31 July 2018

Tiina Astola
Director-General
Directorate-General for Justice and Consumers
European Commission
1049 Bruxelles/Brussel
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Dear Ms Astola

Legacy E.U. Level II legislation

The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

The Committee's attention was recently drawn to the question of the status of secondary E.U. legislation in the event the relevant primary act is repealed. As you know, in the tiered regulatory framework for financial services, at Level 1, the European Commission proposes basic laws which, in the traditional co-decision procedure, are adopted by the European Parliament and Council. The practical details of these laws are considered by the European Commission and are issued through Level 2 implementing measures, which can also be adapted and updated with time if necessary. In the field of financial services regulation, independent authorities—the three European Supervisory Authorities ("**ESAs**")—prepare so-called "technical standards", a special category of Level 2 legislation, and advise the Commission on the adoption of Level 1 and 2 acts and on issuing guidelines on the implementation of the rules. A concern has arisen about the continuity of the implementing measures issued under legislative acts which have been recast or replaced by subsequent legislative acts.

As the Level 1 act (the "**parent act**") empowers the Commission to adopt Level 2 measures and technical standards, the seemingly natural outcome of the Level 1 act being repealed would be for related implementing measures, which will have lost their underlying legal basis, to be repealed too. The Committee has, however, observed several different outcomes in this context. The first, and most simple outcome, is the explicit repeal of secondary legislation in subsequent primary legislation. This is observed in Regulation (EU) No 596/2014 on market abuse (the "**Market Abuse Regulation**" or "**MAR**") wherein Article 37 repeals the preceding Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (the "**Market Abuse Directive**" or "**MAD**") and its implementing measures. As a result, Level 2 legislation under MAD is recorded as being repealed by MAR.[1]

Two other outcomes have also been observed in the continuity of secondary legislation upon the repeal of the parent act. The Committee has noted that, occasionally—and

[1] See, for example, Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1530871548110&uri=CELEX:32004L0072.)

A similar provision to repeal a preceding legislative act and its implementing measures can be found in Article 310 of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance ("**Solvency II**").

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particularly when the Level 1 legislation is not simply repealed but is recast and replaced by a new legislative act—the text preserves the prior secondary legislation even where the parent act is repealed. The FMLC understands that this is achieved by making provision to shift the legal basis of Level 2 measures made under the original parent act to the new act. It is not immediately clear what determines whether it is appropriate to shift the legal basis of the implementing measure, but it does mean that the secondary legislation appears to remain in force.

By way of example, Directive 2014/65/EU on markets in financial instruments ("**MiFID II**"), together with Regulation (EU) No 600/2014 on markets in financial instruments ("**MiFIR**"), repealed and replaced Directive 2004/39/EC on markets in financial instruments ("**MiFID**").[2] Despite this, Level 2 directives under MiFID—such as Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive—remain in force. The FMLC understands that this is facilitated by Article 94 (*Repeal*) of MiFID II which repeals MiFID but also states that:

> References to Directive 2004/39/EC or to Directive 93/22/EEC shall be construed as references to this Directive or to Regulation (EU) No 600/2014 ...

As a consequence, Level 2 measures adopted on the basis of MiFID remain in force—their legal basis is simply shifted to MiFID II. Of course, such reference provisions are common in financial services legislation to ensure the continuity and completeness of the regulatory landscape, so careful reading is required to ascertain if the previous secondary legislation is protected on a case by case basis. For example, MAR includes a similar reference provision but also explicitly repeals the previous Level 2 measures.

A similar technique has been used by draftsmen of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the "**UCITS Directive**"), who have inserted in Article 117 a provision to repeal Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the "**1985 UCITS Directive**") and enable any references to the 1985 UCITS Directive to be read as references to the UCITS Directive.

This method has been utilised with, so far, minimal disruption—although it is not difficult to imagine a degree of market uncertainty in the event an implementing measure published in pursuit of the original and now repealed parent act is overlooked by market participants wishing to abide by the most recent set of rules.

Finally, there are those pieces of secondary legislation which are recorded in EUR-Lex as having been "implicitly repealed" by a more recent legislative measure. For example, Directive 2001/97/EC amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration is stated to have been "implicitly repealed" by Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "**third Anti-Money Laundering Directive**"), which itself was expressly repealed by Directive (EU) 2015/849 on the

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[2] See, Recital 7 and Article 94 of MiFID II.

prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**fourth Anti-Money Laundering Directive**").

There is a lack of clarity on how this outcome is determined and how it differs from the other two outcomes identified above. The Committee imagines that "implicitly repealed" is used in contrast to an explicit repeal, such as that in MAR. However, it is not clear what the criteria for an implied repeal are, for example, whether an implied repeal of secondary legislation takes place when the substance of new (primary or secondary) legislation is inconsistent with it or otherwise covers the field. It is also not clear whether the absence of a reference provision, such as that in MiFID II, necessarily means that an implied repeal has taken place.

Stakeholders have highlighted to the FMLC these ambiguities and the potential for market uncertainty in the manner by which the regulatory authorities determine whether secondary legislation is "implicitly" repealed or its underlying legal basis shifted. The Committee considers that clarity on which Level 2 directives continue to apply after the repeal of their parent act would be widely appreciated in the financial markets and would resolve any residual uncertainty as to which pieces of legislation remain in force.

In addition, any question about the continued application of E.U. secondary legislation is complicated further by the U.K.'s impending withdrawal from the E.U. and HM Government's strategy by means of the European Union (Withdrawal) Act 2018 to incorporate into U.K. law all E.U. legislation which "is operative" or "has effect in domestic law" immediately before Exit Day. The FMLC has written to HM Government to query whether "legacy" Level 2 legislation will also become part of the corpus of received legislation which will apply in the U.K. after Exit Day. The Committee recognises, nonetheless, that this question is not one that applies to financial services alone and that it might be a matter for the consideration of experts in constitutional law.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,

Joanna Perkins

Joanna Perkins
FMLC Chief Executive[3]

Cc: Luis Romero Requena, Director-General, Commission Legal Services

[3] In view of the role of the Bank of England in the preparation for the U.K.'s withdrawal from the E.U., Sinead Meany took no part in the preparation of this paper and the views expressed should not be taken to be those of the Bank of England.