

Financial Markets Law Committee (“FMLC”)

Brexit—Advisory Group

Date: Wednesday 21 March 2018

Time: 9.30am – 11.00am

Location: Bank of England, Threadneedle Street, London EC2R 8AH



In Attendance:

Joanna Perkins (Chair)	FMLC
Rob Aird	Ashurst LLP
Glynn Barwick	Goodwin Proctor LLP
Jennifer Donohue	Algorithm and Extremal Consulting Limited
Paul Edmonson	CMS Cameron McKenna Nabarro Olswang LLP
Kate Gibbons	Clifford Chance LLP
Professor Trevor Hartley	London School of Economics
Alexander Hewitt	Dentons LLP
Katy Hyams	The London Metal Exchange
Bruce Johnston	Morgan Lewis Bockius LLP
Rasphal Kaul	Rabobank International
Dorothy Livingston	Herbert Smith Freehills LLP
Anne MacPherson	Gibson Dunn & Crutcher LLP
Ian Mathers	
Brian McDonnell	Addleshaw Goddard LLP
John McGrath	Sidley Austin LLP
Sinead Meany	Bank of England
Simon Puleston Jones	FIA
Marke Raines	Raines & Co
Professor Arad Reisberg	Brunel University London
Frederick Sturm (Guest Speaker)	CME Group
Simon Turek (Observer)	CME Group
Venessa Parekh	FMLC
Rachel Toon	FMLC

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Minutes:

1 Introduction

- 1.1 Dr Perkins opened the meeting and gave a brief introduction, welcoming Mr Sturm as the guest speaker.

2 The Brexit Experience for a Third Country Exchange (Frederick Sturm)

- 2.1 Mr Sturm gave a brief introduction to CME Group as an operator of futures exchanges and central clearinghouse infrastructure¹.

- 2.2 Mr Sturm reviewed that in March 2016 the European Commission formalized an agreement with the U.S. Commodity Futures Trade Commission (“**CFTC**”) in relation to the supervision of transatlantic central clearinghouses.² Under this agreement the CFTC does not apply any registration, regulation or supervision to E.U. central clearinghouses offering U.S. customers clearing services for foreign futures contracts.³ The European Commission agreed to adopt an equivalence decision with respect to CFTC requirements for U.S. central clearinghouses which allowed the European Securities and Markets Authority (“**ESMA**”) to recognise U.S. central clearinghouses to provide services in the E.U. whilst complying with CFTC requirements. The agreement, which took three years to negotiate, gave the CFTC and ESMA a clear roadmap to guide interaction with each other and removed uncertainty for those regulated by them. In June 2016, the CFTC and ESMA entered into a Memorandum of Understanding to implement the March 2016 agreement.

- 2.3 When the U.K. voted to leave the E.U. at the end of June 2016, Mr Sturm noted, CME Group (and possibly other similar U.S.-based organisations providing services in the E.U.) had not imagined that the forthcoming “divorce” would have great implications for the agreement between CFTC and the European Commission. Following the June 2016

1 Through its CFTC-registered Designated Contract Markets – Chicago Mercantile Exchange Inc. (“**CME Inc.**”), the Board of Trade of the City of Chicago, Inc. (“**CBOT**”), New York Mercantile Exchange, Inc. (“**NYMEX**”), and Commodity Exchange, Inc. (“**COMEX**”) – CME Group offers a wide range of global benchmark products across all major asset classes. CME Group also operates a clearinghouse, registered as a derivatives clearing organization (“**DCO**”) with the CFTC, which offers clearing and settlement services for exchange-traded derivatives contracts and cleared OTC derivatives transactions.

2 See “Commission Implementing Decision (EU) 2016/377 of 15 March 2016 on the equivalence of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the Commodity Futures Trading Commission to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council”, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0377> See also “The U.S. Commodity Futures Trading Commission and the European Commission: Common Approach for Transatlantic CCPs”, 10 February 2016, available at: https://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016

3 “Foreign futures contracts” denote futures products not listed on a CFTC designated contract market.

referendum, the European Commission proposed legislation that would directly impose E.U. rules and provide E.U. governmental agencies with primary oversight of U.S. central clearinghouses, including all of their businesses (i.e., not just those businesses that are relevant for E.U. customers).⁴ Mr Sturm noted that these proposals threaten the hard-won cross-border agreements that have led to equivalence and diverge from the international principles of mutual recognition and regulatory deference which have been consistently endorsed by global policymakers. CME Group considers such deference between regulators to be crucial to the health of international futures markets.

- 2.4 Mr Sturm concluded by highlighting the potential for such collateral damage from Brexit to extend to many Third Country service providers. As the floor was opened up to discussion, an attendee observed that the European Commission took the view that this legislative proposal for a review would not change the equivalence decision but only increase the supervisory rules for individual clearing houses. It was noted that the CFTC has publicised that it does not agree with this view.

3 Update on FMLC's work on Brexit (Joanna Perkins)

- 3.1 Joanna Perkins reported that the FMLC has published four papers and four letters on legal uncertainty arising from Brexit. The most recent of these was a letter sent to the Ministry of Justice, following a recommendation from the Advisory Group in December, commenting on the significant legal uncertainty caused by clause 6 of the E.U. Withdrawal Bill.
- 3.2 Dr Perkins noted that there are currently four other papers in varying stages of preparation. These consider the impact of Brexit on (i) Retained Law; (ii) Emissions Allowances; (iii) BRRD and CIWUD; and (iv) Robustness of Financial Contracts. The FMLC hosted a colloquium in January on the latter in January 2018 and this topic is now being looked into in depth by the working group chair, Professor Hugh Beale.

Plenary discussion on recent Brexit-related developments

- 3.1 Advisory Group members recommended that the FMLC should (i) query the provision in the Withdrawal Bill which requires retained law to be interpreted as a matter of law to ascertain which law (perhaps by means of the Retained Law Working Group); (ii) look

⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, 4 May 2017, available at: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-208_en.

further into dispute resolution in the context of the provisional transitional agreement; and (iii) stay vigilant on schedules to the Withdrawal Bill and secondary legislation which would soon be published.