe' (2008) 67 Cambridge Law Journal 521.
[89] See Carmine Di Noia and Matteo Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the CJEU Decision on the Short Selling Regulation (Case C-270/12)' (2014) 15 European Business Organization Law Review 1.

short of delivering this result, mainly because the pertinent rules – whether in the Rome I, Rome II, or Brussels I-bis Regulations – were devised without bearing in mind the specific problems of the provision of financial services and of the localisation of financial damages. As a result, conflict-of-law rules are not a sufficiently reliable source for a predictable legal environment in the CMU. Scholars have submitted several alternative proposals to fix the status quo. These include almost all the possible connecting factors one can imagine, such as bank accounts, securities accounts, central securities depositories, trading venues, and others, sometimes in combination among them. An assessment of the relative merits of these proposals cannot even be attempted here,[90] but what matters is, after all, to avoid ending up like the proverbial Buridan's ass in the lack of a shared view on the best solution, where any of the alternatives that have been submitted would improve the current regime. Just like in the realm of public enforcement, more space for issuer choice could facilitate a Delaware effect in private law adjudication, which is a precondition for homogeneous interpretations, as the previous sections have shown.

Part IV – Developing bottom-up convergence (ii): data governance

7. *Data spaces as a driver for capital markets integration*

An additional reform strategy that can exploit market participants' incentives in fostering a bottom-up integration revolves around data governance.[91] The intuition underlying this strategy is that the establishment of efficient data spaces can support further integration of EU capital markets and, ultimately, help achieve the objective of a single pan-European capital market. In this context, data spaces are understood as structured information ecosystems where various stakeholders, such as financial institutions, regulators, companies and service providers can share and use data in a secure, interoperable, and compliant manner. Once again, this strategy can be observed from two perspectives: regulation (on which we expand here) and enforcement (which is addressed in section 8).

From a regulatory point of view, data are at the heart of the most recent developments in the CMU and SIU, affecting the activities of listed companies, investment service providers, trading venues and, ultimately, investors. All these market participants increasingly rely on large amounts of data. Whether data are raw, semi-finished or finished materials, their collection and processing involve material costs. Whenever these costs have a component that depends on a cross-border element, thus making a financial transaction more expansive than a purely national one, there can be space for better legal provisions to improve data governance and, therefore, market integration.

Among the many costs that can lead to this kind of problems, search costs are particularly apt to illustrate the point. Investors need to access information concerning, for instance, potential investee companies or the current market price of a financial instrument they own. Investment firms need to know the characteristics of financial instruments before being able to recommend them and to profile their clients before addressing them such recommendation. Looking for such information comes at a cost (a search cost), and as the following subsections show these costs may be materially higher for cross-border transactions. This can happen for various reasons, including the national scope and reach of information repositories or the lack of a common legal framework for the exchange of data. Further zooming in, this regulatory vacuum can determine the lack of common standards for data concerning their format, their speed, their technical features, or their price. When one or more among these

[90] See n 65 for a short selection of sources.
[91] On the importance of engaging non-financial players in the regulation of data spaces and, therefore, of integrated capital markets see CEPS, ECMI and ECRI, Staying Ahead of the Curve. Shaping EU financial sector policy under von der Leyen II (2024), 60, available at https://www.ceps.eu.

elements are missing from the picture, in a way that private ordering solutions cannot mend due to coordination problems, different legal systems will end up speaking different languages not only in the traditional speech, but also in the specific language of data. The CMU and SIU project involve many aspects where common regulatory frameworks are or will be – or, *de lege ferenda*, can be – enrolled in the creation of integrated markets.

Adequate regulation of data spaces is a driver for market integration also because it often involves market participants in various fashions. For instance, new intermediaries (such as ICT third-party service providers or large data platforms) can develop proprietary standards fostering homogenisation of market practice through their market power or, when this is not the case, through regulated bargaining processes among market participants that expand the scope of those standards beyond the parties involved, as is the case with the Financial Data Sharing Schemes (FDSS) under the proposed European Regulation on Financial Data Access (FIDA), as subsection 7.3 shows. Remarkably, the ability of standardised information to deliver capital markets integration goes beyond the scope of data spaces. As data are the input of complex information processing by financial intermediaries, more standardisation of data is likely to lead to more homogeneity in the provision of the final services which are the output of that process. The examples are countless, as the next subsections show, an example being the influence that data concerning client (and product) profiles under the MiFID II investment service regime can have on the performance of the suitability assessment (see subsection 7.2).

7.1. *Issuers*

Data governance is increasingly important in the regulation of listed companies. Increasing reliance on data sharing in the context of issuers' disclosure duties will likely facilitate dissemination and analysis of key information, particularly through machine-readable formats. In this regard, the importance of information digitalization for the purposes of machine-readability and interoperability has recently been stressed by the ESMA itself.[92]

In the realm of issuer regulated information, fast and easy access to machine readable information is a key element for market integration. In this area, the European Single Access Point (ESAP; Regulation (EU) 2023/2859) will provide a centralised database set up by regulatory initiative so that investors based in different jurisdictions will have the opportunity to access a single repository.[93] The importance of this endeavour can be better understood in light of the EDGAR system, which is one of the cornerstone of US capital markets – the worldwide benchmark for capital markets integration.[94]

Because having a single language in place is essential, the ESAP shall provide information in a data extractable format and, when possible, in a machine-readable format. machine-readable formats include information available in the eXtensible Business Reporting Language (XBRL), which is largely adopted for financial reporting and has been a landmark in the development of a data space for corporate information.[95] This is an area where the impact of data standards cannot be overestimated. Building on the harmonised system of International Financial Reporting Standards (IAS/IFRS – Regulation (EC) No 1606/2002), XBRL has developed its own taxonomy for accounting

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[92] ESMA, *Consultation Paper on the RTS on the European Single Electronic Format (ESEF) for sustainability reporting and on the amendments to the RTS on the European Electronic Access Point (EEAP)* (2025), available at https://www.esma.europa.eu.

[93] Eugerta Muçi and Emanuel van Praag, 'Open Finance in Europe: What is coming and why it matters' (2023) 57 Journal of Financial Transformation 94, 100.

[94] Enrique A. Gomez, 'The Effect of Mandatory Disclosure Dissemination on Information Asymmetry among Investors: Evidence from the Implementation of the EDGAR System' (2024) 99 The accounting review 235 (finding that EDGAR reduces asymmetric information but increases inequality in access to data).

[95] Dirk Beerbaum, Maciej Piechocki and Christoph Weber, 'Is there a Conflict between Principles-based Standard Setting and Structured Electronic Reporting with XBRL?' (2017) 12 European Financial and Accounting Journal 33.

items, which for the financial reports involved became a sort of new Esperanto in the area that is more resilient against divergent local interpretations.[96]

To be sure, not all data circulate in fully regulated data spaces, which justifies wondering whether broad and suitable data spaces can develop "bottom-up", with little or no active support from policymakers. This is the case with blockchain systems, which are essentially a database with a decentralised nature. However, despite their low risk of tampering and relatively easy access, reliance on DLT systems is still limited, so the question remains whether EU policymakers should do more to expand their role in securities markets beyond the DLT pilot regime (Regulation (EU) 2022/858), which has not met the expectations, to the extent that this can support the circulation of corporate information and other relevant data across the borders.

In any event, cases where actual or prospective standardization is a reality should not overshadow areas where this is not yet the case. A case in point is sustainable finance, which inevitably relies on complex chains of suppliers of data on key performance indicators and other similar information. Hence, data governance in the area is crucial and the current regulatory framework is evolving. Some of the rules in force for data governance rely on pre-existing strategies that were devised to address equally pressing concerns on the quality of data, as is the case with benchmark administrators that were first regulated after the LIBOR scandal. Here, EU law relies on codes of conduct that benchmark administrators adopt under a 'regulated self-regulation' approach[97] to ensure the quality of data along the supply chain (Articles 11(1)(e) and 15 Regulation (EU) 2016/1011 – Benchmark Regulation; Regulation (EU) 2018/1639). But other segments of information chain remain uncovered, such as those involving the certification of information concerning reporting companies and their supply chain. In this regard, the narrowing of the scope of the Directive on corporate sustainability reporting (Directive (EU) 2022/2464 – CSRD) and, respectively, the Directive on corporate sustainability due diligence (Directive (EU) 2024/1760 – CSDDD) with the 2025 Omnibus Package will exacerbate the problem and open new areas for policymakers to consider for future data governance reforms.[98]

7.2. *Securities markets*

Securities exchanges and other trading venues are an area where the role of data automation is well established, as the smooth circulation of market data on pending orders and executed transactions is essential to ensure that competition in the trading industry does not lead to detrimental fragmentation of liquidity.

The EU system for the circulation of pre- and post-trade information establishes a structured legal framework for the production and circulation of market data, which relies on specialised intermediaries ("data reporting services providers") whose task is exclusively linked to the collection, verification, processing and selling on data concerning order books and contracts (pre- and post-trade information). However, EU law is still struggling to find a satisfactory regulatory equilibrium, hard as it is to strike an efficient balance between broad availability of data (transparency) and creation of liquidity on some conditions (especially for non-equity markets) as well as between free market competition and the creation on legal monopolies to ensure sufficient returns on the consolidation of market data. The recent reform of MiFIR (Regulation (EU) 2024/791) has reshaped the market for

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[96] Ibid.

[97] Malte Wundenberg, 'Regulation of Benchmarks' in Rüdiger Veil (ed), *European Capital Markets Law* (Hart 2017), 705-7. The alignment of the codes with the Benchmark Regulation is subject to supervision and, in the case of divergence, to enforcement (Art. 15(4)).

[98] European Commission, Proposal for a Directive Amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements (COM(2025) 81 final) (26 Februray 2025).

marked data by giving a new role to the – hitherto chimerical – Consolidated Tape Providers (CTPs).[99] Time will tell whether this will lead to the creation of a dissemination mechanism that can compare to US National Market System (NMS), but the repeated failures that have affected the creation of CTPs do not bode well for the future.

Post-trading is not immune from issues concerning data governance, either. Despite repeated reform attempts, the persistent lack of standard message formats is a reason for fragmentation in the clearing and settlement industry and in the corporate action processing, as highlighted in section 5.1.[100] Also relying on data reporting services providers is the circulation of data on transactions (transaction reporting), which support supervision in fostering market integrity through RegTech. Here, progresses are still ongoing to ensure that the quality of the data are sufficient to facilitate supervision across the borders and to reduce barriers in the detection of potential violations.

By the same token, Suspicious Transactions and Order Reports (STOR) by trading venues are crucial to ensure market abuse detection, but they currently offer a limited view of relevant market transactions across the borders. The attempt to create an integrated system for Cross-Market Order Book Surveillance (CMOBS) is ongoing, showing how cross-border data flow are essential to integrate capital markets.

However, STOR and CMOBS can fully express their potential as long as supervisors are able to ripe the benefits of automated supervision of regulated markets and other trading venues. Here, one of the most interesting regulatory problems lies with the fact that regulatory techniques rely on natural language and open-textured rules when defining the conduct to ban – market manipulation being the most obvious example with its references to concepts such as “misleading signals” or “abnormal or artificial” price levels (Article 12 Regulation (EU) 596/2014 – MAR). However, not only does the interpretation of these kind of rules vary form Member State to Member State (see section 3), but automated detection tools based on AI would require clear-cut inputs, which are a precondition for spotting market anomalies (SupTech). This raises the question whether laws using traditional natural languages can perform this role or rules should be treated themselves as input data and be to some extent converted so as to ensure that algorithms can foster compliance at trading and detection level.

7.3. *Investment services*

The third area where data regulation manifests its potential for capital market integration is the provision of investment services. This effect can come in different shapes, some of which are more direct than others. In general terms, European policymakers are seeking to expand the principles of open banking (and of open data more in general) to the world of investment services, another area where data spaces are bound to play a crucial role. This new approach requires smooth circulation of data concerning not only investors (which highlights the importance of personal data protection), but also products, possibly with a view to fostering the comparability of investment alternatives. Compliance will also rely on data-driven RegTech solutions for anti-money laundering and digital operation resilience.

For instance, an indirect but remarkable harmonisation effect may come from the use of algorithms in the performance of appropriateness and, especially, suitability assessments through robo-advice (Article 24 Directive 20014/65/EU – MiFID II). Employing automated mechanisms to perform this kind of analysis may easily lead to more homogenous market practices, as these will tend to follow the standards on the market for the relevant software, which is therefore becoming the actual vehicle for compliance with legal provisions – these latter being converted into data through coding. At the

[99] Christopher P. Buttigieg and Nathan Fenech, Unifying Market Data: Consolidated Tape Providers in the EU and US (2024) WFE Focus 1.
[100] David Murphy, ‘Fragmentation in the Foundations of SIU - The Case of Equity Market Post-Trade Infrastructure’ (Working Paper), available at https://papers.ssrn.com.

same time, a crucial factor in ensuring the quality of the service include the quality of the data used to perform the assessment and their alignment with the characteristics of the software, which should, in turn, meet the clients' features.

Supporting these dynamics will be the Retail Investment Strategy, which the European Commission submitted to, inter alia, grant retail clients the right to receive a report from their intermediaries containing the information collected for the purpose of suitability or appropriateness assessments. The outcome of the proposal is still uncertain[101] but, should the rules on information sharing be adopted, ad hoc regulatory technical standards will determine a standardised format for such reports. This will likely lead to further homogeneity in the provision of investment services, if one considers that assessment criteria can be expected to adjust to the available data – standardization of the input can foster homogeneity of the output. In turn, such developments can support economies of scale in the provision of such services in different jurisdictions.

The picture of data sharing is much bigger, however. To expand the "open finance" approach to capital markets, the proposed European Regulation on Financial Data Access (FIDA[102]) purports to set up a comprehensive regulatory framework for the circulation of customers' financial data from data holders to data users. This ambitious attempt shows how the integration of the market for data can support capital market integration, but also how shaping the former market can contribute to shaping the latter market. In particular, the FIDA proposal relies extensively on Financial Data Sharing Schemes (FDSS). These are special organizations that gather various stakeholders giving them a right to voice their views in the determination of the common standards for data and their circulation, including the technical interface to be adopted for this purpose – one can imagine that this may include, should the parties deem it necessary, a requirement for machine-readability and the connected language requirements. However, problems remain from the perspective of the potentially uneven level playing field among larger incumbent internet platforms, on the one hand, and (other) financial service providers, on the other hand, absent a clear set of rules on the reciprocity of access to data.

Considering the importance of data on individuals, the regime for the circulation of data under the GDPR plays a crucial role in the regulatory framework for capital markets. The literature shows that the GDPR has fostered the creation of structured databases, which is a precondition for complying with its requirements, thus supporting the creation of a favourable environment for automated data analysis. On the other hand, the GDPR restricts the use of data pools for natural persons unless there is prior consent or the data is gathered through web-based collection.[103] The question remains whether these limitations can more than compensate the market-fostering effects and hinder the development of competitive markets for financial (and, in particular, investment) services.

Finally, a precondition for the smooth provision of cross-border financial services on a digital basis is the on-boarding phase. In this regard, the regulatory framework for anti-money laundering automation is a cornerstone for the smooth provision of services, as is the regime concerning the reliance on customer due diligence performed by third parties. EU law has strived to facilitate this step, as well, including through the creation of an EU digital identity and the revision of the rules on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation).

But relevant data in the provision of investment services are not just data on natural and legal persons, of course. Next to the "know your customer" principle in its different shapes (for suitability

[101] European Commission (n 4).
[102] European Commission, Proposal for a Regulation on a framework for Financial Data Access (COM/2023/360 final) (28 June 2023).
[103] For a thorough analysis see Ross P. Buckley, Douglas W. Arner and Dirk A. Zetzsche, FinTech. Finance, Technology and Regulation (CUP 2023).

and appropriateness tests and for anti-money laundering), "know your product is equally important". In this regard, data spaces can support integration by facilitating cross-country comparisons of investment products and drive better investment choices. In this regard, EIOPA has already developed its methodology to categorize unit-linked and hybrid insurance products and has proposed indicators to build "value for money (VfM) benchmarks" to support supervision. The European Commission has proposed introducing similar VfM benchmarks to guide manufacturers and distributors when engineering and distributing PRIIPs. As we mentioned, it remains unclear whether the Commission's proposal will succeed, but these developments highlight a new regulatory approach to retail client protection and underscore the importance of structured data for defining yardsticks that both market participants and supervisors can reference.

Last but not least, data spaces require resilient infrastructures and reliable third-party providers of ICT services. These providers are subject to specific rules under the Regulation on Digital Operational Resilience (DORA). Simultaneously, EU policymakers are becoming more active in the area of cloud computing. In addition to raising concerns about resilience and market stability (which are not part of the analysis), technological services of this kind can reduce the costs of providing services, including on a cross-border basis. Overall, the new approach demonstrates that regulation is shifting toward an activity-based model, which should reduce the scope for regulatory arbitrage. However, expanding financial regulation and supervision to these new areas is not without consequences. Leveraging on data regulation as an integration tool requires that supervisors possess the necessary skill to address new activities, whether alone or in cooperation with other supervisors, which is not always yet the case. Market concentration in technological services can also be a concern, both from the perspective of market dominance and due to the potential conflicts of interest posed by firms simultaneously active in the SupTech and RegTech markets.

8. *Enforcement – once more – and data*

There are many ways proper data governance can buttress market integration by making enforcement smoother. Once more, this applies to both public enforcement through supervisors and private enforcement through courts. Closer coordination among these entities requires proper regulation of data. Even in the new context of data-driven integration, diverging national interpretations of common EU rules will continue to hinder cross-border transactions unless data and their governance support a better management of these persisting divergencies.

In this case, the intuition is that treating law provisions and their interpretations as data may deliver unexpected benefits for the legal integration of capital markets. Well-devised data spaces could facilitate judicial coordination, so it is worth exploring to what extent the enhanced circulation of data among NCAs and among courts can improve supervisory and judicial dialogue, which could then also be facilitated by the use of large language models, thereby supporting capital markets integration.

As to public enforcement, proper data governance can help market integration by making reporting obligation towards supervisors more homogeneous and less burdensome across the borders. The issue of excessive regulatory burdens originating from reporting obligations has recently been a central concern in the EU policymakers' agenda. In 2019, the Commission released the results of a stocktaking exercise (the "Fitness check of EU supervisory reporting requirements"[104]) to assess the overall efficiency and effectiveness of reporting duties. More recently, the CMU Communication of 2021 expressed the commitment to enact a "supervisory data strategy" to improve data standardisation and sharing for the benefit of financial supervisors and supervised entities alike and the SIU communication envisages a strategy whereby ESMA would make its consolidated

[104] European Commission, Commission Staff Working Document – Fitness Check of EU Supervisory Reporting Requirements (SWD(2019) 402 final) (6 November 2019).

supervisory data available to NCAs[105] – a powerful integration tool, if one considers the importance on the input of the supervisor process in influencing its outcome.

But reporting is, of course, just the first step. One of the key conditions for effective supervision and (public) enforcement in integrated capital markets is coordination among competent authorities, as this facilitates supervisory convergence and effective detection and prosecution of violations. Coordination should occur both horizontally, among national competent authorities (NCAs), and a vertically, between NCAs and the European Supervisory Authorities (ESAs, particularly ESMA). Coordination relies on the exchange of information on matters like supervisory approaches (including the interpretation of relevant provisions) and data that may contribute to revealing breaches of law in cross-border settings. As section 6 demonstrates, there is certainly room for improvement in the way NCAs interact in this regard. Models worth considering when addressing these questions include the European Forum for Innovation Facilitators, the Framework for Cross-Border Testing, and the Gateway to National Supervisors. The cooperation platforms at ESMA envisaged in the Retail Investment Strategy also show an increasing attention by policymakers in this regard, but it is far from certain that the proposal will make its way through the legislative process.[106] The crucial role data will have in this area is anticipated by the ESMA 2023-2028 Data Strategy, where ESMA envisions the creation of a data hub where European and national supervisors can rely on high-quality standardised data, and stakeholders can access data of public interest.[107]

Once again, one should not overlook the decisive role of private enforcement in capital markets integration, however. Among the core function of the CJEU is to provide binding interpretations of EU to make sure this is applied in the same way in all EU countries. In this regard, adjudicating requests for preliminary rulings is a crucial function in ensuring homogeneity, and the legal framework for the CMU is no exception. However, there are limitations to the ability of Article 267 TFEU in ensuring uniform interpretation of open-texture rules. First, divergent views between supervisors and supervised entities rarely reach national courts and subsequently the CJEU. Second, the CJEU may defer to national interpretations of social norms to which open-texture rules often refer. Examples of the first type are those mentioned in sections 3 and 4, where material divergences did not reach the CJEU concerning matters such as Payment for Order Flow (now harmonized with a ban), the professional issuance of own financial instruments, information on financial instruments (especially whether this refers to individual financial instruments or their classes), requirements for providing information on probabilistic scenarios and derivatives' mark-to-market. Examples of the second type include prospectus liability, the scope of regulation (such as that of dealing on own account), and the private law consequences of violations.

As the experience of *lex mercatoria* demonstrates, no integration is possible without an adequate adjudicating function. While the CMU/SIU project heavily relies on supervisory convergence to integrate capital markets, there is a structural limit to this strategy. The ESAs and national supervisors do not have a monopoly interpreting and enforcing CMU rules, as they share this function with courts. The previous analysis has shown that the current state of private enforcement in capital markets law exhibits significant fragmentation across Member States. This fragmentation is, at least in part, the result of the influence of private law traditions on investor protection. While the CJEU's ability to promote national alignment is limited, it is worth considering whether an enhanced form of judicial dialogue among national courts could lead to better outcomes. Part of the reasons why national Courts adjudicate with divergent interpretations seems to be that judges rarely look beyond national interpretations when dealing with the private law consequences of EU law. In this regard, improved circulation among courts of structured information on their respective interpretations could foster bottom-up convergence. The creation of common platforms for sharing judicial decisions (after

[105] See European Commission (n 3) and Id. (n 4).
[106] European Commission (n 4).
[107] ESMA, Data Strategy 2023-2028 (ESMA50-157-3404) (15 June 2023).

automatic translation and indexing) and the strengthening of judicial networks should be part of a sound strategy for legal integration of EU capital markets.

This can also occur through properly trained large language models (LLMs) that can support courts in performing their judicial tasks and foster the creation of a truly European case law on CMU-related matters by enhancing the use of data on foreign case law. First, LLMs can help retrieve and analyse foreign decisions through scraping and harvesting systems. Second, they can support the judiciary in understanding foreign disputes in light of local financial market specifics. Third, if programmed with a comparative approach, LLMs can nudge national courts towards interpretations that reduce discrepancies in case law on capital markets while remaining within the boundaries of national legal frameworks.

9. *Conclusion*

This paper has analysed the state of legal integration in European capital markets. It has shown, based on a series of examples, how the project of having a Single Rulebook for the CMU did not deliver the expected results in many areas. In the light of the shortcomings of the current policies for legal integration, the paper has submitted that new approaches should complement traditional regulatory harmonisation by enrolling market participants' incentives to foster capital market integration. One of such new approaches is market participants' choice of law and jurisdiction, and the other is strengthened data governance.

As to choice of law and jurisdiction, the paper has shown that traditional regulatory measures aimed at unifying national legal systems should be complemented with better functioning mutual recognition and negative harmonization tools. These should rely more extensively on markets' participants choice concerning applicable law and jurisdiction, so as to foster capital markets integration through the creation of financial centres and the positive network externalities these develop in terms of specialisation. Moreover, policymakers should focus more on enhanced coordination among national supervisors and between public and private actors involved in enforcement.

Enhance coordination requires, in turn, proper regulation of data. In this regards, the paper highlights that even in the new context of data-driven integration, diverging national interpretations of common EU rules will continue to hinder cross-border transactions unless data and their governance support a better management of persisting regulatory divergencies. The paper therefore provides a concise overview of how data are at the heart of the most recent developments in the CMU and SIU and how this will affect the activities of listed companies, investment service providers, trading venues and, ultimately, investors. Once again, strategies that involve market participants' preferences are more promising than purely top-down approaches in this regard.